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Circuit Court of Appeals, U.S.
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In the

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11108 vs.

THE SHOTWELL MANUFACTURING COMPANY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11109 vs.

BYRON A. CAIN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11110 vs.

FRANK J. HUEBNER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11111 vs.

HAROLD E. SULLIVAN,
Defendant-Appellant.

C. A. - 7
FILED

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

The Schaefer Press, Inc.—Affidavit 1-6-56

TRANSCRIPT OF RECORD FILED MARCH 1, 1954
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1 PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of October (it being the 5th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Three and of the Independence of the United States of America, the 178th Year.

Present:

Honorable John P. Barnes, District Judge
Honorable William H. Holly, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge
Honorable Gunnar H. Nordbye, District Judge

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Saturday, October 17, 1953

Court met pursuant to adjournment

Present: Honorable Gunnar H. Nordbye, Trial Judge

2 PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of December (it being the 7th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Three and of the Independence of the United States of America, the 178th Year.

Present:

Honorable John P. Barnes, District Judge
Honorable William H. Holly, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge
Honorable Gunnar H. Nordbye, District Judge

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Monday, December 7, 1953

Court met pursuant to adjournment

Present: Honorable Gunnar H. Nordbye, Trial Judge

3

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, HAROLD E. SULLIVAN, and FRANK J. HUEBNER,
Defendants.
No. 52 CR 143

1. The above case was commenced by the filing of an indictment on March 14, 1952, by direction of the Grand Jury.

2. The parties at the time of the filing of the indictment were and still are: The United States of America, Plaintiff, and The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, Defendants.

3. Dates of the filing of pleadings:

(a) Indictment, filed March 14, 1952.
(b) Bill of particulars, filed May 29, 1952.
(c) Defendants' motion to dismiss indictment, filed June 2, 1952.
(d) Demurrer of plaintiff to motion to dismiss the indictment, filed June 11, 1952.
(e) Amendment to motion to dismiss the indictment, filed June 23, 1952.
(f) Motion of defendants to suppress certain evidence, filed October 6, 1952.
(g) Amendment to motion of defendants to suppress certain evidence, filed November 12, 1952.
(h) Additional motion of defendants in the nature of a special plea in bar to dismiss the indictment, filed July 28, 1953.
4 (i) Motion of defendants to amend and supplement Paragraph 4 of their motion to dismiss the indictment, filed September 14, 1953.

3. The appearance of Harold E. Sullivan was filed on March 17, 1952; the appearance of The Shotwell Manu-

facturing Company, Byron A. Cain, and Frank J. Huebner was filed on March 26, 1952.

On June 24, 1952, the individual defendants were arraigned before Judge John P. Barnes, and entered pleas of not guilty and were released on bail of $2,500.00 each.

4. The trial was had commencing September 14 and concluded on October 16, 1953, before Judge Gunnar H. Nordbye, specially designated by the Chief Justice of the United States on August 18, 1952 to try the case.

5. The trial was by jury, which on October 16, 1953, returned a verdict of guilty as to all defendants as charged in both counts of the indictment.

6. Judgments against the defendants, The Shotwell Manufacturing Company, Byron A. Cain, and Frank J. Huebner, were entered October 17, 1953. Their motions for acquittal notwithstanding the verdict, a new trial, and in arrest of judgment were, by leave of Court, filed October 26, 1953, and were denied November 28, 1953, and their respective notices of appeal were filed December 3, 1953.

On October 17, 1953, defendant, Harold E. Sullivan's reserved motion for acquittal was taken under advisement, and was denied November 28, 1953. By leave of Court, his motion for a new trial was filed November 30, 1953, and his motions for acquittal notwithstanding the verdict and in arrest of judgment were filed on December 7, 1953, and were denied on December 7, 1953. On December 7, 1953, judgment was rendered against him on the verdict. His notice of appeal was filed December 14, 1953.

5 By order, entered October 17, 1953, bail, in the event of appeal, was increased to $5,000.00, to be approved by the Court, and subsequent orders provided that that be done within the time allowed by law for the filing of the notices of appeal. At the respective times of the filing of the above notices of appeal, bail, in the requisite amount, was furnished pending the appeals and approved by the Court, at which time the respective judgments were stayed pending disposition of the appeals.

6

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

Be It Remembered, that on to wit, the 14th day of March, 1952, the above-entitled action was commenced by

the filing of the Indictment in the office of the Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, in words and figures following, to wit:

7

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA v. THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, HAROLD E. SULLIVAN and FRANK J. HUEBNER	No. 52 CR 143 (Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b)

The March 1952 grand jury charges:

That on or about the 15th day of March, 1946, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, The Shotwell Manufacturing Company, a corporation, Byron A. Cain, President and Treasurer in 1945 and 1946, Harold E. Sullivan, Attorney in 1945 and 1946 and Executive Vice President and Attorney in 1946, and Frank J. Huebner, Vice President in 1945 and 1946, of the corporation, did willfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the corporation to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, Illinois, false and fraudulent tax returns wherein they alleged that the net income of the corporation for the said calendar year was the sum of $561,064.42 and that the total amount of tax due thereon was the sum of $370,638.95, whereas, as they then and there well knew, the net income of the corporation for the said calendar year was the sum of $738,210.65, upon which net income the corporation owed to the United States of America, a total tax of $534,288.89.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

8 SECOND COUNT

The March 1952 grand jury further charges:

That on or about the 15th day of March, 1947, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, The Shotwell Manufacturing Company, a corporation, Byron A. Cain, President and Treasurer, Harold E. Sullivan, Executive Vice President and Attorney, and Frank J. Huebner, Vice President, of the corporation, did willfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the corporation to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, Illinois, a false and fraudulent tax return wherein they alleged that the net income of the corporation for the said calendar year was the sum of $1,202,917.18 and that the total amount of tax due thereon was the sum of $457,012.98, whereas, as they then and there well knew, the net income of the corporation for the said calendar year was the sum of $1,526,490.47, upon which net income the corporation owed to the United States of America a total tax of $579,970.83.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

A True Bill.
John C. Delaney
Foreman

Otto Kerner, Jr.
United States Attorney

9

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

The United States of America

vs.

The Shotwell Manufacturing Company;
Byron A. Cain,
Harold E. Sullivan and
Frank J. Huebner

INDICTMENT

Vio: Section 145(b), Internal Revenue Code;
26 U.S.C., Section 145(b).

(Attempting to defeat and evade the payment of taxes.)

A True Bill.
John C. Delaney
Foreman

Filed in open court this 14th day of March, A. D. 1952
Roy H. Johnson
Clerk

Judge Barnes Criminal Calendar

10-15 * * *

16 And afterwards on, to wit, the 15th day of April, 1952 came the Attorney Vincent O'Brien, pro se and filed in the Clerk's office of said Court his certain Appearance As Additional Counsel For Defendants, The Shotwell Manufacturing Company, et al., in words and figures following, to wit:

17

In the United States District Court
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

APPEARANCE

I hereby enter my appearance as additional counsel for the defendants, The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner, in the above-entitled cause.

Vincent O'Brien
Vincent O'Brien

Vincent O'Brien
105 South LaSalle Street
Chicago 3, Illinois
Tel.: FRanklin 2-4000

18 And afterwards on, to wit, the 29th day of May, 1952, came the Plaintiff by its attorneys and filed in

the Clerk's office of said Court its certain Bill of Particulars in words and figures following, to wit:

19

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * * (Caption—No. 52 CR 143) * * *

BILL OF PARTICULARS

Now comes the United States of America by its attorney, Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and pursuant to order of the Court heretofore entered in this cause furnishes the following Bill of Particulars:

COUNT I

1. It is alleged that the 1945 Corporation Income and Declared Value Excess Profits and Corporation Excess Profits Tax Returns of The Shotwell Manufacturing Company understated the following items:

Gross Sales	understated	$177,146.23
Gross Profits From Sales	"	177,146.23
Total Income	"	177,146.23
Net Income	"	177,146,23

and all resultant income and tax items on the returns.

2. The entire amount of the understatement of gross sales of $177,146.23 is alleged to have resulted from the failure of the defendant corporation to record on its books and to report on its income tax returns for the calendar year 1945 the receipt of over-invoice premium payments on sales of merchandise.

20

3. The unreported over-invoice premium payments for the calendar year 1945 are alleged to have been received from the Eatsum Food Products Company, a sole proprietorship, and its successor company, the Eatsum Food Products Company, a partnership, both then located in New York City, New York, on sales of merchandise by the defendant corporation to said companies.

4. It is not alleged that the cost of goods sold or the cost of operations were overstated.

5. It is not alleged that any items included in the cost of goods sold or the cost of operations in the said returns

for the calendar year 1945 could not properly be included in such returns.

COUNT II

1. It is alleged that the 1946 Corporation Income Tax Return of The Shotwell Manufacturing Company understated the following items:

Gross Sales	understated	$323,573.29
Gross Profits From Sales	"	323,573.29
Total Income	"	323,573.29
Net Income	"	323,573.29

and all resultant income and tax items on the return.

21 2. The entire amount of the understatement of gross sales of $323,573.29 is alleged to have resulted from the failure of the defendant corporation to record on its books and report on its income tax return for the calendar year 1946 the receipt of $212,315.56 in over-invoice premium payments on sales of merchandise and from the failure of the defendant corporation to record on its books and to report on its income tax return for the calendar year 1946 certain sales of merchandise in the amount of $111,257.73.

3. The unreported over-invoice premium payments alleged to have been received by the defendant corporation in the amount of $212,315.56 during the calendar year 1946 are alleged to have been received as follows:

$163,239.05 from General Confections, Inc., a corporation, New York City, New York.

$49,076.51 from Reserve Trading Company, New York City, New York.

The unreported receipts from unrecorded sales in the amount of $111,257.73 alleged to have been received by the defendant corporation during the calendar year 1946 are alleged to have been received from General Confections, Inc., a corporation, New York City, New York.

4. It is not alleged that the cost of goods sold or the cost of operations were overstated.

5. It is not alleged that any items included in the cost of goods sold or the cost of operations in the said return for the calendar year 1946 could not properly be included in such return.

Otto Kerner, Jr.
Otto Kerner, Jr.
United States Attorney for
the Northern District of Illinois.

22 And afterwards, on, to wit, the 2nd day of June, 1952 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion to Dismiss The Indictment Exhibits A, B, and C, Attached Thereto, in words and figures following, to wit:

23

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION OF THE DEFENDANTS TO DISMISS THE INDICTMENT

The defendants, The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner, move that the indictment herein, and each count thereof, be dismissed on the following grounds:

1. The proceedings before the Grand Jury which returned said indictment were not conducted by the United States Attorney for the Northern District of Illinois, Eastern Division, but were conducted by one Arthur B. Cunningham, who purported to act as a Special Assistant to the Attorney General under purported written authority so to do, of the Attorney General of the United States dated at Washington, D. C. March 13, 1952, and filed in the office of the Clerk of this Court the morning of March 14, 1952 (the day said indictment was returned), but who was not, either at the time of his said appointment, or at the time he conducted the said proceedings before said Grand Jury, a resident of the Northern
24 District of Illinois, and who was not in fact nor by the terms of said written authority, an assistant to the United States Attorney, special or otherwise, for the Northern District of Illinois. By reason of the premises, the said Arthur B. Cunningham, as such Special Assistant to the Attorney General, purported so to act as the attorney for the Government, but, contrary to the requirements of Rule 7 of the Federal Rules of Criminal Procedure, failed to sign the indictment as returned.

2. The conduct of said proceedings before said Grand Jury by the said Arthur B. Cunningham as aforesaid was in violation of the rights of the defendants under the Fifth Amendment to the Constitution of the United States,

to be held to answer for the offenses charged in this proceeding only on the presentment or indictment of a Grand Jury in accordance with the traditional Grand Jury procedure at the common law in existence at the time of the adoption of said Amendment. Under the traditional procedure then in effect, only an attorney of or for the vicinage or the locality from which the Grand Jury was chosen could participate in its proceedings. And defendants aver that the Act of June 30, 1906, 30 Stats. 816, 5 USCA, Sec. 310, to the extent that it purports to authorize any attorney or counsellor specially appointed by the Attorney General of the United States, when thereunto specially directed by the Attorney General, to conduct Grand Jury proceedings, where such attorney or counsellor is not a resident of the District in which such proceeding is brought deprives the defendants, and each of them, of the rights guaranteed to them by the Fifth Amendment to the Constitution of the United States and is therefore unconstitutional and void.

25 3. At all the times in question in these proceedings, the Commissioner of Internal Revenue and the Secretary of the Treasury, by virtue of the statutes in such case made and provided, were empowered to compromise any civil or criminal case which might have arisen under the Internal Revenue laws against the defendants. At all times in question in this proceeding, and for many years prior thereto, there was and for many years had been in effect in the Bureau of Internal Revenue a policy from time to time published and promulgated by the Secretary of the Treasury, by the Commissioner of Internal Revenue, and by other responsible Treasury officials, whereby it was publicly represented there would be no criminal prosecution in any case in which a voluntary disclosure of misstatement or omission in a tax return was made to a responsible officer or agent of the Treasury Department before investigation had been initiated, but that the Treasury Department in such case would merely assess such unpaid tax, interest and civil penalties, if any, as might properly be found due under the facts of the case.

In reliance upon said policy, the defendants before the commencement of any investigation within the meaning of the aforesaid statements of the aforementioned Commissioner and Secretary and others, in January of 1948 made such a disclosure in respect of the returns of the

corporate defendant for the years mentioned in the indictment in this cause, and from time to time thereafter until and including March of 1948 reiterated the same, in each instance to a responsible officer or agent of the Treasury Department.

The officers and agents of the Treasury Department to whom the aforementioned disclosure was made ac-
26 knowledged to the defendants the sufficiency and timeliness thereof upon the occasions aforesaid. In further reliance upon said policy and upon said acknowledgments and at the request of said officials and agents, the defendants caused to be made available to them the books and records of the corporate defendant, and communicated to officers and agents of the Treasury Department information in the possession of the individual defendants materially related to said omissions and misstatements and not available to such Treasury officers and agents through the said books and records of the corporate defendant, and which information could not have been obtained from the individual defendants in any manner in view of the constitutional privileges and rights of the individual defendants, and employed the services of accountants to assist said officers and agents in ascertaining facts from such books and records. The corporate defendant in that regard specially incurred and paid, over the period of four years over which the examination by said agents extended, auditing charges in excess of the sum of $20,000.

By reason of the premises, the Government was and is estopped from instituting and maintaining the said indictment and these proceedings.

4. During 1948 and during all the years in question, it was and for many years had been the actual practice of the Department of Justice to refrain from the initiation of criminal prosecution of such cases except upon the recommendation of the Treasury Department, although the Department of Justice reserved discretion as to whether to proceed with the criminal prosecution of any case in which such recommendation was made. Under such practice the Treasury Department has refrained from recommending criminal prosecution of many cases which could have been so prosecuted and the Department of Justice has refrained from criminal prosecution of
27 many cases which have been recommended to it for such prosecution. At none of the times aforesaid has

there been any standard of law, either by enactment of Congress or by established criteria or regulation of the Treasury Department or of the Department of Justice, from which the public or the courts might ascertain the basis on which such prosecution is recommended or withheld. Such practice has given rise to a discriminatory application and enforcement of the law, as will more fully appear upon the hearing of this motion, and in the case at bar has thereby deprived the defendants of due process of law contrary to the Fifth Amendment to the Constitution of the United States of America.

In partial support hereof defendants submit the affidavits hereto attached as Exhiibts A, B, and C, respectively, and they ask that plaintiff be required to answer this their motion within a short day, and that the issues, if any, upon said motion and answer be set for hearing on oral evidence to be taken in open court.

The Shotwell Manufacturing Company,
Byron A. Cain, Harold E. Sullivan, and
Frank J. Huebner,
By Vincent O'Brien
Edward J. Hess
Their Attorneys

Received a copy of the above and foregoing motion, together with the exhibits thereto attached, this 29th day of May, 1952.

Otto Kerner, Jr.
Per E. J. Ryan

28 EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

State of Illinois)
County of Cook) ss

Byron A. Cain, being first duly sworn, on oath deposes and says that he is one of the defendants in the above-entitled cause, and that he makes this affidavit in support of the defendants' foregoing motion to dismiss.

Affiant further says:

1. During all of the year 1948, and continuously since, affiant was President and Treasurer of The Shotwell Manufacturing Company, a corporation, one of the defendants in this cause, and that his co-defendants, Harold E. Sullivan and Frank J. Huebner were, respectively, Executive Vice President and Vice President of said corporation, and that Leon J. Busby was a member of the firm of Busby & Oury, certified public accountants employed by The Shotwell Manufacturing Company as its regular auditing firm during all of the year 1948 and for some years prior thereto.

29 2. That during the month of January, 1948, affiant and other officers of the defendant corporation acting in behalf of said corporation and in their own behalf as officers thereof, delegated Leon J. Busby to communicate with a responsible officer or agent of the Treasury Department of the United States for the purpose of ascertaining whether there was still in effect the published policy of the Treasury Department, of which affiant had theretofore become aware, pertaining to the disclosure of omissions or misstatements in income tax returns, and if so, to ascertain in a preliminary way the requirements of such policy without disclosing the identity of the person by whom such disclosure might be made.

3. That thereafter, but during January of 1948, the said Leon J. Busby reported to affiant and to other officers of the defendant corporation that he had communicated with one Ernest J. Sauber, Chief Deputy Collector of Internal Revenue at Chicago, Illinois, who had told the said Busby that said policy was still in force and effect and that he was a proper person within the requirements of said published policy to whom such a disclosure might be made, and had further informed him that the requirements of such policy as to such disclosure would be fulfilled if the person in question would come forward before investigation had been initiated and acknowledge the incorrectness of his return, and that, in such event, there would be immunity under the Bureau's policy from criminal prosecution but that such tax,

30 interest and penalties, if any, as might properly be due under the facts would be assessed.

4. Thereupon, affiant and other officers of said corporation in their behalf and on behalf of said defendant, during January, 1948, pursuant to said policy, directed

said Busby to reveal to said Chief Deputy Collector of Internal Revenue the identity of The Shotwell Manufacturing Company as the person whose returns for the years 1945 and 1946 contained omissions or misstatements—those being the years in question at all times mentioned in this affidavit—and to inform him in a general way of the nature of said misstatements and omissions and to ascertain from him whether the preperation of amended returns for those years by said corporation should be then attempted, or whether their preparation and filing should be deferred pending an inspection of the books and records of the corporate defendant by agents of the Bureau of Internal Revenue.

5. That thereafter and during the month of January, 1948, the said Busby reported to affiant that he had again communicated with said Chief Deputy Collector of Internal Revenue and had revealed to him, pursuant to defendants' reliance on the policy aforesaid, that there were omissions and errors contained in the returns of said The Shotwell Manufacturing Company for the years 1945 and 1946 and of the general nature of said misstatements and omissions, and that he had inquired as to whether such communications constituted a sufficient disclosure and as to whether the preparation of
31 amended returns for those years should be undertaken at that time; that said Busby further reported to affiant that said Chief Deputy Collector of Internal Revenue informed him that said communications constituted a sufficient disclosure and assured said Busby that he was the proper person to accept such disclosure and that no attempt should be made to file amended returns for those years because said Chief Deputy Collector of Internal Revenue would inform the office of the Agent in charge to the end that the latter office would assign an agent to make such inspection and investigation as might be required, but that the said Chief Deputy Collector of Internal Revenue had further recommended that an attempt be made in the meantime by the officers of the corporation to approximate the extent of the omissions and misstatements based on their then recollections of the matters giving rise to said omissions and misstatements.

6. That thereafter according to his best present recollection, affiant himself during January of 1948, either

alone or in the company of said Busby, and again to a certainty in the forepart of March, 1948, in the company of said Busby called upon said Chief Deputy Collector of Internal Revenue and was informed by him that the information communicated to him as such Chief Deputy Collector of Internal Revenue by said Busby constituted a sufficient disclosure and that he had made appropriate inquiry to ascertain whether any prior investigation had been initiated and had learned that there had been none and that there was none pending, and that the said disclosure was therefore timely within the Department's requirements, and further that the said Chief Deputy Collector of Internal Revenue had talked to Mr. Ralph
32 Johnson, a squad chief in the office of Mr. E. C. Wright, the Internal Revenue Agent in Charge at Chicago, and that Mr. Johnson had indicated that he would go forward with the matter.

7. Thereafter the defendants and other representatives of the corporation, at their request, in reliance upon said policy, and in reliance upon the representations aforesaid, commenced a course of cooperation, and solely for that purpose specially retained accountants who, commencing in 1948, and for a period of approximately four years, assisted the Internal Revenue agents in their inspection and examination of the books and records of the corporate defendant, and assembled for them such data and compilations as were requested, at an expense to the corporate defendant of approximately $20,000.00 or more; and that the examination by such agents of said books and records has extended over a period of approximately four years and was still being conducted at the time of the return of the indictment in this proceeding, and that much of the data and many of the compilations so prepared and furnished by said accountants were not available, in the form requested and supplied, from the books and records of the corporation.

8. That the defendants immediately following said disclosure and with the partial assistance of said accountants thereunto specially directed—all in reliance upon the policy and representations aforesaid, including the representations as to the sufficiency and timeliness of their said disclosure—commenced the preparation and compilation of the preliminary approximation which the said
33 Sauber had recommended as averred in paragraph 5

hereof; that indispensable to the making of said statement was data and information not contained in the books and records of the corporate defendant but in the minds of the individual defendants, which the individual defendants well knew they could not be compelled to reveal and which they knew they had a constitutional right to withhold, but which, in reliance on the matters aforesaid, they supplied, with the result that such tentative approximation or statement was completed and reduced to writing and furnished to the said agents at or about the time of their first appearance for the purpose of inspecting the books and records of the corporate defendant. Affiant further avers that the said statement, among other things, showed that the net balance as a result of the operations therein reflected was $5,898.00, which sum had been deposited in the corporate defendant's bank account during the year 1946, and had been given effect to in its income tax return for that year. Said statement is in the possession of the plaintiff and was exhibited and otherwise used by the Government in the proceedings before the Grand Jury which returned the indictment in this proceeding. From time to time, and on request of agents of the Department of Internal Revenue, the individual defendants furnished said agents with other and more detailed and accurate information regarding the said omissions and misstatements known to them, but which were also not contained in the books and records of the defendant corporation, which information the defendants knew they were privileged not to reveal but did reveal in continued reliance on the policy and representations aforesaid.

34 9. Affiant further avers that although he and his associates have steadfastly maintained that the defendant corporation owes no tax over and above the sum of $370,638.95, which it paid for the year 1945, or over and above the sum of $457,012.98, which it paid for the year 1946, the activities of said agents aforesaid were of such embarrassment in the conduct of the business of the corporate defendant and so disruptive to the relations of the corporate defendant with its customers and suppliers, that affiant at all times during the said period of four years importuned the said agents to bring the matter to a conclusion, and at all such times expressed the willingness of the corporation to pay such reasonable

amount as the said agents might claim to be due. Nevertheless, and heedless of said importunings, and without completing said examination, and for the purpose of bringing a charge prior to the expiration of the six-year statute of limitations in relation to the first count of said indictment, the matter was presented to the Grand Jury on March 14, 1952, to-wit, the last day of the six years, by a special assistant to the Attorney General who received authority only the day before.

Byron A. Cain

Subscribed and sworn to before
me this 26th day of May, 1952.

(Seal) Kirsten Sorensen
Notary Public

35 EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

State of Illinois }
County of Cook } ss.

Leon J. Busby, being first duly sworn, on oath deposes and says that he is a member of the firm of Busby & Oury, certified public accountants with offices in the City of Chicago, County of Cook and State of Illinois, and that he makes this affdavit in support of the motion to dismiss in behalf of the defendants in the above-entitled cause.

Affiant further says:

1. That since 1942 either he or his accounting firm were the accountants regularly employed by The Shotwell Manufacturing Company.

2. That he has actively practiced his profession as a certified public accountant for more than twenty-two years last past and during the course of that practice has had occasion to prepare and to assist in the preparation of income tax returns for clients and has had experience in many cases involving claims for and against clients arising under the Income Tax laws.

36 3. That during the course of his practice he became and was familiar with many of the declarations

of policy of the Secretary of the Treasury and of the Commissioner of Internal Revenue and of other responsible Treasury officials having to do with the position of the Bureau of Internal Revenue with reference to immunity from criminal prosecution in cases where inaccuracies in tax returns were disclosed in advance of the commencement of an investigation, including the following statements of said policy:

(a) May 28, 1945—former Secretary of the Treasury Morgenthau stated at a press conference that some taxpayers who have failed to declare their full income and pay the tax due "may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started."

(b) August 21, 1945—former Secretary of the Treasury Vinson, as guest contributor to Drew Pearson's column, wrote:

"No honest American need fear this drive against tax evaders. No one is going to jail for an honest mistake in filling out his tax return. Treasury policy even permits the wilful evader to escape prosecution if he repents in time. The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return or of failure to make a tax return. Monetary penalties may be imposed for delinquency, for negligence and for fraud, but the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out'."

(c) October 15, 1945—the then Commissioner of Internal Revenue released the following statement to the press:

"The Commissioner said that since June 1, some 30,000 delinquent or amended returns had been filed voluntarily, accounting for additional taxes of more
37 than $50,000,000. Mr. Nunan again stressed the Bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward volun-

tarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases."

(d) August 7, 1946—Secretary of the Treasury John W. Snyder is reported to have said:

"* * * that in accordance with Treasury custom, there would be no criminal prosecution of the taxpayers who voluntarily remembered and reported their tax delinquencies."

(e) May 14, 1947—J. P. Wenchel, the then Chief Counsel of the Bureau of Internal Revenue, said in the course of an address:

"The law requires the prosecution of the tax-evader and that is what the Department recommends to the Attorney General.

"There is one important exception to that. The Department has broad discretionary power long recognized by Congress to determine the policy and procedure for the effective enforcement of the internal revenue laws. The Department, acting under that power, does not recommend prosecution of the evader who repents in time. There is nothing new in the position. Where the taxpayer makes a voluntary disclosure of intentional evasion before investigation has been initiated, criminal prosecution will not be recommended.

"The Department has always encouraged voluntary disclosures.

"And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the government. Healthy administration of the internal revenue laws long ago dictated that policy and I believe that its worth is obvious.

The making of a voluntary disclosure is a simple thing. The taxpayer or his legal agent can go before any official of the Bureau of Internal Revenue or any of its field offices—whether it is the collector, a deputy collector, a revenue agent, a special agent, or any other responsible Treasury officer. There is no special form for making the disclosure. The simple statement that 'I have filed false tax returns and I want to make the government whole,' would

constitute a complete disclosure. Of course, it is best usually to present an amended return or other written document as evidence of the disclosure. If
38 possible, the disclosure should be accompanied by payment of the tax which is known to be due, but this is not a prerequisite."

4. During the month of January, 1948, Byron A. Cain and Harold E. Sullivan, officers of the defendant, The Shotwell Manufacturing Company, requested affiant to communicate with a responsible officer or agent of the Treasury Department of the United States for the purpose of determining that there still was in effect the said policy of the Treasury Department and if so, to ascertain in a preliminary way the requirements of said policy without disclosing the identity of the defendants.

5. That, thereupon, during January of 1948, affiant communicated with Ernest J. Sauber, Chief Deputy Collector of Internal Revenue at Chicago, Illinois, and was told by him that said policy was still in full force and effect and that he was a proper person within the requirement of said published policy to whom such a disclosure might be made, and that the requirements in respect of such disclosure would be fulfilled if the person in question would come forward before the commencement of investigation and acknowledge the incorrectness of his return, and that in such event, under the Bureau policy, the person in question would be granted immunity from criminal prosecution, but that of course such tax, interest and penalties, if any, which might properly be due under the facts would be assessed.

6. Shortly thereafter and during January of 1948, affiant informed the said officers of said corporation of his conversation with the Chief Deputy Collector, Chicago, Illinois; whereupon, they directed him to see the Chief Deputy Collector again and to reveal the identity of
39 The Shotwell Manufacturing Company as the person involved and to disclose to him that its returns for the years 1945 and 1946 contained omissions or misstatements and, in a general way of the nature of said misstatements and omissions, and to do so in pursuance of said policy, and also to obtain from the Chief Deputy Collector advice on whether the preparation of amended returns for those years should be then attempted by said cor-

poration or whether their preparation and filing should be deferred pending an inspection of its books and records by agents of the Bureau of Internal Revenue if they desired to make such inspection.

7. That thereafter and during the month of January, 1948, affiant again communicated with the Chief Deputy Collector at Chicago and told him that the defendants in reliance on the policy of the Bureau aforesaid, had directed him to disclose that there were omissions and misstatements contained in the returns of The Shotwell Manufacturing Company for the years 1945 and 1946, and also told him the general nature of said misstatements and omissions. Affiant also inquired of the Chief Deputy Collector, Chicago, as to whether those communications were sufficient to constitute such disclosure and as to whether the preparation of amended returns for the years 1945 and 1946 should be undertaken at that time, and was informed that said communication did constitute a sufficient disclosure and that no attempt should be made to file amended returns for those years because he would inform the office of the Agent in Charge, to the end that the latter would assign no agent to make such inspection of the books and records as might be required. The Chief Deputy Collector further recommended that pending the commencement of such inspection an attempt be made by the officers of the corporation to approximate the extent of the omissions and misstatements based on their then recollections of the matters giving rise to said omissions and misstatements.

8. That thereafter during January of 1948, and again in the forepart of March, 1948, affiant, together with Byron A. Cain aforesaid, called upon the Chief Deputy Collector, Chicago, during one of which visits the said Byron A. Cain upon so inquiring of the Chief Deputy Collector was informed that the information theretofore communicated to him by affiant constituted a sufficient disclosure, and that the Chief Deputy Collector had made appropriate inquiry to ascertain whether any investigation had been initiated and had learned that none had been and that none was pending, and, accordingly, that the disclosure theretofore made to the Chief Deputy Collector on behalf of the defendants was timely within the view of the Bureau, and that he had talked to Mr. Ralph Johnson, a squad chief in the office of E. C. Wright, the Internal

Revenue Agent in Charge in Chicago, and that Mr. Johnson had indicated he would go forward with the matter.

9. Thereafter Mr. Byron A. Cain and Mr. Harold E. Sullivan reiterated to affiant their desire in reliance on said advice from the Chief Deputy Collector, Chicago, to cooperate with the Bureau and to that end that they desired to specially retain his firm for the purpose of assisting the Internal Revenue agents in their inspection and examination of the books and records of the corporate defendant and to assemble for them such data and compilations as they might request whenever they should commence the inspection of such books and records, and that they also desired affiant and his firm in reliance upon the policy and representations aforesaid, to assist in
41 the preparation and compilation, pending the commencement of the examination of the books and records by the agents of the Bureau of Internal Revenue, of the preliminary approximation aforesaid which the Chief Deputy Collector had recommended.

10. Affiant further avers that he and his firm in and about said matters and related matters rendered special services at the expense of The Shotwell Manufacturing Company in excess of $20,000.

11. That it was impossible to make a compilation of the preliminary approximation aforesaid without data and information in the minds of the individual defendants but not reflected on the books and records of the corporate defendant, which data and information however the individual defendants furnished, stating to affiant that they were doing so in reliance on the advice of the Chief Deputy Collector, Chicago, aforesaid. Affiant further avers that the individual defendants furnished such information and data that he was thereby enabled to prepare a written tentative approximation or statement in time for delivery to the agent of the Bureau at the time he first appeared to commence his inspection of the books and records of said corporation, which said written statement was then and there delivered to said agent. The said statement, among other things, showed that the net balance as a result of the operations therein referred to was $5,898.00, and that said sum had been deposited in the corporate defendant's bank account during the year 1946. Affiant further states that the amount so deposited was given effect to in the income tax return of the cor-

porate defendant for that year and that said statement so furnished was exhibited to affiant during the course of his testimony before the Grand Jury which re-
42 turned the indictment in this proceeding, and that he was questioned concerning it in the presence of the Grand Jurors by Arthur B. Cunningham, Special Assistant to the Attorney General.

Leon J. Busby

Subscribed and sworn to before
me this 28th day of May, 1952.
Alexander Neuman
(Seal) Notary Public

43 EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

State of Illinois }
County of Cook } ss.

Vincent O'Brien, being first duly sworn on oath, deposes and says that he is one of the attorneys for the defendants in the above-entitled cause, and that he makes this affidavit in support of their accompanying motion to dismiss.

Affiant further says:

1. That he caused to be inspected the records in the Office of the Clerk of this Court, and that there is on file in said office an instrument of appointment, a copy of which is in words and figures following, to-wit:

44 DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

March 13, 1952

Mr. Arthur B. Cunningham
Tax Division
Dept. of Justice
Washington, D. C.

Dear Mr. Cunningham:

As an attorney and counselor at law, you are hereby

specially retained and appointed as a Special Assistant to the Attorney General under the authority of the Department of Justice to assist in the trial of the cases hereinafter mentioned, in the Northern District of Illinois, in which the Government is interested; and, in that connection you are specifically directed to conduct in the Northern District of Illinois and in any other judicial district or districts where jurisdiction thereof lies, any kind of legal proceedings, civil or criminal including grand jury proceedings and proceedings before committing magistrates which district attorneys are authorized to conduct.

The Department is informed that Byron A. Cain, Frank J. Huebner, and Harold E. Sullivan have committed in the Northern District of Illinois violations of the Internal Revenue laws of the United States and conspiracies to commit such offenses.

You are expressly authorized to commence prosecution against the above-named persons and such other person or persons as may be implicated for violations mentioned.

You are to serve without compensation other than compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Tax Division, Department of Justice.

Respectfully,
/s/ J. Howard McGrath
Attorney General

By the Attorney General
/s/ A. DeWitt Vanech
Deputy Attorney General
Vincent O'Brien

Filed Mar. 14, 1952
at 9:48 A. M.
Roy H. Johnson
Clerk

Subscribed and Sworn to before me this 26th day of May, 1952.

Kirsten Sorensen
Notary Public (Seal)

45 And on the same day, to wit, on the 2nd day of June, 1952, being one of the days of the regular June

term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

46

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

On motion of counsel for the defendants it is Ordered that a rule be and is hereby entered herein on the Government to file such answer, if any it may desire, to the defendants' motion to dismiss, within 3 days.

47 And afterwards on, to wit, the 5th day of June, 1952 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Demurrer in words and figures following, to wit:

48

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

DEMURRER

Now comes the United States of America by its attorney, Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and says of the motion to dismiss the indictment filed by the defendants herein that it is insufficient in law to entitle the defendants to the relief sought therein.

Otto Kerner, Jr.
Otto Kerner, Jr.
United States Attorney for
the Northern District of
Illinois.

49 And afterwards, on to wit, the 11th day of June, 1952 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion For

One Hearing On Their Motion To Dismiss, And Suggestions In Support Of The Defendants' Motion For One Hearing On Their Motion To Dismiss in words and figures following, to wit:

50

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

DEFENDANTS' MOTION FOR ONE HEARING ON THEIR MOTION TO DISMISS

The defendants, The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, by Vincent O'Brien, one of their attorneys, move:

1. For an order that a complete record rather than a piecemeal record be made on any hearing that may be had on their motion to dismiss heretofore filed herein, and to that end, they further move:

(a) That argument on the demurrer filed by the plaintiff to said motion to dismiss and on such other questions of law or fact as may be presented, be reserved and deferred until the evidence to be taken on said motion has been heard.

(b) That the plaintiff, reserving all objections raised by its demurrer, be required to answer said motion so as to determine the issues of fact, if any, to be tried upon such hearing.

51 (c) That such issues of fact be determined by the court alone upon oral testimony and evidence to be adduced in open court.

In support of this motion, defendants submit the attached suggestions.

Vincent O'Brien
One of the Attorneys for said
Defendants

52

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

SUGGESTIONS IN SUPPORT OF THE DEFENDANTS' MOTION FOR ONE HEARING ON THEIR MOTION TO DISMISS.

The defendants, The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner, by Vincent O'Brien, one of their attorneys, make the following suggestions in respect of their foregoing motion that there be one rather than several hearings on their pending motion to dismiss:

1. Plaintiff has demurred to defendants' motion to dismiss. The Federal Rules of Criminal Procedure though purporting to prescribe all of the pleadings to be employed in criminal proceedings, make no provision for a responsive or other pleading to a motion to dismiss (see Rule 12(a)). Those rules do provide for the hearing on a motion to dismiss in such manner as the court may direct as far as issues of fact are concerned (see Rule 12 (b)(4)).

2. The court has the right and the duty to determine any questions of fact arising under the pending motion,
53 and such questions presented are for the court alone without a jury. United States v. Hashmall, 97 F. Supp. 42; McNabb v. United States, 63 S. Ct. 608; Glasser v. United States, 62 S. Ct. 457; United States v. Franklin, 188 F. 2d 182 (CA 7); Roberson v. United States, 165 F. 2d 752; May v. United States, 236 Fed. 495.

3. Even in civil actions in which the equivalent of a demurrer is expressly permitted by the rules, your Honor in certain cases has declined piecemeal dispositions and has insisted that a complete record be made in one hearing where under circumstances comparable to those at bar your Honor deemed it in the interest of justice so to do.

In the instant matter the specific reasons which call for the application of that procedure are the following:

(a) Points 3 and 4 of the motion to dismiss are the only ones on which any issue of fact is likely to arise. Point 3 asserts an estoppel in bar of the action by reason of a voluntary disclosure and thereby

raises a question of first impression, although estoppels have been successfully invoked against the Government in criminal cases on other grounds.

Point 4 of the motion asserts the absence of due process because of the lack of any known standard for the determination of cases to be criminally prosecuted. This, too, raises a question of first impression.

It follows that the primary law questions raised by the motion to dismiss will probably be finally resolved only in the reviewing courts. It is also apparent that in requesting the court to take evidence in advance of arguments we are not asking it to pursue
54 an inquiry which would be rendered futile because of existing decisions contrary to the legal position taken by the defendants.

In the reported cases, the question of the effect of a voluntary disclosure has thus far arisen only in two ways: (1) Whether it constitutes a compromise agreement within the meaning of Section 3761 of the Internal Revenue Code; (2) Whether a voluntary disclosure provides a basis for the suppression of evidence obtained as a result of such disclosure. (See In re Liebster, 91 F. Supp. 814; In re White, 98 F. Supp. 895; and United States v. Levy, 99 F. Supp. 529.)

In this case, we predicate the motion to dismiss on an estoppel in bar based on disclosure. Accordingly, the above cases are at this time irrelevant and will remain so unless and until there is occasion to interpose a motion to suppress evidence.

(b) In the event the demurrer is heard and sustained without determination of the facts, and in the event error thereto is assigned on any appeal, and a reversal for such error results, there would be no ultimate findings of fact on which the Court of Appeals could act, and it would be necessary at that late date to remand the case for the trial court to overrule the demurrer and to take evidence when the Government pleads over to the motion.

(c) If the demurrer is first heard without the taking of evidence and the making of a complete record, the disposition of the demurrer one way or the other would not obviate the need for determina-

55 tion by the court of the ultimate facts averred in the motion to dismiss, because if the demurrer is overruled, the Government, according to its transcript statement, will desire to plead over. If the demurrer is sustained, we shall want the facts determined in connection with a motion to suppress evidence predicated upon the claimed disclosure.

4. If the suggested procedure is ordered, defendants will have collateral motions for discovery to reach evidence in the possession of the plaintiff material to the factual issues on such hearing, which motions will be promptly presented to the end that an early hearing may be had.

Vincent O'Brien
One of the Attorneys for the
Defendants.

56 And afterwards, to wit, on the 13th day of June, 1952, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

57

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

This cause coming on for hearing on the motion of the defendants for one hearing on their motion to dismiss come the parties by their attorneys respectively and the Court being fully advised it is

Ordered that said motion be and the same is hereby overruled and it is

Further Ordered that hearing on issues raised by the defendants' motion to dismiss and demurrer be and the same is hereby set for June 19, 1952 at 10 o'clock A. M.

58 And afterwards on, to wit, the 23rd day of June, 1952 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Amendment To Their Motion To Dismiss The Indictment in words and figures following, to wit:

59

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

AMENDMENT OF THE DEFENDANTS TO THEIR MOTION TO DISMISS THE INDICTMENT

Now come the defendants, the Shotwell Manufacturing Company, Harold E. Sullivan, Byron A. Cain and Frank J. Huebner, and leave of Court being first had and obtained, file this their amendment to their motion to dismiss the indictment, as follows, to-wit:

1. In paragraph 3 of said motion, after the second full paragraph thereof, insert the following:

"The voluntary disclosure made as aforesaid of misstatements or omissions, aforesaid, among other things, informed said agent of the Treasury Department that the said returns contained omissions and misstatements in that they failed to include, under the heading of gross sales of all or part of the sums received by the corporate defendant through various sales of goods and in that they failed also to include, under the heading of cost of goods sold, various payments made for goods subsequently sold, which payments were in excess of the ceiling prices, as yet by the laws and regulations of the United States Government at the time such goods were purously since, the Commissioner of Internal Revenue took and has maintained the position that, to the extent that the payments made for goods sold were in excess of the ceiling prices for such goods that those payments may not be considered for tax pur-
60 poses despite the fact that the Tax Court and many other courts in every case in which the question has been involved have held that such payments are properly part of the cost of goods sold for purposes of determining taxable income. By reason of the premises, although the defendants maintain that when all of the costs of goods purchased at over-ceiling prices are deducted pursuant to the aforementioned court decisions there would be no additional tax due, nevertheless, the said Commissioner then contended

and has continuously since maintained that there may be no deductions for said costs and that there is additional tax due for each of the years in question based upon the additional gross sales indicated by said disclosure. Defendants further aver that on the basis of the information so contained in the disclosure aforesaid, the Bureau of Internal Revenue contends that the defendants wilfully evaded the payment of taxes for said years, whereas, the defendants, and each of them, contend that there was thereby no intent wilfully to evade the payment of taxes."

The Shotwell Manufacturing Company,
Byron A. Cain, Harold E. Sullivan,
and Frank J. Huebner, Defendants,
By Vincent O'Brien
One of their Attorneys

61 And on the same day, to wit, on the 23rd day of June, 1952, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

62

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

This cause coming on for the Court's decision on the issues raised by the defendants' motion to dismiss and demurrer come the parties by their attorneys respectively and the Court decides the issues orally from the bench and it is

Ordered by the Court that leave be and is hereby given the defendants to file, instanter, amendment to their motion to dismiss the indictment and it is

Further Ordered that the Government's demurrer shall stand and that the defendants' motion to dismiss the indictment be and the same is hereby overruled and denied and on motion of the Government by the United States Attorney it is

Further Ordered that this cause be and the same is hereby set for arraignment and plea to be set for trial on June 26, 1952 at 2 o'clock P. M.

63 And afterwards, to wit, on the 24th day of June, 1952, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

64

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

By agreement of the parties herein by their counsel it is Ordered that this cause be and the same is hereby advanced to this date for arraignment and plea and to be set for trial comes now the United States by the United States Attorney come also the defendants the Shotwell Manufacturing Company by its counsel and Byron A. Cain, Harold E. Sullivan and Frank J. Huebner in their own proper persons and by their counsel and being arraigned upon the indictment filed herein against them waive reading thereof and plead not guilty thereto and it is

Ordered that the Government's motion to set this cause for trial be and the same is hereby continued to September 9, 1952 at 2 o'clock P. M.

65 And afterwards on, to wit, the 8th day of July, 1952, there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On June 19, 20, 23 and 24, 1952, Before The Honorable John P. Barnes, Judge, in words and figures following, to wit:

1 United States of America
Northern District of Illinois
Eastern Division

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, Chief Judge of said Court, in his court room in the United States Court House at Chicago, Illinois, on June 19, 1952, at 2:00 o'clock p.m.

Present:

Hon. Otto Kerner, Jr.,
United States District Attorney,
(450 U. S. Court-House, Chicago 4, Ill.),
represented by
Edward J. Ryan, Esq.,
Assistant United States District Attorney,
on behalf of plaintiff;

Vincent O'Brien, Esq.,
(105 S. LaSalle st., Chicago 3, Ill.) and

Edward J. Hess, Esq.,
(7 S. Dearborn st., Chicago 3, Ill.),
on behalf of defendants.

2 And thereupon the following proceedings were had herein:

By the Clerk: No 52 CR 143, United States of America v. The Shotwell Manufacturing Company, et al.

Hearing on issues raised by defendants' motions to dismiss.

By the Court: Proceed, Gentlemen.

And thereupon Edward J. Ryan, Esq., addressed the Court in argument on behalf of plaintiff.

By Mr. Ryan: If the Court please, since I have questioned the legal sufficiency of this motion to dismiss, I assume that it devolves on me to take the affirmative.

Before proceeding with the argument I want to state for the record that the Government has filed a demurrer in this cause.

There is no such thing apparently known to the law any more as a demurrer, but there is an orderly procedure in opposing these motions, I assume.

It is my conclusion, after examining the motion,
3 that irrespective of the things alleged in it, as a matter of law the defendants would not be entitled to the relief.

Accordingly, I filed a paper, which I entitled a demurrer, for the purpose of raising that issue of law before two or three days were spent in threshing out a fact issue here which might have made no difference.

In filing that demurrer, of course I intended to concede all facts well pleaded for the purposes of the argument on the motion.

However, I do want to state for the record that the Government is not for the purposes of the case admitting the truth of the things set forth in every part of the motion to dismiss, and that in the event that the demurrer was overruled the Government does say that it has a defense to the merits of the motion.

Now, the motion to dismiss is in four parts, based on four points.

The first point that is asserted in support of the motion by the defendants is that while the Grand Jury proceedings in this matter were conducted by a Special Assistant to the Attorney General, yet the indictment was
4 signed by the United States Attorney for this District, and not by that Special Assistant to the Attorney General.

My position is twofold there:

1. That it was not error for the United States Attorney to sign it, or for the Special Assistant to the Attorney General to omit to sign it. And,

2. If by any consideration it should be so considered to be error, that it is a formal error—a formal defect, if any defect at all, and not one that would prejudice the case.

The purpose of the attorney signing the indictment is purely to authenticate the indictment. It is no part of the indictment. It has been so decided by the courts, that the signature of the prosecuting attorney is no part of the indictment.

It has also been decided that the signature of the

foreman is no part of the indictment. These signatures only go to authenticate the indictment. Actually, they are hangovers from the common law practice, where the prosecuting attorney submitted the Bill to the Grand Jury, and the foreman of the grand jury endorsed it as a "True Bill", or "Ignoramus"—"No Bill".

The courts, as I say have reepatedly held where contentions have been made with respect to defects in the signing of the indictment, or the caption of the indictment, that they are matters of form only; there is no prejudice to the defendant, and there is no error there to be noticed by the court.

Rule 52 of the Federal Rules of Criminal Procedure provides:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Now, however, I did say that it was not error for the Special Assistant to the Attorney General to affix his signature to this indictment.

The United States Attorney for the Northern District of Illinois is the attorney for the Government here. He has many Assistant United States Attorneys who present matters to the Grand Jury. They do not sign the indictments; the United States Attorney signs the indictments.

The Department of Justice may designate an attorney to come into a particular district and present a matter to the Grand Jury, but whether he presents it, or an Assistant United States Attorney, or the United States Attorney presents it, or who signs it is an intra-departmental matter.

It is not a matter of which the defendant can complain. He is not prejudiced in any sense by it.

There is no question here but that this is an authentic indictment by a grand jury, and that it was returned in open court.

Rule 7 does say that it shall be signed by the Attorney for the Government, and that the indictment shall be a short, clear statement of the offense, and signed by the attorney for the Government.

Otto Kerner, Jr., is the United States Attorney for the Northern District of Illinois. He did sign the indictment. There is no question here about the authenticity of the indictment.

In support of my contentions I have examined a number of cases, and I find that they are very old.

7 In the case of Caha *v.* The United States, 152 U. S. 211, decided in 1894—

By Mr. O'Brien: What was the citation, Mr. Ryan?

By Mr. Ryan: 152 U. S. 211.

There was an indictment for perjury. And it was contended by the defendant among other things that the form of the indictment was bad, that the indictment was faulty because it was signed by an Assistant United States Attorney instead of by the United States Attorney.

And in passing upon this contention the Supreme Court of the United States said:

"Clearly, there was nothing in any of these matters which tended to the prejudice of the defendant, or rendered it doubtful by what body he was charged with the crime, in what court he was to be tried, or the exact nature of the offence with which he was charged."

And the court there overruled that contention.

And in United States *v.* Atlantic Commission Co., Inc., 45 Fed. Supp., page 187, decided by the District Court for the Eastern District of North Carolina, in 1942,

8 the indictment was for violation of the antitrust laws.

And there it was contended that the indictment was not valid because it was not signed, authorized or ordered by the District Attorney or any of his Assistants, but rather was signed by the prosecutor—by a Special Assistant to the Attorney General.

And there we have the other contentions made.

The court rejected the contention, saying that the omission of the District Attorney's signature was a formality which does not invalidate the indictment.

And in the case of Frisbee *v.* the United States, 157 U. S. 160, the indictment involved— No, it was complained that the indictment was invalid because it was not ordered "A True Bill" and signed by the foreman of the Grand Jury. And the court said that it was a matter of form which came over from the old practice; that formerly all Bills were presented to the Grand Jury by the prosecutor, and then had to be endorsed one way or the other. So the court again rejected the contention that it rendered the indictment invalid.

9 In United States *v.* Sheffield Farms, 43 Fed. Supp., 1, again an indictment under the Sherman Act, it was

contended again that the indictment was invalid because it was signed by a Special Assistant Attorney General, and not by the District Attorney. And there in that case the court said:

> "The absence of the signature of the United States Attorney upon the indictment is only a matter of form (it being no part of the indictment) which does not go to the substance of the indictment, and not being prejudicial to the defendants, will not be considered."

In the case of Wheatley *v.* the United States, 159 Fed. 2d, 599, Fourth District, an indictment for kidnaping. There an Assistant United States Attorney had signed the United States Attorney's name. That was before Rule 7 had been promulgated, which provided that indictments should be signed by the attorney for the Government. And the court said:

> "It has been held that the signature of the prosecuting attorney is no part of the indictment and is necessary only as evidence of the authenticity of the document; and it has also been held that the improper signing of an indictment is not such a defect as would invalidate the instrument."

Citing numerous cases; and also citing Rule 52(a) of the Rules of Criminal Procedure, which I read from, indicating that no error or defect not of a substantial nature should be noticed.

I submit therefore that ground No. 1 is without substance and is not a proper basis for an order dismissing the indictment in said case.

Ground No. 2 sets forth that the indictment, or the matter having been presented to the Grand Jury by a Special Assistant to the Attorney General, a person who was not of the vicinage, that the defendants were deprived of their rights to an indictment by a grand jury as constituted at common law, and that it is therefore in violation of the Fifth Amendment.

Now, there is a statute on the books, and has been, I think, since 1906, that authorizes the Attorney General to appoint a Special Assistant Attorney General, or Special Attorney, to go out into any district and to conduct legal proceedings, either before a grand jury, or in court, or any sort of legal proceeding.

Here, the defendants noticed that statute, and say of it that it is unconstitutional because under the common law the attorneys who attended before the grand jury had to be an attorney of the vicinage.

Now, I assume that at common law vicinage had a definite meaning; it meant a certain locality, or the locality for which the grand jury inquired, perhaps.

I know of no definition. There may be one. And I don't know what application it has in Federal Practice. I don't know whether it means the district, or whether it means the county, or whether it means the state. But suffice to say that in the absence of some compelling authority or argument indicating the invalidity of this statute there is nothing here for the court to notice.

The contention is not new. It was raised in the case of United States *v.* Atlantic Commission Co., which
12 I previously cited—45 Fed. Supp., page 187.

There the exact contention was made with respect to this statute. And the court said:

"With respect to the constitutionality of the statute, defendants rely upon the Fifth Amendment to the Constitution of the United States which provides that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * *.' Defendants contend that an 'indictment of a grand jury' under this amendment means no indictment obtained in accordance with the traditional grand jury procedure, at the common law, at the time this Amendment was adopted; and that, therefore, a later Congressional enactment cannot modify that traditional procedure by permitting the presence of prosecuting attorneys on behalf of the Government during the grand jury proceedings.

"However, defendants have cited no decisions of any court in support of this novel contention. In
13 United States *v.* Thompson, 251 U. S. 407, 409, 40 S. Ct. 289, 64 L. Ed. 333, the Supreme Court, although not discussing the question of constitutionality, apparently gave its approval to the practice of appointing Special Assistants to the Attorney General under the Act of June 30, 1906, which was cited by the Court in its opinion. This may be considered as a tacit ruling that the statute was not unconstitutional. United States *v.* Sloan, D.C., 31 F. Supp. 327, 331.

"Furthermore, defendants' contention would prove too much. It would prevent the service as grand jurors of persons who, by reason of sex or race, were not qualified to serve on a grand jury at the time the Fifth Amendment was adopted, and would chain the courts, in the face of greatly changed conditions, to ancient formulae and would be a denial of the flexibility and capacity for growth and adaptation in the law which is regarded as its "peculiar boast
14 and excellence'."

Citing cases, including that of Hurtado *v.* California, which your Honor may recall held that due process of law was not inflexible, and that the State of California act, doing away with indictments in felony cases, that it was not a rigid concept, that it changed with the times, and that if a fair and proper hearing was given, and fair and proper procedure was followed, that the law was not inflexible but that it changed with the times.

I say there is no merit to this very technical and novel argument that simply because this attorney came from Washington to do the work of presenting evidence to the grand jury, that the indictment is invalid, or that the defendants are in any sense prejudiced.

I say that that contention should be rejected, and the motion to dismiss not allowed on that basis.

Now, as to the third point of the defendants' motion.

In the third point they set up that for some years past the Treasury Department had a policy, and they say that that policy was in substance that if a volun-
15 tary disclosure of tax irregularity or tax evasion was made by a taxpayer prior to the time that any investigation was commenced by the Government—and, as I say, if it was voluntary, that they would be permitted to pay up their taxes and settle their liability and that there would be no criminal prosecution.

They say that they have done that; that they have made a disclosure, and that by reason of this disclosure they have become immune from prosecution, and that accordingly the Government cannot pursue this indictment, and further that it should be dismissed by reason of this voluntary disclosure.

In the affidavit of the accountant, a man by the name of Busby, they set forth the statements of various officials of the Treasury Department which are alleged to form the basis of this policy.

There are not too many of them, and I think they are important here. They are imporiant here for this reason, your Honor:

This is a motion to dismiss. And the third point of this motion to dismiss—in the third point these defendants do not say that they disclosed that they had
16 evaded any taxes.

Examining the face of the motion together with the affidavits filed in support of it, it is apparent that they are admitting that they did not admit that they owed any taxes whatever.

They went in and stated, according to the motion, that they had made omissions and misstatements in their return, but take the position that those omissions and misstatements did not have the effect of evading any taxes whatsoever.

17 In other words, as an example of how that would be true, if you understated your gross income, but you also understated your expenses by a similar amount there would be no tax liability and consequently there could be no tax evasion since the additional income would be offset by the understated expense, and there would be no tax due and owing. Consequently there could be no tax evasion in that case if that was the situation, and there could be no disclosure of tax evasion but simply the disclosure that the return was in error.

But if where that situation would be true, a voluntary disclosure within the meaning of the policy would not have been made, since it is apparent from the utterances that what the officials of the Treasury Department were talking about was where a man came in because of a contrite heart and said, "I have evaded my taxes, and now I want to pay up, confess to the Government and pay up and get this off my mind." And under those circumstances the Treasury Department says, "We won't prosecute you."

Now, these are the statements on which this policy
18 is alleged to have been based—and I think it is apparent what the Treasury officials are talking about—is a confession, an early and voluntary confession of tax evasion.

The affidavit says:

On

"May 28, 1945—former Secretary of the Treasury Morgenthau stated at a press conference that some taxpayers who have failed to declare their full income and pay the tax due 'may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started.'

August 21, 1945—former Secretary of the Treasury Vinson, as guest contributor to Drew Pearson's column, wrote:

'No honest American need fear this drive against tax evaders. No one is going to jail for an honest mistake in filling out his tax return. Treasury policy even permits the wilful evader to escape prosecution if he repents in time. The Commissioner of In-
19 ternal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return or of failure to make a tax return. Monetary penalties may be imposed for delinquency, for negligence and for fraud, but the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, "There is something wrong with my return and I want to straighten it out." '

Now, in connection with that statement I want to call attention to the earlier part of it, where the Secretary said:

"Treasury policy even permits the wilful evader to escape prosecution if he repents in time",

because later on he speaks of omissions and misstatements.

20 The defendants have resorted to that phrase 'omissions and misstatements', and that is what they plead in their motion. They say they have made a disclosure of omissions and misstatements, but that they do not admit any additional tax liability, and did not admit any additional tax liability.

"October 15, 1945—the then Commissioner of Internal Revenue released the following statement to the press:

"'The Commissioner said that since June 1, some 30,000 delinquent or amended returns had been filed voluntarily accounting for additional taxes of more than $50,000,000. Mr. Nunan again stressed the Bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntary and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases.'

"August 7, 1946—Secretary of the Treasury John W. Snyder is reported to have said:

21 "'* * * that in accordance with Treasury custom, there would be no criminal prosecuton of the taxpayers who voluntary remembered and reported their tax delinquencies.'

May 14, 1947—J. P. Wenchel, the then Chief Counsel of the Bureal of Internal Revenue, said in the course of an address:

"'The law requires the prosecution of the tax-evader and that is what the Department recommends to the Attorney General.

"'There is one important exception to that. The Department has broad discretionary power long recognized by Congress to determine the policy and procedure for the effective enforcement of the internal revenue laws. The Department, acting under that power, does not recommend prosecution of the evader who repents in time. There is nothing new in the position. Where the taxpayer makes a voluntary disclosure of intentional evasion before investigation has been initiated, criminal prosecution will not be

22 recommended.

"'The Department has always encouraged voluntary disclosure.

"'And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the Government. Healthy administration of the Internal Revenue laws long ago dictated that policy and I believe that its worth is obvious.

"'The making of a voluntary disclosure is a simple thing. The taxpayer or his legal agent can go before any official of the Bureau of Internal Revenue or any

of its field offices—whether it is the collector, a deputy collector, revenue agent, a special agent, or any other responsible treasury officer. There is no special form for making the disclosure. The simple statement that "I have filed false tax returns and I want to make the Government whole," would constitute a complete disclosure. Of course, it is best usually to
23 present an amended return or other written document as evidence of the disclosure. If possible, the disclosure should be accompanied by payment of the tax which is known to be due, but this is not a prerequisite.'"

Now, I say, your Honor, that it is apparent from these utterances brought all together that what the policy actually is. It is where a man comes in and says, "I have evaded my taxes", and indicates—whether he can indicate the exact amount, or cannot indicate the exact count, but where he says "I have evaded my taxes, and I want to get it off my mind now, and pay up", that if that step is taken prior to the time that there is an investigation commenced so that it is a voluntary disclosure, that the Department will not prosecute.

Now, I say it is apparent from the motion here that that is not so in this case. The pertinent language is as follows: in setting up what the policy is they say that these statements have been made by various officials:

"• • • whereby it was publicly represented there would be no criminal prosecution in any case in which a voluntary disclosure of misstatement or
24 omission in a tax return was made to a responsible officer or agent of the Treasury Department before investigation had been initiated, but that the Treasury Department in such case would merely assess such unpaid tax, interest and civil penalties, if any, as might properly be found due under the facts of the case."

Then they set up that in reliance on that policy they went to an official in the Collector's office, and that they made a disclosure of omission and misstatement.

But in the paragraph following that which I was just reading, they say:

"In reliance upon said policy, the defendants before the commencement of any investigation within

the meaning of the aforesaid statements of the aforementioned commissioner and secretary and others, in January of 1948 made such a disclosure",

relating back to their statement of policy, which was a disclosure of misstatement and omissions upon which the Secretary or the Treasury Department would assess
25 the taxes, if any.

I say that such a statement made to the Treasury Department is not a voluntary disclosure of tax evasion, and does not invoke the policy.

Now, in the affidavit of the defendant Byron A. Cain, he makes the statement, in paragraph 9:

"Affiant further avers that although he and his associates have steadfastly maintained that the defendant corporation owes no tax over and above the sum of $370,638.95, which it paid for the year 1945, or over and above the sum of $457,012.98, which it paid for the year 1946, the activities of said agents aforesaid were of such embarrassment in the conduct of the business of the corporate defendant and so disruptive to the relations of the corporate defendant with its customers and suppliers, that affiant at all times during the said period of four years importuned the said agent to bring the matter to a conclusion, and at all such times expressed the willingness of the corporation to pay such rea-
26 sonable amount as the said agents might claim to be due. Nevertheless, and heedless of said importunings, and without completing said examination, and for the purpose of bringing a charge prior to the expiration of the six-year statute of limitations in relation to the first count of said indictment, the matter was presented to the grand jury on March 14, 1952, to-wit, the last day of the six years, by a special assistant to the Attorney General who received his authority only the day before.

I say that demonstrates on the face of this motion that there was no disclosure of any tax liability, since they have steadfastly maintained that they owed none, and that at most they had gone in and indicated some mistake or omission in the return, not affecting the tax liability, which is not a disclosure of an evasion such as would invoke the policy of the Treasury Department.

Now, further than that, too, — and I would not make this argument unless I were prepared to grant the statement that a disclosure was made, because I think it would come with ill grace from the Government to
27 make such an arrangement and then not keep it, and I would not be a party to such a breach of faith.

But there is a question of law here. So I say that this matter of voluntary disclosure, and whether there will or will not be prosecution where a disclosure is made rests upon the conscience of the Executive Department. there is no immunity that can be acquired, and I know of no case that so holds, without some statutory au- y.

There have been immunity statutes passed, simply to enable the prosecutor or the Government to obtain from people evidence that they could otherwise withhold on the basis of their privilege against incrimination, by giving them an immunity coextensive with their privilege.

The reason those statutes were passed was because the courts' holding was that in the absence of such a statute no binding immunity could ever have been given to them, no immunity that they could plead in bar, and no immunity that they could ever enforce. And that is the reason for the existence of those statutes.

Now, in the case of Ford v. the United States,
28 which I think is rather fundamental, the facts are not identical, but I believe the principle is the same, the Supreme Court of the United States had occasion to pass upon it.

The citation is 99 U.S. Reports, 594.

In that case the District Attorney, it appears, or it was alleged, had made an agreement with certain individuals that if they would testify against some of their accomplices in revenue matters he would assure them that they would not be pressed for taxes due from them or if they were not informed against they would not be prosecuted for any penalty criminally.

Thereafter they were prosecuted. And they alleged that they did testify, and they did discharge their part of the bargain.

Now, just exactly why the District Attorney saw fit not to keep faith with that agreement, or what other reasons there may have been, I don't know.

The principle of law was stated in that case. The Supreme Court of the United States held that even if such an agreement was made it gave only an equitable right to immunity from prosecution, a right which could not be enforced by the courts, which rested alone upon the conscience of the executive, or the executive branch of the Government.

And the Supreme Court went back and reviewed the history of such arrangements, and said that at common law there was a procedure, which was known as approvement whereby if somebody confessed and informed on somebody else and then testified, and he himself was convicted, that the case would be continued so that he could make application to the executive for a pardon.

And the Supreme Court went on to say that that practice was apparently still in use in this country; and the court went on to say:

"Should it be objected that the application may not be successful, the answer of the court must be in substance that given by Lord Denman on a similar occasion, that we are not to presume that the equitable title to mercy which the humblest and most criminal accomplice may thus acquire by testifying to the truth in a federal court will be sacredly accorded to him by the President, in whom the pardoning power is vested by the Federal Constitution.

"Having come to the conclusion that the District Attorney had no authority to make the agreement alleged in the plea in bar, it follows that the Circuit Court erred in the two cases instituted there, in overruling the demurrer to it, and that the judgment must be reversed, and the causes remanded for further proceedings in conformity with the opinion of the court."

And they had said further back in the opinion:

"Waiving for the present the question whether the District Attorney may contract with an accomplice of an accused person on trial, that if he will testify in the case his taxes shall be abated, or that he and his property shall be exempt from internal-revenue taxation, the court will consider in the first place whether the District Attorney, as a public prosecutor, may properly enter into an agreement with

such an accomplice, that if he will testify fully and fairly in such a prosecution against his associate
31 in guilt he shall not be prosecuted for the same offense; and if so, whether such an agreement, if the witness performs on his part, will avail the witness as a defense to the criminal charge in case of a subsequent prosecution."

That was exactly what the court held was the effect it would not have; in other words, it could not be pleaded in bar.

Now, this is but a policy; there is no statute providing that under these circumstances immunity will be given. The defendants predicate their contention for the statutory authority upon the compromise statute. There is a statute empowering the Secretary of the Treasury to compromise, and which is referred to in the motion—Point 3, first paragraph:

"At all the times in question in these proceedings, the Commissioner of Internal Revenue and the Secretary of the Treasury, by virtue of the statutes in such case made and provided, were empowered to compromise any civil or criminal case which might have arisen under the Internal Revenue laws against
32 the defendants. At all times in question in this proceeding, and for many years"—

And then they go on and speak of the policy. And they have referred to the revenue laws, which enable the Secretary to compromise tax liability.

That statute provides that that must be done with the specific assent of the Secretary of the Treasury, and that there must be an offer to pay, and they must arrive at some figure which must be accepted, and then there is a compromise. And then the case is closed by virtue of that statute so that there could be no prosecution in that case.

That, however, is not the case here. There has been no compromise here.

Referring to the case of the United States v. Lustig, decided by the Court of Appeals, I believe it is the Second Circuit, 163 F. 2d, page 85, that was a tax evasion case. The defendants there were indicted for attempting to abate and evade the payment of income taxes. And there they made a motion to dismiss, and a motion to suppress evidence. The motion to suppress evidence

is not material for our consideration here. It was
33 on the theory that in the reliance on this disclosure policy the defendants had given certain evidence to the Government that the Government otherwise would not have gotten, and that in addition to that they acquired immunity by reason of this alleged disclosure then made, and therefore could not be prosecuted. But again they relied upon the statutory authority—upon the compromise section.

But in that case, as here, there was no compromise effected; there was no arrival at figures; there was no offer made of payment; there was no acceptance of payment, so there could not have been any compromise under the statute.

The Government there also took the position that there wasn't any voluntary disclosure, and the court so found. And because the court so found I recognize that this discussion here about immunity does not have the force which it would otherwise have if it were a decision.

With respect to immunity, the court said:

"As for the contention that the defendants received immunity under the compromise statute, it is even more illusory than the one we have already discussed
34 based on an alleged invasion of constitutional rights. The compromise statute affords no shield to one who has violated the tax laws unless there has actually been a compromise. (Citing cases.) It is not even claimed here that there was more than an offer to make a compromise. None of the formalities prescribed by the statute and treated by the Supreme Court as necessary to effect a compromise were observed. (Citing cases.) There was no issue of fact for court or jury as to whether a contract of compromise had been made. Accordingly there is no merit in the defense of immunity."

There have been a number of cases where there have been contentions made that the evidence should be suppressed, where a voluntary disclosure has allegedly been made. And in all of those instances except one the court has denied this motion.

In at least one of the cases the court indicated that even if there was a disclosure that there would not have been any suppression of the evidence since the de-

fendant could not hold the Government to the policy as a matter of contract.

I submit that there is no authority in existence for the proposition that a defendant may acquire immunity by virtue of such a policy as this, by virtue of a promise, or by virtue of anything else other than immunity acquired by reason of a prior trial for the same offense and acquittal or conviction, or by reason of the statute.

And if it were true that such immunity could be authorized there would have been no necessity for Congress to enact the statute providing that such an immunity might be given under certain circumstances where a defendant refused to testify on the ground that he might incriminate himself.

Beyond that posture of the law I say there is no basis in the voluntary disclosure policy on which the defendants can properly ask the court to bar prosecution.

Now, I prefaced my argument by saying that I would not make this kind of an argument if there had been voluntary discovery, and if I were not in a position to assert as I have indicated that it shows that there has been no voluntary discovery.

Upon a hearing on the motion we may go further, but I feel that it is the duty of counsel to call to the attention of the court these matters of law in advance of any two-or-three day hearing on the evidence here, after which hearing the result would still have to be the same even if the defendants proved everything that they allege in their motion.

Now, on Point 4 of the defendants' motion, it sets up—and as a matter of fact it is very brief, and I assume that it would be better if I read it, because it is slightly complicated:

> "4. During 1948 and during all the years in question, it was and for many years had been the actual practice of the Department of Justice to refrain from the initiation of criminal prosecution of such cases except upon the recommendation of the Treasury Department, although the Department of Justice reserve discretion as to whether to proceed with the criminal prosecution of any cases in which such recommendation was made. Under such

practice, the Treasury Department has refrained from recommending criminal prosecution of many
37 cases which could have been so prosecuted and the Department of Justice has refrained from criminal prosecution of many cases which have been recommended to it for such prosecution. At none of the times aforesaid has there been any standard of law, either by enactment of Congress or by established criteria or regulation of the Treasury Department or of the Department of Justice, from which the public or the courts might ascertain the basis on which such prosecution is recommended or withheld. Such practice has given rise to a discriminatory application and enforcement of the law, as will more fully appear upon the hearing of this motion, and in the case at bar has thereby deprived the defendants of due process of law contrary to the Fifth Amendment to the Constitution of the United States of America."

Now, as I see that, that is a bid to have the court listen to evidence about what happened, perhaps in a half a dozen or a hundred, or every other tax case, to find out after examining into the facts in those
38 cases and determining what the merits were there, whether there was a violation of the law there and such a violation that the ends of justice would require the prosecution of.

There is nothing in this motion other than the statement by itself that has given rise to any discriminatory application in the enforcement of the law. And if there was any merit as a matter of law to this contention it certainly would be incumbent upon the defendants to allege something more than a legal conclusion that there is a discriminatory practice. I mean, that is a conclusion. There are no ultimate facts here alleged that indicate that there is any such discriminatory practice. In fact, they say they don't know what the basis is on which the Department--either the Treasury Department or the Department of Justice determines whether there shall be a prosecution or not.

But more than that, a defendant in a case cannot defend himself by saying that there are certain other people who should have been prosecuted. I think that

has been held, that a defendant cannot say that some-
39 body else who did the same thing is not prosecuted. Two wrongs don't make a right.

In every single case—and I think there are something like 96 district attorneys in the United States—now, no United States Attorney prosecutes every single case where there seems to be a violation of the law, and there are situations where the ends of justice require that no prosecution be initiated. And that must be recognized. The sound administration of justice demands that he use some discretion. However, there are no two people who think exactly alike. And there is no way of knowing that each man will use his discretion in the same way. And the net result of a violation, on a certain set of facts that would be turned down in another part of the country, it might be that somebody would prosecute the case in another part of the country. Certainly that is not equal treatment, and it seems that there is not much of any cure for it.

And certainly it furnishes no defense to one man to say as a matter of law, you can't prosecute me because you didn't prosecute somebody else, or somebody
40 else didn't prosecute him down south in some other district. And with equal force perhaps it could be argued that one judge in one district or in one part of the country applies a certain sentence in all probability in a certain type of cases, where another judge in another district feels that in that type of a case you should give probation.

Now, I do not know of any way of correcting such a situation. Judges cannot be deprived of their discretion. They act in accordance with a free conscience. True, the cases may be exactly the same, and there may be a difference. It is not exactly equal treatment. But I do say this that the court on every indictment returned cannot make an investigation of what happened in every other similar case. That must be left to the discretion of the executive department. If that discretion is abused that is maladministration, and there is another cure for that, and it is not with the court in holding that in a given case a man cannot be prosecuted because he charges that there is no uniform policy, or that the policy on which they prosecute is unknown.

So we say that the defendants' motion to dismiss so
41 far as it is based on the fourth point should be overruled and denied as a matter of law.

Now, coming back briefly to the third point, to illustrate, and to leave the facts alone before the court:

There is no need for a policy of not prosecuting an income tax evasion case if there is no income tax evasion case. If there is no income tax evasion case there cannot be any successful prosecution. Nor is a man entitled to immunity or to be free from prosecution if he has made disclosure and it is not a full and complete disclosure.

Now, if he has made a full and complete disclosure and it does not indicate that there is any basis of an income tax evasion case against him he does not need any immunity, he cannot be successfully prosecuted.

Only in the case where the man comes in and gives the facts to the Government and in effect says that he has evaded his income tax, does he need immunity. And I say that in this case we have the contention in this case that there is no tax due and owing, and even if that be a mistake, and I doubt that, even if it is false or made
42 under a mistaken belief in the law that doesn't excuse him from properly declaring his taxes. And he certainly couldn't have any intent to evade and certainly could not be convicted of withholding his tax if he didn't think he owed some taxes, and consequently if there were a disclosure in such a case there could be no disclosure such as would bring them within the policy. And that appears from the face of the motion.

I thank you.

43 And thereupon Vincent O'Brien, Esq., addressed the Court in argument on behalf of the defendants.

By Mr. O'Brien: If the Court please, if we always had that unanimity of viewpoint which Mr. Ryan twice referred to, of agreement between the taxpayer and the Bureau as to whether taxes were or were not due I am sure that your calendars here would be greatly shortened and you would have time for much more other work.

He says that the taxpayer may have been acting under a misapprehension as to the law.

There are many cases in the books with which we are all familiar, in which the Commissioner takes the position and maintains it, if you please, adverse to the taxpayer notwithstanding court decisions to the contrary.

There is plenty of room for argument as to whether there is or is not a tax due. The mere fact that we do not concede in the ultimate that as a matter of law there is any tax due is not to say that there is no subject matter for a disclosure which when made would lead the Commissioner not only to make a claim—a civil claim, but
44 in a case such as this to present the matter for grand jury action.

I wanted to stress that at the outset because Mr. Ryan repeated it and commented on it with that statement. I will come to it more specifically when I get to Point 3.

At the moment I would like to address myself briefly to Point 1, in which we say that the indictment purports on its face to have been signed by the United States Attorney, and not by the Attorney for the Government, within the meaning of Rule 7—Criminal Rule 7, the Attorney for the Government in this case having been a Special Assistant Attorney General, not appointed as an Assistant to the United States Attorney but appointed as a Special Assistant to the Attorney General, for the purposes of presenting this case to the grand jury. And that is one of the main issues, who did so present it.

Now, with one exception Mr. Ryan has alluded to cases all of which were decided before Rule 7 of the Criminal Rules of Procedure was adopted.

Those rules generally, as the court knows, were not adopted until 1944. Consequently every decision to
45 which he referred, including the Commissioner case back in 1942, was decided prior to that time.

The one exception was the Wheatley case—159 F. 2d 599, decided in the Fourth Circuit.

Now, our position, if the Court please, is that at the common law and under the practice which then obtained there was no indispensable requirement that an indictment be signed by the prosecuting officer, although in some local places it had become the usual practice, as is referred to in some of the cases.

All of the cases—all of the Federal cases prior to the enactment of the present rule say that no such signature was an indispensable requirement, or that such signature was not required at the common law, and that its absence was not a defect which would affect the validity of the indictment.

But every one of the important cases amongst those listed, including the United States Supreme Court case, shows that that is true, namely, that the omission does not affect the validity of the indictment. That is true only where there is no statute which expressly requires the
46 making of that signature.

For example, in 135 U. S. 443, the Supreme Court cites with approval and relies upon the leading case of Commonwealth v. Stone, 105 Mass. 569, in which the court said that

> "Where there is nothing in the statute requiring the signature of the prosecuting officer we do not think that its absence is indispensable to the validity of the indictment."

Now, commencing in 1944 the Rules of Criminal Procedure, having the effect of statutory law, expressly required by Rule 7 that such a signature be appended to the indictment.

While that statute is now in your court there have been similar statutes enacted before in many of the States of the Union.

Since the enactment of such statutes every one of those States without exception has held that the absence of that requirement is a fatal defect in the indictment.

Some of the decisions contain a statement of persuasive reasons why that is so.

I illustrate quickly with but a few, if the Court
47 please, because there are no exceptions.

In Indiana, in the case of Hancock v. State, 42 Ind., 393, the defendant moved to quash the indictment on the ground that the signature of the prosecuting attorney was not affixed to the indictment as required by the statute.

The motion was denied, and the defendant excepted and appealed.

The Supreme Court of Indiana reversed, holding that the statute required the signature of the prosecuting attorney and that without it

> "the indictment had no more force than a blank sheet of paper".

In Tennessee, in Teas v. State, 26 Tenn. 174, the defendant appealed from the judgment of conviction on the same ground, and the Supreme Court of Tennessee reversed, and said,

"We have repeatedly held that a bill of indictment to be good in law must be signed by the proper officer appointed to prosecute on behalf of the State."

And then in a better case as far as the exposition of reasons is concerned, State v. Bruce, 77 Mo., 193,
48 there the defendant was convicted, and appealed on the ground that the prosecuting attorney had failed to sign. And the Supreme Court of Missouri reversed the judgment of conviction on the ground that the absence of the prosecuting attorney's signature was fatal. The court pointed out that a statute requiring such a signature had been enacted.

And that is the case here, if your Honor please; your rule was so enacted:

"has been enacted after court decisions holding it wasn't necessary or indispensable to be so signed."

And I stress this point, and point out further that the court said that the requirement could therefore not be considered, as contended by Mr. Ryan, a mere formality which might be dispensed with.

In that respect the court said:

"We are satisfied that no paper can be regarded as an indictment without the signature of the prosecuting attorney.

Now, as I have said, your Honor, the factual situation in the case here falls squarely within the State Court decisions.

49 In 1944 the Supreme Court changed the rule—and the rules so enacted by it have the force of statute—and that expressly requires that the indictment be signed by the attorney for the Government.

Now, counsel cited one case from the Fourth Circuit, the Wheatley case, in which the court failed to give any significance to the enactment of Rule 7 and the law pertaining to a situation of that kind where in the face of existing cases that a signature is not required, and Congress passes an express rule, or the Supreme Court enacts a rule that such a signature will be required.

The court knows all of the significance of that is recognized as the general law but said nothing about it, and goes on to assert that it has been held in the past that such a signature is not required, and that that is all right.

In addition to that, as Mr. Ryan says, the court men-

tions Rule 52, which is the one which says that the court is not justified in taking cognizance of errors not of substance.

And again the court mentions Rule 52 and overlooks the law, a matter which is provided for by the stat-
50 ute, in the face of existing cases which had said it was not essential, which is for that very reason essential. And I submit that such a construction which would enable the court to ignore the requirements of Rule 7 by virtue of Rule 52 gives no effect whatsoever to the provisions of Rule 7, indeed fairly emasculates that provision.

The proper rule of construction requires that both sections be given a meaning. And the only way that can be done, under the proper interpretation of the rule, is to take the interpretation which every State of the country that has a statute—has a similar statute has taken, some of which of those decisions I have referred to, but there are many more.

So that I say in conclusion on that phase of the point that the one case decided in the Federal Courts since 1944 is for the reasons which I have mentioned, not the law; it is not binding on this court; it is not the law in this circuit, it is not in accord not only with the overwhelming weight but the unanimous authorities at general law, all of which are to the contrary.

Consequently we make the point—No. 1 of our
51 motion, notwithstanding the presence of the Wheatley case. I think your Honor will appreciate that in a matter of this kind there are many points which must be brought before the court in the presentation. We have sought to confine them to four, and in no instance will your Honor find as the argument progresses that any of them are made on an insubstantial or frivolous basis.

Now, as to one more thing, in Point 1 counsel says that the indictment was signed by the attorney for the Government.

Now, as to one more thing, in Point 1 counsel says that the indictment was signed by the attorney for the Government.

Now, that raises a question: Who within the meaning of Rule 7(c) is the attorney for the Government? Rule 7(c) requires that the indictment be signed by "the at-

torney for the Government". It does not say "by the United States Attorney"; it does not say "by the United States District Attorney"; it does not say "by the local attorney". And why? Because they have two statutes, with which I have no doubt you are thoroughly familiar—the one, the original one which requires, puts the duty and responsibility on the United States District Attorney for the presentation of indictments to the grand jury in his district.

52 Later, as Mr. Ryan has correctly observed, in 1906 the Congress at the instance of the Attorney General enacted Section 310 which purports to enable the Attorney General of the United States to appoint Special Assistants. And they are now by him specially directed to go into the various districts and to do what they could not theretofore do by existing law, to present cases to Federal grand juries.

Right or wrong that Section 310 is on the books, so that you now have two statutes, one of which provides for the presenting of cases to the grand jury by the United States Attorneys; the other of which enables a Special Assistant Attorney General to come into the district and himself on proper orders to present a case.

Rule 7, taking cognizance of that, provides simply that the attorney for the Government—meaning the attorney, whoever he may be, whether he is a special assistant attorney or whether he is the United States Attorney for his district, shall sign that indictment.

Now, the plain fact of the matter is, as appears from the motion, that Mr. Cunningham, whose authority
53 was then lodged with the clerk, and it was dated the night before, came here from Washington, went into the grand jury and presented the case, and was in a hurry to be gone, and took a plane, and he went, he could not stay to fulfill the requirements of your rule, although he is the one who the papers say presented that case to the grand jury.

The indictment does not in point of fact and within the meaning of that rule bear the signature of the attorney for the Government. It bears the signature of Otto Kerner, the United States Attorney who had nothing to do with the presentation of the case. And as the moving papers show, Mr. Cunningham was not designated as an Assistant, Special, or otherwise, to the United States Attorney.

We of course make no point, or would make no point of the fact here that the indictment was subscribed in the name of Otto Kerner when in fact the presentation was made by one of his Special Assistants. That is not the fact and that is not our contention.

So we say that this indictment by reason of the matters mentioned in Point 1 is fatally defective not
54 merely in matter of form as counsel would have you believe, not in matter of form, as the Missouri Supreme Court expressly held it could not be where the statute so requires, it is fatally defective in substance, and the motion to dismiss in that regard must be sustained.

It is only fair to say to the court, although the court knows it generally, but in this connection undoubtedly I assume that the Government, were that ground upheld, would have the right to apply for a reindictment. But that is not to say, as I see it, that they would necessarily procure a reindictment on such application.

But that is neither here nor there. The motion to dismiss on that basis I respectfully submit should be sustained.

I wonder, your Honor, if we might take a couple of minutes recess?

By the Court: We can recess for a few minutes or recess until tomorrow morning if you prefer.

By Mr. O'Brien: I should have said at the start that I have an appointment, your Honor, to get some x-rays made tomorrow morning. But I will try to finish if
55 you are agreeable, or I was going to ask that it might go until Monday.

By the Court: How much more time will you need?

By Mr. O'Brien: The next point is the important point, Point No. 3. I don't know how long it will take to cover it, but I think I should have an hour.

The Court: All right, you may go until two o'clock tomorrow afternoon.

Mr. O'Brien: Yes, sir.

By the Court: You may go now until two o'clock tomorrow afternoon.

By Mr. O'Brien: Thank you, Judge.

(Whereupon the further hearing of the above-entitled matters were continued until Friday, June 20, 1952, at the hour of 2:00 o'clock p.m.)

56

(Caption—No. 52 CR 143)

Chicago, Illinois,
June 20, 1952,
2:00 o'clock p. m.

Met pursuant to adjournment.

Present:
Mr. Ryan,
Mr. O'Brien,
Mr. Hess.

And thereupon the following further proceedings were had herein:

By the Clerk: Number 52 CR 143, United States vs. The Shotwell Manufacturing Company, et al.

Further hearing.

By the Court: You may proceed, Mr. O'Brien, whenever you are ready.

By Mr. O'Brien: Yes.

And thereupon, Vincent O'Brien, Esq., further addressed the Court in argument on behalf of the defendants.

By Mr. O'Brien: If the Court please, yesterday
57 I finished our discussion of point 1, and the demurrer to it.

And I think that now for the moment I will skip point 2, and come to point 3, which is a point of genuine substance on the matters now before you.

Point 3 is the point on which we base the claim of estoppel in bar by reason of the immunity following the admitted disclosure.

I say to the Court that this point is not one of these formal or technical points commonly found in motions to dismiss, but it is included in the motion to dismiss because under your present rules all matters preceding the general issue must be incorporated in such a motion. Under past practice those would have been interposed by way of a plea in bar of the action.

Now, before I get to the details of that point, I would like you to know a little about the theory.

We do not controvert Mr. Ryan's general statement of the law that in order for a government official bind-

ingly to promise immunity there must be a statute or law of some kind authorizing that to be done, either in special or in general terms.

But I stress the point, your Honor—and it is the
58 key thing of this whole point—that there is present here a statute conferring such power on the officials in question, namely, the Secretary of the Treasury, the Assistant Secretary, the Under-Secretary, and the Commissioner of Internal Revenue, over on the Bureau side. There is such a statute.

Now, before going to that statute, I would like to read, because it is fairly brief, the portion of the motion which states the facts which bring that statute and our claim of estoppel into operation.

We say—and verify it—that:

> "At all the times in question in these proceedings, the Commissioner of Internal Revenue and the Secretary of the Treasury, by virtue of the statutes in such case made and provided"—

Meaning Section 3761.

> —"were empowered to compromise any civil or criminal case which might have arisen under the Internal Revenue Laws against the defendant. At all times in question in this proceeding, and for many years prior thereto, there was and for many years had been in effect in the Bureau of Internal Revenue a policy
> 59 from time to time published and promulgated by the Secretary of the Treasury, by the Commissioner of Internal Revenue, and by other responsible Treasury officials, whereby it was publicly represented there would be no criminal prosecution in any case in which a voluntary disclosure of misstatement or omission in a tax return was made to a responsible officer or agent of the Treasury Department before investigation had been initiated, but that the Treasury Department in such case would merely assess such unpaid tax, interest and civil penalties, if any, as might properly be found due under the facts of the case."

And I would like to veer just a moment, your Honor, and add to the statements of the policy read to you yesterday by Mr. Ryan, a brief allusion to the reason and substance behind that policy.

There are many returns filed, containing omissions or misstatements which, in the practical operation of the

Bureau, would or might never come to the attention of the Government for either civil or criminal purposes.

It has been thought by those promulgating the policy
60 that the adoption of such policy, the publication of it to the people at large would, and it has, resulted in many coming forward disclosing such statements or omissions and ultimately paying moneys in large amounts in the aggregate which the revenue never otherwise would have gotten.

In exchange for that, and by the terms—the express terms of the policy, the Bureau has said to the people that if that is done, there would be no criminal prosecution, reserving, of course, all right to collect any additional tax, or tax deficiency or any interest or penalties, as the nature of the case might warrant.

Going on with the motion, we say:

"In reliance upon said policy, the defendants, before the commencement of any investigation within the meaning of the aforesaid statements of the aforementioned Commissioner and Secretary and others, in January of 1948 made such a disclosure in respect of the returns of the corporate defendant for the years mentioned in the indictment in this cause, and
61 from time to time thereafter until and including March of 1948 reiterated the same, in each instance, to a responsible officer or agent of the Treasury Department."

We further say:

"The officers and agents of the Treasury Department to whom the aforementioned disclosure was made, acknowledged to the defendants the sufficiency and timeliness thereof upon the occasions aforesaid. In further reliance upon said policy and upon said acknowledgments and at the request of said officials and agents, the defendants caused to be made available to them the books and records of the corporate defendant, and communicated to the officers and agents of the Treasury Department information in the possession of the individual defendants materially related to said omissions and misstatements and not available to such Treasury Officers and agents through the said books and records of the corporate defendant, and which information could not have been ob-

tained from the individual defendants in any manner,
62 in view of the constitutional privileges and rights of the individual defendants, and employed the services of accountants to assist said officers and agents"—

Of the government, we mean:

—"in ascertaining facts from such books and records. The corporate defendant in that regard specially incurred and paid, over the period of four years over which the examination by the said agents extended, auditing charges in excess of the sum of $20,000."

And we aver:

"By reason of the premises, the government was and is estopped from instituting and maintaining"—

this action.

Now, I said that in so doing, fundamentally we are relying upon Section 3761. But before going into that section, I would like to clear from my observations a few comments that I have concerning Mr. Ryan's argument of yesterday on this point.

To begin with, Mr. Ryan said that the motion does not aver the existence of a fraudulent evasion, or that any additional tax is due. That is the first thing he
63 says.

The second is that there isn't any statute which confers authority in the officials in question, or any other officials, to grant immunity in such a case, and that the one on which we rely really hasn't much to do with it. He gives it a sort of a quick push-off.

He said, third, that it is really a matter of grace, after all, a matter for the conscience of the Executive Department which made the policy; a matter of conscience to grant or to withhold in its uncontrolled discretion free of interference by any court through the application of the rules ordinarily governing, so far as they apply.

Now, as to the first of these statements, namely, the statement that the motion papers do not admit a wilful tax evasion and an additional tax due in consequence.

Now, what Mr. Ryan meant by that I suppose is made more clearly apparent in the instance or example that he cited at page 17 of yesterday's transcript, as he put it:

"In other words, as an example of how that would
64 be true, if you understated your gross income, but

you also understated your expenses by a similar amount, there would be no tax liability and consequently there could be no tax evasion since the additional income would be offset by the understated expense, and there would be no tax due and owing. Consequently, there could be no tax evasion in that case, if that was the situation, and there could be no disclosure of tax evasion but simply the disclosure that the return was in error."

Well, the trouble with that statement, your Honor, is best illustrated in the case at bar. It overlooks the fact, first, that the bill of particulars filed in the action claims certain premium receipts, and there may be and could well be premium disbursements. And the question of what we may properly deduct from demonstrated income is not merely a question of fact, it is a question of law whether you deduct premium payments for costs of goods.

On that question I submit that the Court will take judicial notice of the fact that the Commissioner of Internal Revenue today, and on the dates in question, has contended that you cannot deduct from your income
65 premium, or overceiling payments as costs of goods acquired.

He has taken that position in several of the reported cases, in one of which there was an appeal to the Fifth Circuit, which he withdrew.

He took that position before the Court of Appeals more recently, in which the Court ruled against him.

The fact remains that it is the decision of no court; it is the Commissioner who says he won't allow it, and so he says there is a tax due. We correctly say on the law, as we understand it in our affidavits, that there isn't any additional tax due. But only some court can determine that.

But when we come in and reveal the facts which, under his theory of the case, justifies his action both for the tax and criminally, if you please, I say that then on the declarations which were read to you, we have made disclosure. And in doing so, we do not have to come forward and admit in our pleadings that it was not a fact that we concealed underpayment of taxes or that there is one red cent of additional tax due. There is no such a requirement as that.

On the second point, which is that this is a matter
66 of grace, I think that that will have to await the main argument, because what I certainly intend to

do in the main argument, is to point out that this is not a matter of grace, but it is a controlling question of law in this case, which must be resolved in my favor if we can get the hearing which we have been seeking and prove the facts, settling this issue once and for all.

If the Court please, in making that argument that it is a matter of grace and within the conscience of the Executive Department, Mr. Ryan recognized the injustice—the inherent injustice inherent in that argument; and he said to you, I think at least three times, that were it not for the fact that they could traverse some of the material factual averments of the motion, that it is not an argument which he would feel free to make, or would want to make—it is not a just argument, in fact.

The impression is given that if in fact there was a disclosure, there would not even be an action here. And, of course, he meant there should not. But that is what he said.

Now, I remind you that we have not lagged in our
67 efforts to get a determination of that basic fact issue.

I came in here after the motion was filed promptly and sought a rule on the government to answer. The government did answer; that is, the government did not answer, but interposed a demurrer.

I then came in and asked that this argument on that demurrer be deferred so that as a preliminary the evidence could be taken and the facts in relation to this matter of disclosure be judicially determined so that they would be established one way or another as a fact and would not be here on a hypothesis or an assumption merely for the purposes of this argument. And I think there is a great difference in the way any court reviews this case, that it has the facts before it, which, unfortunately, we do not have. It is true, as a matter of right, that he can file a demurrer, and he is entitled to this hearing on it. But I still do not think that the reason for the interposition of the demurrer is merely that we would have a couple of days' delay in having a hearing on these facts. And I think that the facts would have a very important bearing on the question of law. But
we haven't got them, and I am prepared to go ahead
68 without it.

Now, coming to another statement of Mr. Ryan's—

and this is a sort of a miscellaneous thing, and I will get rid of it here:

In commenting upon comparable cases having to do with disclosure, he said that there were others, and cited a number of such cases in all, but only in one of which the Court refused to suppress the evidence on the claim of disclosure.

Now, let us not get in any confusion in respect of those cases. You remember, your Honor, in my motion recently made, I said that if we did not have a fact hearing for the purposes of our plea in bar—let us call it, at this point—that no matter how the demurrer was disposed of, we would have to have one later; and in any event, we would have to have one if the case goes on in conection with a motion to suppress evidence—to suppress the evidence so obtained in contravention of the constitutional rights of the individual defendants.

But this is not a motion to suppress evidence. This is a plea in bar of the action. The cases to which Mr. Ryan referred are all cases, with the exception of the Lustig case, which I shall discuss specially—there are three
69 other cases, and those cases all involve an alleged disclosure. In two of those three cases the District Judge found as a fact on a hearing that there had been no disclosure.

In one of the three cases—the Liebster case, the District Judge found that there had been a disclosure, and granted the relief.

In one of the three cases in which the District Judge found no disclosure, the Court of Appeals clearly indicates, contrary to what Mr. Ryan implied, as a matter of law, that had such disclosure been established as a fact, the relief asked for would have been granted.

That case is White vs. United States, reported in 194 Fed. (2d), at 215. And I am reading from page 217, where the Court of Appeals says:

> "While we agree with appellants that if their incriminatory statements had been made, as they claim, not voluntarily but induced by promises of immunity, they would be entitled to be relieved against their use, we think it plain that no such case is made out. In order to prevail on their motions, appellants were obligated to show in a clear and definite way that

70 the evidence they seek to suppress was obtained in violation of their constitutional rights. They failed to do this."

In other words, in the four cases, the defendants all claimed disclosure.

In three of them they failed to establish it as a fact.

In the fourth cases, the Liebster case, they did establish it as a fact, and got the relief.

No one of these cases involves a plea in bar of estoppel.

There is no reported case in the books—lower or upper courts—decisive of the question which your Honor has here. There are cases helpful in the argument, to which I shall presently come, but there is no reported case in point or on all fours with the situation you have here.

Now, coming then to the statute, Section 3761, since that is the foundation of the argument, and since it is what it is, I would like to read it:

"Section 3761. The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or an Assistant Secretary of the
71 Treasury, may compromise any civil or criminal case arising under the Internal Revenue Laws prior to reference to the Department of Justice for prosecution or defense;"

And this is material here:

—"and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

Now, that covers both civil and criminal.

The second section or portion of that section says:

"Whenever a compromise is made by the Commissioner in any case, there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer made as such, with his reasons therefor, with a statement of"—

Three things:

"(1) The amount of tax assessed.

"(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

72 "(3) The amount actually paid in accordance with the terms of the compromise."

This section, your Honor, that is, the last half quite naturally relates to civil settlements.

Now, Mr. Wenchel—you remember, one of the things you had there is the opinion of counsel for the Department of the Treasury; and one of the counsel at the time in question, Mr. Wenchel, points out in his discussion of May 14, 1947—and he was then chief counsel of the Bureau of Internal Revenue:

He said that the law requires the prosecution of the tax evader, and that is what the Department recommends to the Attorney General.

But he said this:

There is one important exception to that:

"The Department has authority, discretionary power long recognized by Congress to determine the policy and procedure in the effective enforcement of the Internal Revenue laws."

Now, having to do with the authority of the officer in question to make the civil settlements pursuant to this section, there are a number of cases, with most of which I need not burden your Honor.

73 All of the important holdings of most of these cases arise—or arose in the Botany case, decided by the United States Supreme Court. And I think, generally speaking, it is enough if I refer to that one alone in detail.

In that case, Botany Worsted Mills vs. The United States, 278 U. S., 282—and this is a civil case, your Honor—agents for the Government and the taxpayer had settled in an informal conference the differences which had arisen with respect to the taxpayer's first return.

The taxpayer then filed an amended return, and paid the additional tax assessments in accordance with it.

The taxpayer later sued to recover the additional tax paid pursuant to the amended return.

The Court of Claims denied recovery on the ground that there had been a compromise within the meaning of what is now Section 3761.

The Supreme Court, although ruling for the government on the merits, held that there had been no compromise within the meaning of the statute. And in so holding, the court said:

"Independently of these concessions we are of the
74 opinion that the informal settlement made in this case did not constitute a binding agreement. Sec. 3221 (now 3761) authorizes the Commissioner of Internal Revenue to compromise tax claims before suit, with the advice and consent of the Secretary of the Treasury, and requires that an opinion of the Solicitor of Internal Revenue setting forth the compromise be filed in the Commissioner's Office."

No, says the Court:

"Here the attempted settlement was made by subordinate officials"—

Not the Commissioner, not the Secretary:

—"by subordinate officials in the Bureau of Internal Revenue. And although it may have been ratified by the Commissioner in making the additional settlement based thereon, it does not appear that it was assented to by the Secretary, or that the opinion of the Solicitor was filed in the Commissioner's office. • • •

"It is plain that no compromise is authorized by
75 this statute which is not assented to by the Secretary of the Treasury. (Citing a case). For this reason, if for no other, the informal agreement made in this case did not constitute a settlement which in itself was binding upon the government or the Mills."

The Mills being the taxpayer.

Now, here:

"And, without determining whether such an agreement, though not binding in itself, may when executed become under some circumstances, binding on the parties by estoppel"—

Meaning, the government, too:

—"it suffices to say that here the findings disclose no adequate ground for any claim of estoppel" • • •.

So that in this civil case, this controlling case arising under the compromise section, the court found there was no binding, enforceable compromise agreement, no contract, because it was made by subordinates, and because it was not approved by the Secretary of the Treasury.

Now, coming back, your Honor, to the statute,
76 the statute covers both criminal and civil cases, the last regulations of the statute requiring the specification of reasons—of three reasons, patently relate to civil cases.

Now, what is our situation? We have a criminal sanction which is involved here. We have a blanket, widely promulgated declaration or declarations of policy addressed to the public at large, made in advance pertaining to criminal sanctions. And made by whom? By the Commissioner of Internal Revenue, by the Secretary of the Treasury, and by counsel—not by any subordinate. The only thing that a subordinate has to do with it is to accept such a disclosure when and if made pursuant to that policy.

The statement of the policy is that if there be a sufficient and timely disclosure there will be immunity from criminal prosecution.

Now, that is a lot different situation than the one which the court was confronted with in that civil case.

Now, as to the requirement in a civil case that the statement of reasons, or, rather, the opinion be filed,

77 the courts afterwards, subsequent to the Supreme Court case, have held that that is merely directory.

I refer, your Honor, in that connection to the case of Backus, et al. vs. United States, 59 Fed. (2d) 242.

In that case, the court enforced a compromise agreement entered into by the Commissioner with the verbal approval of the Secretary, although no opinion had been filed in the Commissioner's Office, as required by the statute.

Said court:

> "This provision in Section 3229 (now 3761), the revised statutes, provides for the filing of such an opinion after the compromise has become complete. It is addressed alone to the officer and is directory and a failure to comply therewith would not affect the compromise itself or its validity."

In the criminal phases of Section 3761, your Honor, you do not have special settlements in relation to the subject-matter of this motion. You have the whole category of people who by inadvertence, intention, or

78 what have you, have filed inaccurate or false returns.

And that tax, or that additional tax which is due is never ascertained. But two officials of the Department, the Secretary of the Treasury or the Commissioner of Internal Revenue say that if a disclosure of the facts be made before investigation is commenced, then there will be immunity.

There is no statement of reasons necessary. The same reason always underlies that policy. The reason is to get people to come forward and get the money into the revenue, into the treasury. That is the reason. It does not differ in the case of any individual or person in that category who undertakes to comply and to make the disclosure.

As a rule, I think—and I am not urging it on the court—but my own notion is that in such situations there is actually a settlement, a compromise agreement or settlement of the criminal phase of the case immediately a sufficient and timely disclosure is made.

There is that point of view. For example, it is expressed by Mr. Frazier, in Is A Voluntary Disclosure A Legal Defense to a Criminal Prosecution, 28 Taxes
79 1071, 1072 (1950), in this fashion; and I read it because it is a rather clear statement:

> "The view that a voluntary disclosure is a bar to a subsequent prosecution may be summarized as follows: The public statements made by various Secretaries of the Treasury, establishing and continuing the voluntary disclosure policy of the Treasury Department, were made under and by virtue of Sec. 3761 of the International Revenue Code. A voluntary disclosure is, therefore, a form of compromise under which the Treasury invites disclosures of past tax frauds and which automatically forces the delinquent taxpayer to pay in full his back taxes, interest and civil fraud penalties in return for a promise of immunity from criminal penalty for such fraud. Sec. 3761(a) of the code, relating to authority to compromise, seems to be couched in sufficiently general language to permit the Secretary of the Treasury to give his advance blanket approval to the compromise of criminal cases."

And it is; it is certainly that broad, a mere reading of
80 it shows that.

But I confine my motion not to the basis of establishing a contract, the enforcement of which involves special considerations, and which usually relate in these matters to the civil side in the payment of money. My plea is one of estoppel. And I would like to digress a moment to the court's decision in that Botany case.

Your Honor has seen such statutes in other matters; you have seen them applied. And what the court did in that case was merely to say: Look, in the first place, we are not going to have any advantage of immunity from subordinates; we are not going to have the Commissioner of Internal Revenue alone making these settlements; they will have to be in collaboration, and with the approval of the Secretary of the Treasury or some one of his assistants.

Now, where you have got a civil settlement involving the payment of money there is going to be a settlement that shows what the claimed amount is, what the claimed deficiency is, how large it is, where it is paid, and that is all going to be filed in the office of the Commissioner. That is a formal requirement.

81 There is also going to be in such matters an opinion of counsel that that is the thing to do; and that, too, should be lodged somewhere so that it will be kept in the records.

Now, for the purpose of avoiding confusion and any such things, the matter has to be done in that way. But it may be that there are some cases in which, by reason of the failure of someone in one or more of these things, a binding agreement does not result as to which situation, says the court, the administration of justice may require the working of an estoppel, or the setting up of an estoppel, to preclude injustice.

Now, here you have got the facts on which there has been no hearing, but which, for the purposes of this motion, they admit—an acknowledgment of the fact of the sufficiency and timeliness of a disclosure made under that announced policy.

What does that mean? That means that these men four and a half years ago came forward, informed them of the facts, collaborated and cooperated with them to ascertain what, if anything, was involved, agreed on the size of the claims, by coming forward and subjected themselves, laid themselves open, made themselves spe-

82 cifically liable not only to the assertion of the civil claims, not to indictment by the Commissioner at least, but by the Department of Justice to the presentation of the matter to a grand jury, which here has been taken.

In reliance on that representation, they thereby then and there changed from their position, and in a far more material way than ever happens in anything that just involves some money. And when there is that changed position made on the promise of those authorized to make it, then the other part is to be fulfilled or not fulfilled, that is, the court—that is, the Bureau will declare that the immunity by the compromise is operative and effective on the theory of estoppel. And that has been carefully provided for in the opinion of the Supreme Court.

Now, folowing that opinion and argument, there was not only the Backus case which said that the filing of that civil opinion was directory, but there were two other cases in which the lower courts did hold an estoppel under this section. And I give these to your Honor.

The first of these, your Honor, is Guggenheim vs. United States, 77 Fed. Supp. 158.

83 In this case the court held that the taxpayer's suit for refund was barred by the compromise agreement previously entered into by the taxpayer and agents for the Bureau. The agreement was approved by the Commissioner, but there was no indication that the Secretary had approved the deal, and no opinion with respect to it was filed in the Commissioner's office.

The court distinguished the Botany Mills case on the ground that an estoppel had arisen against the taxpayer. The court first quoted the paragraph, from the Botany Mills case,—which is the one that I have read to your Honor, when it said:

> "And, without determining whether such an agreement, though not binding in itself, may, when executed, become, under some circumstances, binding on the parties by estoppel, it suffices to say that here the findings disclose no adequate ground for any claim of estoppel by the United States."

That was the language of the Supreme Court of the United States. And the court then remarked:

> "At the time the agreement in this case was executed the statute had not run on the collection of
84 further deficiencies, but when the claims for refund were filed the statute had run. It would obviously be inequitable to allow the plaintiff to renounce the agreement when the Commissioner cannot be placed in the same position he was when the agreement was

executed. A clear case for the application of the doctrine of equitable estoppel exists and should be applied."

The other case is Baldwin vs. Higgins, 19 American Federal Tax Reports, 1341; affirmed in 100 Fed. (2d), 405 (Second Circuit).

The facts were substantially those of the Guggenheim case.

And here the Court of Appeals said:

"Such is not the case here. The waiver and consent agreement is a binding contract and it was accepted and acted upon by the Commissioner.

"Furthermore, it would seem unconscionable and inequitable to permit the plaintiff to sustain a recovery based on his own broken promises. This is an equitable action and a suit based thereunder seeks abstract justice."

85 Now, we have, fortunately, in this Circuit a good many cases having to do with the question of estoppel as against the government in criminal matters. And I would like to refer to a few of those, in the first of which the opinion is by Judge Baker. The case of Voves vs. United States, 249 Fed. 198, at page 192, decided in 1918, and it has been confirmed in later opinions, to which I shall refer.

In this case, D was convicted of selling liquor to an Indian. There was evidence to indicate that government agents had misled D into believing that vendee of the liquor was a Mexican rather than an Indian. D appealed and judgment was reversed. Said the court:

"Grant that the government may use a decoy to discover evidence of a committed crime of whatever nature; that, where one has the intent to commit a malum in se, or the willingness to do a malum prohibitum, a decoy may accompany the wrongdoer and even participate in the offense; that a liquor seller is guilty, despite his honest and reasonable belief respecting the age or race of the purchaser; and even
86 must take his chance that a purchaser, who is not a government decoy, may wilfully deceive him by camouflage, still the question remains: May the government maintain an indictment against a person for doing a malum prohibitum when the government's conduct has misled the person into believing that the prohibited act was a lawful act?

"In a civil transaction between citizens, such conduct as the jury might have found this case would create an estoppel which would preclude a suit based upon the suppressed truth. Is our government of the superman type that releases the ruler from the obligations of honesty and fairness that are imposed upon the citizens? Is one's liberty or reputation as a law-abider to have less protection than his property? We are strongly of the view that sound public policy estops the government from asserting that an act which involves no criminal intent was voluntarily done when it originated in and was caused by the government agent's deception."

To the same effect is United States vs. Healy, 202 Fed. 349; and

87 O'Brien vs. United States, 51 Fed. (2d), 674, also decided in this Circuit in 1931.

There are two other cases to the same effect in criminal matters. The first is:

Newman vs. United States, 299 Fed. 128, in the Fourth Circuit; and

Cupuano vs. United States, 9 Fed. (2d), 41, in the First Circuit.

So that on the question of the law, I summarize our theory and the existing law in this word:

There is a statute; counsel for the Bureau claims there is and says it is Section 3761.

The top officials under that statute have broad authority to settle civil and criminal cases both.

There is no case which says that they do not have the power to settle a criminal case.

There is no case involving a disclosure in which it is said that the power exists under that statute.

The top officials, the Secretary of the Treasury, the Commissioner of Internal Revenue, and the counsel or solicitor, all in these published statements, have put

88 out this blanket settlement offer to those situated in a particular category.

In reliance on that offer, and within its terms, these defendants came forward, and they did what they were told; and they thereby changed their position in a most substantial or radical fashion. And every element essential to the setting up of an equitable estoppel in pais exists by reason of that action.

In addition to the change which occurred then and there, because of what they disclosed and how they revealed themselves, there was a further change of position in reliance on that promise, in the cooperation extended, in the turning over out of the minds of the individual defendants of information, a change essential to helping arrive at the amount claimed or converted.

There is every element of an estoppel. There is no case which says that is not estoppel. The United States Supreme Court leaves it wide open. It does not say: Look, you cannot have an estoppel against the Government under 3761; it says there may be cases in which on the facts there will be an estoppel. And there weren't any
89 facts here because the defendants were not confronted with that.

In two cases—the Guggenheim case and the other case, the courts have adjudged an estoppel, based on 3761, although it was admitted that the agreements were not in accordance with the form—in one case the Secretary had not conformed, but, nevertheless; although they were not valid agreements according to the requirements of that section, nevertheless an estoppel was found in that the agreement in that form had been duly made, and they were estopped to assert what they were trying to assert in violation of that situation.

Now, the point has not been raised by the demurrer, but I know your Honor has an active mind on these things, and I have here a great number of cases establishing that an estoppel;—that there is such a thing recognized throughout the law as a promissory estoppel, that is, a promise predicated on the promise to grant immunity: Dickerson vs. Colgrove, 100 U. S. 578, 580.

And here is a digest reference which is very good, and illustrative of the point. Maybe I can confine it to this because it contains many cases: 19 American Jurisprudence, pages 657-658; estoppel Sec. 53.

90 There they say:

"The broad rule stated in the preceding section to the effect that a promise to do or not to do something in the future does not work on estoppel but must be qualified, since there are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct. The doctrine of 'promissory estoppel' is by no means new, although the

name has been adopted only in comparatively recent years. According to that doctrine, an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice."

I have a whole sheet of cases on that, your Honor. But in the absence of any issue on the point I do not see why it is necessary to take your time with those. But I
91 wanted to have it covered in case the question arose.

Now, I say there is, then, a law point, on the law as it is. And there is nothing contra to what I have said in the form of statute or cases.

The Lustig case to which counsel referred yesterday was a case in which there had been a motion to suppress. The facts were resolved on the issue of disclosure against the defendant, and that really ended the case.

Mr. Ryan himself took cognizance of the fact that the statement of the Court of Appeals was merely dictum when he said, page 33 of the transcript:

"And because the court so found"—

That was after voluntary disclosure:

—"I recognize that this discussion here about immunity does not have the force which it would otherwise have if it were a decision."

Not having the force of any authority, it is dictum. In other words, the court, having found there was no voluntary disclosure at all, had no occasion, there was nothing before it on the question of what had been there found.

And that case did not involve even a claim of estop-
92 pel. All that the court said was that even though it was dictum, that there was not a precise agreement, it did not even attain to the dignity of an offer to compromise, there weren't any signed papers or anything. So how in the world could it have been a compromise? But there is no case in the books or anywhere that says on the situation at bar where there is an estoppel in pais, that it cannot be asserted against the government.

And I again say now, as I said in the beginning of the discussion, that the law which bars the assertion of immunity or the assertion of estoppel against officials of the government who have not been authorized by the statute

to grant immunity or do the thing in question, has no bearing whatsoever on the facts of this case.

We have a law. And they are thoroughly informed. We performed and relied on it. We changed our position, and they are estopped, and this court should so hold. If that is held; the case is still here. They will traverse. We will have a hearing on the fact issue, when and where it may be. And if that fact is established, then I say the plea in bar should be sustained. And this case will then be at an end, except, I admit, for an appeal, so that
93 some upper court can decide what the law is on this question of first impression as far as the facts are concerned.

Now, on point 2, Your Honor, and point 4, they are points of a different nature, and I do not want to take much time on those, particularly on 4.

1 we talked about yesterday.

3 I have talked about now.

2 is the point that a special assistant was sent in here to present the matter to the grand jury?

The factual parts of that point are not challenged. That is all admitted. We say as a matter of law that Section 310, namely, the section enacted in 1906, to which Mr. Ryan referred yesterday, is so construed to the extent that it permits that to be done which is not constitutional.

I said yesterday that prior to 1906 the only statute there was on the books made it the duty and responsibility of the District Attorney to present such matters. That at or about 1906, at the instance of the Attorney General, the Congress enacted Section 310 which purports to authorize the commissioning of a special assistant attorney general to go to any district with authority, written
94 or not, to make grand jury presentments and to do other things.

Now, there was such authority in this case. Mr. Cunningham had written authority lodged with the clerk. But the trouble with that situation is this, Judge, that Congress—the Attorney General and Congress in enacting Section 310, in getting it enacted, assumed that the only thing they had to deal with was the presence of a statute which put this duty on the district attorney, or the United States Attorney.

Actually, the reason that the local attorney comes to the grand jury stems from the common law, not from any

statute. In other words, it was the traditional practice in part of the grand jury procedure at common law to have the case presented by the local attorney, not by someone from outside the bailiwick.

That is shown by 28 Fed. (2d) here. The case in 28 Fed. (2d), your Honor, says that it is prejudicial to the accused, or the defendant, to have counsel from Washington go before the grand jury; that it was regarded as prejudicial at the common law; it over-stresses the importance of the matter, and had an undue influence on the jury. They were far more at home with the local at-
95 torney, says 28 Fed. (2d)—and I will give more recent citations later—and therefore under this procedure within 28 Fed. (2d), 451—by the way, that is the way Judge Killips, the District Judge in Ohio, sums it up:

"From 1787 to the present time, therefore, a federal grand jury has been a body organized and functioning as by the common law at the date of the adoption of the amendment;"

That is the Fifth Amendment;

—"and it seems reasonably clear that no power abides in the Congress to affect or modify the integrity and independence of the body as established. There is no reason, in my judgment, to abate the careless consideration for the rights and liberties of the individual which directed the institution of a grand jury at the beginning, and which later impelled the adoption of the amendment. It is yet entirely consonant with the spirit of our institutions that every reasonable precaution be taken to secure the individual, whose acts are under the scrutiny of a select body of his fellow citizens, from influences to which the grand
96 jury may be selected, even unconsciously or unintentionally, by the government through its chosen prosecuting representative. It is not to underrate the intelligence or independence of a twentieth century grand jury to suggest that some impression not conducive to a thoroughly dispassionate consideration of a charge might result from the presence, as a conductor of the evidence, of one who is seen to be the special representative of the attorney general, however decorous, prudent and fair that personage may attempt to be. This subject was well considered by Judge McCall in United States v. Virginia-Carolina Chemical Co. (CC.), 163 F. 66, 75, whose observa-

tions thereon are worthy of note in the instant case. The general proposition that the Fifth Amendment makes necessary a finding following usage and mode of procedure established in 1787 is, for the purposes of this decision, sufficiently considered in United States v. Wells, (D. C.), 163 F. 313, and Renigar v. United States, (C. C. A.), 172 F. 646, 28 L. R. A. (N. S.), 683, 19 Ann. Cas. 1117, with the citations
97 made in these cases. Grand jurors are accustomed to the practice of a local prosecutor to assist in the development of facts, and are not slow to act with a proper independence against him; but when it is seen that the government is moved to bring into the proceedings a special representative of the Executive Branch, the pending charge may receive, in the minds of the jury a particular emphasis which tends to sway judgment unconsciously."

And so on.

Now, I state from the historical account in this case that it was the practice at common law as it existed at the time of the adoption of the Fifth Amendment to our constitution, to have only a local attorney present matters to the grand jury; that the shift of that practice is prejudicial, or could be, in the way that the court points out; that to the extent that Section 310, enacted in 1906 at the instance of the Attorney General, by the Congress, attempts to overcome it, I assert it is unconstitutional and void.

Now, there is no law on that, either. That is why I make the point, to save it. But the case that Mr.
98 Ryan cited, the Atlantic Commission Company case, that is the one in which this District Judge termed that a novel contention, as was pointed out. Well, that is rather amusing. The judge in the Atlantic Commission case—it was down in the Carolinas, as I remember it, North Carolina, said that it is a most novel contention. And then he went on to take up about two-thirds of his opinion discussing the point. And in almost every respect he discussed it wrong. In the first place, he said, why, it proves too much. If that were so, if you could not change that it would prevent the service as grand jurors of persons who by reason of sex or race were not qualified to serve on a grand jury at the time the Fifth Amendment was adopted.

He does not seem to know that the qualifications for a grand juror at common law in 1787, and right at the present day, are merely those of the electorate in general; in other words, anyone who is qualified to vote can be a grand juror, and that the mere addition of parties qualified to vote automatically enhanced the class qualified to serve as grand jurors.

The court then ducks the constitutional question as
99 being no part of its job to declare a statute unconstitutional, and then he goes on to say that, in any event, in the action there involved, the defendant couldn't rely on the Fifth Amendment because the offense charged was not in the nature of an infamous crime because the penal provisions of the Sherman Act did not permit imprisonment exceeding one year, and therefore it is not within the terms of the Fifth Amendment.

So, for the reasons assigned, none of which are any good, that I am sure, except the practical reason that he does not like to disturb an act of Congress, he concludes that it is all right, that it is lawful to do that.

Outside of these two cases, there aren't any on it. I know the history of Section 310. I know the practice. The only thing I don't know about it is why a local district attorney can't take care of matters within the bailiwick. And I mean, we will show that it would be prejudicial to my clients, indeed, to import somebody authorized over night, filing his authority in the morning, and coming in and presenting a case. But that is the point.

Now, the fourth point I don't care to argue. I put
100 it in on the supposition or hope that there might be a fact hearing before I had occasion to argue it.

I say only this: Of course, there again, in other words, I do not contend that where there is no statute there is immunity in settlement of criminal matters, or that it can be done. I say it is only when the statute authorizes it. I do not claim that any defendant can disturb an indictment or defend a case on the proposition that other people are guilty and they are not prosecuted. I don't make any such claim as that.

But what I mean on that point is that to the extent that Congress delegates the power to officials to do what they are doing, and to decide who shall be prosecuted, and who shall not, and which shall be sent to the Department of Justice, and which shall not that it ought to be according

to set standards and tests which would enable the courts to inquire and proceed to decide it in particular matters.

What I mean, for illustration, Judge, is that if, even though they had a reasonable discretion, if there were a presentation of such matters only for prosecution, and never dismissed, that thereby there would be a depri-
101 vation of due process within the meaning of the Constitution. And, as far as I am concerned, I don't know what the thing is until and unless we get in a hearing, and until I saw what procedure was adopted, and to what extent it might be discriminatory, consequently I made point 4. It is not a factually supported point, and I cannot conscientiously present it to your Honor as such at this time, although point 1 about the lack of signature is of a quasi serious nature.

Point 3 is the substantial point of the case. It is a point which we bring sincerely and genuinely in the belief that the law justifies our position and that we are entitled to a decision on that, leaving the fact question for determination when and if a traverse is filed.

Thank you.

And thereupon Edward J. Ryan, Esq. further addressed the Court in argument on behalf of plaintiff.

By Mr. Ryan: Your Honor, in answer to Mr. O'Brien's remarks, concerning point 1 of this motion, I might say very briefly that the government's position was that
102 the indictment is signed by the attorney for the government, the United States Attorney for the Northern District of Illinois.

The statute, Section 507 of Title 28, authorizes the United States Attorney to conduct legal proceedings in his District, criminal, civil or otherwise. In other words, he has plenary power.

The more recent statute, enacted, I believe, in 1936, authorizes the Attorney General to appoint someone to act in that district.

There is nothing in the statute that the United States Attorney is divested of any of his authority when such commission is issued.

And there is nothing in the commission in this case, that is, the letter, set up in this case, which was set up in one of the affidavits attached to the motion to dismiss,

which indicates in any way that there was any limitation of the authority of the United States Attorney.

The United States Attorney did sign the indictment.

The United States Attorney is here in court before your Honor in the person of his assistant, arguing this case.

103 Now, if Mr. Kerner did not have authority to sign the indictment, perhaps I have no authority to be here arguing.

But counsel has cited nothing to establish that situation.

And, as I say again, it is an internal matter within the Department of Justice, as to who presents the evidence to the grand jury, who signs the indictment, who argues this motion and that motion in court in the case, and who conducts the trial. It is all an internal matter. And in no case can it be considered as prejudicial to the defendant. He is entitled only to a fair trial. It is a matter of no substance who has signed the indictment.

Further than that, even if it were to be assumed that "the attorney for the government" means the particular counsel who presented it to the grand jury, then I might say that if that were so perhaps each assistant attorney should sign his own indictment—each Assistant United States Attorney should sign his own indictment. And even if that were required, is it a part of the indictment? Is it a matter of substance? Would the absence of that signature prevent it from being an indictment? An

104 indictment is the creature or the act of the grand jury.

If the grand jury votes an indictment, does it fail to become an indictment by reason of the fact that the attorney for the government has not signed it, or refuses to sign it? It is still an indictment by the grand jury.

But let us assume a situation where the United States Attorney flatly refuses to sign the indictment, refuses to sign it perhaps because he didn't want that particular person to be indicted, or perhaps because of an improper motive, or perhaps the grand jury drew its own indictment and he had no part in it, he didn't want to sign it, has the grand jury lost its power to indict?

It was certainly the intention of the Supreme Court and Congress in promulgating this rule which says what an indictment shall be, as to the particulars of the charge, and then it says that it shall be signed by the attorney

for the Government. But to make that an indispensable part of the indictment, to do so would be to limit the power of the grand jury.

What would the grand jury do if the United States
105 Attorney refused to sign the indictment? Maintain a mandamus to make him do it?

Can there be any question that if the grand jury came up here with an indictment and handed it up to your honor as a true bill that they had found, that anyone could contend that it was not an indictment that they were handing up simply because the United States Attorney did not do his duty and did not sign the indictment?

I think that indicates, your Honor, that it is only a formal part of the indictment, and that the language of Rule 7 is directory and not mandatory.

Your Honor will recall that the only cases that have been decided on this question so far hold that it is not a matter of substance, that it is a matter of form. One of those cases was decided since Rule 7 was promulgated, and it so holds. And I submit that that point is without merit, although counsel argued in support of it.

Now, as to count 3—and counsel dwelt at length on that, and urged 1 and 3 strongly. Counsel admits that there is no immunity, there is no authority in anyone to grant immunity unless it is conferred by statute.
106 And I met that point yesterday.

He relies, he says, upon the compromise statute.

Well, there just wasn't any compromise here. A compromise imports an agreement. This statute clearly contemplates that the government is going to get together with somebody, ascertain the facts, thrash them out, come to an agreement about how much money is owed, accept payment, and there is the compromise. And that is done. Short of that there is no compromise under this statute.

And the statute plainly says:

> "The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or an assistant secretary of the Treasury, may compromise any civil or criminal case arising under the Internal Revenue laws prior to reference to the Department of Justice for prosecution or defense."

That is sub-section (a) of the statute.

Sub-section (b) says:

"Whenever a compromise"—

Talking about the compromise mentioned above, which is both civil and criminal:

107 "Whenever a compromise is made by the Commissioner in any case"—

And then it goes on to say as to what shall be placed in the file, and speaks of the amount of the taxes, and the additional tax imposed as a penalty for the delinquency, as imposed by law in consequence of the neglect or failure to pay, and the amount actually paid in accordance with the compromise.

Now, that is a compromise. Anything less than that is not a compromise under this statute.

There is no allegation that there was any such compromise here. The allegation is simply that the Treasury officials, the government has authority to compromise under that statute. That is unquestionably true. But there has been no such a compromise.

Now, the Government's position is two-fold.

One is the statutory authority arising on the law. There is no power in any one to grant immunity. And there is a sound reason for that. The power to make the law is reposed by the Constitution in the Congress. Now, there isn't any authority in any individual in the Executive Department to make any binding agreement to repeal the law which congress has enacted in any particular

108 given case or set of circumstances such as would be binding and enforceable by the courts.

True, there are situations where the prosecutor may not prosecute, even though there is a technical violation. These are matters in his discretion. And if he violates that or abuses it, he is responsible to his superiors, and ultimately to the electorate for mal-administration. But he has no power to make any legislation, and if he intentionally would try to do so, if he tried to make an agreement, and if the courts enforced it, they would be recognizing legislation made by that individual.

Now, that is just sound jurisprudence.

But counsel goes on to say that in spite of the fact that he admits there can be no immunity without a statute, yet he relies, he says, first, on the compromise statute,

and then later he said that even in spite of what he said as to the compromise statute, that the government was estopped here.

Now, counsel has cited no case here except a Federal case—he cites a Federal case of entrapment.

Now, there is much language in the cases on the question of entrapment, speaking loosely of estopping the government. But the Supreme Court of the United
109 States has passed on the question of entrapment in the Sorrells case. And in the Sorrells case the court mentioned lower courts that spoke of the government being estopped. In the Sorrells case the Supreme Court decided that it wasn't a question of estoppel. They said that the reason that the Government here could not successfully prosecute a man where there had been actual entrapment was because he really wasn't guilty of anything. And they said that this issue may be raised on the general issue in defense, because he has not committed a violation of the law. And they said that the court is not called upon to interpret these statutes as including a situation where the government goes out and procures a man to do this thing. And that is the rationale of the Supreme Court cases on the question of entrapment.

I don't think there is any other situation where the courts talk about estopping the government in criminal cases.

And I think the doctrine is fairly well settled in the law that the sovereign, acting in a sovereign capacity, is not estopped. It would be against public policy if the
110 sovereign, acting in a sovereign capacity, could be estopped by the act of any individual that goes to make up the government.

The case which counsel referred to in the Texas court, I believe, or in the Supreme Court, arose on a revenue matter. And there is no decision there that there was an estoppel against the government. The estoppel that was being urged there was such that because on the facts there it would have worked the other way. But irrespective of that, there was no such decision. And in spite of all that, the authorities are legion that there is no estoppel against the government acting in its sovereign, as opposed to its proprietary capacity. And certainly, other than in entrapment cases, so-called, there are no cases

that I know of where the Government is estopped to prosecute in a criminal case.

But going beyond that and more fundamentally in this case the Government's position is that the motion shows on its face that there has been no disclosure. Because your Honor will recall that I read these pronouncements of the various officials, and in not a single one of them did they indicate anything other than that this policy is addressed to a person who admits tax evasion, and if he
111 is a tax evader, he has to come in and disclose his tax evasion. If he is not a tax evader, then he does not come within the policy. If he is a tax evader and discloses his tax evasion, he comes under this policy and the Government will not prosecute.

But if he comes in and says that there are errors and omissions in the returns that were not put in the books, that is not what these officials were talking about.

And that is borne out by their statements, that if there is no tax evasion, there can be no disclosure, unless you disclose that there were taxes due. It takes a wilful intent if a man is a wilful tax evader. But if he recognizes that he is a tax evader, and if he comes in and says, I don't owe any tax, but there are some errors in the return, he has not made any disclosure. If he is correct, he would be acquitted.

Now, I say that there is no merit to the contention that there has been a compromise. There is no merit to the contention that this motion alleges a disclosure within the policy. There is no merit to the contention that there would be an estoppel under the broad aspects of the matter. There is no merit to the contention that
112 there is any disclosure, because even here counsel wants to argue and to maintain that they don't owe any taxes. They are either concealing their taxes, or there isn't any tax evasion. And if there is no tax evasion, presumably they would be acquitted of tax evasion. It is just a situation of attempting to hold with the hounds and run with the hare.

Now, with respect to the question of who may be permitted to appear before the grand jury, and I haven't had an opportunity to read all these cases, and I didn't find it—and counsel will correct me if I am wrong, but it strikes me that here the court was saying that this law

authorizing special assistants to appear before the grand jury must be strictly construed, and that it would not apply to this case. That is my understanding from the minute or so that I had to look through the case. I don't know, and I will be corrected if I am wrong. Is that right?

By the Court: What case is it?

By Mr. Ryan: 28 Fed. (2d), from which counsel read concerning the history of the grand jury, and who might appear before it.

113 By Mr. O'Brien: 451.

By Mr. Ryan: 451.

Counsel, are you contending that this is a decision that the statute is unconstitutional and invalid?

By Mr. O'Brien: No.

By Mr. Ryan: In other words, this court found that that statute had not been applied in that case, thereby recognizing the legality and existence of the statute.

By the Court: What was the citation?

By Mr. Ryan: 28 Fed. (2d), page 451.

And looking at the notes in front, I see that it says:

"5 USCA Sections 310, 315, designed to enlarge list of persons who may appear before a grand jury representing the government to function only within limits imposed on Attorney General or District Attorney or deputy of either, must be strictly construed."

Now, I saw one thing in here somewhere:

"Under Section 310, therefore, Mr. Rush, to be qualified, 'must have been specially retained under the authority of the Department of Justice' under

114 some provision of law, and must have been specifically directed by the Attorney General to appear before the grand jury returning this bill to perform duties pertaining to this case, and, under Section 315, he must have received a commission therefor from the Attorney General; and as a necessary completion of his qualification it must appear that, as special assistant to the attorney general, he had taken the oath required by law to be taken by district attorneys, prior to his appearance before our grand jury. We have no doubt that, had he qualified upon his special commission if any, under the provisions of Section 315, his failure to exhibit an exemplification of this qualification prior to his appearance be-

fore the grand jury would not alone sustain a plea in abatement under the curative section already cited."

As I say, I haven't read it all through, I wasn't able to stand here before the court and read it all through. But I do say that this contention was entertained in a more recent case. And this was not apparently cited as a decision, as authority for the other proposition in
115 that case. The statute apparently is being followed every day throughout the country. I don't know how many cases this would overturn if there is any merit to this contention, but I would say that that would bear out my position after a brief examination that that was not the basis of the decision in this case, and that it makes no difference as long as the man is properly qualified under the statute, that he is not of the vicinage or something such. As to the vicinage, I don't know what it is, as I said before, it is something, perhaps there was some suggestion that it might be the locality from which the grand jury is drawn. And if that is true, none of the assistant United States attorneys in this division can appear before the grand jury in Freeport, which is drawn from the western eight counties. That has never been followed here. And I have always appeared out there. I do not think there is any merit to this. I think this case is authority for that. And I submit that it is a highly technical contention that is without substance.

I think that that represents the Government's position, your Honor, on the motion to dismiss here.

116 Counsel made some reference to my passing observation about cases where an attempt was made to suppress evidence. I certainly did not mean to suggest that that issue was being decided here. I think I said at the time that I didn't think that issue was before the court. And as I say, I think I mentioned in passing cases of voluntary disclosure, but I did not urge them as authority on the court. For I say there is no authority anywhere cited holding that the courts in this matter of disclosure, even if there was disclosure, that disclosure can be pleaded in bar. And the Ford case, which I cited, indicates that if there be a promissory estoppel, it would be just as true there as in this case for these people that would have acted to their own dis-

advantage if they testified. And I claim that there is no authority at all for any immunity under the statute. The only statute here has not been applied. And there is no substance to this motion, and I submit that the motion to dismiss should be denied.

By the Court: I will think this matter over, over the week end. And if you gentlemen will come in, or send somebody in at two o'clock on Monday, I think I will be ready to tell you what I think about it.

117 (Whereupon the further hearing in the above entitled matter was continued until June 23, 1952, at 2:00 o'clock p. m.)

118

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

(Caption—No. 52 CR 143)

Chicago, Illinois,
June 23, 1952,
2:00 o'clock p. m.

Met pursuant to adjournment.

Present:
Mr. Ryan,
Mr. O'Brien,
Mr. Hess.

And Thereupon the following further proceedings were had herein:

By the Clerk: 52 Cr 143, United States of America vs. The Shotwell Manufacturing Company, et al.

Further proceedings.

By the Court: You may be seated, gentlemen. I
119 am not going to talk very long, but I will talk for a few minutes.

OPINION

By the Court (Orally): The defendants in this case have filed a motion to dismiss, and to that motion to

dismiss the government has filed a paper which it labels a demurrer.

As I have heretofore stated to counsel, I have assumed that that paper labeled a demurrer admits all facts well pleaded, and says in effect that admitting those facts to be true, yet the moving parties are not entitled to the relief which they ask by their motion.

The court well und rstands that a demurrer to a motion to dismiss is not provided for by the rules of criminal procedure in our court. The Court also understands that the idea of a demurrer is well understood by all lawyers, and that a demurrer is generally held to do those things which I have indicated I would hold this demurrer to do, that is, to admit all facts well pleaded, and to take the position that admitting those facts to be true, the moving parties are not entitled to relief that they ask, namely, the dismissal of the indictment.

120 Four grounds were set up in the motion to dismiss. The first two were as follows:

"1. The proceedings before the grand jury which returned said indictment were not conducted by the United States Attorney for the Northern District of Illinois, Eastern Division, but were conducted by one Arthur B. Cunningham, who purported to act as a special assistant to the Attorney General under purported written authority so to do, of the Attorney General of the United States, dated at Washington, D. C., March 13, 1952, and filed in the office of the Clerk of this Court the morning of * * * the day said indictment was returned, but who was not * * * a resident of the Northern District of Illinois and who was not * * * an assistant to the United States Attorney * * * for the Northern District of Illinois. * * * said Arthur B. Cunningham, as special assistant * * * purported to act as attorney for the Government, but, contrary to the requirements of Rule 7 of the Federal Rules of Criminal Procedure, failed to sign the indictment as returned."

The second reason which the defendants assign
121 for the dismissal of the indictment was:

"2. The conduct of said proceedings before said grand jury by the said Arthur B. Cunningham, as aforesaid, was in violation of the rights of the defendants under the Fifth Amendment to the Consti-

tution of the United States, to be held to answer for the offenses charged in this proceeding only on the presentment or indictment of a grand jury in accordance with the traditional grand jury procedure at the common law in existence at the time of the adoption of said amendment. Under the traditional procedure then in effect, only an attorney of or for the vicinage or the locality from which the grand jury was chosen could participate in its proceedings. And defendants aver that the act of June 30, 1906, 30 Stats. 816, 5 USCA, Sec. 310, to the extent that it purports to authorize any attorney or counsellor specially appointed by the Attorney General of the United States, when thereunto specially directed by the Attorney General, to conduct grand jury proceedings, where such attorney or counsellor is not a resi-
122 dent of the district in which such proceeding is brought deprives the defendants, and each of them, of the rights guaranteed to them by the Fifth Amendment to the Constitution of the United States and is therefore unconstitutional and void."

The indictment in this case was signed by Col. Kerner, the United States Attorney for this District, as follows:

"Otto Kerner, Jr., United States Attorney."

The letter of the Attorney General, dated March 13, 1952, and filed in the Clerk's office, reads, in part:

"As an attorney and counsellor at law, you are hereby specially retained and appointed as a Special Assistant to the Attorney General under the authority of the Department of Justice to assist in the trial of the cases hereinafter mentioned, in the Northern District of Illinois, in which the government is interested; and, in that connection, you are specifically directed to conduct in the Northern District of Illi-
123 nois, and in any other judicial district or districts wherein jurisdiction thereof lies, any kind of legal proceedings, * * *."

And then there is an omission:

"The Department is informed that Byron A. Cain, Frank J. Huebner and Harold E. Sullivan, have committed in the Northern District of Illinois violations of the Internal Revenue laws of the United States and conspiracies to commit such offenses.

"You are expressly authorized and directed to commence prosecution against the above-named persons and such other person or persons as may be implicated for violations mentioned. * * *"

Rule 7 of the Federal Rules of Criminal Procedure reads, in part, as to the indictment:

"(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government * * *."

124 Unquestionably Col. Kerner was at the time of the return of the indictment, and still is, for that matter, the United States Attorney for this District, and as such the court believes he is authorized to sign that indictment.

The letter from the Attorney General appointing special assistants provided that they should

"assist in the trial of cases hereinafter mentioned,"

and that apparently is exactly what they did. They did appear before the grand jury, and did assist in the trial of the case.

That designation of the special assistant attorney general is apparently pursuant to Section 310, Title 5 of the United States Code, which provides:

"The Attorney General or any officer of the Department of Justice or any attorney or counsellor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceedings, civil or criminal, including jury proceedings * * * which district attorneys may
125 be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

You have observed that the special objection which counsel for defendants make under their point 2 is that

"the Act of June 30, 1906, 30 Stats. 814, 5 USCA, Sec. 30, to the extent that it purports to authorize any attorney or counsellor specially appointed by the Attorney General of the United States, when thereunto specially directed by the Attorney General, to conduct grand jury proceedings, where such attorney or counsellor is not a resident of the district in

which such proceeding is brought deprives the defendants, and each of them, of the rights guaranteed by them to the Fifth Amendment to the Constitution of the United States."

As I recall the Fifth Amendment to the Constitution, it provides that no one shall be charged or convicted of an infamous crime except by presentment or indictment by a grand jury. I will assume that the offense charged against the defendants is an infamous crime—whether it is or not I have not examined—but I will assume that
126 it is for the purposes of this motion and demurrer.

It is the idea of the defendants, as expressed by counsel for the defendants, that the concept of a grand jury as referred to in the Fifth Amendment had inseparably associated with it the idea of representation of the sovereignty by an attorney of the vicinage, so that a statute which would permit an attorney from outside the vicinage to appear for the sovereignty before a grand jury—such statute would be unconstitutional and void; that Section 310 is unconstitutional and therefore the appearance of these men from outside the vicinage was error which would destroy this indictment.

I cannot bring myself to believe that the idea that the sovereignty must be represented by an attorney of the vicinage was so inseparably connected with the idea of a grand jury at the time of the adoption of the Fifth Amendment, that if Congress should permit the appearance of someone from outside the vicinage to represent the sovereignty, that action of Congress would be unconstitutional and void. I cannot believe that; I cannot believe that.

127 And one reason I cannot believe it is because the Fifth Amendment provides for the prosecution of infamous crimes by presentment or indictment. If a bill of indictment was prepared by the attorney for the sovereign it became a true bill when it was voted by a grand jury. But a presentment was something that originated with the grand jury, and presumably if it was a presentment the attorney for the sovereignty didn't have anything to do with it. That is one reason why I think the idea of the representation of the sovereignty by an attorney of the vicinage was not inseparably connected with the idea or concept of the grand jury, as those

words "grand jury" are used in the Fifth Amendment. There may be other and better reasons.

I think when the Fifth Amendment was adopted the interest of the people was centered upon the jury and not upon the attorney. They provided that infamous crimes must be prosecuted by presentment or by indictment by the grand jury.

It is said, in one or more of the cases, that there is some advantage to an accused in the requirement that the sovereignty be represented by a lawyer or lawyers from the vicinage rather than by lawyers from a
128 distance. It is suggested that the grand jury may be overawed by men from a distance.

That is exactly contrary to my observation and experience. I think in this district, since I have been here, the gentlemen from Washington have had greater difficulty with grand juries than have local district attorneys. And that sounds reasonable to me if even I hadn't had that experience. If one is going to be prejudiced he is going to be prejudiced against the outlander, and not going to be prejudiced against the local man, if he is going to be prejudiced at all. So I do not think that it does inure to the disadvantage of the defendants that the sovereignty may be represented by an Assistant Attorney General rather than by a district attorney. And so, I do not think there is anything wrong with that indictment in that respect. I do not think there is anything wrong. I think the statute referred to, Section 310, is constitutional.

I think the indictment was signed by the proper officer. I think the assistant attorneys general, though they were from a distance, were properly authorized to appear and assist. I do not believe that the motion is good on those scores.

129 The third point was urged with great vigor, sincerity and ability. That ground is as follows:

"Ground 3. That at all times in question in these proceedings, the Commissioner of Internal Revenue and the Secretary of the Treasury, by virtue of the statutes in such case made and provided, were empowered to compromise any civil or criminal case which might have arisen under the Internal Revenue Laws against the defendants. At all times in question

in this proceeding, and for many years prior thereto, there was and for many years had been in effect in the Bureau of Internal Revenue, a policy from time to time published and promulgated by the Secretary of the Treasury, by the Commissioner of Internal Revenue, and by other responsible Treasury officials, whereby it was publicly represented there would be no criminal prosecution in any case in which a voluntary disclosure of misstatement or omission in a tax return was made to a responsible officer or agent of the Treasury Department before investigation had been initiated, but that the Treasury Department in such case would merely assess such unpaid taxes, in-
130 terest and civil penalties, if any, as might properly be found due under the facts of the case.

"In reliance upon said policy, the defendants, before the commencement of any investigation within the meaning of the aforesaid statements of the aforementioned Commissioner and Secretary and others, in January of 1948 made such a disclosure in respect of the returns of the corporate defendant for the years mentioned in the indictment in this cause, and from time to time thereafter until and including March of 1948 reiterated the same, in each instance to a responsible officer or agent of the Treasury Department.

"The officers and agents of the Treasury Department to whom the aforementioned disclosure was made, acknowledged to the defendants the sufficiency and the timeliness thereof upon the occasions aforesaid. In further reliance upon said policy and upon said acknowledgments and at the request of said officials and agents, the defendants caused to be made
131 available to them the books and records of the corporate defendant, and communicated to the officers and agents of the Treasury Department information in the possession of the individual defendants materially related to said omissions and misstatements and not available to such Treasury officers and agents through the said books and records of the corporate defendant, and which information could not have been obtained from the individual defendants in any manner, in view of the constitutional privileges and

rights of the individual defendants, and employed the services of accountants to assist said officers and agents in ascertaining facts from such books and records. The corporate defendant in that regard specially incurred and paid, over the period of four years over which the examination by the said agents extended, auditing charges in excess of the sum of $20,000.

"By reason of the premises, the government was and is estopped from instituting and maintaining the said indictment and these proceedings."

Concerning this point 3, counsel for the defend-
132 ants, in one of the papers filed, states:

"Point 3 asserts an estoppel in bar of the action by reason of a voluntary disclosure and thereby raises a question of first impression, although estoppels have been successfully invoked against the government in criminal cases on other grounds."

In argument, which I say was pressed with vigor, and very great ability as I thought, it was said that the statute providing for compromise gave authority to the officers of the Government to lay a basis for estoppel there having been disclosed to them facts which were not otherwise in the possession of the Government, the statute laid the basis for this estoppel. I have considered that argument over the week end, since it was made, and I have come to this conclusion:

There are statutes which permit compromising of tax liability. No doubt they are wise, but it is of no consequence to the court whether they are or not, they are there, and they are made by Congress. If there is any occasion for my expressing an opinion on them, I think I would say that they are a wise exercise of legislative power. But the question is: May estoppels against
133 the government arise out of negotiations looking toward compromise under these statutes?

I have thought a good deal about that, and I have come to the conclusion that to permit estoppels to arise out of negotiations for compromise would simply destroy those statutes. If persons who for some reason or another, good, bad or indifferent, had failed to file proper returns, knew that what they did looking toward a compromise,—the disclosure which they might make would give rise to an estoppel, they would hesitate to make disclosures.

If governmental officials knew that if they sat down at a table and heard some more or less complete disclosures looking toward compromise they might subject the government to an estoppel, it would have the same effect. An estoppel resulting from an incompleted compromise might have a greater effect than a compromise. And neither side would take action looking toward the compromises which the government has said are beneficial to the United States.

I think the idea which I have attempted to voice is one excellent reason why incomplete—uncompleted negotiations for compromise should not be permitted to give rise to an estoppel in favor of either side. Accord-
134 ingly, I think the third point is not well taken.

The fourth point was not urged with the vigor with which the third point was urged.

The fourth point is as follows:

"4. During 1948 and during all the years in question, it was and for many years had been the actual practice of the Department of Justice to refrain from the initiation of criminal prosecution of such cases except upon the recommendation of the Treasury Department, although the Department of Justice reserved discretion as to whether to proceed with the criminal prosecution of any case in which such recommendation was made. Under such practice, the Treasury Department has refrained from recommending criminal prosecution of many cases which would have been so prosecuted and the Department of Justice has refrained from criminal prosecution of many cases which have been recommended to it for such prosecution. At none of the times aforesaid has there been any standard of law, either by enactment
135 of Congress or by established criteria or regulation of the Treasury Department or of the Department of Justice, from which the public or the courts might ascertain the basis on which such prosecution is recommended or withheld. Such practice has given rise to a discriminatory application and enforcement of the law, as will more fully appear upon the hearing of this motion, and in the case at bar has thereby deprived the defendants of due process of law, contrary to the Fifth Amendment to the Constitution of the United States of America."

On this fourth point, counsel for the defendants said, in one of the papers filed:

> "Point 4 of the motion asserts the absence of due process because of the lack of any known standard for the determination of cases to be criminally prosecuted. This, too, raises a question of first impression."

As I say, this point was not urged with the vigor with which the third point was urged I do not think the point is well taken. That the Treasury Department and the Department of Justice have been prosecuting some 136 cases and not prosecuting others, if they have been doing that, I do not think that fact imports into the case which they may choose to prosecute a want of due process.

Accordingly, no one of the four points being well founded, the motion to dismiss will be overruled and denied.

By Mr. O'Brien: If the Court please, one of Mr. Ryan's points he had argued went to the sufficiency of the facts as pleaded in support of a disclosure. I do not understand anything the Court has said to turn on that point in any way, and I do not want to delay by even asking for leave to file at some future date an amendment. But I would like to have leave to file instanter a brief amendment going to the extent of the disclosure allegations factually, which does not change the sense of your Honor's ruling. (Handing a document to the Court.)

By the Court: Any objection?

By Mr. Ryan: I don't believe so, your Honor.

By the Court: You may have leave to file the amendment to the motion to dismiss the indictment. And this motion will be—

137 By Mr. O'Brien: And the demurrer to stand.

By the Court: And the demurrer to stand. And the motion will be overruled and denied.

By Mr. Ryan: I understand there are to be other motions; otherwise, I was going to suggest an arraignment today.

By the Court: What sort of other motions?

By Mr. Ryan: By the defendants?

By Mr. O'Brien: I haven't considered any other motions at this time, your Honor. But it may well be, and undoubtedly will be, that at some time prior to the trial we will have a motion to suppress the evidence, but that is not in the chain of pleading nor the matters that are involved here.

By the Court: When can you conveniently bring your clients in to plead? During this week?

By Mr. O'Brien: I can't answer that directly, your Honor. I haven't asked about it. I assume that if they are here—this is Monday—that Thursday or Friday would be a suitable time.

By the Court: Thursday morning, or two o'clock.

By Mr. O'Brien: Very well. If I find, your Honor, for any reason as to any one of them, that that is not so I will promptly notify counsel.

138 By the Court: Which do you prefer, to come in at 10 or at 2 o'clock?

By Mr. Ryan: Two o'clock.

By the Court: Two o'clock, Thursday.

(Whereupon the further proceedings in the above entitled cause were continued until Thursday, June 26, 1952, at 2:00 o'clock p. m.; however, the next ensuing proceedings herein, as hereinafter appears, took place on Tuesday, June 24, 1952, at 12:05 o'clock p. m.)

139

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

Chicago, Illinois,
June 24, 1952,
12:05 o'clock p. m.

Met pursuant to notice.

Present:

Mr. Ryan,
Mr. O'Brien
Mr. Hess.

And, as more fully hereinafter appears, the defendants, and each of them, were present, the individual defendants being present respectively in their own proper persons, and the corporate defendant by counsel.

And Thereupon the following further proceedings were had herein:

140 By Mr. O'Brien: Judge, I had a motion to re-set the arraignment time. I thought, since these men were in the building, that I could bring them in now.

By the Court: To what time?

By Mr. O'Brien: Right now.

By the Court: Have you got them here?

By Mr. O'Brien: Yes.

By the Court: Bring them in.

By Mr. O'Brien: Mr. Hess went to get Mr. Ryan. Maybe we could do that. But I don't want to keep you waiting. I didn't realize you would quit that soon.

By the Court: I have got a meeting over at the Bar Association.

By Mr. O'Brien: We will collect them and get them ready.

By the Court: How soon?

By Mr. O'Brien: Within five minutes, at the most.

By the Court: I will step inside and then I will be out again.

(The court left the bench. And at 12:18 o'clock p. m. on said day, the following further proceedings were had herein:)

By the Clerk: Number 52 Cr 143, United States of America vs. The Shotwell Manufacturing Company,
141 Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner.

Motion to rest cause for arraignment and plea to this date, and for the arraignment and plea of the defendants instanter.

(The defendant, The Shotwell Manufacturing Company, was present by counsel; each of the individual defendants, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner was present in his own proper person.)

By Mr. Ryan: Do you waive the reading of the indictment?

By Mr. O'Brien: Yes, we waive the reading of the indictment, of course.

By Mr. Ryan: And the pleas?
By Mr. O'Brien: Pleas of not guilty.
By Defendant Byron A. Cain: Not guilty.
By Defendant Harold E. Sullivan: Not guilty.
By Defendant Frank J. Huebner: Not guilty.
By Mr. Ryan: That is as to the individual defendants, Mr. Cain, Mr. Sullivan and Mr. Huebner.
And the corporation?
By Mr. O'Brien: Right.
By Mr. Ryan: They all plead not guilty?
By Mr. O'Brien: Right.
142 By Mr. Ryan: Now, your Honor, I had intended before Thursday—in fact, this afternoon, to call the Department, inasmuch as they had told me that they intended to send an attorney out to try this case, and sound them out on whether there might be any question of convenience or availability on the date. I haven't done that, so that the only thing I could suggest is that if the Court sets a date in the fall, I will certainly do anything possible, and notify them of any conflict of dates, if they are sending a man who is engaged somewhere else in the country, and I would so notify the Court.
By the Court: When would the defendants prefer it?
By Mr. O'Brien: Your Honor, I think that we should have a date at which the matter would be set. There hasn't been time to go into that phase of the case, the evidentiary side of matters, so if there could be some date set at which we could appear and state positively when we would be ready, that would be better and more reliable.
By the Court: What do you say?
By Mr. Ryan: I think, in view of our situation, and with another man coming in, who is not here now, that perhaps that is a sensible suggestion, that is, to set
143 it for a very early date at which to set the trial date, and set a date which is convenient for all concerned. That is my understanding of your suggestion.
By Mr. O'Brien: Yes.
By the Court: I am going away from here on Friday of this week, and I won't be back for ten weeks. That will be about September.
By Mr. O'Brien: I don't think that would cost any time, Judge, because in that time we can see specifically

what there is, and at the end of that time state with some certainty when and why we think the hearing ought to be.

By the Court: I have indicated to the Chief Judge of the United States Court of Appeals of this Circuit that I do not want to try this case. He asked me to dispose of the preliminary motions, and I feel that I have done that.

By Mr. O'Brien: I think, then, that within that time, Judge, there would also be the opportunity, or as soon as I am somewhat better informed of the scope of the factual material, and if this would be in order then to ask if we can make inquiry there and see what the assignment is, and what the convenience of the court would be.

144 By the Court: Well, suppose the motion to set for trial be continued to September 9, 1952, at 2:00 o'clock, with the understanding that the case shall be set for trial, say, within two months after that time.

By Mr. O'Brien: I really don't know, Judge, to be honest about it.

By the Court: Well, that would seem to be reasonable. This is now the sixth month, and two months after September will take you to the 9th day of November. That is five months.

By Mr. O'Brien: That is true. Of course, there is another factor there. We have the elections in around that time, which disturbs me somewhat.

By the Court: Yes. What do you think?

By Mr. Ryan: I have no objection to that suggestion, your Honor, that it be set for trial on September 9th for some reasonable date within two months or so; I don't care whether it is two months or two weeks.

By Mr. O'Brien: It is elastic. It might be shorter or it might be a little beyond that, Judge. I think at that time we can be much more specific about it, maybe—I don't know.

By the Court: Well, suppose we continue the
145 motion to set for trial to September 9th?

By Mr. O'Brien: All right.

By the Court: At two o'clock.

By Mr. O'Brien: All right.

By Mr. Ryan: Now, I have one other point, your Honor, which I want to urge more fully.

By Mr. O'Brien: If I may interrupt once more, I

assume, and this is for the record, that that is set before your Honor for the 9th.

By the Court: Yes, it is set before me. But if the Chief Circuit Judge designates somebody else, I shall hope that he will be here at that time.

By Mr. O'Brien: Yes. There is no objection at this time, is there, if the Court please, to our making any inquiry about that, if there is some occasion to do it, it would be all right to ask Judge Major?

By the Court: No, no objection on my part.

By Mr. O'Brien: So far as you are concerned?

By the Court: No, no objection on my part.

By Mr. Ryan: Just one very brief point: I read more fully the amendment to this motion which counsel filed yesterday. And I note that in it, that the moneys received, that they admit to receiving in addition to
146 their state gross receipts, they were paid out.

Now, I filed a demurrer to this other motion, and at the time I filed it I intended it for what I considered to be an orderly procedure, and I intended not to admit any of these points. And I am not making such an admission. And I don't want that demurrer standing alone to even formally admit that.

And I ask leave to file a paper in which I may deny the matter set up by the amendment, so that for the record there will be a denial that I make such an admission.

I understand that it don't make any difference, the motion was decided on a different basis, but I want to state this for the record, so that there will not be such an admission.

I would also like leave to introduce a denial of some sort to the material in the amendment.

By the Court: I don't see any necessity for that. I have assumed all the facts well pleaded, together with the amendment to be true.

The motion to dismiss will have to be denied.

147 By Mr. Ryan: That is correct, except that there is some old law on that.

By the Court: It was admitted for the purposes of the motion.

By Mr. Ryan: All right. I think I have preserved my position.

By Mr. O'Brien: Yes.

Thank you, Judge. I am awfully sorry to have kept you.

By the Court: That is all right.

(Which were all of the proceedings had in the above entitled cause on June 19, 20, 23 and 24, 1952.)

148

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

CERTIFICATE

I hereby certify that the above and foregoing transcript comprising pages numbered consecutively from 1 to 147 is a full, true and accurate transcript of my original shorthand notes of all the proceedings had on the hearing of the above-entitled cause June 19, 20, 23 and 24, 1952.

June 25, 1952.

Roy E. Fuller
Roy E. Fuller
Official Court Reporter
United States District Court
Northern District of Illinois

66 And afterwards on, to wit, the 4th day of September, 1952 there was filed in the Clerk's office of said Court a certain Subpoena Duces Tecum Re: The Shotwell Manufacturing Company, With Marshal's Return Endorsed Thereon in words and figures following, to wit:

66A

UNITED STATES DISTRICT COURT
Northern District of Illinois

The President of the United States of America
To The Shotwell Manufacturing Company
3501 West Potomac Avenue
Chicago, Illinois

Greeting:

We Command You, that all business and excuses being laid aside, you and each of you attend before the Honorable William J. Campbell one of the Judges of the United States District Court for said District, on the 6th day of August, A. D. 1952, at 10:00 o'clock in the forenoon in Room 757 United States Court House in Chicago, in said District, to testify and give evidence in a certain cause now pending and undetermined in said Court wherein The United States of America is Plaintiff and The Shotwell Manufacturing Co., et al, are Defendants, on the part of said United States of America. And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, the hereinafter described books and records of The Shotwell Manufacturing Company, Chicago, Illinois, hereinafter described as the defendant corporation, for and relating to the years 1943 to 1946, both inclusive:

67 1. Corporate Minute Books

2. Capital Stock Records
   - (a) Stock Certificate Books and Stubs
   - (b) Canceled Stock Certificates
   - (c) Records of all stock issued and outstanding.
   - (d) Record of agreements, if any, relating to stock.
   - (e) Record, if any, of beneficial owners of stock.
   - (f) All other records maintained and in the possession of the defendant corporation which relate to the capital stock.

3. Ledgers
   - (a) General Ledger for the years 1943, 1944, 1945 and 1946.
   - (b) Income and Expense Ledger for the years 1943, 1944, 1945 and 1946.
   - (c) Factory Ledgers for the years 1943, 1944, 1945 and 1946.
   - (d) Accounts Receivable ledgers for the years 1943, 1944, 1945 and 1946.

4. Cash Receipts Records
   - (a) Cash Receipts Books
   - (b) Cash Receipts Summary

(c) Cash Receipts Journal Entries.
(d) Cash Receipts Remittance advises together with related records attached thereto.
(e) Cash Receipts Bank Deposit Slips.
(f) Record of Cash Receipts, if any, not deposited in corporate bank account or accounts.
(g) All other records relating to cash received which were maintained by and are in the possession of the defendant corporation.

5. Cash Disbursement Records
(a) Cash Disbursement Books
(b) Cash Disbursement Summaries
(c) Cash Disbursement Journal Entries
(d) Canceled checks.
(e) Cash Disbufsement Vouchers together with all supoprting records thereto such as purchase invoices, purchase orders, purchase contracts, receiving records, warehouse receipts, freight bills, etc., and all other records maintained by and in the possession of the defendant corporation which relate to cash disbursements.

68 6. Journal Entries
(a) Journal Entry Books
(b) Journal Entry Summaries
(c) Journal Entry Vouchers together with supporting records relating thereto.

7. Sales Records
(a) Sales Invoices
(b) Sales Invoice Summaries
(c) Sales Invoice Journal Entries

8. Debit and Credit Records
(a) Debit and Credit Memorandums
(b) Debit and Credit Memorandum Summaries
(c) Debit and Credit Memorandum Journal Entries
(d) Debit and Credit Memorandum Vouchers together with supporting records relating thereto.

9. Bank Account Records
(a) Bank Statements for all Monetary and Sugar Ration Accounts.

(b) Deposit Slips for all Monetary and Sugar Ration Bank Accounts.
(c) Concealed checks drawn on Monetary and Sugar Ration Bank Accounts.
(d) All other records relating to all bank accounts.

10. Safe Deposit Boxes
(a) All Records maintained by and in the possession of the Defendant Corporation relating to Safe Deposit Boxes in Safe Deposit Vaults and/or in other places.

11. Purchase Records
(a) All records relating to purchases of raw materials used in the manufacture of finished products.
(b) All records relating to purchases of items other than raw materials.

12. Receiving Records
(a) All Receiving Records.

69 13. Consumption Records
(a) All Records of Raw Materials Used and Consumed in the Production of Finished Products.
(b) All Records of the Sale and/or Exchange of Raw Materials.
(c) All Records of the Use, Sale and/or Exchange of Items other than Raw Materials Used in the Manufacture of Finished Products.

14. Production Records
(a) All Records of Production of Finished Products and of Raw Materials Used in the Production of each type of Finished Product.

15. Shipping Records
(a) All Records Relating to all Shipments by the Defendant Corporation.

16. Inventory Records
(a) All Records of Perpetual, Book, and Periodic Physical Inventories.

17. Employees Records
(a) Personal Records for all Employees.
(b) Social Security Records for all Employees.
(c) Withholding Records for all Employees.

18. Pay Roll, Commission and Bonus Records
    (a) All Records relating to payments for salaries, wages, bonuses and commissions.
19. Expense and Overhead Records
    (a) All Records Relating to Expense and Overhead Accounts.
20. Busby and Oury, C.P.A. Compilations
    (a) All work papers, records, and analysis prepared by Busby and Oury, C.P.A. which relate to the operation of the defendant corporation for the years 1943 to 1946, both inclusive.
21. Sugar Allotment Records
    (a) All records relating to allotments of sugar received and/or requested from the Office of Price Administration, United States Government.
22. Cocoa Bean and Chocolate Allotment Records
    (a) All records relating to allotments of chocolate and cocoa bean grind received and/or requested from suppliers of chocolate and the United States Department of Agriculture.
23. U. S. Government Contracts
    (a) All records relating to contracts between the defendant corporation and the United States Government and/or agencies thereof, which were prepared by or for and are in the possession of the defendant corporation.
24. Other Records
    (a) All records and correspondence maintained by and in the possession of the defendant corporation in connection with the operation of its business which are not specifically set forth hereinbefore.

together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, which relate to the operation of the defendant corporation for the years 1943 to 1946, both inclusive, that can or may afford any information or evidence in said cause. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshal of the Northern District of Illinois to execute and return in due form of law.

Roy Ho Johnson
Clerk
By James F. Kochta
Deputy Clerk

71 Asst. Secretary
Mrs. Gladys B. Morrill

Served this writ on the within named The Shotwell Manufacturing Co., a corporation, by delivering copies thereof to Mrs. Gladys B. Morrill Asst. Secry. an agent, of said corporation, this 30th day of July, A. D. 1952.

The President of said corporation not found in my district.

T. P. O'Donovan, U. S. Marshal by Ferdinand Manzara, Deputy.

1 Service	$ .50
16 Mileage	$1.60
Total	$2.10

72 And on, to wit, the 15th day of August, 1952 came the Defendants by their attorney and filed in the Clerk's office of said Court their certain Objection And Their Motion To Quash Subpoena Duces Tecum Issued By The Clerk To The Shotwell Manufacturing Company, Returnable August 6, 1952, With Affidavit Of Vincent O'Brien Attached thereto, in words and figures following, to wit:

73

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

OBJECTIONS OF THE DEFENDANTS AND THEIR MOTION TO QUASH SUBPOENA DUCES TECUM ISSUED BY THE CLERK IN THE ABOVE-ENTITLED CAUSE, TO THE SHOTWELL MANUFACTURING COMPANY, RETURNABLE AUGUST 6, 1952.

The defendants, by Vincent O'Brien, one of their attorneys, pursuant to leave of Court heretofore given, object to the issuance of the subpoena duces tecum directed to The Shotwell Manufacturing Company commanding it to attend before the Honorable William J. Campbell on the 6th day of August, 1952, at 10:00 o'clock in the forenoon, in Room 757, United States Court House in Chicago, to testify and to give evidence in the above-entitled cause on the part of the plaintiff, and to bring with it for production at the time and place aforesaid, the certain books and records and documents therein specified, on the following grounds, to-wit:

1. The sole authority for the issuance of subpoenas is Rule 17 of the Federal Rules of Criminal Procedure, the potentially pertinent subsections of which are (a) and (c). Under said Rule said subpoena was improvidently and unlawfully issued because:

(a) There was and is no proceeding, hearing or
74 trial pending to which said subpoena or the evidence therein referred to can be related.

(b) As to documentary evidence which the Rule contemplates may be produced before the court at a time prior to the trial or prior to the time when it is to be offered in evidence, there was and is no order of the court such as required by the Rule justifying the issuance of the subpoena in the absence of a pending or set hearing or trial to which it might be related.

2. No showing has been made by way of verified petition or motion, or otherwise, such as is generally and customarily required, of the materiality and necessity for the production of the books, papers and documents in question at a time prior to trial or prior to the time when they will be offered in evidence in order to induce the Court to direct such production in the exercise of its discretion, nor, more specifically, is there any such showing as to why such order should be granted in this case at this time in view of the fact that the plaintiff had full right to inspect and copy, and did inspect and copy the books, records and documents in question for a period extending over more than four years immediately preceding the presentation by it of evidence to the Grand Jury which returned the indictment in this case.

3. Notwithstanding any required or ostensible showing which plaintiff might endeavor to make, there should be

no order for the issuance of such subpoena because the matters and things therein requested to be produced are within the purview of a motion to suppress evidence to be filed by the defendants for hearing before the trial court when the Senior Judge of the Court of Appeals shall have designated the Judge who is to try the issues in the above-entitled cause. Pending disposition of such motion, it would be prejudicial to the interests of
75 the defendants at this time to require the production of such books, records and documents in advance of trial.

4. In any event, it would be both unreasonable and oppressive to require the production of said books, papers and documents and would harass and impede the defendants in and about the preparation of their defense after the plaintiff has already had full opportunity to inspect and to copy all of such books, records and documents and for more than four years preceding the return of the indictment in this proceeding had all of such books, records and documents available for inspection and copying, and during said time had its representatives engaged in such inspection and copying with accounting aid provided by the defendants at a cost to the corporate defendant in excess of $20,000.00.

Defendants submit in support hereof the affidavit of Vincent O'Brien, one of their attorneys, and by reason of the premises defendants move that the said subpoena duces tecum be quashed; or, in the alternative, that plaintiff's motion for an order directing that said books, papers and documents be produced before the Court at a time prior to the trial be entered and continued pending disposition of defendants' motion to suppress as aforesaid.

The Shotwell Manufacturing Company,
Byron A. Cain, Harold E. Sullivan,
and Frank J. Huebner, Defendants,
By Vincent O'Brien
One of Their Attorneys

Received a copy of the above and foregoing Objections, together with the affidavit therein referred to, this 15th day of August, 1952.

Otto Kerner, Jr.
Attorney for Plaintiff
Per E. J. Ryan
Asst. U. S. Atty.

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IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

AFFIDAVIT

Vincent O'Brien, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendants in the above-entitled cause and their duly authorized agent in this behalf, and that he makes this affidavit in support of the foregoing objections to and motion to quash the subpoena duces tecum.

1. Affiant avers that in and by the motion of the defendants to dismiss the indictment heretofore filed herein, it was represented to the Court that at all times in question there was in effect a policy published and promulgated by the Secretary of the Treasury, by the Commissioner of Internal Revenue and other responsible Treasury officials, that there would be no criminal prosecution in any case in which a voluntary disclosure of misstatement or omission in a tax return was made to a responsible officer or agent of the Treasury Department, in reliance upon which policy, the defendants in January of 1948 made such a disclosure in respect of the returns involved in this proceeding, the sufficiency and timeli-

77 ness of which was acknowledged to the defendants upon the occasion of such disclosure; that in and by said motion it was further shown that in reliance upon said policy and upon said acknowledgment the defendants caused to be made available to said officials and agents of the Treasury Department the books and records of the corporate defendant, and employed the services of accountants to assist said officials and agents in ascertaining pertinent facts from such books and records, and that the corporate defendant over the period of four years of examination thereof by said agents expended or incurred auditing charges in excess of $20,000.00; that in and by said motion it was further shown that during said period of four years the said agents were importuned to bring the matter to a conclusion, and that after such four years of inspection, copying and assistance the matter was presented to the Grand Jury on March 14, 1952, to which said motion and the affidavits in support thereof,

now on file in the office of the Clerk of this Court, affiant asks leave to refer and calls to the judicial knowledge of the Court.

2. On, to-wit: the 13th day of June, 1952, the defendants interposed their motion for one hearing in respect of their motion to dismiss, to which motion for one hearing, together with the suggestions in support thereof, now on file in the office of the Clerk of this Court, affiant asks leave to refer, and asks that the Court take judicial notice thereof. In and by said motion and suggestions it was, among other things, stated that if the demurrer which the plaintiff had filed in respect of said motion was first heard without the taking of evidence and the making of a complete record, the disposition of the demurrer would not obviate the need for determination by the Court of the ultimate facts averred in the motion
78 to dismiss, because, if the demurrer was overruled, the Government would desire to plead over, and if the demurrer was sustained, the defendants would, nevertheless, want the facts determined in connection with a motion to suppress evidence predicated upon the claimed disclosure.

3. That after rendition by the Court of its opinion sustaining the plaintiff's demurrer to defendants' motion to dismiss the indictment, according to the transcript of said proceeding prepared by the official reporter of this Court acting for Judge John P. Barnes, the following colloquy occurred:

> "By Mr. Ryan: I understand there are to be other motions; otherwise, I was going to suggest an arraignment today.
>
> "By the Court: What sort of other motions?
>
> "By Mr. Ryan: By the defendants.
>
> "By Mr. O'Brien: I have not considered any other motions at this time, your Honor. But it may well be, and undoubtedly will be, that at some time prior to the trial we will have a motion to suppress the evidence, but that is not in the chain of pleadings nor the matters that are involved here."

4. Thereafter, on June 24, 1952, the defendants being present in open court for arraignment and plea, the following statement from said transcript to have been made by the same Court:

"I have indicated to the Chief Judge of the United States Court of Appeals of this Circuit that I do not want to try this case. He asked me to dispose of the preliminary motions, and I feel that I have done that."

5. That to this date, neither the defendants nor any of their counsel have received notice of the appointment by the Chief Judge of the Court of Appeals of a Judge to try the issues in this case, and that, accordingly, there has been no opportunity to present before the trial judge the motion to suppress the evidence above referred to. Affiant further avers that such motion to suppress evidence will be made and that one of the bases therefor is that the
79 action of the Government in repudiating the terms of its disclosure policy after the defendants in reliance thereon had submitted the books, records and documents as aforesaid of The Shotwell Manufacturing Company, has the same effect in law as in the case of an illegal search and seizure or an invalid confession, and that thereafter such books, records and documents may not be obtained by the Government even by what originally would have been due process. Affiant further avers that the said motion to suppress evidence comprehends the books, records and documents specified in the said subpoena, and that if said motion after presentation and hearing is allowed, the plaintiff will be without right for any purpose to obtain or to use the same. Affiant further avers on information and belief that, accordingly, the plaintiff is endeavoring by its said subpoena to render most matters to be presented by said motion to suppress.

6. Affiant further avers that pending the disposition of said preliminary motions before the said Judge John P. Barnes, he and the defendants permitted certain agents of the Treasury Department to inspect certain books, records and documents of the said corporation to the extent from time to time requested by them for the purpose of relieving Judge Barnes of the annoyance of entertaining and disposing of motions for the production of said books, records and documents; and affiant avers that to the extent of such requests the plaintiff confined itself to matters which, as it then seemed to affiant, did not fall within the scope of the matters which defendants will seek to suppress, but that when after disposition of such motions the plaintiff made demands for books, records and docu-

ments clearly comprehended by the subject matter of said motion to suppress, their production was refused by affiant, and the subpoena in question followed.

80 7. Affiant further avers that the preliminary motions referred to by Judge John P. Barnes now stand disposed of and that prior to the commencement of the summer recess affiant's attention as counsel for the defendants was focused upon the subject matter of such motions, but that since then affiant has been engaged, and is now engaged in the preparation of the defense upon the merits so as to be prepared for trial in the event that the cause is not disposed of upon determination of the motion to suppress. Affiant avers that the books, records and documents in question are extremely voluminous and that it will take affiant and others and expert accountants months to analyze the same for purposes of such defense, and that right down to the time of trial, if any, it is essential that they be protected in the preparation of their defense from the unreasonable and oppressive demands of the plaintiff, in view of the fact that plaintiff as aforesaid has had and has utilized more than four years in and about the inspection, copying and analyzing and investigation of said books, records and documents.

Vincent O'Brien

Subscribed and sworn to before me
this 15th day of August, 1952.
Edith Johnson
Notary Public
(Seal)

81 And afterwards on, to wit, the 18th day of August, 1952 there was filed in the Clerk's office of said Court a certain Designation Of District Judge For Service In Another Circuit, By Chief Justice Of The United States, Fred W. Vinson, Dated August 15, 1952, Washington, D. C. in words and figures following, to wit:

82 DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER CIRCUIT

The Chief Judge of the Seventh Circuit having certified that there is a necessity for the assignment of a judge from another circuit to perform the duties of dis-

trict judge and hold a district court in the Northern District of Illinois; and the Chief Judge of the Eighth Circuit having consented to the designation and assignment of the Honorable Gunnar H. Nordbye, United States District Judge of the District of Minnesota, in that Circuit, to hold the District Court in the Northern District of Illinois to try the case of United States v. Shotwell Candy Co. et al.

Now, therefore, pursuant to the authority vested in me by Title 28, United States Code, Section 292(c), I do hereby designate and assign the said Gunnar H. Nordbye to perform the duties of district judge and hold a district court in the Northern District of Illinois, within the Seventh Circuit, to try the case referred to in this designation and to dispose of all proceedings in relation thereto.

Fred W. Vinson
Chief Justice of the United States

Dated, Washington, D. C. Aug. 15, 1952.

83 And afterwards, to wit, on the 9th day of September, 1952, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnard H. Nordbye, District Judge, appears the following entry, to wit:

84

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * * *

On motion of the Government by the United States Attorney it is Ordered that this cause be and the same is hereby set for trial on December 1, 1952 at 10 o'clock A. M.

85 And afterwards, to wit, on the 16th day of September, 1952, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

86

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

ORDER

This matter coming on to be heard on the objections of the defendants to a subpoena duces tecum heretofore caused to be issued herein by the United States for the production of certain books and records of the defendant Shotwell Manufacturing Company, and the defendants' motion to quash the said subpoena, and further, on the motion of the United States supplemental to the subpoena duces tecum for an order directing that the books and records sought in said subpoena be produced in court prior to trial and impounded in the office of the Clerk of the United States District Court for the Northern District of Illinois, arguments of counsel being heard, and the Court being fully advised in the premises,

Now, Therefore, It Is Ordered that the objections of the defendants to the said subpoena duces tecum and the motion of the defendants to quash the said subpoena be, and the same are, hereby overruled and denied. So much of the Government's motion for the production and impounding of the books and records covered by the said

87 subpoena duces tecum as seeks the production of the said records in court and the impounding of said records in the Clerk's Office is hereby denied, and It Is Ordered that the records covered by the said subpoena duces tecum be forthwith produced by the defendant corporation and made available at the offices of the said corporation for examination by agents and attorneys of the United States during reasonable business hours.

ENTER:

Gunnar H. Nordbye
Judge

Dated this 16th day of September, 1952.

88 And afterwards on, to wit, the 6th day of October, 1952 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion For A Subpoena For Production Of Documentary Evidence Pursuant To Rule 17 Of The Federal Rules Of Criminal Procedure in words and figures following, to wit:

89

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION OF DEFENDANTS FOR A SUBPOENA FOR PRODUCTION OF DOCUMENTARY EVIDENCE PURSUANT TO RULE 17 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The defendants, The Shotwell Manufacturing Company, Harold E. Sullivan, Byron A. Cain, and Frank J. Huebner, by their attorneys, move for an order directing the United States of America to produce before the court, or at a place to be therein specified, at a time prior to the trial, and to permit to be inspected by the defendants and their attorneys, those books, papers, documents or objects obtained by the United States of America or by its attorneys (other than those comprehended within the defendants accompanying motion made pursuant to Rule 16 of the Federal Rules of Criminal Procedure, and except memoranda prepared by Government counsel which consist of narrative statements of persons or memoranda of interviews—to-wit: the work product of Government counsel):

(a) In the course of the investigation by the Grand Jury which resulted in the return of the indictment herein;

(b) In the course of the Government preparation
90 for the trial of this cause if such books, papers, documents and objects have been presented to said Grand Jury or are to be offered as evidence on the trial of the defendants, or any or either of them, under said indictment, or if they constitute admissible evidence material to the issues in the above-entitled cause, even if the Government may not intend to adduce such evidence.

To the above end, said defendants further ask that the Court order the issuance of appropriate subpoenas duces tecum for the production of such books, papers, documents or other objects at such time and place pursuant to the provisions of Rule 17 of the Federal Rules of Criminal Procedure.

The Shotwell Manufacturing Company,
Harold E. Sulliivan, Byron A. Cain,
and Frank J. Huebner, Defendants,
By Vincent O'Brien
Edward Hess
Their Attorneys

91-93 * * *

94 And afterwards on, to wit, the 6th day of October, 1952 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion To Suppress Certain Evidence, etc., Exhibits A, Affidavit of Byron A. Cain, Exhibit B, Affidavit Of Leon J. Busby, and Exhibit C, Affidavit of Vincent O'Brien, Attached Thereto, in words and figures following, to wit:

95

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION OF DEFENDANTS TO SUPPRESS CERTAIN EVIDENCE: TO SET SAME FOR HEARING: AND FOR ISSUANCE OF SUBPOENA FOR PRODUCTION OF CERTAIN DOCUMENTS, ETC., IN ADVANCE OF THE HEARING SO TO BE SET.

I.

The defendants, The Shotwell Manufacturing Company, Harold R. Sullivan, Byron A. Cain, and Frank J. Huebner, and each of them, move that certain evidence in the possession of the plaintiff and hereinafter more particularly described, be suppressed on the trial of the above-entitled cause, and for a further order that, so far as feasible, it be presently returned to the defendants, for the following reasons:

1. At all times in question in these proceedings and in this motion, the Commissioner of Internal Revenue and the Secretary of the Treasury, by virtue of the statutes in such case made and provided, were empowered to compromise any civil or criminal case which might have arisen under the Internal Revenue laws against the defendants. Pursuant to the powers by said statutes conferred, the

Bureau of Internal Revenue, through the Secretary of
96 the Treasury, the Commissioner of Internal Revenue and through other responsible Treasury officials thereunto duly authorized, publicly offered and held out to all of those whose income tax returns contained omissions or misstatements that there would be immunity from criminal prosecution in any case in which the taxpayer who had filed such a return would come forward before investigation had been initiated and acknowledge the existence in such return of such omissions or misstatements, and that the Treasury Department in such case would thereupon merely assess such unpaid tax, interest and civil penalties, if any, as might thereafter be determined to be due under the facts of the case when ascertained. At all of the times above-mentioned, and for many years prior thereto, said offer was and had been in full force and effect.

2. In reliance thereon, the defendants before the commencement of any such investigation and without knowledge or notice of any kind that any such investigation had been initiated (if any such investigaton had been initiated within the meaning of said offer), in January of 1948, came forward and made such acknowledgment in respect of the returns of the corporate defendant for the years mentioned in the indictment in this cause, and from time to time thereafter until and including March of 1948, reiterated the same, in each instance, to a responsible officer or agent of the Treasury Department Pursuant the acknowledgment of the sufficiency and timeliness to the disclosure made as aforesaid, and in reliance upon thereof, as hereinafter mentioned, the defendants informed said agents of the Treasury Department, among other things, that the said returns contained omissions and misstatements in that they failed to include under the heading "Cost of Goods Sold", payments to the extent that such payments were in excess of the ceiling price as set down by the laws and regulations of the United States at the time such goods were purchased.

97 At all times in question and to the date hereof, the Commissioner of Internal Revenue took and by regulations and otherwise has maintained the legal position that to the extent that prices paid for goods subsequently sold were in excess of the ceiling price, that such payments could be considered, for tax purposes, as part of the cost of goods sold, despite the fact that the Tax Court

and certain Courts of Appeals in every case in which the question has been involved have held that such payments are properly part of the cost of goods sold for purposes of determining taxable income. Such payments exceed any alleged unreported income on which plaintiff bases its claim for additional taxes.

3. The officers and agents of the Treasury Department to whom the aforementioned disclosure was made acknowledged to the defendants the sufficiency and timeliness thereof upon the occasions aforesaid. In further reliance upon said disclosure and also upon said acknowledgment of its sufficiency and timeliness, and at the request of said officials and agents made in pursuance thereof, the defendants caused to be made available to said officials and agents the books and records of the corporate defendant, and the individual defendants communicated to officers and agents of the Treasury Department information in their possession materially related to said omissions and misstatements and not available to such Treasury officers and agents or to any one else through the said books and records of the corporate defendant, which information could not have been obtained from the individual defendants in any manner in view of the constitutional privilege and rights of the individual defendants; and the defendants caused to be employed certain accountants to assist said officials and agents in obtaining the facts. The corporate defendant in that regard specifically incurred and paid for such service auditing charges in excess of the
98 sum of $20,000.00.

4. The said Treasury officials and agents in the manner aforesaid, and in purported pursuance of the disclosure aforesaid, and in purported continuing recognition of the timeliness and sufficiency thereof, conducted an examination of said books, records and date and made copies and notations and memoranda thereof continuously over a period of more than four years preceding the return of the indictment in this cause, and at no time prior thereto or in the course of said examinations did the Bureau of Internal Revenue, the Department of Justice, or any officer or agent of the Treasury Department, or any one else, advise the defendants, or any or either of them, that said disclosure for any reason was untimely or insufficient or that criminal prosecution was or had been contemplated or considered or that it would or might be recommended.

The defendants and each of them in permitting such examinations did so in continued reliance upon the acknowledged sufficiency and timeliness of said disclosure and without knowledge of any possibility of repudiation by said agents and without knowledge that criminal prosecution would or might be recommended.

5. Notwithstanding the premises, the said officials at or shortly before the time of the presentment of the matter to said Grand Jury, and after examination and analysis of said books and records extending over a period of four years as aforesaid, repudiated the said offer so relied and acted upon by the defendants as aforesaid, and caused to be initiated the proceeding before said Grand Jury which resulted in the indictment returned in this cause.

6. At the time of said disclosure, and at all times thereafter, the Bureau of Internal Revenue, contrary to the premises aforesaid, did not intend to forego criminal
99 prosecution of these defendants or to refrain from recommending such prosecution. At and continuously after the time of said disclosure, the Bureau of Internal Revenue, without notice to or knowledge of the defendants, or any or either of them, intended to impose qualifications, conditions and requirements different from and in addition to those publicly mentioned in said offer, and it also at all of said times intended to claim, assert and exercise discretion in any event, including the event of full compliance with its published offer, to recommend criminal prosecution. Said intentions and reservations were not mentioned in said offer or otherwise and were in fact unknown to the defendants, and to each of them.

7. By reason of the premises, the defendants, and each of them, aver that the actions aforesaid of the Bureau of Internal Revenue constituted an improper inducement of a confession or admission of facts upon which a criminal prosecution might be based and an illegal search and seizure of the books, papers and records of the defendants, and that, in consequence, the admission in evidence of all books, records, papers and statements so obtained, and any copies thereof or data procured therefrom as a result of information obtained therefrom would violate the rights of the defendants, and each of them, under the Fourth and Fifth Amendments to the Constitution of the United States.

Accordingly, the defendants ask that the said evidence be suppressed and that its use by the plaintiff at any hearing herein and on the trial of this cause be forbidden, including, without limiting the generality of the foregoing, the following evidence:

(a) Any and all affidavits and statements received from suppliers or customers of the defendant corporation whose names were procured from its books and records.

100 (b) Any written statement made by the defendants, or any or either of them, following the disclosure aforesaid, including any recordings or stenographic notes or transcriptions of any statements made by defendants after the disclosure aforesaid.

(c) Any worksheets prepared by defendants' auditors, at their direction, for delivery to said officials and agents.

(d) Any and all photostats, photographs or copies of any kind which may have accompanied the written disclosure statement aforesaid, or pertain thereto.

(e) Any and all photographs or photostats or copies of any kind of the books, records and papers of the corporate defendant.

(f) Any and all notes or memoranda made by said officials and agents from the books, records and papers of said corporation.

(g) Any statement of the corporation's sugar dealings during the years 1941 to 1947, which may have been furnished to said agents.

(h) Any analyses of purchases and supporting data furnished said agents.

(i) Any analyses of production records furnished said agents.

(j) Any analyses of sales taken by or furnished to said agents.

(k) Any composite or comparative statement of the last three foregoing analyses.

(l) Any and all records of the corporation pertaining to transactions with David G. Lubben or with any of his companies, including General Confections, inc., Reserve Trading Company, and Eatsum Food Products Co., (whether the proprietorship or the partnership), including any accounts receivable, ledger cards for said companies or any or either of

them; any copies of invoices of sales to Lubbon or to any or either of said companies; and any file or data pertaining to "Miscellaneous Accounts Receivable—Other."

(m) Any cancelled checks paid to Lubben or any or either of said companies by the defendant corporation, together with any copies or photostats of said checks or notations concerning them.

(n) Any and all invoices, vouchers and cancelled checks or copies thereof having to do with purchases made by the defendant corporation of sugar, chocolate and corn syrup.

101 At the special instance and request of the United States Attorney in this proceeding, the defendants made available, or agreed to make available to the plaintiff, the following data:

Remittance advices for 1945 and 1946.

Bank statements for 1945 and 1946.

Group of folders relating to items that are classified as "Accounts Receivable Others."

Additional remittances advices from April to December, 1946, and from January to April of 1947.

General Journals, July to December, 1946; January to April, 1947.

General Ledgers for 1946 and 1947.

Bank Statements, April to December, 1946; January to June, 1947.

which latter items are, therefore, expressly excluded from this motion to suppress.

Pursuant to order entered by this Court on September 9, 1952, various books, records, papers and other data of the defendant corporation, as listed in the subpoena mentioned in said order, were directed to be made available to the plaintiff at the defendant corporation's premises, which said order was entered over the objections of the defendants, but on the understanding, expressed by both the United States Attorney and the Court, that the status as evidence of any material produced in response thereto would abide the result of this motion to suppress. All of the items included within said subpoena were among those mentioned in paragraphs 3 and 4 hereof. Accordingly, defendants also ask that all of such evidence be likewise suppressed, and that its use at the trial be prohibited, together with any and all copies, notes and information pro-

cured as a result of the inspection of any of such items. They ask also that the aforementioned order be vacated and set aside.

102 In partial support of their said motion to suppress, defendants submit the affidavit hereto attached as Exhibit A, and in further partial support hereof, the defendants adopt and by reference make a part hereof the affidavit of Leon J. Busby, a photostatic copy of which is attached hereto, as Exhibit B, the original of which, as Exhibit B, was attached to the motion to dismiss the indictment heretofore filed in the above-entitled cause; and they submit also the affidavit of Vincent O'Brien, hereto attached as Exhibit C. Said affidavits are so submitted at this time merely to verify the basis for this motion and to show that it is presented in good faith. They are so submitted, however, without prejudice to defendants' right to a hearing on evidence to be taken in open court.

II.

Defendants further move that this, their motion to suppress, be set down for hearing before the Court, on evidence to be adduced in open court in support thereof, including testimony to be adduced by the said affiants Cain and Busby, at a date to be fixed by the Court.

III.

It is essential in the preparation for such hearing that files of the Department of Justice and of the Treasury Department, insofar as they pertain to the subject matter of the said disclosure, including, without limiting the generality of the foregoing, all correspondence, memoranda and telegrams, and copies of memoranda or transcriptions of telephone conversations, relating to said subject matter; any and all statements and affidavits of officials or agents of the Bureau of Internal Revenue relating thereto; any and all records, memoranda, instructions, reports or documents bearing upon the time of the commencement of investigation, if any, of The

103 Shotwell Manufacturing Company, David G. Lubben and his said companies mentioned in the bill of particulars heretofore filed herein by plaintiff, to-wit: General Confections, Inc., Reserve Trading Company and

Eatsum Food Products Co., be made available for examination by the defendants and their attorneys before the Court at a time prior to such trial, and that upon their production, that the defendants and their attorneys be permitted to inspect the same. To that end, defendants further move that a date be fixed by the Court, prior to the time set for such hearing, at which said items shall be so made available; and that subpoenas duces tecum may issue pursuant to the provisions of Rule 17 of the Federal Rules of Criminal Procedure for the production of said items at the time so set for that purpose.

The Shotwell Manufacturing Company,
Harold E. Sullivan, Byran A. Cain,
and Frank J. Huebner, Defendants.
By Vincent O'Brien
Edward Hess
Their Attorneys.

104

EXHIBIT A

In the United States District Court
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

State of Illinois)
County of Cook) ss.

AFFIDAVIT

Byron A. Cain, being first duly sworn, on oath deposes and says that he is one of the defendants in the above-entitled cause, and that he makes this affidavit in partial support of the defendants' foregoing motion to suppress, etc.

Affiant further says:

1. During all of the year 1948, and continuously since, affiant was President and Treasurer of The Shotwell Manufacturing Company, a corporation, one of the defendants in this cause, and that co-defendants, Harold E. Sullivan and Frank J. Huebner, were, respectively, Executive Vice President and Vice President of said corporation, and that Leon J. Busby was a member of the firm of Busby & Cury, certified public accountants employed by The Shotwell Manufacturing Company as its regular auditing firm during all of the year 1948 and for some years prior thereto.

2. That during the month of January, 1948, affiant and other officers of the defendant corporation acting
105 in behalf of said corporation and in their own behalf as officers thereof, delegated Leon J. Busby to communicate with a responsible officer or agent of the Treasury Department of the United States for the purpose of ascertaining whether there was still in effect the published policy of the Treasury Department, of which affiant had theretofore become aware, pertaining to the disclosure of omissions or misstatements in income tax returns, and if so, to ascertain in a preliminary way the requirements of such policy without disclosing the identity of the person by whom such disclosure might be made.

3. That thereafter, but during January of 1948, the said Leon J. Busby reported to affiant and to other officers of the defendant corporation that he had communicated with one Ernest J. Sauber, Chief Deputy Collector of Internal Revenue at Chicago, Illinois, who had told the said Busby that said policy was still in force and effect and that he was a proper person within the requirements of said published policy to whom such a disclosure might be made, and had further informed him that the requirements of such policy as to such disclosure would be fulfilled if the person in question would come forward before investigation had been initiated and acknowledge the incorrectness of his return, and that, in such event, there would be immunity under the Bureau's policy from criminal prosecution but that such tax, interest and penalties, if any, as might properly be due under the facts would be assessed upon subsequent determination of the amount.

4. Thereupon, affiant and other officers of said corporation in their behalf and on behalf of said defendant, during January, 1948, pursuant to said policy, directed said Busby to reveal to said Chief Deputy Collector of Internal Revenue the identity of The Shotwell Manufacturing Company as the person whose returns for
106 the years 1945 and 1946 contained omissions or misstatements—those being the years in question at all times mentioned in this affidavit—and to inform him in a general way of the nature of said misstatements and omissions and to ascertain from him whether the preparation of amended returns for those years by said corporation should be then attempted, or whether their prepara-

tion and filing should be deferred pending an inspection of the books and records of the corporate defendant by agents of the Bureau of Internal Revenue.

5. That thereafter and during the month of January, 1948, the said Busby reported to affiant that he had again communicated with said Chief Deputy Collector of Internal Revenue and had revealed to him, pursuant to defendants' reliance on the policy aforesaid, that there were omissions and errors contained in the returns of said The Shotwell Manufacturing Company for the years 1945 and 1946 and of the general nature of said misstatements and omissions, and that he had inquired as to whether such communications constituted a sufficient disclosure and as to whether the preparation of amended returns for those years should be undertaken at that time; that said Busby further reported to affiant that said Chief Deputy Collector of Internal Revenue informed him that said communications constituted a sufficient disclosure and assured said Busby that he was the proper person to accept such disclosure and that no attempt should be made to file amended returns for those years because said Chief Deputy Collector of Internal Revenue would inform the office of the Agent in Charge to the end that the latter office would assign an agent to make such inspection and investigation as might be required, but that the said Chief Deputy Collector of Internal Revenue had further recommended that an
107 attempt be made in the meantime by the officers of the corporation to approximate the extent of the omissions and misstatements based on their then recollections of the matters giving rise to said omissions and misstatements

6. That thereafter according to his best present recollection, affiant himself during January of 1948, either alone or in the company of said Busby, and again to a certainty in the forepart of March, 1948, in the company of said Busby called upon said Chief Deputy Collector of Internal Revenue and was informed by him that the information communicated to him as such Chief Deputy Collector of Internal Revenue by said Busby constituted a sufficient disclosure and that he had made appropriate inquiry to ascertain whether any prior investigation had been initiated and had learned that there had been none

and that there was none pending, and that the said disclosure was therefore timely within the Department's requirements, and further that the said Chief Deputy Collector of Internal Revenue had talked to Mr. Ralph Johnson, a squad chief in the office of Mr. R. C. Wright, the Internal Revenue Agent in Charge at Chicago, and that Mr. Johnson had indicated that he would go forward with the matter.

7. Thereafter the defendants and other representatives of the corporation, at their request, in reliance upon said policy and in reliance upon the representatives aforesaid, commenced a course of cooperation, and solely for that purpose specially retained accountants who, commencing in 1948, and for a period of approximately four years, assisted the Internal Revenue agents in their inspection and examination of the books and records of the corporate defendant, and assembled for them such data and compilations as were requested, at an expense to the corporate defendant of approximately $20,000.00 or
108 more; and that the examination by such agents of said books and records has extended over a period of approximately four years and was still being conducted at the time of the return of the indictment in this proceeding, and that much of the data and many of the compilations so prepared and furnished by said accountants were not available, in the form requested and supplied, from the books and records of the corporation; that more specifically, there were submitted to and examined by said agents the books and records of the corporate defendant for the year 1941 relating to sugar, corn and chocolate, and also th ledger sheets and journals for that year; all of the books and records of the corporate defendant for the years 1943 to 1946, inclusive, including all supporting data requested by said agents in respect thereof; and that during the course of said cooperation, aforesaid, neither affiant, nor any of said defendants to his knowledge, was informed by any agent of the Bureau of Internal Revenue, or any one else, nor did affiant, or any of the defendants to his knowledge, know that the Bureau of Internal Revenue did not intend to forego criminal prosecution or not to refrain from recommending such prosecution, or that it intended, if such is the fact, to impose qualifications, conditions and requirements different from or in addition to those pub-

licly mentioned in said offer, or that as of the time of said disclosure or during any time during the period of cooperation aforesaid, the Bureau of Internal Revenue intended to claim, assert or exercise an alleged discretion to recommend criminal prosecution in spite of the compliance aforesaid with the terms of its published offer.

8. That the defendants immediately following said disclosure and with the partial assistance of said accountants thereunto specially directed—all in reliance upon the policy and representations aforesaid, including the representations as to the sufficiency and time-
109 liness of their said disclosure—commenced the preparation and compilation of the preliminary approximation which the said Sauber had recommended as averred in paragraph 5 hereof; that indispensable to the making of said statement was data and information not contained in the books and records of the corporate defendant but in the minds of the individual defendants, which the individual defendants well know they could not be compelled to reveal and which they knew they had a constitutional right to withhold, but which, in reliance on the matters aforesaid, they supplied, with the result that such tentative approximation or statement was completed and reduced to writing and furnished to the said agents at or about the time of their first appearance for the purpose of inspecting the books and records of the corporate defendant. Affiant further avers that the said statement, among other things, showed that the net balance as a result of the operations therein reflected was $5,898.00, which sum had been deposited in the corporate defendant's bank account during the year 1946, and had been given effect to in its income tax return for that year. Said statement is in the possession of the plaintiff and was exhibited and otherwise used by the Government in the proceedings before the Grand Jury which returned the indictment in this proceeding. From time to time, and on request of agents of the Department of Internal Revenue, the individual defendants furnished said agents with other and more detailed and accurate information regarding the said omissions and misstatements known to them, but which were also not contained in the books and records of the defendant corporation, which information the defendants knew they were privi-

leged not to reveal but did reveal in continued reliance on the policy and representations aforesaid. Among other
110 things, defendants also informed said agent of the Treasury Department that said returns continued omissions and misstatements in that they failed to include under the heading of cost of goods sold payments to the extent that such payments were in excess of the ceiling prices as set by the laws and regulations of the United States at the time such goods were purchased during the years 1945 and 1946.

Byron A. Cain

Subscribed and sworn to before me
this 22nd day of September, A. D.
1952.

(Seal) Alexander Neuman
Notary Public

111-118 • • •

119 **EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

State of Illinois }
County of Cook } ss.

AFFIDAVIT

Vincent O'Brien, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendants in the above-entitled cause, and that he makes this affidavit in support of their foregoing motion to suppress evidence, etc.

Affiant further avers that in the preparation of said motion to suppress he intended to procure a new affidavit from Leon J. Busby, but was and is informed by the office associates of said Busby that the said Busby is absent from the city and in the State of California due to the serious illness of his daughter.

Vincent O'Brien

Subscribed and sworn to before me this 29th day of September, 1952.

(Seal) Edith Johnson
Notary Public

120 And afterwards, to wit, on the 17th day of October, 1952, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entries, to wit:

121

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER

This matter having come on to be heard upon the motion of the defendants pursuant to Rule 17(c) of the Rules of Criminal Procedure for the issuance of appropriate subpoena duces tecum for the production of certain books, papers, documents or other objects before the Court at a time prior to the trial, the Court having heard the arguments of counsel on both sides:

It Is Ordered, that the United States of America produce, at the time and place hereinafter stated, those books, papers, documents or objections obtained by the United States of America, or by its attorneys (other than those comprehended in the order concurrently entered in this proceeding on the motion of the defendants made pursuant to Rule 16 of the Federal Rules of Criminal Procedure, and other than memoranda prepared by Government counsel and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews, to-wit: the work product of Government counsel):

122 (a) In the course of the Grand Jury investigation which resulted in the return of the indictment herein;

(b) In the course of the Government's preparation for the trial of this cause if such books, papers, documents or objects have been presented to said Grand Jury or are to be offered as evidence on the trial of the defendant, or of any or either of them, under said indictment.

It Is Further Ordered, that upon the production of said books, papers, documents or objects, the defendants, their agents and attorneys, be permitted to inspect and to photostat the same, or any part or portions thereof, at the time, place and manner hereinafter provided.

It Is Further Ordered that all of said books, papers, documents or objects so to be produced by the terms of this order shall, until the further order of the Court, be made available for inspection and copying at the offices of the Intelligence Unit of the Bureau of Internal Revenue, 105 West Monroe Street, Chicago, Illinois; and that the plaintiff and the attorney for the Government shall permit the removal of such of said books, papers, documents or objects as the defendants, their agents or attorneys, shall desire to be photostated; and, to that end, shall appoint a custodian to accompany the defendants, their agents or attorney, to see that the items so to be photostated are kept intact and returned to said office.

And it appearing to the Court that the matter mentioned in (a) above is of necessity presently available; and it further appearing to the Court from the representations in open court of counsel for the Government that as to
123 the matter mentioned in (b) above, all of such matter is ultimately ascertainable but as of the present time all such matter has not as yet been ascertained so that the Government does not presently know with certainty the precise extent of the material to be adduced by it in evidence at the trial, but that it and its attorneys are willing presently to turn over to the defendants such books, papers, documents and objects which the Government or its counsel, in the exercise of good faith, now know with reasonable certainty are to be utilized as evidence on the trial, and that they are willing to ascertain and to produce the remainder of said matter by the 5th day of November, 1952.

Now, Therefore, It Is Ordered, that the items in (a) above, and all items mentioned in (b) above, which the

United States of America or the attorney for the Government, in the exercise of good faith, now know with reasonable certainty is to be utilized as evidence by the plaintiff on the trial of the above-entitled cause, shall be produced at the place aforesaid, and shall be there so made available for inspection and copying in the manner aforesaid, commencing on the 31st day of October, A. D. 1952, and from day to day thereafter (except Saturdays, Sundays and Federal holidays), during the usual hours of business on each day until said inspection and copying shall have been completed.

It Is Further Ordered, that the plaintiff and the attorneys for the Government shall by the 5th day of November, A. D. 1952, produce for inspection and copying the remainder, if any, of the items mentioned in (b) above, at the same place and on the same terms and conditions as hereinabove provided in respect of other items.

124 It Is Further Ordered, notwithstanding anything herein contained, that neither the plaintiff nor the attorney for the Government, either by this order or by the terms of said subpoena, shall be required to disclose the name or names of informants, if any.

Accordingly, it is further Ordered that there be issued pursuant to Rule 17 of the Federal Rules of Criminal Procedure appropriate subpoenas duces tecum for the production of such books, papers, documents or other objects at the time and places aforesaid.

It Is Further Ordered, that that part of the defendants' motion which asks for books, papers, documents or objects obtained by the United States of America, or by its attorney, if they constitute admissible evidence material to the issues in the above-entitled cause even if the Government may not intend to adduce such evidence, is denied, and the defendants' contention that they are entitled to said items and their exception to the denial of their motion in that respect is hereby noted.

Enter:

Gunnar H. Nordbye
Judge

Oct. 17, 1952.

125

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER

This matter having come on to be heard upon the motion of the defendants for discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the Court having heard the arguments of counsel on both sides and it appearing to the Court that the items in said motion, and hereinafter mentioned, may be material to the preparation of the defense, and that the requests made by said motion are reasonable to the extent hereinafter allowed.

It Is Ordered, that the attorney for the Government permit the defendants, their attorneys and agents, to inspect and to copy, photograph or photostat the books, papers, documents or tangible objects obtained from or belonging to the said defendants, or any or either of them, including, without limitation of the generality of the foregoing, any and all auditors' reports and worksheets, compilations and analyses, mentioned in part I of said motion, turned over to the Bureau of Internal Revenue, and the officials and agents thereof, by or on behalf of the de-
126 fendants, or any or either of them, during the years 1948 to 1952, inclusive.

It Is Further Ordered, that the attorney for the Government also permit the defendants, and any or either of them, their attorneys or agents, to inspect and copy, photograph or photostat such books, papers, documents or tangible objects as have been obtained by the United States of America by seizure or by process from David G. Lubben, Eatsum Food Products Co., a sole proprietorship, Eatsum Food Products Co., a partnership, General Confectioners, Inc., a corporation, or Reserve Trading Company. To the extent that true and correct copies of said books, papers, documents or tangible objects obtained by seizure or by process, as aforesaid, were supplied to or produced by the attorney for the Government rather than said items themselves in the original form in which they were obtained or seized by process, then it shall be

a sufficient compliance herewith that the United States attorney make available to the defendants for inspection and copying aforesaid, the true and correct copies so procured by or supplied to the attorney for the Government. To the extent that neither the originals nor true and correct copies of said books, papers, documents or tangible objects obtained by seizure or by process from said David G. Lubben or from the companies last aforesaid have been or are supplied or furnished by the United States of America to the attorney for the Government aforesaid, then, it is further Ordered, that the United States of America, through the attorneys for the Government in this proceeding, within two days from the date hereof, advise counsel of record for the defendants of the precise place or places where said items so obtained by
127 seizure or process are held; and it is Ordered that the plaintiff make said books, papers, documents or tangible objects forthwith available to the defendants, their attorneys and agents, for inspection and copying at the place or places so designated.

It Is Further Ordered, that all of the said books, papers, documents, records and tangible objects, or copies thereof, as aforesaid, which the attorney for the Government, as hereinbefore provided, is to make available for inspection and copying, shall be made so available at the offices of the Intelligence Unit of the Bureau of Internal Revenue, 105 West Monroe Street, Chicago, Illinois, beginning on the 5th day of November, A. D. 1952, and from day to day thereafter (except Saturdays, Sundays and Federal holidays), during the usual hours of business on each day, until said inspection and copying shall have been completed. The plaintiff and the attorney for the Government shall permit the removal of such of said books, papers, documents, tangible objects, or copies thereof aforesaid, as the defendants, their agents or attorneys, shall desire to be copied in the form of photographs, photostats or microfilm; and to that end, shall appoint a custodian to accompany the defendants, their agents or attorneys, who shall see that the items to be photographed, photostated or microfilmed are kept intact and returned to said office.

In so far as the books, papers, documents or tangible objects, if any, which the United States of America is

hereinabove directed to make available to the defend-
128 ants, their attorneys and agents, for inspection and copying aforesaid, at places to be designated by the United States of America through the attorney for the Government, as aforesaid, are concerned, it is further Ordered, that the time and manner of making such inspection and of making the copies thereof shall be the same; provided that if more than one place is so designated by the United States of America, the Court, on application of the defendants, may make such other provision as to time as may appear just.

It Is Further Ordered that part III of the defendants' motion for discovery and inspection pursuant to Rule 16 be, and it is hereby denied, without prejudice to their right to renew the same if made more definite and on a showing of materiality.

Enter:

Gunnar H. Nordbye
Judge

Oct. 17, 1952

129 And afterwards, to wit, on the 31st day of October, 1952, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

130

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption No. 52 CR 143) • •

ORDER

The above cause came on for hearing on defendants' motion to suppress evidence and to set same for hearing, and for the issuance of subpoena duces tecum for the production of certain documents in advance of the hearing so set.

Mr. Vincent O'Brien and Mr. Edward J. Hess appeared in behalf of the defendants in support of said motion;

and

Mr. Otto Kerner, Jr., United States Attorney, appeared by Mr. Edward J. Ryan, Assistant United States Attorney, in behalf of the United States of
131 At teh close of the preesntation of the motion, the America.

Court stated to counsel that a date would be set for hearing on defendants' motion to suppress. The phase of the motion pertaining to the issuance of subpoenas for the production of documents in advance of the hearing, as outlined in the notice of motion, was taken under advisement.

Defendants seek to suppress certain evidence outlined in their motion upon the ground that such evidence was procured by the Government in violation of defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States. Briefly, it is defendants' position that, pursuant to authority vested in the Bureau of Internal Revenue, through the Secretary of the Treasury, the Commissioner of Internal Revenue, and through other responsible Treasury officials, there was publicly held out to taxpayer who had made omissions or misstatements in their tax return that there would be immunity from prosecution in any case where the taxpayers guilty of such omissions or misstatements came forward before any investigation was made or initiated by the tax authorities and acknowledged such omissions and misstatements, and that the Treasury Department in such case would merely assess the unpaid tax interest and civil penalties, if any, as might be determined to be due the Government under the facts when ascertained. It is contended by the defendants that in reliance thereon they came forward in January, 1948, and made such acknowledgment in respect to the tax return of the corporate defendant to a responsible officer or agent of the Treasury Department before the commencement or initiation of any investigation by the tax authorities. It is further contended that the officers and agents of the Treasury Depart-
132 ment to whom the disclosure was made acknowledged the sufficiency and timeliness of the disclosure so

made, and that in reliance upon the disclosure and acknowledgment of the sufficiency and timeliness, the defendants caused to be made available to such officials books, papers, documents, etc., relating to the omissions and misstatements in the tax return of the corporate defendant, and that from the books, papers, documents, etc., made available to the Treasury Department and agents, computations, notations, and memoranda have been made by such officials. The position of the defendants on this motion is that the motion of such officials constituted an improper inducement of a confession and admission of facts upon which the criminal prosecution is based herein and that the admission in evidence of any such data thus obtained from the defendants would violate their rights under the Constitution of the United States.

The defendants' position on the hearing of the motion to suppress is that there should be made available to them and their attorneys for examination some time prior to the hearing on said motions "all correspondence, memoranda and telegrams, and copies of memoranda or transcriptions of telephone conversations, relating to such subject matter [said disclosure]; any and all statements and affidavits of officials or agents of the Bureau of Internal Revenue relating thereto; any and all records, memoranda, instructions, reports or documents bearing upon the time of the commencement of investigation, if any, of The Shotwell Manufacturing Company, David G. Lubben and his said companies mentioned in the bill of particulars heretofore filed herein by plaintiff, to wit: General Confections, Inc., Reserve Trading Company and Eatsum Food Products Co. • • •."

133 Defendants are proceeding under Rule 17(c), Federal Rules of Criminal Procedure, which was enacted to enable either party to a criminal case to obtain a subpoena duces tecum returnable prior to the date of trial. Presumably, defendants are seeking the right by a subpoena duces tecum to obtain the production before the hearing of relevant documents and data and to inspect and examine any such documents and data in the possession of the Department of Justice and the Treasury Department which may bear upon the question as to whether or not the alleged disclosure by the defendants of the omissions or misstatements in the corporate tax

return was the first information which the Government officials had of such omissions or misstatements. In effect, they are seeking to delve into the records of the Treasury Department and the Department of Justice in order to ascertain and determine whether there are documents and data which may disclose that the Government did or did not have knowledge of the alleged tax omissions and misstatements of the corporate defendant before the disclosure was allegedly made by the defendants in January, 1948.

The application for the subpoena duces tecum is opposed because it is contended that it is in effect a dragnet by which the defendants hope to obtain some evidence which may be helpful to them in sustaining their motion to suppress. Obviously, that characteristic of defendants' motion is of substance, but is that objection fatal to defendants' motion? Defendants, from the very nature of the situation, have no information as to the type of data or documents or other information which the Government may have in its files and which may reflect when the investigation was initiated by the Government or when knowledge came to the Government of the corporate defendant's tax omissions. Documents, letters, telegrams,
memoranda, etc., in the possession of the Government
134 may reflect relevant and material information as to this issue. The defendants are unable with any particularity or definiteness to identify specific documents or writings because they have never seen such documents. There is good reason to assume, however, that some data or documents or written material in possession of the plaintiff may refer to the alleged disclosure by the defendants of the subject matter of the motion to suppress or as to the time when the Government officials first initiated any investigation of the corporate defendant or were informed of the tax delinquencies of this defendant. True, some of the letters, affidavits, transcriptions of telephone conversations, etc., may be privileged—some may be the work product of counsel for the plaintiff—and there may be other valid objections to the production of such documents.

The tenor of the recent pronouncements in well-considered decisions tends to recognize with greater liberality the right of a defendant to have access to such documents

which may be relevant to his defense and which are in possession of the Government. In absence of a showing as to the exact nature and type of documents in possession of the Government which are relevant to the issues on this motion, I am unable to determine whether the documents called for are privileged or whether for any reason they may be considered outside the scope of a subpoena duces tecum under Rule 17(c). Upon this showing, however, I see no good reason why a blanket subpoena should be issued returnable before the hearing and before the Court is afforded an opportunity to inspect and pass upon any objections that the plaintiff may have to the right of the defendants to inspect such documents. My view is that defendants should have the
135 benefit of subpoenas duces tecum returnable, however, at the date of this hearing. Plaintiff will be required to produce in response to such subpoenas at the date of the hearing all documents within the scope of this order. Upon the day of return, if plaintiff has any objection to defendants' right of inspection and examination of such documents, the Court then can consider each specific document or writing and the objection thereto and pass upon such question before the material is made available to the defendants. This plan should not particularly delay the hearing. There is no reason to assume that the documents are so lengthy or complex that the defendants should be afforded a certain period prior to the date of the hearing for the inspection of such documents. The showing does not justify the issuance of a subpoena duces tecum of the scope and extent as required with reference to David G. Lubben, General Confections, Inc., Reserve Trading Company and Eatsum Food Products Co. If the investigation by the Government or information obtained by it regarding David G. Lubben and the companies named has any bearing upon the issues raised by the motion to suppress, any such records, documents, etc., will be within the ambit of the order which follows, Therefore,

It Is Ordered, That subpoena duces tecum may be issued by the Clerk of this Court commanding plaintiff to produce from the files of the Department of Justice and Treasury Department all correspondence, memoranda, telegrams, copies of memoranda, and transcriptions of telephone con-

versations relating to the subject matter of the alleged disclosure by the defendants of the corporate defendant's tax omissions and misstatements, and further, all statements and affidavits of the officials or agents of the Bureau of Internal Revenue relating thereto, and any and all
136 records, memoranda, instructions, reports or documents bearing upon the time of the commencement of the investigation of the tax delinquencies of the Shotwell Manufacturing Company.

It Is Further Ordered: That defendants' motion to suppress certain evidence be set down for hearing on the 12th day of November, 1952, in the United States Court House at Chicago, Illinois, at ten o'clock A. M., and that the subpoenas duces tecum which may be issued be returnable at that date and at that hour.

Enter:

Gunnar H. Nordbye
Gunnar H. Nordbye
United States District Judge
Acting under Assignment to the
Northern District of Illinois

Dated this 31st day of October, 1952.

137 And afterwards, to wit, on the 12th day of November, 1952, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

138

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

ORDER

On motion of the defendants for leave to file herein instanter their amendment to the motion of said defendants to suppress evidence, etc., presented in open court:

It Is Ordered, that leave be, and it is hereby, granted said defendants to file instanter said amendment to their

motion to suppress evidence, etc.

Enter:

Gunnar H. Nordbye
Judge

Nov. 12, 1952

139 And on the same day, to wit, the 12th day of November, 1952 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Amendment To Motion Of Defendants To Suppress Evidence, Etc., in words and figures following, to wit:

140

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

AMENDMENT TO MOTION OF DEFENDANTS TO SUPPRESS EVIDENCE, ETC.

The defendants, The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, by Vincent O'Brien, their attorney, leave of Court being first had and obtained, file this their amendment to the motion to suppress certain evidence heretofore filed herein, as follows, to-wit:

1. Strike the words following the word "they" in the fifteenth line of the second paragraph of said motion and insert in lieu thereof the following:

"intentionally failed to include, under the heading of gross sales, all or part of the sums received by the corporation defendant through various sales of goods, and in that they failed also to include, under the heading of cost of goods sold, various payments made for goods subsequently sold, which payments were in excess of the ceiling prices as set by the laws and regulations of the United States Government at the time such goods were purchased."

2. Strike the last paragraph of paragraph 2 of said motion and insert in lieu thereof the following:

"As of the date hereof there are and have for varying periods of time been in effect decisions of the Tax Court, United States District Courts, and United

States Courts of Appeals, in every case in which the question has been involved, holdings that such premium payments are properly part of the cost of goods sold for purposes of determining taxable income. Notwithstanding said decisions, and each of them, the Commissioner of Internal Revenue to the date hereof has refused to acquiesce in the determination established by said decisions, or any or either of them. The said disclosure was made, however, prior to the determination evidenced by said decisions. But at the time of said disclosure, and on several occasions thereafter, said defendants informed said agents that in the Commissioner's view there were unpaid taxes due and owing for said years from the said corporate defendant. Said defendants at said times also stated that the said corporation through its officers aforesaid was ready, able and willing to pay such unpaid tax, interest and civil penalties, if any, as might be determined to be due after inspection and investigation by the agents of the Bureau of Internal Revenue. Such payments equalled such unreported receipts."

3. Strike the period at the end of paragraph 5 and add after the word "cause" at the end of said paragraph the following:

"without granting to said defendants, or to any of them, contrary to the custom and practice obtaining in such matters, any hearing or conference at any level, and even without communicating to them the amount which upon such inspection and investigation the Bureau of Internal Revenue had determined to be due; and without affording the corporate defendant or said officers on its behalf opportunity to pay such amount."

4. After paragraph 7 in said motion insert the following:

"8. Defendants, and each of them, also aver that even if the said disclosure was insufficient or entirely, or both, plaintiff, by reason of the premises, is estopped from so asserting, and that they are, nevertheless, entitled to the relief by this motion requested."

The Shotwell Manufacturing Company,
Byron A. Cain, Harold E. Sullivan and
Frank J. Huebner, Defendants.

By Vincent O'Brien
Their Attorney

142 And afterwards on, to wit, the 21st day of November, 1952 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion And Affidavit of Vincent O'Brien in words and figures following, to wit:

143

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION

The defendants, by Vincent O'Brien, their attorney, move the entry of an order directing the plaintiff to produce at the hearing on November 21st, 1952, in the matter of the defendants' motion to suppress evidence, the following items, to-wit:

(a) Any and all orders, directives, communications or mimeographs from the Treasury Department or any of its officials to the Special Agent in Charge, the Agent in Charge, or the Collector of Internal Revenue, all at Chicago, Illinois, having to do with the subject matter of voluntary disclosures or with the procedures prescribed in relation thereto from and during the year 1934.

(b) The particular mimeograph order or directive, if any, issued to implement that part of the address given by J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, May 14, 1947, reading as follows:

> "An investigation is initiated when a Special Agent, an Internal Revenue Agent, a Deputy Collector, or other Bureau officer, is assigned a return for examination, or where an investigating officer has requested advice of appropriate officers of the Bureau with respect to the filing of a return or the payment of taxes.

144 "The time of disclosure and the time an investigation begins are, therefore, matters which can be ascertained with complete objectivity and certainty, thus protecing both the Government and the taxpayer from decisions based on guesswork or other vague circumstances. To assure adherence to this principle, the

Bureau stands ready at all times where a dispute may arise as to the time of a disclosure and the time an investigation was initiated to open its records in that regard."

by the Secretary of the Treasury or any official thereof to the said agencies at Chicago, Illinois, or any or either of them.

(c) Any order, directive, mimeograph or other document from the Secretary of the Treasury or any official thereof to the said agencies at Chicago, Illinois, or any or either of them, requiring in effect that in case any investigation initiated by any of such agencies in Chicago might reveal the identity of a taxpayer within the jurisdiction of another agency, to notify such other agency and to request it to call for the return of such other taxpayer or to initiate its own investigation in respect of such other taxpayer, and requiring such other agency to acknowledge in writing that it had done so.

(d) The manual prescribing the specific operating procedures in force in the office of the Agent in Charge in Chicago during the years 1947 and 1948, whether prescribed by that office of by the Bureau of Internal Revenue or the Treasury Department in Washington, with particular respect to the auditing of the tax returns of all corporations in general and to the transmissions of such returns by the Collector of Internal Revenue to the Agent in Charge at Chicago, for that purpose, to the distribution of such returns to the proper departments of the office of the Agent in Charge, and to the assignment of such returns by such department or a group leader thereof to an Internal Revenue Agent for examination and audit.

145 In support of this motion, defendants attach the affidavit of Vincent O'Brien.

The Shotwell Manufacturing Company,
Byron A. Cain, Harold E. Sullivan,
and Frank J. Huebner, Defendants,
By Vincent O'Brien
Their Attorney

146

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

State of Illinois }
County of Cook } ss.

AFFIDAVIT

Vincent O'Brien, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendants in the above-entitled cause, and that he has read the above and foregoing motion by him on their behalf subscribed, and that he makes this affidavit in support of such motion.

Affiant further says that the items, the production of which by the plaintiff is requested, are or may be material to the issues on the hearing of the defendants' motion to suppress certain evidence to the extent that these manifestly have to do with the definition of the so-called voluntary disclosure policy; with the origin of the policy as referred to in the various public utterances in 1945 and 1947 as set forth in the motion to suppress and supporting papers; with the Bureau's view as established by such items as to the time at which an investigation may be said to have been initiated, and with the requirements of
147 the Bureau as to the auditing of the tax returns of all corporations, whether under investigation or not.

Vincent O'Brien

Subscribed and sworn to before me this
17th day of November, 1952.

(Seal)

E. R. Wendell
Notary Public

148 And on the same day, to wit, on the 21st day of November, 1952, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entries, to wit:

149

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

This day comes the United States by the United States Attorney come also the defendants by their counsel and enter herein their motion to have the plaintiff produce certain manuals, directives, etc., and the Court having heard the arguments of counsel and being fully advised in the premises it is

Ordered that said motion be and the same is hereby overruled and denied.

150

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

This being the day to which this cause was continued for further hearing on the motion of the defendants to suppress evidence come the parties by their counsel respectively and the Court now having heard the evidence adduced and the arguments of counsel and being fully advised in the premises it is

Ordered that the defendants' motion to suppress evidence be and the same is hereby overruled and denied.

151 And afterwards on, to wit, the 15th day of December, 1953 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On November 12, 13 and 21, 1952, before The Honorable Gunnar H. Nordbye, Judge, in words and figures following, to wit:

1

United States of America
Northern District of Illinois
Eastern Division

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * * (Caption—No. 52 CR 143) * * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Gunnar H. Nordbye, Chief Judge of the United States District Court for the District of Minnesota, sitting as one of the Judges of the United States District Court for the Northern District of Illinois, Eastern Division, in his courtroom in the United States Court House at Chicago, Illinois, on November 12, 1952, at 10:00 o'clock a. m.

Appearances:

Hon. Otto Kerner, Jr.,
United States District Court
(U. S. Court House, Chicago 4, Ill.);

Edward J. Ryan, Esq. and
John P. Lulinski, Esq.,
Assistant United States Attorneys.
2 on behalf of the United States.

Edward J. Hess, Esq.,
(7 S. Dearborn St., Chicago 3, Ill.) and
Vincent O'Brien, Esq.,
(105 S. LaSalle St., Chicago 3, Ill.)
on behalf of defendants.

* * *

By Mr. O'Brien: Judge, I have a motion before we start, for leave to file this amendment.

By Mr. Ryan: I haven't seen it, Judge. Counsel told me something about it in a general way.

By Mr. O'Brien: Here it is. (Counsel handing document to Mr. Ryan.)

By Mr. Ryan: May I inquire of counsel, in the
3 context, this doesn't change the effect of the latest disclosure of being one where additional unclaimed

deductions washed out unrecorded gross receipts except the amount of $5,000, is that correct? It simply amounts to an affirmative statement in the motion that you did receive additional gross income, receipts?

By Mr. O'Brien: We assert it is a fact such payments equal recorded receipts. $5,898 was obviously erroneous. The $5,898 went into income, reported income.

By Mr. Ryan: Then, if I understand the motion now as it stands, the unreported gross receipts allegedly disclosed as washed out by the unrecorded gross payments.

By Mr. O'Brien: That is so stated.

By Mr. Ryan: I have no objection.

By the Court: Very well.

By Mr. O'Brien: May I have the order, then, if that is agreeable, Judge?

By Mr. Ryan: Your Honor, Mr. Wright, District Commissioner of Internal Revenue, is here with the Treasury Department records which were requested by the defendants under the subpoena issued bearing
4 on the subject-matter of disclosure. Mr. Wright, as I understand, has a schedule to make a train to go to New York today. For that reason I would like if it were agreeable to the Court to have him make his tender of these documents for the Court's examination and have him excused, if possible, if that is agreeable to counsel and the Court. I don't know whether counsel expects any testimony from him, but that is my suggestion, if it meets with the approval of the Court.

By Mr. O'Brien: May I ask, what time does Mr. Wright have to leave?

By Mr. Ryan: Mr. Wright, please. Maybe he has some time.

By Mr. Wright: Your Honor, I am scheduled to leave on the 2:00 o'clock train at the Pennsylvania Railroad. I would have to leave the office at about a quarter to 2:00, at the latest.

By Mr. O'Brien: The other question is as to any testimony whether the other folks who are subpoenaed are here.

By Mr. Kerner: Who do you mean by that, the
5 Secretary of the Treasury, the Commissioner?

By Mr. O'Brien: Yes, sir.

By Mr. Kerner: On that, if the Court please, I wish to appear in their behalf.

In a previous conversation between counsel of my office and Mr. O'Brien, it was understood that their appearance would not be personally necessary at all, but merely a production of records.

Yesterday, Mr. O'Brien called our office and informed us that he wished these two gentlemen to be present. I am informed that they are both engaged in setting up these various district offices under the reorganization of the Treasury Department and their appearance here would be extremely difficult and would upset the national scale of the set-up of these new districts. However, if the Court wishes them to be here, we will have to make some arrangements for them to be here at the Court's convenience.

By Mr. Ryan: I might supplement that further by saying that I had advised the local treasury people and
the regional counsel offices, district counsel office
6 here of Mr. O'Brien's statement yesterday that he would desire them personally for the purpose of giving testimony, but, of course, yesterday was a holiday and I understood at least, the last word I had from the Treasury last night, the people in Chicago, that they had not reached either of those two individuals yesterday, so that it may well be they haven't learned until this morning that counsel did desire their presence in fact.

By the Court: Were they personally served?

By Mr. Ryan: They were personally served, but in my conversation with Mr. O'Brien before I had received information from the Treasury as to what their attitude would be on the production of these records, I queried him on alternatives, and one of them was that if they were willing to tender the records for the Court's examination, would he require the personal appearance, would he insist, take the position of the personal appearance of the Secretary of the Treasury and the Commissioner was required. At that time Mr. O'Brien indicated to me that he thought not. He was interested in the documents.

7 By the Court: I am only allotted two days for this hearing. I do not see how we will get the offi-

cials from the Treasury Department in that time, if the situation is as Mr. Ryan discloses.

By Mr. Ryan: I might say something further. I don't know to what extent counsel would care to make an offer of proof that he expects from them, but I understand that he expects to interrogate, by what he told me yesterday, the Secretary of the Treasury and the Commissioner of Internal Revenue respecting their views on the interpretation of the statements made publicly on the disclosure document.

At that time I indicated to him, thinking offhand, that I would object to the materiality of any views that they held since it seems to me the only thing that is material was the public pronouncements that came to the defendants that they could have acted upon.

By the Court: What have you to say, counsel, about the belated statement on your part that you wanted these officials here according to Mr. Ryan?

8 By Mr. O'Brien: Not a belated situation, if the Court please. I will say it this way: I subpoenaed the officials properly, personal service to their people delegated for that service. I have no desire, I want the record to show, to inconvenience or discommode them. I felt under the authorities and under the regulations all discretion is withdrawn from subordinates and consequently unless I was to be met and the Court was to be met with the respectful declination to answer which would have to be from a subordinate, I would have to subpoena those who are vested with the discretion, with the authority, since the Secretary is superior to the Commissioner, and since his discretion on any matter which might call for discretion would prevail I found it necessary to subpoena both.

It is true that Mr. Ryan called me the day before yesterday and actually tried to narrow the thing and at that moment and on that call I said that if the papers mentioned in the court's order were tendered according to that order that I, of course, had no interest in who it was who produced them. I thought about it beyond

9 that and I didn't understand that I was committing myself to any agreement that was in any sense irrevocable.

Yesterday morning, which was a holiday, a Federal holiday, too, I got through to Mr. Ryan and told him

there were averments of my motion which I might require and would require oral testimony to support it, which could come only from the same gentlemen.

When Mr. Ryan had inquired whether that had to do with the authenticity of the published policy or statements, and we digressed on that subject a moment, and concluded that in so far as those items were concerned, that we would put in the full context of the published policies as contained in this report of the hearings before the Subcommittee of the Ways and Means Committee of the House, considered in the proceedings of last January.

I then suggested that the same report contains testimony of the various people, particularly Mr. Dunlap, and that I had no desire to have the folks here if the pronouncements on this might be—the whole book—could go in, or those published statements plus that part
10 of the testimony before the Committee which has to do with the disclosure principle problem.

At first, Mr. Ryan thought that that would be agreeable and so told me, and then he said it occurred to him he could not cross-examine a book. I didn't think to say so, but I later realized that that is true of any document which goes in evidence and that in this case those who made the pronouncements are available to him so that his case does not rest or depend upon cross-examination of the book. If he wanted the people to explain, he could bring them.

On independent grounds, however, I have no doubt but that the book is admissible; and however all of that may be I now say that if it is agreed that not only the public statements but the statements of these folks concerning the disclosure phase of the question may be received in evidence here, I do not need those men.

Now, one thing further. Since it was Mr. Dunlap who appears to have testified at length on that subject
11 I thought that he alone—I first thought in talking to Mr. Ryan—that he alone would suffice. Then Mr. Ryan asserted that he was not the Commissioner back in 1948, when these things occurred. I then said if the point was to be made of that, I suppose I would have to have Mr. Snyder, since he was the Secretary. Afterwards, again, not in conversation, I noted from a quick perusal that Mr. Dunlap for many years has been in

the field and in the Bureau and that while all the time he has not been Commissioner, nevertheless he has been in a position to have experience and qualification and he so testified, so that I now say again if those parts may go in, I have no desire to have those witnesses.

I do, of course, want the documents which I understand Mr. Wright is to tender under the Court's order to the Court.

Now, one thing more of the conversation with Mr. Ryan. I did say yesterday morning, too, that I could see, I didn't know whether your Honor would allocate two days or two and a half days, we told you it would probably be about a day and a half, that is my recollection, or at least flow over to the next morning. I said that if it was in any way inconvenient to these gentlemen, these momentary suggestions or expressions of mine, that that would inconvenience them, as far as I am concerned, it is perfectly agreeable to have them come tomorrow morning, and Mr. Ryan said that in that event they could go on out of order. That is, we could interrupt whatever was on at that time to go into it.

Now, I don't have any extensive examination.

By Mr. Ryan: My feeling is this, your Honor: at the time counsel made the suggestion to me, and I am still of this opinion, what views the Secretary of the Treasury or the Commissioner may have held which were their own which they later expressed long after this alleged disclosure in 1952 before some Congressional Committee and which, therefore, could not have possibly been communicated to the defendants and upon which they could not have possibly acted would have no materiality here.

The only thing that is important is not even what Mr. Wenchel may consider as being the proper construction of what he said in his statement, but what a court would say, a reasonable person is entitled to take out of it, and upon which they might act and not what reservations, he had or what opinions he or anyone else might later express with respect to the nature of the doctrine or what it meant.

When Mr. O'Brien suggested to me, then, that these views were incorporated in the report of this hearing, I said to him that—after some consideration that I didn't know what they had said. I didn't know whether

the construction they had placed upon these things would be the construction that I would urge upon the Court as a fair construction of the language, and accordingly I wasn't prepared to say at that time to say to him that I will accept, assuming the Court rules it material, their opinion, but I will accept the things they said without exploring the situation further. I have not read this. I have read the statements that were published, but I have not read all of the testimony that was given by these individuals.

If, after reading it, and finding out what counsel wants to put in, and if the Court has ruled it material, there may be no reason why I would want to cross-examine anybody about it. I don't know that yet. I will be happy to make an effort at the noon recess.

By the Court: Let's proceed now and Mr. Ryan can look over the document further at the noon recess and we can take up the matter further.

By Mr. O'Brien: If I could add one sentence, Judge, I don't wish to delay the proceeding, but to try to move expeditiously. I want to make my position clear in a couple of sentences on that phase of the disclosure thing.

I whole heartedly agree with Mr. Ryan if this is his concept that the published statements, those which went to the public and on which any member who comes forward relies, should be the test before the court dependent upon the facts produced. With that I agree, but there has been a suggestion not upheld by the Court of Appeals but nevertheless of a principle by Judge Wyzanski in Massachusetts, and in connection with a pre-indictment motion where they didn't want to project the procedure beyond the point to which it already arrived on motions to suppress, that unless on such a motion, pre-indictment motion, there is some proof adduced that would give the connotation of a misrepresentation or non-disclosure amounting to a misrepresentation on the part of the Treasury or its officials at the time that the first contact is made, that then what has there been in the nature of the rules or device in the matter? It is just sort of a broken contract according to Judge Wyzanski.

Now, I know from the books and these reports and many prior items, statements, and from the sharp dif-

ference of opinion of construction which exists between those officials leading ultimately to an abandonment in 1951, not a retroactive abandonment, but the abandonment of the policy, I know that the reservations they had, the conditions they imposed, the way they construe, has been so shaken up and confused that for them to have that fact in mind, and not to cure it by way of a public announcement of that situation amounts to
16 the very thing that I am talking about. In short, I don't want any people here, that policy or these things in the record just to clutter the record or to prolong this hearing, but it is with that issue that I am concerned.

By the Court: We will proceed.

By Mr. Ryan: If the Court please, with respect to Mr. Wright, do I understand he will have to remain until you will put in your evidence and you will call him?

By Mr. O'Brien: Mr. Wright, will you step up, sir? I think Mr. Wright will tender the documents or do whatever he is going to do. I would like to get him free. I don't think that I would interrogate him on that part of the subpoena. We are here now, Judge, to a point where we moved, as I see it, to the subject of the production of the documents to the Court. Mr. Wright has been subpoenaed.

By Mr. Wright: In accordance with the provisions of this subpoena that was served on me, I have produced all of the records that are in my office bearing on
17 this case and they are now in custody of the Court with the United States Attorney.

By the Court: Will you further identify yourself?

By Mr. Wright: My name is Ernest C. Wright, District Commissioner, Chicago District.

By Mr. O'Brien: He is the boss.

By Mr. Wright: The documents are in the Court, sir.

By the Court: Very good.

By Mr. Ryan: I only have this to say with respect to them: some of them have only been turned over this morning. I myself haven't seen some of them and after your Honor makes a determination there may be some he is inclined to turn over that I would like to be heard on the question of whether the Government has any interest—

By the Court: You have no objection if you examined them?

By Mr. Ryan: I have, sure. There are some that are not evidentiary and I would have to object to them.

By Mr. O'Brien: May I interrupt just a second?

18 Mr. Wright's statement to the Court said he had in the courtroom the documents that were in his office and I am not sure, I know he means those that have come to him, but the record doesn't show it. I assume he means all of the documents that are in the Treasury Department, within the scope of your Honor's order.

By Mr. Wright: That is right, Bureau of Internal Revenue officials over which I have jurisdiction.

By Mr. O'Brien: As far as I am concerned, you may leave.

By Mr. Wright: Thank you. Thank you, your Honor.

By Mr. Ryan: If your Honor please, unless there is further preliminary business, I should like to be heard briefly on the question of whether there should be any hearings, whether this motion is legally sufficient to entitle defendants to the relief which they seek. My observations are brief. I indicated to counsel the last time, in a general way, what they were, and I indicated to him yesterday more specifically what my objec-

19 tions were. I think I can state them quite briefly.

By the Court: Very well.

By Mr. Ryan: If the Court please, this motion to suppress certain evidence in this case is made upon the theory that because the officials of the Treasury Department made certain public pronouncements known as the voluntary disclosure doctrine and because the defendants acted upon them, and further because they were given certain alleged assurances by the then Assistant Collector of Internal Revenue in this District, and because this prosecution is now brought that their rights under the Fifth Amendment would be infringed upon if such documents or information as they turned over to the Government pursuant to this alleged disclosure were used against them in the trial of this case, therefore, the basis of their motion is the voluntary disclosure doctrine itself.

Now, my first point with respect to that doctrine is that the doctrine contemplates a disclosure of a tax evasion in return for which the Government promised im-

munity from prosecution. I refer to the statements of what the policy is which is embodied in the affidavit
20 of Mr. Leon Busby which is attached to the defendants' motion to suppress.

As set forth in that affidavit, it reads as follows:

"May 28, 1945—Former Secretary of the Treasury Morgenthau stated at a press conference that some taxpayers who have failed to declare their full income and pay the tax due may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where said voluntary disclosure is made before investigation is started.

"August 21, 1945—Former Secretary of the Treasury Vinson, as guest contributor to Drew Pearson's column wrote: 'No honest American needs fear this drive against tax evaders. No one is going to jail for an honest mistake in filling out his tax return. Treasury policy even permits the wilful evader to escape prosecution if he repents in time. The Commissioner of Internal Revenue does not recommend
21 criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return or of failure to make a tax return. Monetary penalties may be imposed for delinquency, for negligence and for fraud, but the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officers and simply saying, 'There is something wrong with my return and I want to straighten it out.'"

Then it further says:

"October 15, 1945—the then Commissioner of Internal Revenue released the following statement to the press: The Commissioner said that since June 1 some 30,000 delinquent amended returns had been filed voluntarily, accounting for additional taxes of more than $50,000,000. Mr. Nunan again stressed the Bureau policy of restraining from instituting
22 criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases."

I don't think that is particularly important to my position.

Going to the Wenchel statement of May 14, 1947, which was approximately a little over one year prior to the time—a little less than one year prior to the time they allege they made their disclosure, there was a published statement as follows:

"The law requires the prosecution of the tax evader, and that is what the Department recommends to the Attorney General. There is one important exception to that. The Department has broad, discretionary power long recognized by Congress to determine the policy and procedure for the effective enforcement of the Internal Revenue laws.

"The Department acting under that power does not recommend prosecution of the evader who re-
23 pents in time. There is nothing new in the position that the taxpayer who makes a voluntary disclosure of intentional evasion before investigation has been initiated criminal prosecution will not be recommended.

"The Department has always encouraged voluntary disclosures, and what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the Government.

"Healthy administration of the Internal Revenue laws long ago dictated that policy and I believe its worth is obvious.

"The making of a voluntary disclosure is a simple thing. The taxpayer or his legal agent can go before any official of the Bureau of Internal Revenue or any of its field offices, whether it is a collector, a deputy collector, special agent or any other re-
24 sponsible treasury officer. There is no special form for the disclosure. The simple statement 'that I have made a false tax return and I want to make the government whole' would constitute a complete disclosure. Of course, it is better usually to present an amended return or other written document as evidence of the disclosure. If possible, the disclosure should be accompanied by payment of the tax which is known to be due, but this is not a prerequisite."

Your Honor, my position is that the doctrine contemplated that if a person came in and said, "I have evaded my taxes, I have cheated the government, made a fraud on the government," and made that disclosure timely, he would not be prosecuted. He could have been because what he has just said in effect amounts to a confession, but he will not be since timely he has come in. He came in voluntarily and made the disclosure for the purpose of paying the taxes.

Now, therefore, the voluntary disclosure doctrine contemplated by the former policy was a disclosure of
25 an attempt to defeat and evade taxes. The policy involved a forbearance to prosecute. Prosecution wouldn't be feasible for any conduct not amounting to wilful evasion. If a given disclosure doesn't involve an admission of evasion of taxes, and certainly if it involves, rather, a negativing of evasion, then clearly the alleged disclosure is not only a disclosure, but represents a further fraud if subsequent prosecution demonstrates that there was guilt and that there was guilt of tax evasion.

Now, to contend that the Government offers immunity to a person who will come forward and confess his lack of criminality is to argue or to reduce the doctrine of a voluntary disclosure doctrine to the level of the inane. If it means anything at all, and it has that application, it suggests that perhaps if the innocent do not confess, the Government may prosecute them.

Now, if this alleged disclosure here was a truthful disclosure then these defendants have nothing to fear from the evidence which they gave in the course
26 of the disclosure. Only if it was not a truthful disclosure do they have anything to fear because there is nothing in any of the motions or pleadings or affidavits to indicate that at any time the defendants disclosed that they owed any taxes. As amended, the motion simply alleges they had certain additional gross receipts that were unrecorded and certain additional disbursements that were unrecorded that were deductible, as they contend, and they washed each other out, and they owed no taxes as the result of the transaction.

Now, further, Mr. Busby in his affidavit, or Mr. Cain in his affidavit, in support of the motion to dismiss the indictment in this case stated under oath as follows:

"Affiant further avers that although he and his associates have steadfastly maintained that the defendant corpration owed no tax over and above the sum of $370,638.95, which it paid for the year 1945, or over and above the sum of $457,012.98, which it paid for the year 1946, the activities of the said
27 agents aforesaid were of such embarrassment in the conduct of the business of the corporate defendant and so disruptive to the relations of the corporate defendant with its customers and suppliers that affiant at all times during the said period of four years importuned the said agents to bring the matter to a conclusion, and at all such times expressed the willingness of the corporation to pay such reasonable amount as the said agents might claim to be due."

There is a statement from Mr. Cain that there isn't any tax liability in this case and this affidavit was made this spring, in June or May, or whenever the motion to dismiss was made, and subsequent to the alleged disclosure, and there he says that he and his associates have steadfastly maintained that they don't owe any taxes.

Now, that can't be said to be a disclosure under the doctrine which they have set forth in their motion. Certainly, the Government doesn't contemplate that someone comes in and tells them they don't owe any
28 taxes but there is some omission of offsetting items the Government doesn't contemplate they are going to prosecute them, of course, and there isn't any need for the application of the voluntary disclosure doctrine to that because there isn't any fraud.

Now, however, if someone comes in and makes that statement and subsequently a grand jury charges that there is an attempt to defeat and evade taxes by a certain amount, then depending upon whether there is a verdict of guilty or a finding of guilty by the Court or acquittal, then only will it be determined whether that disclosure in which they profess they owed no taxes is a truthful disclosure or represented a further attempt to mislead and defraud the government.

Now, can it be said that the Government puts a premium or offers a reward for the privilege of being deceived?

Now, the indictment in this case alleges tax evasion. If the defendants owed no taxes, if they are not guilty of tax evasion and at all times operated under the
29 belief they owed no taxes they could possibly not be guilty of tax evasion. To the extent they ever would be guilty of tax evasion perforce that disclosure was false, it couldn't help but be false.

Now, it is contemplated—I would like to make brief reference to the authorities— by the courts that, of course, a disclosure that is made will be full and free and honest; that the taxpayer would not attempt to deceive the government and that he will disclose everything that he knows about his tax liability.

Now, in the case of Centracchio vs. Garrity, in 198 Fed. (2d) 382, decided by the First Circuit United States Court of Appeals for the First District in July 25, 1952, there the contentions made by the taxpayer were quite parallel to those made here, save that the motion to suppress was brought after the case had apparently been referred to the United States Attorney for prosecution, but before he had presented it to the grand jury. They filed a motion to suppress the evidence and to restrain the United States Attorney from presenting the evidence to the grand jury.

30 The court decided the case on the ground that it would not be good policy to restrain the United States Attorney from making the presentations to the grand jury and necessarily therefore didn't decide anything about whether there was any merit to the motion to suppress, but the Court did consider and expressed itself somewhat freely on that question.

The court at page 389 of the opinion, in concluding, said:

> "If it be assumed for the moment that evidence disclosed to the Treasury officials on the faith of the announced voluntary disclosure policy and in compliance with its conditions should be excluded from evidence"—

the court was not conceding that—

> —"in a subsequent criminal trial it would seem that the taxpayer would have to satisfy the court that he had made a voluntary good faith disclosure of all data necessary to a corrected computation of

his income tax deficiencies and that he made such
31 disclosure before investigation was under way."

Now, the contention here was the same, that the use of this evidence would violate the defendants' rights under the Fifth Amendment inasmuch as he went to the agency he told them he was making a disclosure and turned over his documents or gave them testimony or admissions or something of the sort but there, although the court was disposing of it on a different ground, the court said that assuming that on that ground, he could get the evidence suppressed he would have to show that he made a good faith disclosure.

Now, of course, the duty to make a disclosure doesn't cease with the first statement that is made. Here counsel have picked out one of the statements, the term omissions and misstatements from, I believe it was Secretary Vinson's pronouncement. If the taxpayer comes in and says he made omissions and misstatements.

Well, an omission of $50,000 income from your tax return might very well—an omission of that income—might very well make you a tax evader or a misstatement by claiming that you incurred expenses of $100,00 more than you did and deducted them, might also very well
32 make you a tax evader, and counsel for defendants employed those two terms throughout their pleadings rather than to say there was any statement of evasion.

Reading their full context and considering them there cannot be any other construction of the document than that it contemplates a disclosure of tax evasion. It contemplates a situation wherein a man might be prosecuted, not a situation in which he is innocent when the government says under those circumstances if you disclose we will not prosecute you. Here there is no disclosure. There is no disclosure within the meaning of this voluntary disclosure doctrine. There is no disclosure of tax evasion. In fact, there is a complete denial and negativing of any tax evasion.

Now, if that be true, then these people would be given a trial. If it is not true, and they are convicted, the evidence here would be properly against them since their alleged disclosure will have been a further deception to the government. In other words, the case here in-
33 volved the question of whether or not his disclosure represented a disclosure of all of the gross receipts

which were unrecorded, number 1; and, 2, whether the portion of the disclosure that alleged that they had maintained was in fact true, that they did make such payments.

Now, there is no question here involved of a technical question of whether or not such payments are deductible. That is up in the court to be decided now. If they actually made those payments into the black market and if they are not deductible, the Supreme Court holds they are not deductible, certainly nobody can be held responsible for making a mistake concerning that. It is just simply a technical adjustment and they would have to pay their tax. There would be no question of fraud involved in the situation.

Now, I think it is clear, and I do not want to burden the court, but I think it is established that a motion to suppress doesn't necessarily have to be heard prior to trial. The cases are legion where the court has deferred the hearing or a determination of that until the trial.

34 Accordingly, the purpose of filing the motion in advance is to put the court on notice that such a contention will be made in order that he may hear it now if he sees fit and not interrupt the trial into what may be a collateral matter.

In this case not to say there need not be any hearing, but to the extent there need be and when all the evidence is in and the court permits it to go to a jury, that will amount to a determination by the court that there is no bonafide voluntary disclosure as far as his burden is concerned. If the jury finds the defendants guilty, obviously they either did not state fully what their gross receipts were that were unrecorded, or they did not state truthfully that they had made payments to certain people.

Certainly, it would be proper for the government to prove that alleged disclosure was false in that they did not make such payments. It would be proper for the government to prove that the alleged disclosure was false in that it disclosed only a portion of the gross

35 receipts that were unrecorded.

It would be proper for the government to prove that the disclosure was false to the extent that the defendants protested that they owed no taxes, that they

never consciously evaded any taxes. It would be proper on this motion. But to do that would involve a trial of the general issue in this case. The question of whether there was a wilful attempt to defeat and evade is the same as trying a tax case. There would be no difference. There is nothing in the law that requires two trials of this case, but if that kind of evidence were offered by the government on this motion to suppress, certainly I assume the court would receive it if there was the contention that the disclosure instead of being a case where the Government had misrepresented and deceived the defendants, a case where the defendants had misled and deceived the government agents.

Now, I make this argument on the face of the pleadings. I don't intend by it to admit other than arguendo that any such assurances were given by the defendants.

My information is to the contrary as are alleged by
36 the defendants, but I am assuming arguendo that even had they been, certainly at that time he wouldn't have any reason to feel that there ought to be a prosecution when a taxpayer comes in and says, "I had additional receipts and I had additional deductions and they washed each other out." It would be simply a civil matter, a question where the deductions were allowable or not. No question of fraud. Of course not.

On any date a man may walk into a treasury official and he may say, "I have received certain income, but I have had certain deductions I didn't claim."

How anybody could say the disclosure was sufficient, I don't know, since obviously he could only be taking what they said to him. If it subsequently turned out it wasn't true, it couldn't be contended there was a disclosure there. So I say that what is contemplated by the doctrine is a disclosure of tax evasion.

The determination with respect to what that disclosure was must abide by the verdict of the jury in this case. If they are found guilty it means there was no honest disclosure. If they are found not guilty, it
37 means the evidence was certainly entitled to admission.

I think that that represents my position, your Honor, and for those reasons, in the interest of economy, and in the interest of not wasting time to try out an issue that

is immaterial at this point, I suggest and request that the court overrule and deny and dismiss the motion to suppress on the grounds that it does not state facts entitling the defendant to the relief prayed, but the issue as to whether or not there was any voluntary disclosure in this case must abide the final determination of the court. There was no statement or admission of tax evasion. It represents an attempt to hold with the hounds and to run with the hare, and for that reason I suggest that the request for the motion be overruled, denied and dismissed.

By the Court: Well, I will hear the evidence.

By Mr. O'Brien: If I may suggest, if your Honor please, we would like to take time for the court to look at these documents which are here to make its determination—

By the Court: You can go forward with your
38 proof.

By Mr. O'Brien: I think, if the Court please, although we were denied, for reasons assigned by the court, which I think sound, the right to see them in advance of trial, I believe that at this time we should—we are entitled to have the Court make its determination and to be put in possession of those if any that we are to have so that I may determine the order and method of my proof with those available.

39 By the Court: Well, I take that you have other proof and are going to call witnesses in addition to any documentary proof that the records of the government may furnish, and I see no reason why you should not go forward with your proof, and this noon hour I will look over those documents and consider whether or not they should be made available to you.

By Mr. O'Brien: Very well, Judge.

In that event, may we have a recess of five minutes?

By the Court: Surely.

(Whereupon a short recess was taken after which the following proceedings ensued, to-wit:—)

By the Court: Proceed, Gentlemen.

By Mr. O'Brien: Mr. Busby, please.

40 LEON J. BUSBY, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your full name, Mr. Busby?
A. Leon J. Busby.
Q. And your profession?
A. Certified Public Accountant.
Q. For how long have you been in that profession?
A. About thirty years.
Q. What is your firm name?
A. Busby and Oury.
Q. And your offices are here in Chicago?
A. 120 South LaSalle, Chicago, Illinois.
Q. When you say Certified Public Accountant, you mean you are such under the laws of the State of Illinois?
A. That is correct.
Q. Did you or your firm do the accounting work, the outside accounting work of the Shotwell Manufacturing Company?
41 A. Yes, sir.
Q. For how long was that true?
A. Since about 1942.
Q. That was continuously since 1942?
A. Yes.
Q. Can you state briefly the nature of the service, of that accounting service, over the period you mentioned?
A. We did general auditing work for the purpose of certifying financial statements used in credit channels. We prepared income tax returns. We installed efficiency systems, and other special claims and documents in connection with wage stabilization and salary stabilization, and so forth. General Accounting nature.
Q. During your work for the firm, did you ever hear of David G. Lubben?
A. Yes.
Q. Or his companies, Eatsum Food Products Company, General Confections Company and Reserve Trading Company?
A. Yes, sir.

Q. Did you have occasion to make a trip to New York to investigate the financial position of General Confections Company in the year 1948?

42 A. Yes.

Q. Do you know when it was that you went?

A. The middle of January. I would say between the 7th and the 11th of January.

Q. Did you check your records at my request to verify that?

A. Yes, to the best I could do.

Q. At whose direction or request did you go?

A. Mr. Byron Cain, President of Shotwell Manufacturing Company.

Q. Did he say the purpose for which he wanted that determination made?

A. Yes.

Q. What, if anything, did he say about that?

A. He said Mr. Lubben desired to make a $50,000 loan from the Shotwell Manufacturing Company for the General Confections Company, and he desired that I accompany one of the Shotwell officers, Mr. Stanley Graflund, to Mr. Lubben's plant, the General Confections Company Plant, and determine whether they were financially secure in a manner that would justify this loan.

Q. And was it from January 7th to January 11th that you went and spent the time to that end?

43 A. Yes.

Q. Did you make a check of the financial position, condition of the company?

A. Yes, we made a cursory survey, financial check.

Q. And did you or did you not conclude that the company's financial position justified such a loan?

A. We determined that it did not justify such a loan.

Q. Did you, sir, report to Mr. Cain?

A. Yes, I did.

Q. To anyone else?

A. Mr. Cain and Mr. Huebner, Mr. Graflund, the officers of the Shotwell Manufacturing Company in general.

Q. At the time that you left or departed for that examination, did you know anything about overceiling or premium, so-called premium receipts or payments that Shotwell Manufacturing Company had received or made?

A. No, I did not know of any of them.

Q. Did you actively, were you active in the auditing work done for the corporation during the—

A. I supervised it.

Q. During the period you mentioned.

44 And during the course of that work, and of that supervision, had you or had you not become familiar with the situation that I have mentioned as to such payments prior to this visit?

A. I had not.

Q. Sir?

A. I had not.

Q. Did you then become familiar with the fact?

A. During this trip I was appraised of it.

Q. Who first appraised you of that condition?

A. Mr. Stanley Graflund.

By the Court: I didn't get the name?

By the Witness: Stanley Graflund.

By Mr. O'Brien: G-r-a-f-l-u-n-d?

By the Witness: Correct.

By Mr. O'Brien:

Q. What did you do, if anything, on your return to Chicago on January 11th?

A. I called Mr. Cain and made an appointment to report our findings and that is what I did immediately.

Q. Did you make and keep such appointment?

A. Yes.

Q. When?

45 A. Sunday, January 11th.

Q. Where?

A. At his home.

Q. Who else, if anybody, was present?

A. I believe Mr. Harold E. Sullivan was there.

Q. What, if anything, did you say about the advisability of making such a loan?

A. I told them that the corporation's housekeeping was poor, that the $50,000 loan wasn't nearly enough to do any good for them. Further, that the organization of the company was such that it didn't justify loaning them any money and that they should not make it.

Q. What, if anything, did you say to them concerning the premium payment situation of which Graflund had apprised you?

A. Well, that was one of the elements in determining whether or not the company was financially sound. I told them that Mr. Graflund had reported to me that the corporation had a contingent, if not a real liability for additional taxes and I discussed with Mr. Graflund the nature of this contingent or real liability, and he told me that it was the collection of overceiling prices for candy sold, and this particular conversation ran directly toward General Confections, but it followed
46 that the Shotwell Manufacturing Company was a part of the deal, and he told me that he didn't know how much it was.

By the Court: Who told you?

By the Witness: Mr. Graflund. He didn't know how much the overceilings were, and also that he thought the money had been paid out by Shotwell.

By Mr. O'Brien:

Q. If I may interrupt, Mr. Busby, I don't think you made it clear. Who was Mr. Graflund?

A. Mr. Graflund was the Comptroller, I believe, and Vice President of the Shotwell Manufacturing Company at that time.

Q. I am referring to your conversation on January 11th with Messrs. Sullivan and Cain. What, if anything, did you say to them about the premium payment situation which Mr. Graflund had told you about?

A. Well, this is what I was telling them.

Q. I am sorry.

A. And I told them that I had learned about this overceiling matter and while it may not be that Shotwell was in serious position, they should file amended
47 returns to get the matter on record, and we discussed it for a while.

Q. Well, I just wanted to know what was said about the premium payments. Have you finished or stated your recollection of what was said on that?

A. Yes. Well, the crux of it was that I recommended very earnestly that they file amended returns to get on record.

Q. Did you ask them if there had been overceiling payments?

A. Oh, yes, they readily admitted it.

Q. Now, what, if anything, was then discussed be-

tween you and those officers of the corporation concerning the disclosure of that situation to the Bureau?

A. Well, they wanted to know, they—

Q. What is it that you talked about?

A. These people, Mr. Cain, Mr. Sullivan, in particular, wanted to know the procedure and whether or not it would be in order to discuss it with the Department, and I told them that I thought it would, then even if they made the disclosure which was in my opinion the thing to do and customary, there probably would be nothing to it except they would clear The Shotwell
48 of omissions from the tax returns.

Q. Did you at that time or during your subsequent conversations with them call their attention to any of the public statements of that policy?

A. Well, only to direct their attention that it was a common thing to make disclosures to the Department and in so doing I didn't see that there was any serious consequences, that there wouldn't be any critical attitude by the Department towards them.

Q. Have you fully stated what you said about that as near as you can remember?

A. Well, in essence, yes. We discussed it for quite some time with respect to immunity and how we should go and who to talk to.

By Mr. Ryan: I object to that and move it be stricken out unless he can relate conversations. As a matter of fact, there is some question of materiality.

By the Court: Sustained.

By Mr. O'Brien:

Q. Mr. Busby, if I may suggest, you must tell what the conversations were. You are not permitted to characterize them.
49 First, let me ask you, over how long a period of time did you discuss the subject of coming forward or making that disclosure?

A. Well, we started on this one day, Sunday, and I would say we discussed it for a couple of weeks off and on.

Q. And in that discussion did you and they consider who might be selected to do that?

A. Well, at the moment the thought was that the Collector's Office was—

By Mr. Ryan: Object.

By Mr. O'Brien.

Q. Who was to communicate with the proper office, whatever it was?

A. They gave me the assignment to communicate with the Department.

Q. That I know, but my question is who, not who, but was there any discussion before you got the assignment as to who might go in?

By Mr. Ryan: I will object on the ground it isn't material who would go in. What happened is demonstrable.

By the Court: He may state the conversation in that regard.

50 By the Witness:

A. Well, I was selected to go in, if that is the answer.

By Mr. O'Brien:

Q. Mr. Busby, if you will just listen to my questions. You have already said that. Did you discuss the question as to whether a lawyer should go in?

A. Yes, the representation was discussed.

Q. I am trying to get, and the Court is interested in having the conversation.

Now, what, if any, lawyers were discussed as people who might go in?

A. We discussed Mr. Dan Taylor, George Bowden, William Quely—

By Mr. Ryan: I think I will object to what lawyers were discussed. If there is a conversation and it is material if he relates it, I think it may be admissible, but not just characterize a discussion.

By the Court: Yes, I assume if you want to go into that, you will have to have him relate the conversation.

By Mr. O'Brien:

Q. What was said about it?

51 A. We were discussing, who to get for a representative of the corporation and whether or not the corporation needed legal counsel. A part of this discussion, of course, included these names.

Q. And it was concluded that you would go in?

A. At the moment it was concluded that I would go in and explore the situation.

Q. What, if anything, was said about the time of going in commencing with your conversations of January 11th?

A. After a week or ten days it was decided I would go in immediately and find out what the procedure would be.

Q. What, if anything, did you do about that?

A. I went over to the Collector's Office and talked to the Chief Deputy Collector, Mr. Earnest Sauber. I had a little acquaintance with him from other tax matters and asked him whether or not it would be proper to file amended returns for a tax client that I had that needed—

By Mr. Ryan: I will object unless he can state the conversation that he had with Mr. Sauber. What he said, what Mr. Sauber said, but no characterization.

52 By the Witness: This is a conversation, sir.

By the Court: Tell what you said and relate what Mr. Sauber said in return, if anything.

By the Witness:

A. I asked him if it would be proper to file amended returns. He said in his judgment he would not do so, and that at that time I don't believe—at that time the name of the taxpayer was not disclosed. We discussed the question of disclosure and whether or not there would be—

By Mr. Ryan: I will object to the characterization —"we discussed the question of disclosure."

By Mr. O'Brien: Mr. Busby, you have to tell what you said and what he said.

By Mr. O'Brien:

Q. When you went in to see Mr. Sauber, what did you say to him?

A. I said, "I have a client that want to clean up some omissions from his tax return."

Q. Did you tell him the nature of the omissions?

A. Yes, I discussed the nature of the omissions.

Q. Now, don't say you discussed it. Tell what you said.

A. I told him the omissions.

53 Q. You must say what you said and what he said. What did you say?

A. I told him that the client had had some black market transactions with one of its customers and that they had shipped candy to this customer who had in turn sold the candy to his customers at prices over the ceiling; had collected for this candy in cash and had re-

mitted a part of this cash to The Shotwell Company; that Shotwell had paid this money out to sources for raw materials and as such the transactions to a large extent washed each other. However, we wanted to go into the matter and have the agent come out and examine the situation and see what the real condition was and if there was any net amount due to the Government, we wanted to pay it.

Q. Was the mention of Shotwell and of the other companies made in your first visit you made to Sauber?

A. No, it was not.

Q. When you say Shotwell, are you referring to a subsequent visit?

A. Yes.

Q. Is your conversation on the occasion of the
54 first visit as you stated it correct with the exception of your naming of the parties?

A. That is correct.

Q. What, if anything, was said on that occasion between you and Mr. Sauber relative to the disclosure policy and the immunity of your client if it came forward?

A. Mr. Sauber advised me that if the disclosure is timely and the facts that I had related to him were correct, he saw no reason why the immunity policy of the Bureau should not be applied in this particular matter.

Q. Immunity from criminal prosecution?

A. From criminal prosecution.

Q. What, if anything, was said at that time about the mode of determining the amount as to whether you were to file amended returns or the Government would make an inspection, was anything said at that time?

A. Not at the first trip.

Q. Have you covered what you recall of your first visit?

A. Yes.

Q. Following that, did you report to the individual defendants here?

55 A. Yes.

Q. What did you say to them?

By Mr. Ryan: I will object unless it is established who he is talking to and who was present.

By Mr. O'Brien: I thought I covered that—the individual defendants.

By Mr. Ryan: I don't know whether they were all there.

By Mr. O'Brien:

Q. Were the individual defendants, Cain, Huebner and Sullivan present?

A. They were all present.

Q. How long following your talk with Mr. Sauber was it before you reported to them?

A. The next day.

Q. What did you tell them?

A. I told them that Mr. Sauber had recommended that one of the officers come forward and disclose the identity of the taxpayer and that if this were done, they should proceed to determine as nearly as possible how much was involved, and he saw no reason why there should be any trouble with respect to criminal prosecution in case of timely disclosure.

56 By Mr. Ryan: I didn't get that—cases, what?

By the Witness:

A. (Continuing) In case the officers of the company came in in time and it was a timely disclosure.

By Mr. O'Brien:

Q. May I ask, Mr. Busby, did he say that the name of the company was to be disclosed, is that it?

A. Oh, yes.

Q. Did he say that that had to be done by an officer of the company?

A. No, or a representative.

Q. You see, I want to keep the record straight now. Were you correct or incorrect when you said that he said that an officer would have to come in and give the name of the company? Did Sauber ever say that?

A. No—an officer or the company's representative.

Q. Did you tell them what Sauber had said about there being no need for amended returns?

A. Yes.

Q. What did they tell you, these officers?

A. They told me—

Q. Did they finally tell you to go back?

57 A. Yes, they told me to go back and disclose the name of the taxpayer.

Q. Let me interrupt. Was that conversation at a later date?

A. I don't recall. It was all within a very few days there.

Q. After you had first been in?

A. Yes, it was a very short time.

Q. Did they authorize you to disclose the name of the company?

A. Yes, they did.

Q. And to do whatever was necessary for a full disclosure?

A. Yes.

Q. Did you go back?

A. Yes.

Q. Who did you see?

By Mr. Ryan: I will object to the statement "whatever was necessary for a full disclosure" unless he relates the conversation and tells who says that.

By the Court: Yes.

By Mr. Ryan: If it was said.

58 By Mr. O'Brien:

Q. Who said it, Mr. Busby?

A. Said what?

Q. Who said that you were to go back and you were authorized?

A. Mr. Byron Cain.

Q. The President of the Company?

A. President of The Shotwell Manufacturing Company.

By Mr. Ryan: Can we have what was said by him? What did he say?

By the Witness: He said, "Busby, you go in and talk to the Collector's Office and disclose the whole affairs, whole details as I have outlined it to you and get their instructions in a little more specifically as to how we should proceed."

By Mr. O'Brien:

Q. Did you go back?

A. Yes.

Q. Within the days that you mentioned?

A. Within two or three days. Maybe the next day. I can't recall exactly.

Q. Did you go to the same place?

A. Yes.

Q. Is that here in this building?

59 A. Yes.

Q. And you talked to Mr. Sauber?

A. That is correct.

Q. Were you accompanied or were you alone?

A. I believe on the first appointment I was alone.

Q. By the first appointment, do you mean the one following?

A. The second appointment.

Q. Sir?

A. The second appointment.

Q. Now, what did you then say to Mr. Sauber and what did he say to you?

A. I asked him if we should file amended returns. He said—he asked me if I knew how much was involved, and I told him no, and further we had no specific records from which we could determine. He suggested that we go back and gather such information as we could from any memorandum or memory and summarize it on a form, and in the meanwhile he would contact the office of the agent in charge and have an auditor come out and work with us for the purpose of substantiating or getting together the true facts as nearly as could be accomplished.

Q. Did he at that time in your presence communi-

60 cate with the agent?

A. No.

Q. He said he would do that?

A. Yes.

Q. And he said that the agent would send, the agent in charge, was that Mr. Wright's office?

A. That is Mr. Wright's office.

Q. The same Mr. Wright who was here this morning?

A. That is correct.

Q. That he would send his agent out to—I have forgotten your words.

A. To verify the summarization that we could get together, that we did get together, or to work with us in compiling the summary.

Q. Did he say anything about the agents inspecting the books and the records to arrive at the amount?

A. Oh, yes. The agent was to cover an examination of the books which would include just about a routine audit, verification of the tax returns; that he would examine the books and any other data that we had to submit to him.

Q. Have you related as much of your conversation on the second visit that you remember?

A. Yes, I think I have. We had several visits. I don't recall.

61 Q. May I ask you then, did you at that time tell Mr. Sauber—

By Mr. Ryan: He may direct his attention to subjects but not lead him by saying did he tell him such and such.

By the Court: Yes, sustained.

By Mr. O'Brien:

Q. What, if anything, was then said about the identity of the taxpayers?

A. Well, I identified the taxpayer.

Q. You didn't tell us that, so I have to ask you. What did you tell him?

A. I told him it was The Shotwell Manufacturing Company.

Q. Chicago?

A. Chicago, Illinois.

Q. Did you also tell him the names—

By Mr. Ryan: Object.

By Mr. O'Brien:

Q. What, if anything, was said about the names of the officers?

A. Yes, the names of the officers were discussed—Mr. Byron Cain, the President, Mr. Harold Sullivan, Executive Vice-President, Frank Huebner, Vice President. I discussed Mr. Graflund.

62 Q. Now, did you again see Mr. Sauber?

A. Yes.

Q. About the same subject matter?

A. Yes, sir.

Q. On this next occasion were you alone or were you in company?

A. I was accompanied.

Q. By whom?

A. By Mr. Cain, President of Shotwell.

Q. When was that?

A. I can't recall exactly. I would say some time in February, around the first of February; maybe the latter part of January.

Q. Are you speaking now of your third visit, your visit with Mr. Cain?

A. I can't say which one it was. There were several of them.

Q. I am asking you about the one at which Mr. Cain was first present?

A. I would call that the third visit, yes.

Q. Let me ask you this: Did Mr. Cain accompany you more than once?

A. Yes.

Q. When was the first time as near as you can
63 place it?

A. That is what I was guessing.

Q. I don't want a guess.

A. The latter part of January or February.

Q. Your best recollection?

A. I would say the middle of February, somewhere in there. I can't say positively.

Q. Well, do you remember when it was that he accompanied you on the second visit, that is, the second time that he went in?

A. We were in there in March, around March 1st or 2nd.

Q. Is that your best recollection?

A. Sir, we were in there—

Q. I just want your best recollection.

A. I can't pin point it. It is somewhere between January I was in the office frequently. Mr. Cain was with me two or three times.

Q. Well, take the occasion of Mr. Cain's first visit, was there conversation at that time with Mr. Sauber?

A. Yes.

Q. Was there anyone present other than you, Cain and Sauber?

64 A. Not at the first visit.

Q. On the occasion of the second visit was anyone present other than the same folks?

A. No, I believe not. No.

Q. On the first visit at which Cain accompanied you what, if anything, did Cain say to Sauber?

A. He related the Shotwell matter just about as I had related—

By Mr. Ryan: I am going to object.

By Mr. O'Brien:

Q. Mr. Busby, please. You should tell us the conversation.

A. He told Mr. Sauber that he was the President of The Shotwell Manufacturing Company and that Shotwell had some black market transactions with one of its customers, Mr. Lubben, and that he understood that the Shotwell Company could come forward and make a disclosure of these transactions without fear of prosecution and that if there was any tax due, he wanted to pay it.

Q. What, if anything, was said about the question of time? Was anything said as to whether Shotwell was under investigation?

A. I can't recall at that meeting whether anything was said or not.

65 Q. While I am thinking of that, at your next meeting at which Cain was also present, was anything said about that?

A. Yes.

Q. What was said?

A. Mr. Sauber told Mr. Cain that he had inquired of the Internal Revenue Agent in charge about the tax returns filed by The Shotwell Manufacturing Company and that he had learned they were not under investigation.

Q. Going back to your conversation on the occasion of Mr. Cain's first visit with Mr. Sauber, what, if anything, did Mr. Sauber tell Mr. Cain about the future visit of an auditor from the office of the agent in charge?

A. He told Mr. Cain that he had contacted Mr. Wright's office and that there would be a man out to work with me in the compilation and verification of this disclosure, and he said he would do that as soon as he could find it expedient, that the man would be out as soon as he could get around to it.

Q. Did Sauber say anything at that time about the premium payments for acquisition of raw materials?

66 Was anything said about that that you can remember?

A. Well, he said the payments as he understood them, they would not be deductible as an offset against these premium collections.

Q. Who said that?

A. Mr. Sauber, and cited some rulings at the time.

Q. What, if anything, was said by Cain as to whether Sauber wanted any papers at that time?

A. He asked him if he wanted to see a rough sum-

mary of the figures that had been gotten together. Mr. Sauber said he did not, that the agent would go into that matter when he got out there.

Q. Now, would you describe a little more fully to the Court what you mean by this summary or figures—I will withdraw that for a minute because I want to ask you this: Following those conversations, did any officer of the company ask you to assist in the assembling of the data necessary to make such an estimate?

A. Yes, Mr. Cain, President of the Taxpayer, asked us to proceed following the conference with Mr. Sauber and get together the information the best we knew how and that the officers or anyone that was in the organization, that is, The Shotwell Organization, who knew
67 anything about it would be made available to us since the company had no records or at best very scattering records from which these facts could be obtained.

Q. Did the company have, except for the premium payments a complete set of records?

A. Oh, yes.

Q. And supporting papers?

A. I referred to the records pertaining to the premium payments.

Q. Incidentally, was that work which you were told to do within your current service there or was this special?

A. No, this was a special assignment. We were assigned specifically to the agent to work with the agents on this specific assignment.

Q. And was it specially billed for?

A. Yes.

Q. Who at the company did you see for the purpose of going forward with that assignment?

A. Well, the principal man was Mr. Stanley Graflund.

Q. Mrs. Morrill, too?

A. Mrs. Morrill, too.

68 Q. Who is Mrs. Morrill?

A. She is the office manager and in charge of the accounts.

Q. Did you and members of your staff commence that work and stay with it until it was finished?

A. I was on vacation for a couple of weeks. We commenced it about the first of April. We had to get through with the busy income tax season.

Q. I just wanted to know if it was commenced?
A. It was commenced, yes.
Q. And finished?
A. Yes.
Q. By you and members of your staff?
A. Yes.
Q. Together with the different people whose service at the company you needed?
A. Yes.
Q. Who are some of the people at the company who helped assemble the data required in this work?
A. Mr. Stanley Graflund, Mr. Howard Roeser, Mrs. Morrill, Gladys Morrill, and Mr. Huebner worked on it, Mr. Cain. Those are the principal ones. A few clerks that I can't remember, also.
Q. For that purpose were all of the books and records, papers of the corporation made available?
69 A. Oh, yes.
Q. Will you tell the Court, how you went about the task of assembling the data needed.
A. Mr. Cain told me—
Q. Briefly, please, Mr. Busby, for my purpose, at least.
A. (Continuing)—told me that the only customer or anyone else with whom they had black market transactions was Mr. Lubben or General Confections Company or Eatsum, all one, from my standpoint.
Q. All Lubben companies?
A. All Lubben controlled. I suggested if he had billed Mr. Lubben for all of these transactions, at the regular ceiling prices, he must have copies of the sales invoices on trial and this would give an overall picture of all possible overceiling items that could be in question, and they had these invoices.

We recapped them on a ten-column sheet of paper, several sheets, and gave a description of the invoice, the amount, the date, the commodity, the weight, and the amount, totaled them, so we could determine just how much was involved on this account.

Q. Was that for the purpose of determining the
70 maximum?
A. That was for the purpose of determining the maximum.

By Mr. Ryan: Maximum what?
By the Witness: Maximum amount.
By Mr. O'Brien: Maximum amount.
By the Witness: Maximum amount of items and amount to be billed.
By Mr. O'Brien:
Q. That could be involved?
A. That could be involved. After we got this so-called control, it was a matter of memory from Mr. Huebner as to how much the overceiling prices amounted to, that is, per unit, per pound. We had the pounds, poundage, which we could take from the invoice.
Q. May I interpose to ask this: From time to time over the period was there some variation in the going rates of overages?
A. Not to my knowledge.
Q. You don't recall whether there was or not?
A. No. As far as I know it was usually the same on the same commodity.
Q. At any rate, did you take the highest overage as to each commodity that was called to your attention?
71
A. Yes.
Q. And what did you do?
A. After pricing each item as listed on this paper at the poundage rate, an extension was made to show the maximum amount of overage that could be involved.
Q. And was that applied to all of the items without prior determination as to whether there was or wasn't an overage in that particular case?
A. That is right.
Q. And you got sheets together to show this result and all of the supporting invoices and papers?
A. That is correct.
Q. What else was done in this regard?
A. After determining the overall amount of premium collections, we attempted to verify our computation which was based on these invoices and the best recollection of those that were helping us by outside sources, where such sources were available.
Q. Now, if I can interrupt a minute, I forgot, in that part of the process which involved the communication of rates and data and estimates to be super-imposed on these invoice items, did you get that information from the officers of the company?
72

A. Yes, Mr. Graflund.

Q. How about Mr. Cain?

A. Yes, Mr. Cain worked along with us, but he didn't have custody of the records.

Q. No, no, I am not talking about the records, Mr. Busby. I am talking about what was in their minds.

A. He furnished information.

By Mr. Ryan: I will object. I don't think it is particularly important how he gathered the information, from what source. If he wants to prove they tendered certain information to the Government, certain books and records, documents, summaries, that may be material, but how they went about computing them, I don't know whether that is relevant.

By the Court: I suppose it may be relevant who furnished it.

By the Witness: Mr. Cain, Mr. Huebner.

By Mr. O'Brien:

Q. Mr. Sullivan?

A. Mr. Sullivan.

73 Q. Mr. Graflund?

A. Mr. Graflund. Those were the principal officers that furnished the information.

Q. As a matter of fact; they are the only officers—how about Roeser, was he an officer?

A. If he was an officer, he furnished some of the information.

Q. Outside of those people?

A. Mrs. Morrill. I don't know if she was an officer at that time.

Q. Did anyone have information other than them at that time?

A. That is all I remember at the time.

Q. You started to say that you then went to any available outside sources to make such further checks as occurred to you?

A. Yes, that is correct.

Q. As the auditor?

A. That is correct.

Q. In conversations which you had with these folks and the assembling of the papers, did they tell you of the dealings with Lubben and his companies?

A. Yes.

Q. No one kept that fact from you?

74 A. No.

Q. Did they also tell you—

By Mr. Ryan: Objection.

By Mr. O'Brien: Withdraw it.

By Mr. O'Brien:

Q. Was there any mention by them of the shipments of un-invoiced merchandise?

A. Yes.

Q. And were such items as far as you and they could ascertain them incorporated in your figures?

A. Yes.

By Mr. Ryan: Objection. There is no way he can know to what extent they could ascertain them. I move that be stricken.

By the Court: When you say "they", I don't know to whom you are referring.

By Mr. O'Brien: I mean the people working with him, if your Honor please.

By Mr. Ryan: I think that that should be stricken out, the extent somebody else could ascertain them, since he obviously couldn't know that.

By the Court: He may state as far as he knows who furnished the information.

75 By the Witness:

A. I inquired of these people.

By the Court: What people?

By the Witness: The officers that were assisting me in preparing this disclosure and they told me that they furnished all the information that they knew of.

By Mr. Ryan: I move that all of that information be stricken out.

By the Court: It may be stricken out.

By Mr. O'Brien:

Q. We don't know who you mean. Which officers?

A. Mr. Cain, Mr. Sullivan, Mr. Graflund, Mr. Roeser, Mrs. Morrill, Mr. Huebner.

By Mr. Ryan: Same objection unless one person said it. If everybody said it at a different time that is something else.

By the Witness:

A. At different times during the collection of the summary of the information.

By Mr. Ryan: I think we should have if Mr. Sullivan, Mr. Cain, Mr. Graflund said something with respect to what they had furnished and to what extent they furnished information, he ought to say what each of
76 them said.

By the Court: Sustained.

By Mr. Ryan: Move what he testified to be stricken out?

By the Court: It may be stricken.

By Mr. O'Brien: I think that is too broad and general, if the Court please. There are many things he said. I would like to connect it up rather than to have such a general striking if I might, subject to your Honor's striking it if I fail to do that.

By Mr. O'Brien:

Q. Did you ask each of those officers about uninvoiced shipments?

A. Yes.

Q. What did you say?

By Mr. Ryan: Well, —

By Mr. O'Brien:

Q. What did you say on the occasion of asking each one of them during the course of your special assignment?

By Mr. Ryan: I will have to object unless he can give a conversation with an individual, otherwise, I have no way of testing.

77 By the Court: I don't know of any other way to go at it.

By Mr. O'Brien:

Q. Did you have a conversation with Mr. Cain about it?

A. Yes, I did.

Q. What did you say to him and what did he say to you?

By Mr. Ryan: And when was the conversation?

By the Witness:

A. During the summary—during the compilation of the figures that went into the summary somewhere between June 1st and—I would say around June 12th, the 12th or 15th, I asked him whether or not there were any other unbilled shipments that he knew about and he said no, there were not, that he has given me and directed Mr. Graflund to give me all of the unbilled shipments that he knew about.

Q. About the same time did you have a conversation with Mr. Graflund?

A. Yes, Graflund was sitting with me.

Q. What did Graflund say?

A. He said, "I have given you all that I have any knowledge of."

Q. Now, going on with the paper itself, what out-
78 side checks, checks I believe you called them, did you make?

A. We found among Shotwell's—The Shotwell Manufacturing Company's records some papers that Lubben had sent in covering these overceiling items and we were able to compare Lubben's figures with the independent computation that we had made.

Q. Did you give consideration to that in arriving at your ultimate decision?

A. Yes. In many instances the figures were identical and it made us feel that our computations were correct.

Q. That is your computations working from the invoices?

A. Invoices.

Q. And applying those maximum rates?

A. Unit rates.

Q. To all of the invoices.

Did the office of the agent in charge send an agent out to the premises?

A. Yes.

Q. Who was he?

A. Mr. Joe Lima.

Q. About when was it that you recall that he
79 arrived?

A. I would say some time in July of 1948.

Q. After his arrival there at that time, did you talk to him?

A. Yes.

Q. What, if anything, was said to him by you as to what you had been doing in the interim?

A. I explained to him, I handed him a copy of this tentative computation and explained to him how it was arrived at and told him what it was.

Q. Did you inquire of him the occasion for his visit?

A. Yes.

Q. What did you say and what did he say?

A. He started on his examination in the regular routine manner and I told him that there was something specific that we ought to go into first and he said, "Yes, I know about it," and he said, "What have you got on it?"

With that, I handed him the paper and he proceeded to make his own investigation.

Q. Will you pick out of these papers, Mr. Busby, the one which you so handed to Mr. Lima so that I can have the reporter identify it?

A. This is the first batch of papers that I handed
80 to him, the one on the top in particular. I believe it was in typewritten form, however.

By Mr. O'Brien: Will the reporter mark this set of papers consisting of six sheets, Defendants' Exhibit 1 for identification?

(Documents so marked.)

By Mr. O'Brien: If the Court please, the instrument marked Defendants' Exhibit 1 as I hold it here is a set of photostats which we made or had made from documents submitted through Mr. Ryan and if this is one of such documents, I would like to offer it without further preliminary.

By Mr. Ryan: Do I understand correctly, to save time, that all of these documents that are now submitted as Defendants' Exhibit 1, that the witness has testified that he gave the originals of all of those documents to Agent Lima?

By Mr. O'Brien: Just this one.

By Mr. Ryan: Just the one on top?

By Mr. O'Brien: Yes.

By Mr. Ryan: Well, I haven't any objections to the introduction of the first sheet on the testimony of
81 this witness which he testified he gave to the agent. But as to the rest at this time, yes, I would object to it.

By Mr. O'Brien: I am not asking about that. I just want to know that this is a photostat of papers that you made available to me.

By Mr. Ryan: I will concede that. If you say that is so, I will concede it.

By the Court: Gentlemen, I think it is about adjournment time.

How about these documents?

By Mr. Ryan: We have an awful lot of them. They have come from the directors offices.

By the Court: Have you looked them over at all?

By Mr. Ryan: I haven't had an opportunity.

By the Court: Look them over and it is very possible that some of these documents you will not have any objections to.

By Mr. Ryan: It is doubtless that some I will have no objection to, cards affecting the assignment of return for examination, I propose to put them in myself. I have no objection, but much of the other material is not evi-
dentiary. It is work product. It fixes no time
82 within which anything happened. It is narrative and
I have no objection with respect to that, but I don't know. I haven't, as I said, had any opportunity to go through all of these. I assume that there are certain things, but I have to tender them under the instructions received from the Treasury Department, I have to tender them to the Court and the Court must make a determination. I am not impowered to offer them to the defendant.

By the Court: Very well, but I take it from what you say that as to some of them you assume there will be no objection on the part of the Government as to their relevancy?

By Mr. Ryan: That is correct. Those are those cards reflecting the assignment dates of returns of examination.

By the Court: Why don't you look over all the documents and determine which documents you have no objection to and to those documents that you think are not evidentiary or not admissible for any reason and re-
quires the perusal of the Court before it is turned
83 over to the defendant, I will have to assume that
burden then.

By Mr. Ryan: Let me say I can do this: I can go over and I can pick out certain things which if your Honor turns them over to the defense I won't say that they are not evidentiary, but I don't have the discretion imposed in me to designate any documents for turnover.

By the Court: All I want you to do is to turn over to me the documents you recognize as being evidentiary or reasonably so, and I will take the burden of turning them over to Mr. O'Brien if I deem they should be.

By Mr. Ryan: All right.

By the Court: And if those you think are not evidentiary or not admissible for any reason, then I assume I will have to examine those and determine whether they should be turned over to Mr. O'Brien.

By Mr. Ryan: I will undertake to separate those documents.

By the Court: I thought you might simply file that.

By Mr. Ryan: I will undertake that, and I will do as much as I can. There is quite a lot of them, Judge.

84 I can't guarantee how soon I will finish. I will start.

By the Court: We will adjourn until two o'clock.

(Whereupon a recess herein was taken until 2:00 o'clock p.m. of the same day, Wednesday, November 12, 1952.)

85

* * (Caption—No. 52 CR 143) * *

Chicago, Illinois,
November 12, 1952,
2:55 o'clock p.m.

Met pursuant to recess.

Present:

Mr. Ryan
Mr. O'Brien
Mr. Hess
And other Counsel.

And thereupon the following further proceedings were had herein:

By the Clerk: 52 CR 143. United States of America *v.* Shotwell Manufacturing Company. Defendant's motion to suppress certain evidence.

By the Court: Proceed, Gentlemen.

LEON J. BUSBY, resumed the stand, having been previously duly sworn, was examined and testified further as follows:

Direct Examination (Ctd.).

By Mr. O'Brien: If the Court please, is there any-
86 thing at this time on the documents?

By Mr. Ryan: I have separated these, your Honor. If your Honor turns them over I won't make any objection on the grounds that they are not evidentiary.

By the Court: You have no objection on the ground they are not evidentiary?

By Mr. Ryan: That is right.

By the Court: I assume there is a reasonable probability they are evidentiary.

By Mr. Ryan: I think there is.

By the Court: All right, turn them over.

(Mr. Ryan handed documents to Mr. O'Brien.)

By Mr. O'Brien: Exactly what do you think are not?

By Mr. Ryan: I will make the statement—reports of Agents, narrative reports, statements taken from witnesses with respect to possible witnesses I have not considered as evidentiary. Anything of a narrative nature.

Now, these that I have culled out reflect certain
87 things that took place, such as the assignment of returns, request for information or returns which would have some evidentiary significance for this disclosure—the beginning of both the New York investigation, the assignment of returns of the Shotwell case. This includes the date of the assignment of the returns of the Lubben or Lubben companies in New York for investigation. Everything that I consider bearing upon the legally operative acts applying to this disclosure and the narrative statements about comments on the facts but not reflecting any action taken at that time I have not considered evidentiary.

By the Court: I think we will go forward with whatever proof counsel wants now to offer.

I assume we will take most of the afternoon anyway. I will go over the other documents this evening and will endeavor to pass upon them so counsel may have the benefit of those that I do consider evidentiary and
88 relevant.

By Mr. O'Brien: All right, sir.

By the Court: I do that because we are trying to expedite matters and as I construe the defendants' position they expect to, hope to find something in the documents which will indicate that the alleged disclosure was made before any of these documents, at least, reflect the disclosure was made or that they will in some way tend

to corroborate defendants' position that this was the first disclosure.

If that is true, then I don't understand that my delay will in any way prejudice the defendants.

By Mr. O'Brien: I don't claim any prejudice.

I will say one thing, then I will be quiet, but to insist the inspection tonight with reference to what Mr. Ryan said on the matter of work product—

By the Court: I will give you an opportunity to be heard on that and give you every opportunity to protect your rights on that.

89 By Mr. O'Brien:

Q. You were about to pick out the second document, Mr. Busby. Will you do that, please?

A. May I ask, the second document that was given to whom, for refreshing my memory?

Q. To the Government Agent or Agents.

A. When he came out to examine the books of Shotwell?

Q. Yes, sir.

By the Court: Is this Agent's name Liman, L-i-m-a-n?

By Mr. O'Brien: L-i-m-a, like Lima, Ohio.

By the Witness:

A. Specifically, these documents were handed to—

By Mr. O'Brien:

Q. No, just pick me out the second one, if you will.

A. That is what I was going to explain. I can't tell which one was handed to him first or second, I do know the first one, which is this.

Q. Speaking of Defendants' Exhibit 1?

A. That is correct.

Q. —for identification.

90 A. This one sheet. The additional date was available for him and he looked at it indiscriminately. It was all in support of this one item. I can't say whether I handed him any one of these papers. I would judge this would come second.

By Mr. O'Brien: Mark this Exhiibt 2 for identification, please.

(Document marked Defendants' Exhibit 2 for identification.)

By the Witness: I presume—

By Mr. Ryan: I will object to his stating which came

first and second and third if it is not based on some recollection that he had.

By the Court: Yes.

By Mr. Ryan: Not just what he thinks from looking at it would be the order.

By Mr. O'Brien: I didn't ask him that. I don't care which came first or second.

By Mr. O'Brien:

Q. I just have noticed, Mr. Busby, there are two instruments here which look pretty much the same. This is one, is it not?

91 A. That is correct.

Q. Which is the other, that is what I want to know?

I will withdraw the last marking 2 for identification, and I will now submit to be marked as Defendants' Exhibit 2 for identification a series of six sheets.

(Document marked Defendants' Exhibit 2 for identification.)

By Mr. O'Brien:

Q. Now, Mr. Busby, you may state whether Defendants' Exhibit 2 for identification was delivered to any Agent.

A. Yes, that was delivered to Mr. Sam Krane, specifically.

Q. Will you state briefly the occasion for the making of Defendants' Exhibit 2, Exhibit 1 having already been made?

A. Exhibit 1 is a summary of the findings with supporting sheets, such supporting sheets do not have descriptive headings for each column.

Further, the supporting sheets do not show a detail of unbilled shipments totaling $65,734.64, although the 92 total mentioned was included in the summary sheet.

Now, Mr. Krane came into possession of this.

By the Court: Mr. who?

By Mr. O'Brien: Krane.

By Mr. Ryan: Special Agent, Intelligence Unit.

By Mr. O'Brien: The gentleman sitting behind Mr. Ryan.

By the Witness: Yes, I know.

By the Witness:

A. Mr. Krane came in possession of this Exhibit 1

and was discussing it with me and in an attempt to be helpful I added the descriptive columns on a copy of Exhibit 1 and furnished the details of the unbilled shipments, all of which added nothing to the summary sheet except for explanation purposes.

By Mr. O'Brien: May it also be stipulated, Mr. Ryan, that Defendants' Exhibit 2 for identification are the photostats of papers that Mr. Krane gave us through your direction under one of the court's orders?

By Mr. Ryan: Yes, sir, photostats of records fur-
93 nished by the Intelligence Unit here in Chicago.

By Mr. O'Brien:

Q. Mr. Busby, there are some other sheets from the same source which are before you.

Are any of these of like nature that were delivered to the Agents, or are they not?

I do not know.

A. That was delivered to Mr. Krane. Also this. Also this.

Q. But the documents which reflected your work up to and including, I think, July of 1948 are those marked Defendants' Exhibits 1 and 2 for identification?

A. That is correct.

Q. Now, during the course of the examination by the Agents, can you state briefly what was made available to them in the way of the books and records and papers of The Shotwell Manufacturing Company?

By Mr. Ryan: From his own knowledge.

By Mr. O'Brien: Yes.

By the Witness:

A. All of the records, general accounting records
94 as well as some subsidiary records of The Shotwell Manufacturing Company were made available.

Also, what we consider as public accountants private papers of Busby & Oury were made available.

These private papers covered the audit over the past several years, 1943 through 1947, as I recall it. And anything else that they wanted or asked for that I had acquaintance with was made available to them.

Q. Now, did the Agents makes copies, photographic, photostatic, or otherwise, of certain of the records, if you know?

A. I don't know.

Q. You don't know that personally?

A. Not specifically, no.

Q. In addition to the audit reports which you mentioned, were there other papers in the same category, such as work sheets which you prepared and gave to the Agents, which you had prepared?

A. Yes.

Q. Or did you keep all your work sheets?

A. Yes, we kept the principal audit papers and work sheets.

95 Q. Were these exhibited to the Agents, too?

A. Yes.

Q. Did the Agents make longhand notations that you noticed during the course of their inspection of the records?

A. Yes, many of them.

Q. You said that you gave Defendants' Exhibit 2 for identification to Mr. Krane.

A. That is correct.

Q. When did Mr. Krane come to the plant, approximately?

A. About the middle of 1948. I would say June or July, somewhere around in there.

Q. I mean, to work. Was he there for some time?

A. Mr. Krane, no. His work spread over a long period of time, but he wasn't there every day. He came in from time to time.

Q. Now, was Mr. Mammel ever at the plant?

A. Yes.

Q. Would you spell that, please? Is it M-a-m-e-l?

By Mr. Mammel: M-a-m-m-e-l.

By Mr. O'Brien: What is the first name, sir?

By Mr. Mammel: Charles J.

96 By Mr. O'Brien:

Q. Do you recall approximately when it was that Mr. Mammel came to the plant?

A. About February of 1949.

Q. Was Mr. Mammel during the times that he has been at the plant out of the office of the Agent in Charge, Mr. Wright?

A. Yes, that is my understanding.

Q. The same Mr. Wright?

A. Yes.

Q. And did Mr. Mammel conduct an inspection and examination of the same books, papers and records?

A. Yes, I believe he did.

Q. How long a time would you say prior to the indictment that he was engaged in doing that at the premises, over what period of time?

A. More or less continuously from February of 1949 up to the time of the indictment, or a very short time prior.

Q. And at that same period from time to time Mr. Krane also was there?

A. That is correct.

Q. Going back to the instruments marked Defendants' Exhibits 1 and 2 for identification, and directing
97 your attention to the unbilled shipment item on the first sheet of those exhibits, $65,134.64—

A. —734.

Q. 60, what?

A. $65,734.64.

Q. Do you know whether since the preparation of those papers the company has learned that an item of $14,758.00 was erroneously included by it?

A. Yes, I was told that that is a duplication which had been billed for and included before in this recapitulation.

Q. And you saw that invoice?

A. Yes.

Q. Now, at the time that Mr. Krane came to the company premises, or in and about that time, did you talk to him?

A. Yes.

Q. Was it at that time that you—

By Mr. Ryan: Would you establish the date of that conversation, please?

By Mr. O'Brien:

Q. Well, I am asking now, I suppose for the approximate time at which you gave Mr. Krane in the way that you described Defendants' Exhibit 2 for identifica-
98 tion?

A. I would say about the 1st of August, 1948.

Q. And did you have a discussion with him then?

A. Yes.

Q. What, if anything, did you say to him and he to you on the occasion of your talk?

A. I told him in a general way the story as I had gathered it leading up to the summarization of these papers—

By Mr. Ryan: I am going to object to that and move it be stricken.

By the Court: It may be stricken.

By Mr. O'Brien:

Q. You just have to say what you told him. Keep that in mind. We just want the conversation.

What did you tell him?

A. I told him the figures—

Q. Tell us what you said. What did you say to him, and what did he say to you?

A. He asked me first about the summary sheet that I had turned over to Mr. Mammel—not to Mr. Mammel—Mr. Lima, which is the first sheet of Exhibit I that you have there.

I told him where I got the figures from, how I ar-
99 rived at them.

By Mr Ryan: Objection and move it be stricken.

By the Court: Yes, strike it out.

By Mr. O'Brien:

Q. Again, tell me what you said. You do as many other witnesses do, but just tell us what was said. What you said.

A. It is kind of difficult for me to word it—the difference between "I told you" and "what I said."

I told him that I had been employed by The Shotwell Manufacturing Company to compile the statistics in a tentative way and this work I had done and was represented by this summary sheet which I had turned over to Mr. Lima when he came in to make an examination.

He asked me where I got the figures from and I told—

Q. Figures on the summary sheet? What document on the summary sheet?

A. Sheet 1 as attached to Exhibit 1.

And I explained to him that I had recapped them from the invoices in corroboration of the officers of the
100 company, Mr. Cain, Mr. Sullivan, Mr. Huebner, Mr. Graflund, and I told him that I had been in personally prior to that time and talked to Mr. Sauber about the situation and Mr. Sauber had suggested that I make this compilation rather than to file an amended return

since an amended return was only an approximation, and I told him Mr. Sauber had asked me to give this summarization to the Agent, Mr. Lima, when he came out to investigate, and Mr. Lima would make his own computations in corroboration with whatever help we could give him.

Mr. Krane asked me about the date of my conference with Mr. Sauber and asked me specifically about circumstances leading up to this matter.

By Mr. Ryan: Well, I will have to object to that, and move it be stricken.

By the Court: It may be stricken.

By Mr. O'Brien:

Q. What did he say?

A. That is all.

Q. From time to time after that did Mr. Krane request other things of you, documents, inspection of documents, or the like?

101 A. Yes, from time to time he asked for specific documents.

Q. Was he given them?

A. Yes, it was given to him, some of which he said he was going to photostat. All documents that he asked for were given to him if I had them.

Q. And he was permitted to photostat them?

A. Yes, as far as I was concerned.

Q. Now, Mr. Mammel you say came out about February of 1949?

A. Yes.

Q. Did he come alone?

A. Yes, I believe—he was alone.

Q. Did you see him shortly after his arrival?

A. Yes, I believe it was the first day he was there.

Q. Did you have a conversation with him?

A. Yes.

Q. At that time?

A. Yes.

Q. What was said?

A. I asked him what he was going to do and he said he was going to make a detailed audit of the records of Shotwell Manufacturing Company.

102 I told him I didn't see why that was neecssary, that Mr. Lima had been out and audited the accounts or was in the process of doing so, and he said, "Well,

he hasn't made a detailed audit and I am going to make a detailed audit."

Q. Is that what you presently remember?

A. Yes.

Q. What, if anything, did Mr. Mammel say about help?

A. Well, following the first conversation Mr. Mammel said that he was short of help, that the Department couldn't assign him sufficient help to expedite this investigation and that he was going to take whatever time was necessary to do it alone if he saw that that was necessary to do it that way.

Q. Did he ask for any help?

A. Well, he said he would appreciate any help that the company could give him.

Q. What did you do about it?

A. I discussed it with Mr. Cain, and Mr. Cain told me to put our staff at his command, give him whatever help he could in order to expedite the situation and get the examination through with as soon as possible.

103 Q. Did you do that?

A. Yes.

Q. Did you specially bill the company for that service?

A. Yes.

Q. Is it true, as your affidavit says, that the bills for that work were in excess of $20,000?

A. Yes, spread over the period of a few years, two years at least.

Q. Diverting for a moment to your talks with Mr. Sauber, will you tell the court what years, if any, were mentioned to him?

A. The years 1945 and 1946 specifically; also 1944, 1945 and 1946.

Q. Also in relation to your talk with Mr. Sauber, your initial conversation, what, if anything, was said as to whether he was an agent or official to whom a disclosure may be made?

A. He said he was the proper officer to whom a disclosure could be made.

Q. During the times that the agents were at the premises, or in any way active in an inspection of the records or the auditing of the books to which you have referred, did any one of those agents ever tell you that the

104 work was not being done for the purpose that Mr. Sauber had stated?

A. No.

Q. Did you at any time that you or your associates were working in this way ever know that there was any other purpose?

A. No.

By Mr. Ryan: Purpose other than what?

By Mr. O'Brien: Other than the one stated by Mr. Sauber that they would be out to examine the books to determine an amount.

By Mr. O'Brien:

Q. Did you know that?

Do you understand the question?

A. No.

By Mr. O'Brien: Will you please read the question, Mr. Reporter?

(The last question was read by the reporter, as follows:

"Q. Did you at any time that you or your associates were working in this way ever know that there was any other purpose other than the one stated by Mr. Sauber that they would be out to examine the 105 books to determine an amount?")

By the Witness:

A. No, I did not.

By Mr. O'Brien:

Q. Did you ever have occasion before this in 1948, Mr. Busby, actually to make or assist in the making of a disclosure of the type claimed here?

A. No. This is the first one that I had any experience with at all.

Q. Is it true that in your professional capacity you were acquainted with the published statements of the Treasury on the subject?

A. Oh, yes, sure.

Q. In speaking to the defendant and shortly after January 11, 1948, were there any of those published statements to which you directed their attention?

A. Yes, in particular the statement of Mr. Wenchel, the chief counsel of the Bureau of Internal Revenue at that time.

Q. Was that the statement made in 1947?

A. Yes.

Q. In a speech delivered by Mr. Wenchel?

A. Yes.

106 Q. Or a paper read by him?

A. Yes, that was published quite a bit.

Q. Just two things, Mr. Busby:

I am not sure that I heard you right, but I think a little bit back there you spoke of an amended return as being an approximation. Did you say that?

A. If I remember the question at the time, Mr. Sauber advised me not to file an amended return, to include these over-ceiling omissions because not knowing what the amount was, the amended return still would not be correct and it would be much better for the taxpayer if he waited until the Agent came out and determined this amount on a basis that could be acceptable to the Department.

Q. Your approximation was the thing evidenced by Defendants' Exhibits 1 and 2, not an amended return, is that true?

A. That is correct.

Q. The other thing I wanted to ask you: On your second visit to Mr. Sauber, that is, after the company had told you to come in and reveal its identity, and so forth, did you or did you not then tell him that you wished to make a disclosure on their behalf?

107 By Mr. Ryan: I object. It is leading and suggestive.

By the Court: Yes, I think the question is leading. At least, suggestive.

By Mr. O'Brien:

Q. What, if anything, was said about disclosure at that time?

A. I told Mr. Sauber that the taxpayer wished to make a disclosure and to make whatever corrections and payments of taxes that were necessary.

By Mr. O'Brien: That is all I wanted to make clear.

Before you start your cross examination I would like to offer in evidence as Defendants' Exhibit 1 and 2 the instruments so marked for identification. It is merely for the purpose of showing what was done pursuant to what Mr. Sauber said.

By Mr. Ryan: No objection.

By the Court: Admitted.

(Said documents were received in evidence by the Court, and respectively marked Defendants' Exhibits 1 and 2.)

108 By Mr. O'Brien: The court will understand that I am reserving my motion and request that these documents too be suppressed, but I am offering them to show what was done in the way of their cooperative attempts, only for that purpose.

By Mr. Ryan: I have no objection to them being received in evidence.

By The Court: All right.

By Mr. Ryan: Anything else?

By Mr. O'Brien: I thought maybe we could stipulate without putting the physical documents in for the moment that the statements contained in the report of the hearings before the Subcommittee on the Committee on Ways and Means of the House, the proceedings had on January 23, 23, 24 and 25 of this year as issued through the Government Printing Office, that those parts we referred this morning in their full content manifesting the published policy of the Treasury Department be considered as in evidence. I don't like to deprive ourselves of the whole book but we can arrange later to have

109 that part—

By Mr. Ryan: I think we ought to identify what the statements are and I will agree to it.

The first published statement is an excerpt from a statement by the Secretary of the Treasury, Fred M. Vinson, regarding the tax drive published in the Washington Post on August 21, 1945; the address of J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue given at a dinner in the Waldorf-Astoria, New York, on May 14, 1947; the statement for release to Sunday newspapers on May 25, 1947, of Secretary Snyder.

Do you want the statement terminating the policy?

By Mr. O'Brien: Yes, we might as well.

By Mr. Ryan: Agree to that then.

The statement of Secretary Snyder made for release on Thursday, January 10, 1952, reflecting the abandonment of the voluntary disclosure policy.

110 I stipulate that those may be received as evidencing the published statements involving the voluntary disclosure doctrine in this case. If necessary, abstracts can be made.

By Mr. O'Brien: I can't find it now, and I don't want to delay the proceedings, but I will reserve the right to offer also in the same connection the press release which was issued at the time that the policy was recalled or terminated.

By Mr. Ryan: That is what this purports to be, I believe.

By Mr. O'Brien: The particular pages are not complete, but I will find it.

You may cross examine.

Cross Examination By Mr. Ryan.

Q. You testified that you went to New York on a mission for Mr. Cain in January of 1948, is that correct?

A. Yes.

Q. What date did you return from that mission to Chicago?

111 A. January 10, 1948.

Q. When you returned you testified that you made a report to Mr. Cain, is that correct?

A. That is right.

Q. You recommended against the loan and then you discussed with him certain information you received from Mr. Graflund concerning the receipt of over-payment moneys by the Shotwell Corporation, is that correct?

A. That is correct.

Q. At that time did Mr. Cain tell you that the Shotwell Corporation had received over-ceiling payments?

A. Yes, he told me that.

Q. Did he tell you at that time what the Shotwell Company had done with the money they received as over-ceiling payments?

A. Yes, he said it was paid for the acquisition of raw materials for Shotwell to be used in the regular production.

Q. All of it?

A. Yes.

Q. Did you then have with him some discussion
112 concerning the implications that that might have for the corporation's tax liability?

A. Yes.

Q. Did you give him any advice as to whether that would affect his tax liability?

A. I advised him to file amended returns and get on record—

Q. Well, no, that isn't my question.

Did you advise him as to how it might affect his tax returns?

A. Yes.

Q. What did you tell him as to how it might affect his tax returns, the corporation's tax returns?

A. I told him that the corporation may have a tax liability.

Q. Now, can you explain how the corporation would have a tax liability as a result of that procedure?

A. Well, there would be in principle the corporation had taxable income. There was some question with respect to the disbursements, number one, the approving of the disbursements, and number two, whether the disbursements were allowable deductions.

Q. Did you advise him that there was some question whether the disbursement was an allowable deduction?

A. In my mind yes I did advise him.

113 Q. Did he advise you at that time that he had considered it an allowable deduction?

A. Yes.

Q. Then Mr. Cain did not at that time admit to you that he had attempted to evade any corporate taxes, is that correct?

A. Not specifically as such, no.

Q. Well, did he say something that indicated to you that he might have evaded corporate taxes?

A. Yes, he wasn't posted on the tax regulation.

Q. Did he profess belief that these expenditures were deductible?

A. He didn't know.

Q. Did he say he didn't know whether they were or not?

A. That is correct.

Q. Did you ask him why he had not recorded them on his books?

A. Yes, I did.

Q. Did he tell you that he had not recorded them on his books in order to evade income taxes?

A. Not at all.

Q. What did he tell you was the reason for not recording them on his books?

114 A. He didn't want to—in particular, he didn't want to show a violation of the OPA laws, Office of Price Administration—prices.

Q. In paying money or receiving money?

A. In receiving money, and paying it.

Q. Did he indicate to you that he was fearful that by indicating payments of over-ceiling amounts that he would thereby become implicated in price violations?

A. Yes, that was—

Q. In paying for material over ceiling?

A. Over ceiling price payments, yes.

Q. And that was the reason he had not included those payments in his books?

A. As well as the receipts, yes.

Q. I believe maybe you answered this question, you did say you advised him there was some question whether or not those payments were deductible?

A. Serious question, yes, I did.

Q. As of the day you were talking about?

A. Yes.

Q. Then your understanding of the situation at that time as gleaned or obtained from Mr. Cain was that
115 the over ceiling payments that were unrecorded balanced the gross, the unrecorded gross receipts, is that correct?

A. That is correct.

Q. So that to the extent that they would be deductible they would wash each other out, is that correct?

A. That is correct.

Q. Now, did you consider that a failure to report these washed-out gross receipts, or failure to report these gross receipts and a failure to claim the deductions offsetting in the event that they were determined to be deductible might constitute the basis for criminal liability?

A. I considered that it was an incorrect return.

Q. Did you advise him that what he had done might result in criminal liability?

A. Yes.

Q. In spite of the fact he had denied that he had intended to evade?

By Mr. O'Brien: Object as argumentative.

By the Court: Cross examination. He may answer.

By the Witness:

A. Mr. Cain is not a tax man and he relied, I
116 believe, on my advice that these items were not deductible. At that time, why he seriously considered that he was in violation.

By Mr. Ryan:

Q. Well, he indicated, did he not, to you, that he was learning then for the first time that they were not deductible?

A. That is correct.

Q. Now, when you called on Mr. Sauber as you stated on the first occasion whenever it was you advised him that you had a client unnamed who had had some black market transactions and black market receipts and black market payments roughly offsetting each other, I believe you said.

Q. Is that right?

A. That is right.

Q. Did you tell Mr. Sauber that the corporation owed any income taxes?

A. I told him there was a possibility that they did.

Q. Did you tell Mr. Sauber that the corporation sought to defeat and evade any taxes?

A. Repeat the question?

Q. Did you tell Mr. Sauber that the corporation,
117 your client, had sought to defeat and evade any taxes?

A. No, I don't think so.

Q. Well, don't you know whether you did or not? Are you suggesting that perhaps you told Mr. Sauber that your client, the corporation, had sought to defeat and evade taxes?

A. As I recall it, I told Mr. Sauber that the corporation, the method of handling these receipts, was probably liable for tax.

Q. Probably liable for tax?

A. That is correct.

Q. And that was on the theory that the black market payments would not be deductible?

A. That is correct.

Q. Do you recall now whether at that time the Tax Court had held that those payments were deductible?

A. Under certain circumstances, yes, but it was quite clear that it was very doubtful.

Q. But the only judicial pronouncement on the subject was that they were deductible, is that right?

A. I doubt that very much. Maybe if they were
118 cost of goods sold they may have been—

Q. Pardon?

A. If they were construed as costs of goods sold they may have been deductible.

Q. Did you know of a judicial pronouncement at the time to the effect that they were not deductible?

A. Yes, a serious question as to being deductible, particularly if they were construed as expenses rather than cost of goods sold.

Q. So it was a question then in litigation, is that correct?

A. Right.

Q. And the question of whether they were deductible or weren't deductible was something with which a taxpayer could hardly be expected to know?

A. Mr. Sauber advised us that they were not deductible based on his experience and the regulation.

Q. Now, then, when Mr. Cain told you that certain black market payments had been made, did you ask him to whom they had been made?

A. Yes.

Q. Did he tell you?

A. Yes. I am sorry, you are talking about pay-
119 ments. He didn't tell me to whom the payments were made.

Q. What did he say when you asked him to whom they had been made?

A. He didn't know.

Q. What?

A. He didn't know.

Q. He said he didn't know?

A. Yes.

Q. Did you ask him then how he knew that payments had been made if he didn't know to whom they had been made?

A. No, not specifically. He told me that the method of handling the cash transaction through the company would show that they had been paid out. In other words, the money came in and messengers came in to get the money and it was paid to them.

Q. Now, have you had occasion to work in the Treasury Department in tax cases, Mr. Busby?

A. Not fraud cases.

Q. Well, let me ask you this question: Do you know whether the Treasury Department or Bureau of Internal Revenue will accept deductions, large deductions, on 120 returns where they cannot be substantiated as to whom they were paid?

A. I wouldn't expect that they would accept them.

Q. Well, then, did you perchance at that time advise Mr. Cain to go in and give what information he could and seek to make a voluntary disclosure in order to avoid prosecution should it be true that he had not made these payments?

A. I advised him to go in and make—

Q. Was that your reasoning?

A. State your question again?

Q. That you advised him to go in and make some kind of disclosure to the Government on the possibility that there had been no black market payments made?

A. No, I didn't advise him that.

Q. It was because of this question about whether these deductions might or might not be taken that you advised him to go in, is that it?

A. I advised him to clear up his tax returns regardless of the reason. The tax returns were erroneous and from my standpoint they should be corrected.

Q. What was your purpose in advising him to 121 have the tax returns cleared up?

A. To avoid tax liability, possible tax liability.

Q. Tax liability?

A. Yes.

Q. For the payment of those taxes, is that what you mean by tax liability?

A. Yes, tax liability.

Q. Was it for the purpose of avoiding criminal prosecution?

A. I advised him to go in and make a disclosure assuming there would be no—

Q. For the purpose of avoiding criminal prosecution?

A. Well, the principal reason was to avoid the tax liability and get it paid.

Q. Do you avoid tax liability for civil taxes by disclosing to the Government that you owe them?

A. Yes, if they accept a corrected return you pay the tax.

Q. You don't avoid the liability, do you?

A. You pay it.

Q. That is right, you pay it rather than avoid it.

122 Then, was it your purpose to have him go in there in order to avoid criminal liability?

A. Only as implied by not paying the tax that is due.

Q. Only as implied by not paying the tax that is due?

A. Yes.

Q. Well, did you mean that you considered at that time that if a person didn't pay taxes that were due that criminal liability followed?

A. It is always hanging over their head.

Q. Now, have you ever heard of the term used by the revenue people "technical adjustment"?

A. Would you explain what it means? Not as you have stated it.

Q. An adjustment to tax liability. In other words, it increases, we will say, tax liability without any indicia of fraud being present?

A. Yes.

Q. Would you say when a person was in doubt whether the law was unsettled, whether something was deductible or not deductible, that would be more or less a technical adjustment that might result in higher tax lia-

123 bility, but without indicia of fraud?

A. Yes, that was standard issues, simple and small.

Q. And to the extent that black market payments had been balancing the gross receipts would that not have been the situation here in this case?

A. I didn't think so. This was a larger amount involved.

Q. Because of the size involved?

A. That has something to do with it.

Q. Despite the uncertainty of the law on the question?

A. Uncertainty to the deductions, yes.

Q. Now, Mr. Cain had told you that he had not attempted to defraud the Government, isn't that correct?

A. He had told me that he hadn't attempted to record his transactions because of the OPA regulation.

Q. And he had not attempted to evade his taxes?

A. I don't believe he made that statement. I don't recall discussing it as such.

Q. But he gave you a reason for not recording
124 them that was different from tax evasion, isn't that correct?

A. Federal income tax evasion?

Q. Pardon?

A. Federal income tax evasion?

Q. Did he say that that was the reason?

A. No, I said he gave me a reason different from that. Wasn't that your question?

Q. Yes.

Now, then, when you went to see Mr. Sauber you told him about these transactions whereby they received black market money and paid it out, roughly balancing, correct? And you told him that there might be tax liability or not, depending on the deductibility of those payments, is that correct?

A. Yes, I guess that is generally what I said.

Q. And you did not tell him that perhaps that the payments might have been made, isn't that correct?

A. No, I didn't know whether they were paid or not.

Q. Did Mr. Cain tell you at that time when you came back from New York and you had that conference that the Shotwell Company had made unrecorded sales?

By the Court: Repeat that again, please.

125 By Mr. Ryan:

Q. I ask the witness, in that conference with Mr. Cain after he came back from New York if Mr. Cain told him that the Shotwell Company had made unrecorded sales.

A. I don't remember that he did.

Q. Did you tell Mr. Sauber anything about this client of yours unnamed having made unrecorded sales?

A. Yes, I think so.

Q. You told Mr. Sauber—what did you tell him concerning that?

A. I told him they had unrecorded income from black market collections and I saw one or two unrecorded sales.

Q. When did you tell him that?

A. During the first conversation with him and the second.

Q. Where did you get that information if you told it to him?

A. From Mr. Graflund.

Q. But not from Mr. Cain?

A. No.

Q. That information from Mr. Graflund came to
126 you on this trip from New York about the unrecorded sales?

A. Yes.

Q. Did you ask Mr. Cain when you were talking to him if the corporation had made unrecorded sales?

A. I don't recall that I did.

Q. Now, you did tell Mr. Sauber in this first conversation that your client had made black market payments, didn't you?

A. Yes.

Q. But you stated a little while ago that you didn't know whether that was the fact or not?

A. I had been told that was the fact.

Q. Did you tell Mr. Sauber at that time that you would be unable to furnish the names of the persons to whom the alleged black market payments were made?

A. Yes.

Q. Did you tell him that you would be unable to furnish those names?

A. Yes.

Q. Now, then, on the occasion of your second visit to Mr. Sauber was Mr. Cain with you?

127 A. I believe not. I believe he was with me on the third visit.

Q. Well, what was the purpose of your second visit to Mr. Sauber?

A. It was to disclose the name of the taxpayer and to get instructions as to how to proceed.

Q. Did you receive such instructions as to how to proceed?

A. Yes.

Q. What was the occasion for your third visit?

A. I went with Mr. Cain to corroborate the conference, the information obtained from the second visit.

Q. What was the occasion for the fourth visit that you related?

A. I don't recall particularly, except in general the further instructions. There were several visits in there. I can't segregate the fourth and fifth, and so fourth. There were several visits that I made for instructions and reporting.

Q. Now, at the time that you were talking to Mr. Cain and advising him to make a disclosure, as you say, did you advise him that it would be necessary for
128 him to make a full and complete disclosure?

A. Yes.

Q. And an honest disclosure?

A. Yes.

Q. You advised him that that would be necessary?

A. Yes.

Q. Now, on what date did you say you went to Mr. Sauber's office on the first occasion?

A. I would judge around the 12th or 13th or 14th of January, 1948.

Q. And approximately on what date did you visit him the second time?

A. Oh, somewhere around the early twenties, the 20th, I would say, of January.

Q. Did you make any contemporaneous memorandum of the date on which you went to Mr. Sauber's office?

A. No, I am guessing based on circumstances that would cause me to remember it.

Q. You state that you had read Mr. Wenchel's statement and the other statements relative to disclosure, did you not?

A. Yes.

Q. Were you aware of the importance of timeliness in making a voluntary disclosure?

129 A. Yes.

Q. Why didn't you see fit to make a record of the date on which you commenced this alleged disclosure for your client?

A. Well, when we discussed it, that is, Mr. Cain and Mr. Sullivan and myself discussed it after my return from New York there didn't seem to be any particular urgency about it and it was not considered too serious a matter at that time, and no particular emphasis was placed on recording dates.

Q. Well, then, you didn't attach much importance to the disclosure as bearing on your possible criminal liability, is that right?

A. I attached importance to it but whether it was today or two days later I didn't attach too much importance at that time.

Q. Well, you are aware of the Wenchel statement concerning voluntary disclosure, are you not?

A. Yes.

Q. Were you not at the time?

A. Yes.

Q. Were you aware that according to the Wenchel statement that the period in which a voluntary disclosure could be made would be cut off by the assignment of a return for investigation?

130 A. Yes, I considered the Wenchel statement very liberal and gave me the impression to go in and discuss it at such time as was convenient, why, it would be satisfactory. I gave no thought to anyone being assigned to the case.

Q. Are you aware that an assignment of a return for investigation to an agent does not involve any publicity or notification of the taxpayer?

A. Yes.

Q. Were you aware that that could have taken place on or about the time of your first visit to Mr. Sauber?

A. There is a possibility, although I had no knowledge.

Q. But you still didn't see fit to make any memorandum of the date, is that correct?

A. No. It is pin pointed very well with the trip to New York as far as I was concerned.

Q. Well, did you see fit to send in any registered letter or communication to Mr. Sauber or any other Treasury official?

A. No.

Q. Evidencing your disclosure or alleged disclosure?

131 A. No. He gave us the impression that we had made a disclosure and that was all that was necessary and that he was a proper officer and could accept it, and that the instructions that he gave us for proceeding was going to be all right.

Q. You didn't ask Mr. Sauber for any such statement in writing?

A. No, I didn't think it was necessary at the time.

Q. Now, then, you state that Mr. Sauber advised you that it would not be necessary for your client to make amended returns, is that correct?

A. That is correct.

Q. And suggested that an effort be made to determine the liability or to determine the amounts involved in these black market transactions?

A. That is right, pending the time the agents came out to check and corroborate in this determination for themselves.

Q. And what did he tell you the agent would do?

A. He said he would come out and make the usual examination and go into this phase of it in particular.

Q. In other words, the agent would make an audit,
132 is that correct?

A. That is correct.

Q. Of the returns for the years involved?

A. Sure.

Q. Or did he tell you that the agent would come out to assist you in arriving at these black market transactions?

A. Oh, no, he told us that the agent would come out and make his own investigation and we were to assist the agent.

Q. In other words, you weren't operating under the impression that this work of the agent would be any different than it would be in any case of any corporation where he was auditing a return, is that correct?

A. None whatsoever, except more extensive.

Q. Now, on the occasion of the first visit to Mr. Sauber when Mr. Cain was with you, did you not tell Mr. Sauber that the black market payments balanced the black market receipts except for a difference of five thousand some dollars which had been included on the 1946 return?

A. I told him that was my understanding, yes.

Q. From whom did you obtain that understanding?

133 A. From Mr. Graflund.

Q. Mr. Graflund?

A. Primarily, yes.

Q. Well, who secondarily or any other way if you found it out?

A. I can't say. Maybe Mr. Cain had something to say about it. There were general conversations back and forth.

Q. Was Mr. Cain present when Mr. Graflund told you that?

A. I don't recall. It was generally discussed.
Q. But you told Mr. Sauber that?
A. Yes.
Q. In Mr. Cain's presence, is that right?
A. Yes.
Q. I show you Defendants' Exhibit 1, the first sheet which has been described as containing the summary, that is, a sheet which you turned over to Mr. Lima, is that correct?
A. That is correct.
Q. Does that purport to reflect a summary of the black market transactions, both the receipts and the expenditures?
A. That is the estimate. Most of this is based on 134 memory of the people that are involved.
Q. Whose memory?
A. Mr. Cain, Mr. Huebner, Mr. Graflund.
Q. Well, directing your attention to the disbursements, chocolate milk, corn syrup, from whom did you obtain those figures?
A. Those are approximations made by Mr. Cain.
Q. Those were made by Mr. Cain?
A. Yes, from memory.
Q. Is this Mr. Cain the only source from which you ever received any information as to the amount of these alleged black market disbursements?
A. Well, he was responsible for them, I guess.
Q. Well, is he the only source from which you received it?
A. Yes—Mr. Graflund and Mr. Roeser and Mr. Huebner were attempting to contribute, but they didn't make any contributions to speak of. Mr. Cain was the spokesman for it.
Q. In what form did Mr. Cain give you those figures that are contained on the disbursements?
A. A written memorandum on it.
Q. Do you still have that memorandum?
A. I don't know. I can't answer. Mr. Krane, I 135 imagine, has a photostatic copy of it.
Q. Did you seek to obtain information about the disbursements from Mr. Graflund?
A. Only in this conference with Mr. Cain and Mr. Huebner and Mr. Roeser, but they had no records from

which they would draw upon to determine the disbursements and they just approximated them the best they could.

Q. The only people who had any recollection or furnished any information about disbursements was Mr. Cain, is that correct?

A. He assumed the responsibility for the statement.

Q. Did anybody else furnish you any information about the disbursements?

A. No.

Q. Now, when you submitted Defendants' Exhibit 1 to the Government, which listed those expenditures, had you verified the disbursements or substantiated them in any way?

A. No, and only partially the receipts. The whole schedule is tentative.

By Mr. Ryan: I beg the indulgence of the court for just a moment, if the Court please.

136 By the Court: We will take our afternoon recess. Suspend for ten minutes.

(Recess taken.)

By the Court: Proceed, Gentlemen.

By Mr. Ryan:

Q. Now, Mr. Busby, you testified to having certain conversations with Revenue Agent Charles Mammel, is that correct?

A. Yes.

Q. At different times throughout the course of his examination of the Shotwell Company?

A. Yes.

Q. Did you make any memorandum contemporaneous memorandum, showing the dates and the substance of those conversations with Mr. Mammel at the time that you had them?

A. No memorandum, no.

Q. And you testified to certain conversations you had with Mr. Krane, is that correct?

A. Yes.

Q. Did you make any contemporaneous memorandum respecting the dates and the substance of those conversations?

137 A. No.

Q. Did you make any contemporaneous memorandum respecting the dates and the substance of the con-

versations you had with Mr. Sauber when you were present alone and when Mr. Cain was present?

A. No.

Q. And as a matter of fact in connection with conversations that you had with Mr. Krane or Mr. Mammel you don't actually remember what the conversations were, do you?

A. Oh, yes, I do.

Q. Now, as a matter of fact, didn't Mr. Sauber tell you at his office while Mr. Cain was present that this appeared to be a civil case?

A. No.

By Mr. Ryan: That is all.

Redirect Examination by Mr. O'Brien.

Q. Did you know at the time you were advising with your clients on the subject matter of disclosure whether the Commissioner of Internal Revenue was then allowing the deduction of premium payments for goods acquired?

138 A. There had been some fringe deductions of this nature allowed, depending upon the circumstances in each case.

Q. Are you speaking now of expenses?

A. I am speaking of expenses, deductions as cost of sales.

Q. I am speaking of the cost of goods acquired.

A. That was the leaning at the time.

Q. Do you know what the regulations in effect at that time was?

A. I believe the regulation allowed the deductions if they could be substantiated as costs of goods sold. At least, the question was being debated and the decisions had been to that effect in the lower tax bodies.

Q. In 1948?

A. Yes, as early as some time in 1948, I recall. The Commissioner had not acquiesced in those cases, to my knowledge.

Q. That is my question: Was the Commissioner allowing them or wasn't he?

A. The Commissioner was not allowing them, no.

Q. That is my question.

Referring to Defendants' Exhibit 1, I think you
139 said that the first sheet was given to Lima?

A. Yes, sir.

Q. At his appearance at the plant?

A. Yes.

Q. When or over what period were subsequent sheets made available?

A. Well, they were available to Mr. Lima when he came, but he made his examination in the regular way and, of course, it took time to get to all of these sheets and he was taken off the case, I guess, before his investigation was completed.

Q. Now, when you spoke to Mr. Lima about those sheets what, if anything, was said to him concerning their tentative nature?

By Mr. Ryan: I think I will object on the ground it is improper redirect. I don't recall going into anything like this.

By Mr. O'Brien: Sure, your very last question you asked the witness and the witness said that they haven't verified the disbursements and that the receipts also were partially tentative, if I understood him correctly.

140 By the Court: He may answer.

By Mr. O'Brien: Read the question, please.

(Question read.)

By the Witness:

A. I told him that they were tentative, explained to him how I had gone about getting them together and that they were only a guide to his work in determining what the situation was, everything subject to verification.

By Mr. O'Brien:

Q. Is there any circumstance which you now recollect which fixes the date of your fourth visit to Mr. Sauber, that is, the time at which you and Mr. Cain went in there during the month of March? Is there any circumstance to which you can relate that visit which would enable us to determine the time?

A. Well, I don't know unless—we went in—Mr. Cain was in California, as I recall it, and the first day that he came back we were over to see Mr. Sauber.

Q. Do you know what that day was?

A. The best I can recollect is the first two or
141 three days in March. I can't say exactly.

By Mr. Ryan: Is that the fourth visit?

By Mr. O'Brien: The fourth visit.
By the Witness:
A. If I had to name a date I would say the 4th of March—the 3d or 4th, somewhere in there.
By Mr. O'Brien:
Q. At any rate, it was upon Mr. Cain's return from California?
A. That is correct.
Q. In that month?
A. Yes, sir.
Q. Do you have any idea as to when it was with reference to the date of his return, how soon after his return?
A. That we called on Mr. Sauber?
Q. Yes, sir.
A. It was the following day. As a matter of fact, I had talked to Mr. Cain on the telephone and I knew he was coming in and he was coming in for that specific purpose, among other things. I don't know what else he came in for.
Q. Was it the day following the day he arrived, or was it the day that he arrived?
142 A. You mean from California, arrived here in Chicago?
Q. Yes, sir.
A. The day following the time he arrived in Chicago.
Q. Do you now know when it was that he arrived in Chicago? I mean, as to what time of the day.
A. It was the evening. I can't remember definitely, but I think I talked to him on the telephone the day he arrived. It was late. It was evening.
By Mr. O'Brien: I think that is all.
By Mr. Ryan: No recross.
By Mr. O'Brien: That is all, Mr. Busby.
(Witness excused.)

143 BYRON A. CAIN, one of the defendants herein, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. Your full name is Byron A. Cain?
A. That is right.
Q. C-a-i-n. Where do you live, Mr. Cain?

A. 1155 Mohawk Road, Wilmette, Illinois.

Q. During the year 1948 what office did you have in The Shotwell Manufacturing Company, a corporation?

A. I was president and treasurer.

Q. What office did Mr. Sullivan have, Harold Sullivan?

A. Executive vice president.

Q. And Mr. Huebner?

A. Vice president.

Q. And it is true, is it not, as Mr. Busby testified, that his firm was then and had for some years been the regular outside auditors employed by that company?

A. From the date that Mr. Sullivan and I acquired an interest in the company.

144 Q. When was that, about?

A. About the first of the year of 1942.

Q. Incidentally, at that time and for some years thereafter, Mr. Sullivan was active in the company too, was he not?

A. That is correct.

Q. Do you remember, while I think of it, whether Mr. Shotwell also participated in the information which went into this Defendants' Exhibit 1 and 2?

A. Yes, he did.

Q. What position did he occupy in the company?

A. Well, at first I was general manager and he was president, and then subsequently until his death he was chairman of the board. His death was just about eight months ago, six or eight months ago.

Q. You were present here during Mr. Busby's testimony, were you not?

A. All during it.

Q. I will come back to this more fully later, but I would like to see you now, if you were in California during the month of February, 1948.

A. Yes, I was.

145 Q. Where?

A. At the home that I rented—well, it was on Via Los Palmos in Palm Springs. I think it was 435, or something like that.

Q. I don't care about the exact address.

Is it true that early in March you returned to Chicago from Palm Springs?

A. Yes, I returned on the third day of March.

Q. 1948?

A. 1948.

Q. At my request did you have your secretary bring to my office the documentary data from your files establishing those dates?

A. I did.

Q. Is it true that you, upon your return, went with Mr. Busby to see Mr. Sauber?

A. We did.

Q. When was that?

A. It was on the 4th day of March 1948.

Q. Had the Shotwell Manufacturing Company had dealings with David G. Lubben and the companies, Eatsum Food Products and General Confections, Inc.?

A. It had.

Q. Both with the proprietorship known as Eatsum
146 Food Products, and the partnership business conducted under the same title?

A. It had, although we didn't know that there was a partnership. I don't believe, until after we got into this investigation. It was a carry-through.

Q. What is referred to as a proprietorship and partnership?

A. That is right.

Q. Had those dealings extended as far back as 1944, at least?

A. Yes, they had.

Q. And during all the war years?

A. During the balance of 1945 and a portion of 1946.

Q. Was any part of the year 1945 and 1946 when corn was in short supply?

A. During all of that period corn was in short supply.

Q. All during 1945?

A. I think so; at least, practically all of 1945, but a good portion of 1946.

Q. Was it more pronounced in one part of 1945 than in another?

147 A. Well, it kept building up. It started and just kept on to a peak and then dropped off.

Q. When did it hit its peak?

A. I would say in mid-1946.

Q. What products of corn did you require in the conduct of the business?

A. We required corn syrup and dextrose.

Q. Dextrose is corn sugar?

A. That is right.

Q. Could you operate the business, the candy manufacturing business, without these items?

A. It could not be operated.

Q. Could anyone else?

A. Nobody could.

Q. It was stated by Mr. Busby that it was not possible to say or to name the people to whom premium payments were made for materials.

A. That is correct.

Q. In the case of corn, briefly will you tell the court why that was so, something about the pattern as to the premium payments that were related to the acquisition of corn or corn syrup?

A. Well, during the years in question the farmers just quit selling corn. They just quit selling unless they
148 received a premium payment, and then some of the astute boys went out and offered them a premium, and assembled the corn and somebody would volunteer to us, we people who had to have corn to keep our factories running, had to have by-products of corn, to get us corn, upon payment of certain sum of money per car, and we could acquire that corn syrup one of two ways: We either traded some of our merchandise at ceiling price, or we paid out cash, and everybody in the business did exactly the same thing.

Every candy manufacturer in the United States did one of two things: He had to. He couldn't possibly operate, and that doesn't only go for candy manufacturers, that goes for all users of the by-products of corn, because the refinery was actually down. Several refineries went down. The farmers wouldn't sell corn at ceiling prices, period, and that is when this black market developed in corn.

Q. Just a little bit further. When these folks had acquired the corn available to be sent to the refineries were you informed of that in some fashion in some instances?

149 A. We either had reasonable assurance that the people who told us they could get the corn for us who were not the principals, understand, could have been a salesman for one of the corn syrups, "I can make this arrangement and send a man out to the plant," or "I will cause a man to be sent to the plant."

They tried to keep hands off—

By Mr. Ryan: I will object to conversations like these unless he tells whom he had them with, when, where and who was present.

A. If the Court please, I don't know.

By the Court: Wait a minute. I don't see that we are particularly concerned with this under the motion to suppress. It may be stricken.

By Mr. O'Brien: Well, if the Court please, I think the detailed way we are not concerned with here.

The sole purpose of my inquiry is to give it to the court to the extent it may be deemed pertinent.

I intend to be very brief about it. I intend to prove
150 in view of the objection and ruling that the people who came in and advised them of the availability of corn which could be ear marked for them at the refineries were faceless people whose identity they didn't know, that they paid the money for the overage, the corn went into the refineries, and they got from it such an amount of syrup as the refinery chose to sell them, so that the cost per pound of syrup was determined by what they had paid for the corn in the form of overage only.

If the corn itself was paid for by the refinery in cash, I mean, invoiced at ceiling to the people who sent it in, the overage was paid in cash by our people and the syrup they actually got and the quantity was paid by check representing the cost.

I could elaborate on it but I offer to prove that to the extent it may be material.

By Mr. Ryan: I think that perhaps certainly only to
151 the extent that I cross examine him concerning any statement he made as to whom he got corn syrup from would there be any occasion for counsel to question him concerning it.

I think primarily perhaps the only thing to be concerned with is what he told to Mr. Sauber, what conversations he had with him.

By the Court: I would think so.

By Mr. O'Brien: The same would be true with respect to the other materials which were in short supply, sugar, chocolate. I assume the ruling would be the same. I didn't intend to go into that in detail.

By Mr. O'Brien:

Q. What connection, if any, was there, Mr. Cain, in

the sales at premium prices to Lubben's companies and the premium prices that were paid for the materials in short supply?

By Mr. Ryan: I think perhaps the same objection would go to that. What is important is what he said.

By Mr. O'Brien: Just a preliminary question.

152 By the Court: It may be very material in determining the merits of the lawsuit, but I don't see how it is material now on this motion.

By Mr. O'Brien: I don't intend to pursue it very far; just a preliminary question.

By the Court: All right, briefly.

By the Witness: Restate the question.

(Question read.)

By the Witness:

A. Well, our practice was to make only premium sales when we were in need of premium money.

By Mr. O'Brien:

Q. Did you make any premium sales, as you term it, to anyone other than Lubben and his companies?

A. None.

Q. About how many customers did you have?

A. Sixteen thousand.

By the Court: I wonder if we can't hurry along a little bit.

By Mr. O'Brien: I am skipping some material, Judge, because of what you said.

By Mr. O'Brien:

Q. Do you recall, Mr. Cain, any occasion or an
153 occasion late in the year 1947 or early in 1948 when Lubben asked your company to lend General Confections $50,000?

A. I do.

Q. Is it true that you sent Mr. Busby east to investigate the financial position of General Confections, Inc.?

A. I did.

Q. Is it true as he said that on his return and on January 11, 1948, he reported to you at your home?

A. That is correct. Mr. Sullivan came over to my house.

Q. Harold Sullivan was present, too?

A. That is right.

Q. And will you state briefly what his report was?

A. He told us—

Q. His advice.

A. He told us that his financial condition was very bad, that $50,000 wouldn't do him a bit of good in his judgment from a cursory examination of his books, therefore, we would be very silly to enter into such a loan.

154 Mr. Sullivan and I were business men. We didn't make the loan.

Q. At that time did Mr. Busby speak to you and Harold Sullivan on the subject of premium receipts and premium payments?

A. He did.

Q. You were thoroughly familiar with those at that time, were you not?

A. We were.

Q. Prior to that time, prior to January of 1948, did Busby know anything about them?

A. Not a thing.

Q. Did he inquire of you if it was true that there was such payment?

A. Yes, he did.

Q. And of Harold, too?

A. Yes, he did.

Q. Did you tell him that there had been?

By Mr. Ryan: If there is going to be any more, I think there ought to be a question of what conversation.

By Mr. O'Brien:

Q. What did you tell him?

A. I told him what had gone on in the company,

155 that we had been taking over ceiling prices, and we had been making trade deals. We had taken over ceiling payments from Lubben and his various companies over a period of a couple years, and he promptly became exercised about it and said, "We must make an amended return."

Mr. Sullivan and I told him to go down and make whatever arrangements was necessary with the proper authority to make such amended return.

Q. What, if anything, was said as to the reason for your failure to incorporate those items in the 1945 and 1946 returns?

A. Well, our reasons, of course, were very apparent. We were in violation—

Q. No, what was said?

A. We told him we were in violation of the OPA and

subject to triple penalty if we were, and we certainly didn't want to put that on our tax return. That was number one.

Q. How long did you and Harold Sullivan and Busby discuss it before you decided to have Mr. Busby go in to inquire?

A. My recollection would be at the top a week. It could have been longer, but I doubt it.

156 Q. At that time did you know whether any investigation of Shotwell had been commenced?

A. No, none.

Q. Did you have any information of any kind?

A. No, none.

Q. As to a pending investigation of Shotwell?

A. No.

Q. At that time did you have any knowledge or information of any kind as to any pending investigation against Lubben or any of his companies?

A. None.

Q. Did you discuss with Mr. Busby the question as to who was to contact the people at the Bureau?

A. Yes, we discussed that at great length. A suggestion was made by one of us, I think my suggestion was that we discuss the matter with Mr. Bowden; that Busby threw in Mr. Taylor's name, and Sullivan threw in another name, and finally we decided to let Mr. Busby go down and, at least, explore the situation with whomever he was going to explore it with.

Q. At the time of this discussion with Mr. Busby and before he was appointed to go down for any purpose, what, if anything, did he say to you about

157 the policy of voluntary disclosure?

A. He was very clear on that. He said if we went in and made a disclosure that is all there was to it. They would probably assess a tax and we would pay the tax, and that would be that.

Q. Did he say anything more about what the policy was?

A. I think that satisfied me.

Q. Did he say anything more about what the policy was?

A. At that time, Mr. O'Brien, I don't believe he did.

Q. Did he tell you before going into the policy what

the effect of the failure to put these items in the return might be?

A. He said we might be subject to criminal liability if we didn't do it.

Q. And what did he say in respect to criminal liability if you went in?

A. He said there would be none.

Q. And was it then after a week or so that you asked him to go in to see the appropriate officer?

A. Yes, that is right.

Q. Did you or Mr. Sullivan or Mr. Huebner at
158 that time authorize him to reveal the name of the taxpayer?

A. The minute he reported back to us we—

Q. No, when you first sent him.

A. We told him not to make a disclosure of the name.

Q. Or of its officials?

A. Or anything.

Q. What did you ask him to ascertain?

A. To ascertain just to set a hypothetical case before whomever he was going to interview and outline it and ask him if there would be any criminal liability in that event, and to report back to us.

Q. Did you ask also what it is that you would have to do, to ask him to ascertain what you would have to do if a disclosure was made?

A. Oh, yes. You mean the mechanics?

Q. Yes, sir.

A. That, of course, I left up to him.

Q. Now, did Mr. Busby subsequently tell you that he had been in?

A. He did.

Q. Did he say who it was that he had talked to?
159 A. Yes, he told me he had talked to Ernest Sauber.

Q. Mr. Sauber was then the Chief Deputy Collector of Chicago?

A. That is correct.

Q. And he is still in this area, is he not?

A. That is right.

Q. When he reported back to you were any of the other officers of the company present?

A. I think possibly Mr. Sullivan and Mr. Huebner were present because we made a decision and we would be present.

Q. What, if anything, was said as to whether Mr. Sauber was the proper person to make such a disclosure to?

A. Mr. Busby assured us that he was, and said that he was.

Q. What did he tell you that Mr. Sauber had said?

A. He said that after he presented this hypothetical case to Mr. Sauber, Mr. Sauber said that we were in no position to file an amended return because we seemed to have no definite knowledge of how much money we had taken in, and therefore it would be best just to leave it as it was and an agent would come out to the
160 company in question and compile whatever information they needed to assess a tax, if a tax was assessable.

Q. Let me ask you, Mr. Cain: At the time that you decided to have Mr. Busby explore the situation did you give any consideration, or was any consideration given to the question of whether there was any proceedings for criminal prosecution being instituted for violation of OPA items?

A. Yes, we investigated the OPA and found out that since, I think it was July 1, 1947, that no suit had been filed.

In other words, the agency had been disbanded and no suit had been filed and therefore all of the boys were going in, you know, one by one.

Q. Was that here in this district?

A. Yes, there was a lot of them going in.

Q. Following that did you tell Mr. Busby to go back to Sauber and reveal the identity of the company and make this disclosure?

A. I did.

Q. Was that and everything you have said here in relation to the corporate returns for the years 1945
161 and 1946?

A. That is correct.

Q. What did you tell Busby to say to Mr. Sauber?

A. Well, I told him to just state the facts, that we had taken in a lot of over ceiling money and that we spent a lot of over ceiling money. That we couldn't ascer-

tain how much we had taken in and how much had been spent. We couldn't ear mark it, but that we had to give him a very rough statement of facts because it was quite a large job to try to assemble something—

By Mr. Ryan: Objection. The answer should be confined to the conversation.

By Mr. O'Brien: He is saying what he told him to say.

By Mr. O'Brien:

Q. Am I correct?

A. That is right, that is what I told Mr. Busby to do, to tell Sauber those facts.

Q. What, if anything, did you tell him to say concerning the payment of that tax which you planned to do?

A. I told him we were ready, willing and able to pay any tax that might be assessed.

162 Q. Did you tell him to tell Sauber that?

A. Yes.

Q. Was this still in January?

A. I left for California and drove out that year and I arrived at my house on the first day of February.

Q. I am asking you whether—

A. I am trying to answer your question, Mr. O'Brien. I am trying to figure the date. It is my best recollection that I had one meeting with Mr. Sauber personally prior to going out there, but I can't be sure, but this conversation that I had with Mr. Busby was before I went to California. You can rest assured of that.

Q. You are certain of your conversation with Mr. Sauber in March of 1948?

A. Very definitely.

Q. Is it your best recollection now in looking over the facts of this matter that you also saw Mr. Sauber before you left?

A. It is my best recollection that I did see him for a short time.

Q. When you were there personally, when you first met Mr. Sauber, what did you say to him?

163 A. I asked him about the timeliness—

By Mr. Ryan: Objection.

By Mr. O'Brien:

Q. No. You must say what he said.

A. I said, "Mr. Sauber, the only thing I am disturbed about in this whole situation is, have you had

the agent check the file in this case, and if you haven't done so, will you do so?"

By the Court: When did you say it, sir, in February?

By the Witness: This was in January, Judge.

By Mr. Ryan: This is to Mr. Sauber?

By the Witness: That is my best recollection, Mr. Ryan.

By Mr. O'Brien:

Q. Go ahead. You were telling us about what you said to Sauber.

A. I think that is my only purpose in going there with Mr. Busby, was to get that one thing over.

Q. When you saw Sauber in March did you ask him—what, if anything, was said between you and him as to the fact of whether any investigation had commenced?

164 A. He assured me that there had been no investigation commenced.

By Mr. Ryan: Object to that.

By Mr. O'Brien:

Q. What did he say?

A. He said, "Byron, for goodness sakes, quit worrying about it! There is nothing started about it, and just go on about your business and forget about it."

By Mr. Ryan: I don't know now who is telling Cain—

By the Witness: Mr. Sauber.

By Mr. O'Brien:

Q. What, if anything, did he say he had done to ascertain that?

A. He said he had checked with the Agents' office.

Q. Did he say what they told him?

A. "He assured me that I could go out and whistle."

Q. No, what did he say? What did he say?

A. He said that he had checked with the Agents' office.

Q. And they told him what?

A. They informed him that everything was all 165 right, so I could forget about it.

Q. Did you then in March ask Mr. Sauber anything about the need for filing an amended return?

A. I certainly did. I went into it in great detail.

Q. What did you say?

A. I told Mr. Sauber of our problem in trying to ascertain the amount of money that we had received in over ceiling payments.

I said that the only thing that we could possibly do in dealing with a chap like this chap Lubben would be to take every invoice that we had sent to him and apply the maximum over ceiling price.

And then I said there definitely had been trade deals with Mr. Lubben, but there was no way for us to separate them, and if we applied the maximum over ceiling price—Now, this thing started, and I told him this—this thing started slow like all things like this. The over ceiling price of candy was low. Then it reached up like the corn market did to a peak. We used the peak price in our application to his invoices.

Q. Did you tell him you were—

166 A. I am talking to Mr. Sauber, this conversation. I said, "We will use the peak price and when we come up with that figure, that would be the best of our recollection."

He said, "You can't make an amended return. You just give us—we will have to send a man out there and you will work with him and we will get the best we can."

I said, "As to our expenditures I just can't tell you anything. I don't know."

Q. What did he say about expenditures?

A. He said "it wouldn't do any good if you did know because we wouldn't allow them anyway. We absolutely won't allow over the ceiling expenditures."

I said, "O.-K., but I hope you will take it into consideration and see that we are treated fairly."

I think that is the tone on which that particular meeting of March 4th ended.

Q. What, if anything, was said concerning the payment of the tax when and if the tax was determined?

A. Well, I told him in view of the government

167 situation where they make no allowances, we owe them a lot of money, and we stood ready and able to pay it immediately, and the sooner we would pay it the better I would like it, but I said that wouldn't stop us if at some future time we tried to get our money back or a portion of it for these over ceiling payments.

He said, "That is perfectly all right. All we want to do is get the tax. That is my job. I am a collector and I want to get the tax."

Q. What did you do about assembling the data that you told Sauber you would assemble pending the arrival of the agent?

A. We started out to make a compilation. We were primarily interested in over ceiling payments to us, anything that could be charged to us. That is the only thing we were interested in.

So we started out to assemble that data and as things usually do, the agent didn't appear and he didn't appear, so it dragged.

The minute he appeared everybody went to work on it again.

Mr. Busby, I think, had a man working on it continuously from about, oh, January, February, right
168 on through, but then we put the whole staff on it, Mr. Huebner, and the whole gang of us got to work, Mr. Sullivan, and we assembled what would give him something to go by and we told him that.

Q. What did you assemble?

A. We got the invoices that had been shipped to Lubben and through Mr. Huebner's memory we tacked the highest price that we in our judgment had ever been charged on over ceiling and we considered no trade deals, no straight deals with the fellow at all. Every single invoice we considered that we got some kind of a cash rebate on.

Q. Whether you did or not?

A. Whether we did or not, whether it was a trade or not, and then we finally came up with a figure of something like $400,000.

We said, "Here it is."

And then they were in a dilemma about what to do about the payouts, and I said, "I will tell you what we will do about it: Give me a piece of paper."

I said, "Busby, work it backwards."

I wrote it down this way—"There is your payouts."
169 It took me one minute, less than a minute and I knew they weren't any good, and we couldn't substantiate them, but I threw them in for what they were worth. I hoped they believed that we paid out something.

Q. Well, on that, Mr. Cain, you had available amongst the office records all of the invoices for materials purchased including those in short supply?

A. That is correct.

Q. Nearly everything was in short supply?

A. Everything that we used.
Q. Stuff that you used?
A. That is right.
Q. And you did have the invoices?
A. That is right.
Q. Showing the times of acquisition and the quantity?
A. The only thing we could prove by that, Mr. O'Brien—
Q. No, I just say, showing the time of acquisition and the quantities?
A. That is right.
Q. Is it a fact that Messrs. Sullivan and Huebner
170 were in New York in the early part of February, 1948?
A. Yes, they called me on two occasions out in California.
Q. Have you checked the records of the company to see if that is so?
A. That is right. One call was $15 and something; the other was $19.
Q. That they were there?
A. That is right, they were there.
Q. Did they tell you at that time of their conversation with Mr. Lubben concerning this $50,000 loan?
A. They did.
Q. Who did you talk to, Sullivan or Huebner?
A. I talked to Mr. Sullivan.
Q. What did he say?
By Mr. Ryan: I object. I can't see what bearing this has on the question at hand.
By the Court: Has it any bearing?
By Mr. O'Brien: I think so.
By the Court: In what way? There is no contention
171 that a loan was made to Lubben, so why go into it further? I assume there is no such contention.
By Mr. O'Brien: I am not going into the loan, but I assure your Honor that it could have some connection.
By the Court: If you will indicate to me what it is I will be glad to listen to you. I don't see it.
By Mr. O'Brien: I think the connection is, Judge, from what I understand to be the situation, that at that time, based on the part of the conversations that were

had concerning that loan, it will be perfectly clear that as far as we can rely on what Mr. Lubben said, he was not or had no knowledge that their companies were under investigation in February of 1948, and it is in relation to that conversation that I am seeking to establish that fact, such as it may have relation to the primary issue here.

By Mr. Ryan: The question whether or not the defendants had any knowledge of it, they can testify whether they did or didn't. They have already done so.

172 If they had any knowledge whether Lubben was under investigation or they were under investigation, they say they did or didn't have the knowledge—

By Mr. O'Brien: If the Court please, if the Government wants to stipulate that it is quite immaterial what was the fact, as long as we didn't have knowledge of it, why, I will go along with that.

By the Court: Tell me what you want to prove by this conversation.

By Mr. O'Brien: I want to prove that in this conversation of February, 1948, Lubben was threatening to go in and report the situation to the Revenue Office and that he hadn't yet been there.

By the Court: You mean he was threatening to report?

By Mr. O'Brien: Threatening that unless we gave him the money he was going in.

By the Court: Well, do you offer that as proof that there had been no investigation of Lubben up until that time?

By Mr. O'Brien: Proof of the fact that as far as
173 it is material Lubben was representing that there had been none.

By the Court: That isn't any evidence that there hadn't been any investigation of Lubben. You can't prove that by what Lubben said.

By Mr. O'Brien: No, but I can prove that he had not gone in.

By Mr. Ryan: You can't prove anything more than what Lubben said.

By the Court: Anything he said over the phone is hearsay.

By Mr. O'Brien: Well, all right.

By the Court: It is hearsay in the sense of trying to prove the fact that no investigation had been made of Lubben.

Isn't that it?

By Mr. O'Brien: That is true.

I will put Mr. Sullivan on to cover that.

By Mr. O'Brien:

Q. Is it true, Mr. Cain, that you retained the services of Mr. Busby to work with you and the officers and your employes in not only assembling the data but in
174 assisting the Government agents in their audit work?

A. That is correct.

Q. And you continued to do that right up until shortly before the time of the indictment?

A. That is right.

Q. At any of those times from beginning to end did you have any intimation or notice from any agent, or from anyone else for that matter, that a conduct of that investigation was for any purpose other than to ascertain the amount due as Mr. Sauber had told you?

A. No.

Q. Did anyone tell you, did any of the agents or anyone else, tell you that there might be a criminal prosecution?

A. I was leaving for California—

Q. No, I mean during these times.

A. Mr. Sam Krane told me, finally.

Q. Yes, but I mean prior to that. While you were there?

A. Mr. O'Brien, they were there almost continuously from 1948 until we were indicted.

Q. When was it that Sam Krane talked to you?

175 A. He didn't call me, I called him. I was leaving for California this year and I don't know just when it was. Around the middle of February or the latter part of February.

Q. Right close to the time of the indictment?

A. That is right, and I said, "Sam, when are we going to get the case wound up? Please tell me when."

He said, "I think you better come down and see me."

I said, "All right."

He said, "This afternoon."

So I went down. I think it was two o'clock.

Q. I can't hear you.
A. I think it was about two o'clock in the afternoon.
Q. Yes, sir?
A. He took me into a little office and he said, "Your case is in the hands of the Justice Department."
Q. Meaning that they had recommended criminal prosecution?
A. That is right. That was about the first—it
176 may have been around the first of March.
Q. That is the first you knew about it?
A. That is the first I knew about it.
Q. What year was that, this year?
A. Yes, this year.
Q. Now, Mr. Cain, I want to ask you one other question in that connection:
As far as you know, was anybody at your company, any other officer or employe given any notice or any information prior to that time that a criminal prosecution was to be or might be recommended?
A. No, sir.
Q. During any time before the indictment in this case did the Department of Justice or the Bureau of Internal Revenue or anyone else tender you or invite you to any conference?
A. No, sir.
Q. Did they ever tell you what amount they had determined to be due?
A. No.
Q. And asked you to pay it?
A. No.
Q. They never notified you what the figure was?
177 A. I tried consistently to get it.
Q. You never saw it—is it true that you never saw it until you saw what they claimed in the indictment?
A. That is correct.
Q. And to your best knowledge and belief is that true as to the remaining defendants?
A. That is correct.
By Mr. Ryan: I will object to his belief.
By the Witness: Well, it is true. It is true as to the remaining defendants.

By Mr. O'Brien:

Q. Do you have any information of anything to the contrary as far as the other defendants are concerned?

A. Not the slightest.

Q. In addition to inspecting and auditing your books did the agents go to your suppliers and customers, to your knowledge?

A. They did. In fact, they told me they were going to do that, and I told them that I would save the Government a lot of money, that I would give them and have Mr. Sullivan and Mr. Huebner join me in an affi-

178 davit that we never paid any of our suppliers a penny over the ceiling, but they went out deliberately to embarrass The Shotwell Manufacturing Company. There could be no other reason.

By Mr. Ryan: I object to that conclusion and move it be stricken.

By the Court: That may be stricken.

By the Witness: I am sorry.

By Mr. O'Brien:

Q. And did that, to your knowledge, have a good or bad effect on the business of the company?

By Mr. Ryan: Objection. It is immaterial.

By the Court: Sustained.

By Mr. O'Brien:

Q. In that connection did you decide to call upon Mr. Ernest Wright?

A. Yes, sir.

Q. And did you do so?

A. Yes, we did.

Q. You say "we," you and who else?

A. Mr. Sullivan.

179 Q. Do you remember about when that was?

A. I would place the date in about sometime in 1950. I think there were two visits to Mr. Wright.

Q. The first visit in 1950?

A. It could have been in the early part of 1950—whenever they started out. The visit you are talking about is the one that was in connection with their going out and visiting the companies.

Whenever they started to visit the company right after that we went to see Mr. Wright.

Q. Can you place the date no more closely than that?

A. Well, let's call it mid-1950.

By Mr. Ryan: Mid-what?

By the Witness: That is just a guess, though.

By Mr. O'Brien:

Q. I don't want your guess. I would like to have your best recollection on it.

A. 1949—

By Mr. Ryan: What is the answer, 1949?

By the Witness: No. 1949 Mammel came in. I was trying to get the sequence of events through my own head.

180 By Mr. O'Brien:

Q. When the agents were visiting the customers were they on the premises, at the plant?

A. No, they weren't on the premises. They would come in and go out, come in and go out.

Q. Were they there steadily?

A. They would disappear and then we would get reports that they had been calling on our customers, on our suppliers.

Q. Was there any time that they disappeared for a couple months?

A. Yes, I believe there was.

Q. Refreshing your recollection, I will ask you to state if that wasn't as late as 1951?

A. That was our last visit. Our last visit to Mr. Wright—

Q. Do you remember visiting Mr. Wright at that time or was that Mr. Olson?

A. That was Mr. Olson.

Q. Well, let's veer a minute. When did you visit Mr. Olson?

A. I visited Mr. Olson in October, 1951.

Q. Which Mr. Olson?

A. The Mr. Olson who was Mr. Wright's assist-

181 ant. I think that is Mr. Oscar Olson. Is that correct?

By Mr. Mammel: Yes.

By Mr. O'Brien:

Q. Were you alone or with somebody?

A. I was alone.

Q. What conversation did you have with Mr. Olson?

A. Well, I called Mr. Wright and he wasn't in, that

is, by phone. I was called to the Blackstone Hotel—this is preliminary to my going there—and asked to take the chairmanship of a Democratic dinner for Frank McKinney who was being made National Committeeman of the Democratic National Committee, and I said, "Boys, I don't think I should. I have a tax case over there, and one of the newspapers is liable to pick it up or do something about it and I think I shouldn't."

They said, "Why don't you call over there?"

I said, "All right, I will call."

So I did call.

I couldn't get Mr. Wright so I saw Mr. Olson.

I told Mr. Olson very frankly just what I am stating here.

182 I said that I was asked to take this job and I begged off.

He said, "I would have no worry about it at all, but I would prefer you see Mr. Wright, but if I were you I'd have no worry about it at all."

And he went through all the steps that had to be done before anything could ever reach the public in this case. That was in October of 1951 and he knew, he was very familiar with it.

By Mr. Ryan: Would the reporter read that answer back, the last portion?

(Record read.)

By Mr. O'Brien:

Q. When was it with reference to that visit to Mr. Olson that you at last saw Mr. Wright?

A. I would say that we had seen Mr. Wright in the early part of 1951 and again in 1950. Mr. Sullivan and I visited him on both those occasions.

Q. On the occasion of your last visit early in 1951, was anyone present other than the three of you?

A. No, there was not.

Q. What did you say to Mr. Wright?

By the Court: When was this?

183 By Mr. O'Brien: Sir?

By the Court: When was this?

By Mr. O'Brien: As well as he could place it was early in 1951, Judge.

By the Witness:

A. We went into great detail about the case.

By Mr. O'Brien:

Q. No. I want to know what you said and what he said.

A. I told him that the company was suffering and suffering severely from the tactics that were being used by the agent and I wanted a bill, I wanted to get it over with, and he kind of smiled and said it was probably the condition of the market rather than the agents that were causing our business to suffer. The candy business wasn't too good, anyway.

Q. I want the whole conversation. What else was said?

A. Then he went into—we went into a discussion of the case itself and he wound up by asking us who got the money.

Q. What did you tell him?

A. I told him we didn't know.

184 Q. What did he say?

A. He said we weren't cooperating with our Government.

Q. Did that end the conference?

A. Just about. He again assured us that he would check into it and see if a bill could be brought forth. Something like that. And we left on a rather pleasant note.

By Mr. Ryan: That a bill would be brought forth?

By the Witness: We asked him if we couldn't get the tax matter settled. That is all we were trying to do.

By Mr. O'Brien:

Q. Do you recall about when it was that Mr. Lima left the plant and Mr. Krane came in?

A. I don't know too well, Mr. O'Brien. I don't believe I saw Mr. Lima at all when he was there. I know that he was there because I was there every day but, I don't think I saw him at all and I did see Mr. Krane discuss the problem with him, oh, two or three times, and I think he got out of the case in the fall or close to Christmas.

Q. What year?

185 A. Around 1948, the latter part of 1948.

Q. Did he come back later?

A. I don't believe Mr. Krane came back until 1951.

By Mr. O'Brien: Your Honor, I may have a few more questions of Mr. Cain. But I think substantially I have

covered it. I imagine I would save time if I go through my notes more carefully.

At what time do you want to adjourn?

By the Court: Off the record.

(Discussion off the record.)

By the Court: Do you want to work tonight?

By Mr. Ryan: Well, I have some interviewing to do of witnesses that I haven't seen that I have to get working on. I would more or less—

By the Court: Well, my problem is I should be in Minneapolis by Friday morning.

By Mr. Ryan: I do have some people to talk to.

By the Court: All of your witnesses are from here?

By Mr. Ryan: I brought some people from out of
186 town. I have som from New York. As a matter of fact, I have two people here right now from New York—three people, to be exact. They are not all local people. There are going to be some local people from the Treasury Department here.

As I say, the testimony of my witnesses will not be extensive, as extensive as this has been. It will be brief, for the most part. But I don't see how I can assure the court that we can finish tomorrow. I can review the situation with that in mind.

By Mr. O'Brien: I don't think it will be finished tomorrow.

By Mr. Ryan: As I indicated to the court, I thought I would probably take a day. I can't see other than that I will. I am trying to allow appropriate time for cross examination. It is always guess work.

By Mr. O'Brien: If you have to be back Friday, Judge, is there any time—

By the Court: I have to be back Friday morning.

187 By Mr. Ryan: I am willing to go ahead, Judge, for a time tonight. I would like to have some time. I don't want to work too late because I have to do some planning and interviewing.

By Mr. O'Brien: I worked until one o'clock this morning getting ready.

By Mr. Ryan: But I am willing to go ahead for a certain length of time, your Honor, and then I can talk to these witnesses afterwards, if that is agreeable.

By the Court: What documents have you that you want me to look over?

By Mr. Ryan: I have one more folder that apparently wasn't brought up. These are all the documents on the disclosure from the Treasury Department except—

By the Court: Are you contending that any of these documents are privileged as such or otherwise admissible except on the ground that they lack evidentiary value?

By Mr. Ryan: Well, they are all, there is a privilege, there is a regulation in the Treasury Department that
188 prevents the turnover of any files, not evidence that is gathered, but files that they have, correspondence, things of this type. They fall into the classification covered by the confidential files regulation and emyloyes are not permitted to turn them over without permission from the secretary of the Treasury.

Now, with respect to them, of course, there could be in any file of any papers a paper could be evidentiary for certain purposes and certainly files like these records of the Revenue Office showing the assignment of returns, those are evidentiary, they are made in the regular course of business. Some other documents I took out. These, I say, with respect to them, although they all fall within the meaning of the regulation, although the Secretary can lift it, and to the extent that they are not evidentiary they are represented there to the extent that I considered them to be represented I have separated them and turned them over to counsel.

189 With respect to the rest of these the tender has been made to the court for a determination that if he feels that they should be turned over they are being presented to him to be examined.

With respect to any particular documents from among that group the court would select to turn over I should then want to see them and find out if there was some public policy that I might bring to your attention against turning them over.

By the Court: I assume you don't intend to offer any of these documents?

By Mr. Ryan: I have no knowledge of any documents in there that I intend to offer.

By the Court: We will resume again at seven-thirty, Gentlemen.

(Whereupon a recess herein was taken to 7:30 o'clock p.m. of the same day, November 12, 1952.)

190

• • (Caption—No. 52 CR 143) • •

Chicago, Illinois,
November 12, 1952,
7:30 o'clock p.m.

Met pursuant to recess.

Present:

Mr. Ryan
Mr. O'Brien

And thereupon the following further proceedings were had herein:

By the Clerk: 52 CR 143. United States of America *v.* Shotwell Manufacturing Company. Hearing on defendants' motion to suppress certain evidence.

By the Court: You may proceed.

BYRON A. CAIN, one of the defendants herein, resumed the stand, having been previously duly sworn, was examined and testified further as follows:

191 *Direct Examination by Mr. O'Brien.*

Q. Mr. Cain, in your conversation or conversations with Mr. Sauber what, if anything, was said by you to him as to your ability to say who the premium payments were paid to?

A. Well, I told him it would be impossible for us to tell him who the payments were paid to because we didn't know.

Q. What did he say about premium payments in general?

A. He said that premium payments regardless of whether we could or could not tell would not be allowed by the Government.

Q. Did Mr. Busby tell you, Sullivan, or Huebner, that is, you or Sullivan in your talk on January 11, 1948, or any of your talks after that that there was any requirement for a disclosure other than those mentioned in the published policy?

A. No, sir.

Q. Did you ever know of any other or further requirements?

A. No, sir.

Q. Did you know if it is the fact that your ability
192 to say to whom premium payments were made was or might be regarded as a condition precedent to a disclosure?

A. No, sir.

Q. Did you know at any time if it is a fact that the Bureau of Internal Revenue claimed a continuing discretion to recommend criminal prosecution even though a disclosure had been made?

A. No, sir.

Q. When did you first hear of any visit by Mr. Krane to the Shotwell premises for any purpose?

A. It was either on June 21st or June 22d of 1948.

Q. Prior to that time did you have any knowledge or information of any kind that there was or may have been an investigation of Lubben or any of his companies?

A. No, sir.

By Mr. O'Brien: You may cross examine.

193 *Cross Examination by Mr. Ryan.*

Q. Now, Mr. Cain, before you sent Mr. Busby to New York and before he returned and told you that he learned you received over ceiling payments you knew, of course, that you had received over ceiling payments?

A. Certainly.

Q. Did you consider prior to that time that Mr. Busby talked to you the effect of these over ceiling transactions and the corporation tax liability?

A. Yes, we had.

Q. You had considered it.

Was it your thought it would effect your tax liability to increase it or that it would remain constant in spite these transactions?

A. Well, at that time we didn't know.

Q. Well, at the time that you filed corporation tax returns for the year 1945 did you consider that they were honest tax returns or an honest tax?

A. They couldn't have been.

By the Court: I don't hear.

By Mr. O'Brien: A little louder.

By the Court: They could not have been.

194 By Mr. Ryan:

Q. You mean that you considered at the time that

the corporate return for 1945 was filed that it could not have been an honest tax return?

A. That is correct, inasmuch as it didn't reflect our total income or total expenses.

Q. Did you consider at the time the corporation tax return for 1945 was filed that it did not show the total of net taxable income?

A. Restate that?

(Record read.)

By the Witness:

A. I would say yes to that statement.

By Mr. Ryan:

Q. That you considered it did not show the total of net taxable income.

By the Court: I don't think the witness answers the question. He nods his head.

By the Witness: I said yes, your Honor.

By Mr. Ryan:

Q. So when the 1945 tax return for the Shotwell Corporation was filed you considered it to be a fraudulent return?

A. Inasmuch as it did not reflect the total income 195 and total expense it was fraudulent, yes.

Q. And in that it did not reflect the total, in your opinion, the total tax due the Government, is that right?

A. In the opinion of the Government, yes.

Q. I mean, in your opinion. I am not questioning about the opinion of the Government. In your opinion.

A. In my opinion I would never give the Government any money unless they told me I owed it to them, as I would have to take the Government's opinion on taxes.

Q. My question is, when the Shotwell Corporation tax return for the year 1945 was filed, did you consider that you had omitted from it some of the net taxable income, the net taxable income that was in fact received by the Shotwell Corporation?

By Mr. O'Brien: I think he has answered that, if the Court please.

By the Court: He may answer.

By the Witness: Yes.

By Mr. Ryan:

Q. Well, then, you considered the 1945 to be a fraudulent return, is that correct?

196 A. That is correct, inasmuch as my modification of the answer previously.

Q. What modification is that?

By the Witness: Read it back to him, Mr. Reporter.

By Mr. Ryan:

Q. Well, did you or didn't you consider it a fraudulent return?

A. Yes, it was a fraudulent return inasmuch as it did not reflect the total income and expense of the company.

Q. Well, would you consider a return fraudulent if it showed all of the tax that was due from the taxpayer even though there were inaccuracies in it?

A. Yes.

Q. You would consider it fraudulent?

A. Yes.

Q. Did you consider that the 1945 tax return of the Shotwell Corporation was fraudulent because it did not reflect all of the net taxable income of the corporation and all of the tax due the United States?

A. I would say yes to that question.

197 Q. Did you consider the 1946 tax return of the Shotwell Corporation fraudulent as not reflecting correctly the total net taxable income of the corporation for that year and the total tax due?

A. Yes.

Q. Now, then, when you called on Mr. Sauber in company with Mr. Busby did you tell him that the Shotwell Corporation had filed false income tax returns for the years 1945 and 1946?

A. Yes, I guess I did.

By Mr. Ryan: Mark this Government's Exhibit 1 for identification.

(Document so marked.)

By Mr. Ryan:

Q. I show you, Mr. Cain, a copy of an affidavit which has just been marked Government's Exhibit 1 for identification, which purports to be a copy of an affidavit that you made in connection or in support of the motion to dismiss.

I ask you to look at it and see if that is the affidavit that you made—if it is a copy of the affidavit.

A. Are you trying to say that because I say omissions and misstatements—

198 Q. No, I am just asking you, Mr. Cain, if that is a copy of your affidavit.

A. Yes, this is a copy.

Q. Directing your attention then to the last page thereof and to the language:

> "Affiant further avers that although he and his associates have steadfastly maintained that the defendant corporation owes no tax over and above the sum of $370,638.95 which it paid for the year 1945, or over and above the sum of $457,012.98 which it paid for the year 1946, the activities of said agents aforesaid were of such embarrassment. * * *"

Is that your statement made under oath?

A. That is my statement under oath, and it still stands.

Q. There is no question pending.

Now, then, directing your attention to a conference that has been testified to which you had with Mr. Busby when he returned from New York in January of 1948, at that time he asked you about those over ceiling transactions that the Shotwell Company had had, is that correct?

199 A. That is correct.

Q. At that time did you tell him that the Shotwell Corporation had made false tax returns for the years 1945 and 1946?

A. At that time I told Mr. Busby that we had omitted this over ceiling receipts and over ceiling payments.

Q. Did you tell him—

A. No, I did not.

Q. You did not tell him that.

You did tell him, did you, that you had had over ceiling receipts, you had received over ceiling payments and you had paid out over ceiling payments and that roughly they balanced or washed each other out?

A. That is correct.

Q. And you told him, did you, to go to the Bureau of Internal Revenue and make certain hypothetical inquiries concerning what should be done in a situation such as that?

A. That is right.

Q. In a situation where there were balancing gross receipts and additional deductions, is that right?

200 A. That is correct.

Q. Did you tell him to tell the official of the Treasury Department hypothetically otherwise that the Shotwell Corporation owed the Government taxes for those years?

A. He reported back that the Government told us that we did owe taxes.

Q. Well, did you not tell him to tell the Government or the Bureau of Internal Revenue hypothetically or otherwise that the undisclosed corporation owed the Government taxes?

A. I told him to tell the Government that because of our inability to ear mark the over ceiling payments that we would in all probability owe money.

Q. In other words, because of your failure to work them up, in other words, to report accurately on what you had received and what you had paid out, is that what you mean?

A. Well, Mr. Ryan, when you pay money out to faceless people it is impossible to ear mark it and to keep a record of it.

Q. Well, now, he came back and reported to you what?

A. He came back and reported to me and to Mr.
201 Sullivan that he had presented the case to Mr. Sauber, and Mr. Sauber said there was a lot of them at that time, and that he saw nothing unusual about it, but that we could not under any circumstances make an amended return because we couldn't give them the exact amount of money that had come in over ceiling, or the exact amount of money that had gone out; therefore, it would be necessary for them to send an agent out and assemble that information. He would appreciate it if we would help him with it.

Q. You sent him back the second time?

A. That is correct.

Q. On that occasion you told him, did you, to disclose the identity of the taxpayer?

A. That is right.

Q. Did you at that time tell him to advise Mr. Sauber that the Shotwell Corporation had made false tax returns for the years 1945 and 1946?

A. I had quite a bit of confidence in Mr. Busby. He knew the case by that time.

Q. Did you tell him to tell Mr. Sauber that the corporation had made false tax returns for those years?

202 A. I don't recall telling him anything. We told him what to do, to go in and disclose the Shotwell Manufacturing Company, period.

Q. Do you recall what you did tell him?

A. We told him to go to whomever he had been to before and disclose the identity of the taxpayer.

Q. And did you tell him to tell Mr. Sauber that the corporation had made false returns for the years 1945 and 1946?

A. I don't believe I did. I don't think I had to tell Mr. Busby anything. We certainly told him to go in and do whatever was necessary to get the matter straightened out.

Q. Did Mr. Busby in the course of informing you about the requirements of the voluntary disclosure doctrine on or about January 11th or 12th of 1948 tell you that it was necessary that the taxpayer make an honest, full disclosure of all the material facts?

A. Mr. Sauber told us that we couldn't make that.

Q. No—Mr. Busby.

A. Mr. Busby reported back to us that Mr. Sauber said we couldn't—

Q. I am sorry, I mean, in the conference you had 203 with Busby before he went over to Mr. Sauber the first time.

A. No, he did not.

Q. He did not?

A. No.

Q. Did he tell you that at any time?

A. No. In this case it was utterly impossible to make it complete. It had to be dug out and dug up and even today we can't be sure it is complete and accurate.

Q. Well, in sending him over to Mr. Sauber you had in mind making a disclosure to avoid criminal prosecution, was that the purpose?

A. Very definitely.

Q. Did you, Mr. Cain, make any memorandum of the date upon which you went to Mr. Sauber to commence this disclosure?

A. Well, Mr. Ryan, we have reconstructed it in this way: That Mr. Busby was in New York on the 10th day of January, or returned to Chicago from New York. He reported to me at my house the next day, which was a Sunday, I believe.

We asked him to go in so it had to be shortly there- 204 after. I left for California on the 23d or 24th, and I saw Mr. Sauber before I left.

Q. Well, my question is whether or not you made any memorandum of the date on which he went over there for the first time.

A. No, I have not. I just have the facts.

Q. Did you make any memorandum on the date which he went over there on the occasion which he was instructed to disclose the taxpayer's name?

A. No, I made no memorandum.

Q. Did Mr. Busby advise you in January, on or about the 11th or 12th, before he went over to Mr. Sauber for the first time that one of the things that was important in a voluntary disclosure is that it be timely?

A. Yes, I think he did.

Q. And did he tell you that that required that it be made before the tax return and been assigned for examination by the Bureau of Internal Revenue?

A. I think he did.

Q. Were you not mindful of the importance of establishing the date upon which that disclosure was made for that reason?

205 A. Well, I didn't make a memorandum.

Q. It was important to you?

A. It has become important. I had implicit confidence in my Government and Mr. Sauber at that time, and I still do have.

Q. Did you suggest to Mr. Busby that he send any registered letter or notification to the Bureau of Internal Revenue concerning disclosure?

A. I made no suggestion.

Q. Or require any statement from them?

A. I made no suggestion.

Q. Concerning the disclosure.

Now, after Mr. Busby returned from the second conference with Mr. Sauber he reported back to you, did he?

A. On each occasion, yes.

Q. And on the second occasion when he reported back what did he tell you?

A. He told us he had disclosed the taxpayer's name and that Mr. Sauber had suggested that he would send somebody out from the Agents' office as quickly as possible and for us to go ahead and gather what data we could that would be helpful to the Agent in the meantime.

206 Q. Well, did you then yourself have a conference with Mr. Sauber?

A. I am inclined to believe that I did, Mr. Ryan, and prior to my leaving for California on the 23rd or 24th.

Q. And that would be the occasion of Mr. Busby's third visit, your first visit?

A. That would be right.

Q. And you think that was in January also?

A. It had to be because I left here on the 23d or 24th of January.

Q. That is if it was prior to your departure for California?

A. It was prior to my departure.

Q. You are certain of that?

A. That is right.

Q. At that time what conversation took place between you and Mr. Sauber and Mr. Busby?

A. Well, I went into the matter of the over ceiling receipts. He discouraged me on the matter of the over ceiling payments. He said it was out, that they might give it some consideration, but if they did it would be very little, that the Department's rule is they would 207 not consider over ceiling payments by us.

Q. Were you surprised by that statement?

A. Well, I wasn't surprised because I didn't know what I was going into.

After all, I was a business man. I got involved in this thing through no particular desire on my part. I wanted to build up a business and so I wasn't surprised nor was I disappointed.

I said, "We stand willing and able to pay any amount of tax that is assessed against us, and we are anxious to get the job done. If we find that we have money coming back or feel that we have money coming back, we will use every means to get it back, but we are ready to pay it right now."

Q. Did you tell him the corporation owed taxes for those years?

A. I did. We undoubtedly owed taxes.

Q. Did you tell him that before he told you that the disbursements in the black market would not be deductible?

A. Only because I told him I could not ear mark the disbursements. I thought if I go through them and ear

mark a good portion of the disbursements that I
208 could get a deduction or at least that portion of them, that I could ear mark. I expected to be assessed for those that I could not ear mark.

Q. Whether you owed the taxes or not, is that right?

A. Whether I owed—I expected to be assessed for them.

Q. But to the extent that they would be deductible you would consider that you didn't really owe the taxes, even though—

A. You mean my own mental reservation on it?

Q. —even you might be in a position where you would have to pay?

A. That is correct.

Q. Well, then, you wouldn't have considered yourself guilty of any fraud at that time, is that right?

A. I don't understand this fraud thing all the time, Mr. Ryan. Under the terms of the Revenue Act I was guilty of fraud.

Q. Well, the statute involved provides that anyone who attempts to defeat and evade the payment of any tax imposed under the particular chapter, wilfully
209 attempts to defeat and evade, is guilty of what we call tax evasion, and that is the fraud to which we have reference, I have reference, in asking these questions—the wilful attempt to defeat and evade the payment of taxes, and on the basis of what you say your attitude was when you talked to Mr. Sauber you didn't consider that you were a wilful evader, is that right?

By Mr. O'Brien: If the Court please, I object to that question. I think it calls for a legal conclusion of the witness. He made his position plain, his interpretation of a moot question of law. I don't think it is particularly helpful to the inquiry here.

By Mr. Ryan: It is a question of consciousness of guilt or the absence of consciousness of guilt.

By the Court: That is right. He may answer.

By the Witness: Will you read that question, please?

(Question read.)

By the Witness:

210 A. That is a long question, isn't it?

Well, I was certainly an unwilling evader.

By Mr. Ryan:

Q. Well, you mean, in the sense that your evasion

was incident to something else, or in the sense that it wasn't wilful if there was evasion?

A. Mr. Ryan, if it hadn't been for the fact that the OPA was in effect and we had to do things in violation of that law, this tax case never would be. We would have reported every penny of income that ever came in to the company.

Q. Well, do I understand then that the answer to the question is that you felt in the position of a reluctant evader because you had to evade in order to conceal the black market operations?

A. I had to evade to stay in business, if that is the way you want to put it. I will answer it that way. Nobody could stay in business unless they got corn syrup, and we had to get corn syrup or close our factories and that was not only true of us, it was true of every manufacturer in the business in the United States.

Q. Well, then, you say that you did tell Mr. Sauber that the corporation owed taxes unquestionably?

211 A. We told Mr. Sauber that unquestionably we owed taxes, that is right, under their rules.

Q. How do you reconcile that with your affidavit in which you say that at all times you have maintained throughout these proceedings that the corporation owed no taxes?

A. Well, we morally owe no taxes. If we took in money and spent the money we owe no taxes, but under your rules we do owe taxes.

In other words, if the Government changes your income tax to ten percent, I am sure you are not going to give them thirty percent next year. That is why I say I have to go by the rules.

Q. Well, did you or did you not consider that in fact you owed taxes to the Government or the Shotwell Corpration owed taxes to the Government for the years 1945 and 1946 when you talked to Mr. Sauber the first time?

By Mr. O'Brien: I object. It is not a question of fact, if the Court please. It is a matter of a legal interpretation.

By the Court: It is a question of his own mental state of what his attitude was. That may play an impor-

212 tant part in so far as the Legislature is concerned.

By the Witness:

A. We told Mr. Sauber that we felt that we owed a tax.

By Mr. Ryan:

Q. Did you?

A. What is it?

Q. Did you? Did you feel that you owed a tax?

A. Yes, I felt that we owed a tax.

Q. Morally and legally?

A. My answer still stands. I felt that I owed a tax.

Q. Did you make any distinction between the feeling that you owed it legally and the feeling you owed it morally? You made the distinction a little while ago, that is the reason I ask.

A. Yes, I would make a very definite distinction between a moral obligation and a legal obligation.

Q. Did you feel that you owed it legally and morally, or just legally and not morally?

A. My attitude was such when I went in to Mr. Sauber that I said, "We owe you a tax. We want to pay that tax, whatever it might be, and if, if, your bill is too high, if it is too big, and we find some reason to come
213 back and try to get some of it back, we will do so."

Q. Did you mean what you said to him?

A. Yes, I meant that we wanted to pay the taxes.

Q. That you owed the taxes?

A. I really meant that. I meant we wanted to settle this thing.

Q. What did you mean in your affidavit when you say,

> "That at all times in your proceedings you and your associates have maintained that the corporation owed no taxes."?

A. Well, I am going over to the moral side of it now.

Q. Well, do you mean when you spoke to Mr. Sauber you were speaking legally, and when you spoke in the affidavit you were speaking morally, is that what you mean?

A. And when I spoke to Mr. Sauber and explained the case to him from the moral angle he understood just that.

Q. Well, of course, Mr. Cain, a taxpayer either owes taxes or he doesn't. There is a distinction between ow-

ing taxes and considering yourself in a position
214 where though you don't think you owe them you can't prove that you don't.

Do you understand that distinction?

A. That is right.

Q. Now, if I understand you correctly, you meant that you owed the taxes, in fact, and you said so to Mr. Sauber.

Is that right?

A. I meant that I owed the taxes and couldn't prove that I didn't.

Q. You owed them and you couldn't prove that you didn't?

A. That is right. I meant, that is just what I meant.

Q. Well, if you were charged with being in New York and couldn't prove that you weren't, that wouldn't mean that you were there, would it?

A. No.

Q. And if you didn't owe the taxes but you couldn't prove that you didn't that wouldn't mean that you owed them, would it?

A. Mr. Ryan, we took in quite a large sum of money and we couldn't say what happened to it. Because of our own negligence I felt that we owed the Govern-
215 ment some taxes.

Q. Did you feel, did you believe, that the gross receipts unrecorded you had received exceeded the gross disbursements unrecorded?

A. At the time I made the disclosure?

Q. Yes.

A. I don't believe I knew the status of the situation at that time.

Q. Now, what other conversation did you have with Mr. Sauber after that first visit, or during that first visit you made to him besides telling him that you owed the Government taxes and were willing to pay whatever you owed?

A. I think my purpose in going there with Mr. Busby was to get his reassurance that he had checked the Shotwell file and that there was no investigation pending.

Q. What did Mr. Sauber say in that connection?

A. I don't recall on that visit, Mr. Ryan, but I am very definitely positive what he said on my visit on March 4th.

Q. Did you mention to him on the first visit the question of whether there was an investigation?

A. I am inclined to believe that we did. If we
215 didn't get his assurance at that time we got his promise to make a complete check and give us the assurance at a later date.

Q. Well, on the second occasion what did he say with respect to the timeliness of your disclosure?

A. He said that they had—the agents' office had checked the file and that there was no investigation pending.

Q. Did he say who in the agents' office had checked the file?

A. I am inclined to believe he said Johnson, but Johnson's name came into this thing—it is five years ago—but I believe it is the agents' office, but I can't say for sure. But it was the agents' office that checked the file and he told me to quit worrying about it.

Q. And what else did he say in that conversation? Tell us what else he said.

A. He said somebody from the agents' office would come out to the factory and get the figures on it and asked us to cooperate with him, with whomever came out there.

Q. Now, at which meeting, the first or the second, was it, that he told you as you testified that it
217 wouldn't make any difference whether you could prove the disbursements of these over ceiling moneys or not?

A. I think at both meetings. He emphasized that to us.

Q. He said to you that it made no difference so far as the Government was concerned?

A. That is right.

Q. Whether you proved that you actually made those expenditures or not?

A. That is right. He said it was the Government's policy that over ceiling payments could not be deducted.

Q. Now, in your conversations with Mr. Sauber, Mr. Cain, did you ask him if there would be any publicity in this case?

A. No, I did not.

Q. In your conversations with him did he ever tell you that this was just a civil case?

A. Not to my knowledge, although that is all I ever expected it to be.

Q. Would that be something that you would be apt to forget if he said it?

A. I don't think so because I had no reason to
218 ask it. He told me to go on and quit worrying about it. I thought it was something that would be in the normal course of events and clean itself up very quickly.

The only person I asked about possible publicity was Mr. Olson. That was in October of last year.

Q. Mr. Cain, I show you Defendants' Exhibit 1 marked for identification and direct your attention to the first sheet which has been described as the summary sheet, I believe, the sheet which Mr. Busby said he delivered to Mr. Lima as the first piece of disclosure evidence.

A. Yes.

Q. And ask you if you saw that sheet before Mr. Busby turned it over to Mr. Lima.

A. Well, I am not a bookkeeper, but I am inclined to believe that I did.

Q. Do you recall, Mr. Cain, Mr. Busby asking you to whom you had made expenditures or over ceiling expenditures in order to obtain materials for your candy factory?

A. Yes, I recall him asking me to try to establish some expenditures in this thing.

219 Q. Did you do that?

A. Yes, I did.

I said, "It isn't going to make any difference anyway, so let's work the thing backwards and just charge it backwards. Let's put something on there and let's hope it will get in."

Q. Will you explain what you mean by working it backwards? How would you go about that?

A. There was a certain amount of cash left in the surplus account or the box or wherever it was kept, and that was deposited in the corporation, so we started with that as a base and we arrived at a figure of over ceiling payments, and then I checked that and just mentally closed by eyes and charge this, this, this, and this, without going into detail as to where it had gone.

We expected to go into detail on it and we have persistently tried to go into detail on it, but when we go into detail on it the only thing with the agents whom we have talked with seemed to want to know is not that we bought sixteen million pounds of corn syrup when we had a quota of probably seven million pounds, they don't want to know about the quantities of this
220 merchandise that we got, they want to know who got the money, and I don't know.

Q. Well, now Mr. Cain, directing your attention to the first item of disbursement that is scheduled here, chocolate, $45,000, does that entry on that sheet which you caused Mr. Busby to turn over to the Government mean that $45,000 was paid to obtain chocolate?

A. Not necessarily, no, and we so told them.

Q. What is it supposed to mean if it is not supposed to mean that?

A. Mr. Ryan, there was a summary sheet. This was a sheet that really was for our own purpose. We had made our disclosure months and months and months before this sheet was put out and when we got down to this figure, Lima was in. We had to do something quickly so I said, "Give him these figures and we will go ahead and work."

Now, to this date we haven't been able to substantiate all of the payments but those figures will all change if any of these gentlemen will give us a chance we can tell you in dollars and cents where—not where it went, but how it went. They don't want to know how it
221 went, but where it went and to whom.

Q. Do I understand correctly you did not and did not consider this summary sheet on Exhibit 1 as forming a part of the disclosure?

A. Definitely not.

Q. Definitely not?

A. Definitely not.

Q. And directing your attention to the second item $30,000 for milk, is that supposed to mean that the Shotwell Corporation spent $30,000 to obtain milk during the period involved here?

A. The same answer that I gave you on chocolate and that applies on milk.

Q. In other words, it doesn't mean that $30,000 was spent for milk, is that right?

A. No, because since that time we have made an investigation and we find that on corn alone, on corn syrup alone, a tremendous amount of money, far in excess that was on this sheet was expended for that one item and we are trying to rebuild those figures.

Q. But these figures don't mean what they say, is that right?

222 A. These figures are reasonably accurate.

By Mr. O'Brien: What do you mean by these figures indicate?

By the Witness: I am pointing—

By Mr. O'Brien: Describe them for the record.

By the Witness: The figures of over ceiling payments to The Shotwell Manufacturing Company that we were all vitally interested in because we had been told to be as accurate on that as we could with reasonable accuracy and I say only reasonable because we had not done the research that we have done since, but the payments —when Mr. Lima came in these figures were simply something we put down on the paper and each time they tried to pin us on it.

By Mr. O'Brien: Which figures? You say these figures.

By the Witness: The expenditure figures, but the expenditure figures are going to have to be revamped entirely.

By Mr. Ryan:

Q. These figures don't mean what they say, is 223 that correct?

A. That is correct; that is correct, and Mr. Lima was told that.

Q. Were you present when Mr. Busby turned this schedule over to Mr. Lima?

A. No, I was not. I don't think I ever met Mr. Lima.

Q. Did you tell Mr. Busby to tell Mr. Lima that these figures on disbursements didn't mean what they said?

A. I can't answer that. I don't know.

Q. When you put these figures down or gave Mr. Busby these figures to put down and gave to Mr. Lima you knew they didn't mean what they said, is that right?

A. When I talked with Mr.—

By the Court: I think we would get along faster if you would answer the questions.

By the Witness: I can't answer that question, your Honor.

By the Court: Say you can't answer. Don't enter into a discussion.

By the Witness: I am giving him an answer to it.

224 By the Court: Answer the question.

Please read the last question.

(Question read.)

By the Witness:

A. I knew that the figures above were as accurate as is possible to make them.

By Mr. Ryan:

Q. I am speaking about the figures below, did you know they didn't mean what they said, what you gave them to Mr. Busby to give them to Mr. Lima?

A. It was our best estimate at that time.

Q. Well, do you mean to say that the $45,000 figure here for chocolate bears some resemblance to the actual figure, if any, that was spent for chocolate?

A. I can't answer that.

Q. You just don't know?

A. I just don't know.

Q. And you didn't know then, did you?

A. It was strictly an approximation. We knew this was not going to be allowed.

Q. Well, then, you knew that what you were submitting to the Government was inaccurate information, is that correct?

A. Not so far as—they were told it was inac-

225 curate.

Q. Were you present when that occurred?

A. We at no time represented to the Government that we could rebuild these figures accurately.

Q. Well, Mr. Cain, what benefit did you think these figures that you had no reason to know were correct and that you knew weren't correct, what benefit did you think they would be to the Bureau of Internal Revenue?

A. I didn't know that they would be of any benefit to them. If they presented me a bill for the three hundred and ninety-odd thousand dollars, a tax on that, I would have paid it, and then I would have gone ahead and tried to build up this other item.

Q. But did you make an offer of money of taxes in that amount to the Government?

A. I have told everybody in this case that I am all the time ready and willing to pay any bill that was presented to me.

Q. But the Government apparently didn't see fit to render you just any bill, whether it was right or wrong, but they sought to find out whether or not these figures were correct, is that right?

226 A. No, that isn't right. They sought to find out who got the money.

Q. Well, wouldn't that perhaps have something to do with whether they were correct or not?

A. I don't think so.

Q. Well, the Government has received no assurance, you say, from you that they were truthful or that they meant what they said.

A. The Government told me that they wouldn't recognize them to begin with.

Q. Did any of the Revenue Agents tell you that? I mean, the investigating agents.

A. I don't know—I don't recall my conversation with the Revenue—but I believe some of them intimated there was no deduction allowed for over ceiling payments.

Q. To whom did you pay any of the money that you say was spent for the purpose of procuring materials over ceiling?

A. I didn't pay any of it to anybody.

Q. What did you do with it?

A. I never handled a penny of it.

Q. Did you ever receive any of it from Mr. Lubben?

A. No.

227 Q. Personally?

A. No.

Q. Who did?

A. Oh, various people in the company.

Q. Well, who would they be?

A. Mr. Huebner, I think Mrs. Morrill received some, Mr. Graflund, Mr. Roeser, and possibly one or two others.

Q. Well, who might the others be?

A. I would have to refresh my memory on it.

Q. But you did not?

A. I never did, no.

Q. Did you ever see any of the money?

A. I think on one occasion I might have seen the money.

Q. That is, between the time it was received and paid out?

A. You mean did I see it between the time it was received and paid out? Oh, I would think so. I was president of the company.

Q. But you are not sure whether you did or not?

A. Well, I didn't bother too much about it. It was either under the control of Mr. Shotwell or Mr. Huebner or under the control of Mr. Huebner.

228 Q. Are you sure that you never got it?

A. Well, I was kept advised of what was going on and I knew, I knew of my own knowledge from people calling me about the corn market that we couldn't possibly get corn syrup unless we got corn to the refinery, so I knew we had to get money or make trade deals, one of the two.

Q. In other words, because you were getting materials you concluded that you did, in fact, receive the money, is that right? Otherwise you wouldn't have had it to pay out for materials.

A. How much money we received I am not in a position to say, I don't know, but we did receive some money.

Q. Who paid the money out, if you received it?

A. Various of the individuals that I mentioned.

Q. Who would they be, who were they?

A. Mr. Huebner, Mr. Hogan, I recall he paid some money out, Mr. Roeser paid some money out; anybody that happened to be there.

Q. Are you sure that they paid it out?

A. Why certainly. We got the product that we paid for, that is my assurance.

Q. Did you pay for the product? Was it billed 229 to you and did you pay the bill?

A. It was billed to us at ceiling price.

Q. And it was reflected on your books at that price?

A. At ceiling price, that is correct.

Q. So that you did pay the regular ceiling price for all materials which you received in your factories?

A. Oh, yes.

Q. And they were reflected in your books?

A. That is right.

Q. Then how are you sure that any of this money was paid out to anybody for materials? You didn't receive the money, you aren't sure you ever saw it, and you didn't pay it out?

A. I am an executive, Mr. Ryan, and I am just as sure that that money came in and went out as I am sure that raw materials came in and went out. That is my business to know those things.

Q. You say Mr. Huebner paid some of it?

A. I think he did, yes.

Q. Do you know whether he did or not?

A. No, I don't. No, I don't.

Q. Who was another person that you named?

230 A. I know that Mr. Kelly paid some out; I know Mr. Hogan paid some out.

Q. Mr. Kelly, what is his first name?

A. John Kelly.

Q. Is he an employe?

A. He was an employe.

Q. In what capacity?

A. Sales manager of the marshmallow division.

Q. Well, to whom did Mr. Kelly pay any of this money?

A. To a Dr. Doe.

Q. Where is Dr. Doe located?

A. Board of Trade Building.

Q. In this city?

A. That is right.

Q. What sort of a doctor is he, dentist?

A. That is right.

Q. Mr. Kelly paid money to him, is that correct?

A. That is right.

Q. How much did he pay to him?

A. I haven't the slightest idea.

Q. You know that because Mr. Kelly told you he paid money to Dr. Doe?

A. I think that is right, and also somebody else 231 told me that Kelly had gone down to Dr. Doe's office.

Q. Who else told you that?

A. Somebody out at Shotwell.

Q. You don't remember?

A. No, I don't.

Q. And you don't know how much?

A. No, I don't.

Q. Do you know what it was for?

A. For corn.

Q. Do you know whether it would approximate a hundred thousand dollars or five thousand dollars or two thousand dollars?

A. No, I don't know how much it would be.

Q. It could have either been a thousand dollars or a hundred fifty thousand dollars?

A. No, it couldn't have been a hundred and fifty thousand. It could have been anywhere from three thousand to fifteen thousand, I would say, or twenty thousand.

Q. I wouldn't want to pin you down—

A. I am just trying to say I don't think over fifteen or twenty went out at one crack on any one of those deals. In other words, we were dealing with faceless
232 men. This man, unfortunately, I wish he were, he is faceless.

Q. Do you know did Mr. Kelly send this money to Dr. Doe?

A. So far as I know, I don't know how the delivery was made.

Q. Do you know why Mr. Kelly paid the money to Dr. Doe?

A. Sure.

Q. Why?

A. Because he was told to by one of the salesmen for the corn syrup company. He was told to by one of his superiors, but the superior was told to do it by one of the salesmen for the corn syrup company.

Q. Mr. Kelly was told by one of his superiors?

A. That is right.

Q. Do you know who that superior was?

A. In all probability it was somebody in the auditing department, or Mr. Huebner.

Q. Do you know who in the auditing department it would have been?

A. It could have been the sales manager, Mr. Hogan, or it could have been Mr. Graflund or Mr. Huebner.
233 Somebody told him to go down and give that money to Dr. Doe. Whether he gave it to him in person or put it in a slot in his door I don't know.

Q. Do you know whether he gave it to him in cash?

A. Not definitely I do. It went out in cash.

Q. Do you know whether or not he got a receipt for it?

A. No, he did not.

Q. Well, do you know anybody else that received any of this money that was paid out?

A. Not of my own knowledge, no, sir.

Q. Who does know?

A. I don't know.

Q. You don't know who does know where any of the rest of this money was paid to, or to whom it was paid?

A. I don't know to whom this money was paid.

Q. Well, are you satisfied that it was so paid?

A. I am satisfied that it was so paid.

Q. Could you find out to whom it was paid?

A. I could probably find out some of the people, but I could never trace all of them. After all, Mr. Ryan, this money went to the farmer in the very great proportion with subcommissions off.

234 Q. You don't know that, do you?

A. Oh definitely I know it. I stopped out in the country time after time and would say to any of these fellows that were running the elevators what the black market price on a car of corn was and they would quote it.

Q. Did you pay any of the farmers any money?

A. No, I did not. I never paid a penny.

Q. Did you ever try to find out to whom any of this money had been paid?

A. No.

Q. But there were people in your own organization who knew, is that correct?

A. No, only a very few of these people were known.

Q. Did the people who got the money come to your organization and get it out of the safe themselves in disguise, or something?

A. No, they did not, but we made it our business not to know who they were. You have to get into the operation of this corn market to understand what was happening at that time.

Q. Yes, I know, but if an individual in your organization had to take money and pay it to someone he
235 would then know to whom he had paid it, wouldn't he?

A. No.

Q. He wouldn't?

A. No, not necessarily.

Q. Would he pay it to a man standing on the corner with a carnation in his lapel, or something of such arrangement, is that it?

A. He could pay it to the man who came to the office and said, "I came in on the corn deal, and we got a call from somebody else and said the corn deal was set up and this corn was going to be shipped, we will say, Corn Products Company or somebody else."

Q. What assurance would you have that that money, that you would receive this product?

A. This thing started slow and built up and we never lost a car of corn.

Q. Would some of the amounts paid been very large amounts?

A. Yes, quite substantial.

Q. As much as fifty thousand dollars?

A. No, not in one place at one time.

Q. Thirty thousand?

236 A. Thirty thousand might go—twenty or twenty-five.

Q. And that would be paid in cash to a stranger?

A. That is right.

Q. With no receipt or no identification?

A. Generally the amounts were smaller, but it could have been a substantial amount was paid out. But that would only be after a long time in dealing with that particular source.

Q. Well, now, in connection with the sugar that is shown on this sheet you show, of course, these figures aren't right, they don't mean this—

A. The total means something, Mr. Ryan.

Q. The total on the sugar?

A. No, not on the sugar; the total of money paid out means something and what we proposed to do was to substantiate as much of that money as we could, and then try to get the sum, but the time just wasn't there. It is like this lawsuit. All working all last night to get ready for it. When something happens you get started.

What I wanted particularly to do was to get our disclosure of the amount of money that we owed the Gov-

ernment, that we had collected over ceiling. I wasn't
237 particularly interested in that other item. The only thing I thought was important and the thing that Mr. Sauber impressed on me was important was how much money did we get.

Q. And you didn't think it made any difference whether this schedule, Exhibit No. 1, Defendants' Exhibit 1, was accurate or not because it didn't form a part of the disclosure, is that correct?

A. Our disclosure was made to Mr. Sauber. This was just a memorandum.

Q. And you didn't consider this as a portion of the disclosure?

A. No, sir.

Q. Well, did you make an attempt to secure information as to what happened to the money and to whom it went for the disbursements?

A. We are still in the process of obtaining that.

Q. Was that for the purpose of turning it over to the Government?

A. Turning it over to the Government?

Q. Turning the information over to the Government, the substantiation of the disbursements?

A. That is correct. We just turned it over and said, "We will start with this and we will go from
238 there."

Q. Did you ever tell Mr. Krane that you would never tell him what you did with the money or to whom you paid it?

A. I don't believe I did.

Q. Do you recall a conference with Mr. Krane on October 12, 1948—October 19, 1948, at your office, at Shotwell, do you recall a conference on or about that date?

A. I recall a lot of conferences with Mr. Krane.

Q. Well, do you recall telling him that you would not at any conference that you had with him that you would not ever tell him?

A. I think I was pretty consistent in my statements to all of these gentlemen that I did not know, I made it my business not to know, nor did I want to know where that money had gone. That is, to whom, not to where, but to whom that money had gone. Certainly, I wanted to know how we spent it.

Q. Well, then, so far as of the present time with the exception of the payment to Dr. Doe you have no further information as to who any of the money was paid?

239 A. That is right.

Q. Right now.

Now, Mr. Cain, when did you first learn that Mr. Lubben and his companies were under investigation by the Internal Revenue Bureau?

A. Whenever Mr. Krane came into our office.

Q. You mean for the first time?

A. That is right, for the first time, June 21st or 22d.

Q. And you did not know it at any time prior to that?

A. No, I did not.

Q. Where were you on June 21, 1948?

A. I was in New York City.

Q. When did you find out that Mr. Krane had visited your office on that date?

A. I think I had a telephone call from my office either on the day or the day after his visit. We usually report in every day when we are away from there, that is, from the factory.

Q. Did you call your office?

A. I can't tell you whether I called or was called, but as I say, under normal circumstances we would call almost every day that we are away.

240 Q. Were you at the Waldorf-Astoria at that time?

A. Yes, at a candy convention.

Q. And you received the call from Mr. Graflund, is that correct?

A. I think that is correct.

Q. And he told you that Mr. Krane was there, did he?

A. Yes.

Q. At the time of his call?

A. That is right.

Q. And that he wanted, he was making certain inquiries?

A. Yes.

Q. And he wanted certain records?

A. That is right.

Q. Having to do with carloads of chocolate or chocolates?

A. I don't recall what it was, but whatever he wanted I told him to give him anything he wanted.

Q. Did Mr. Graflund tell you that he hadn't been able to locate records concerning these shipments of chocolates at that time on June 21st, 1948?

A. I don't believe he did, Mr. Ryan.

241 Q. Do you know why he mentioned it to you, why he mentioned Mr. Krane's presence?

A. Why certainly. When a man comes in from checking on a customer of ours like Lubben, that would be a normal thing for him to do, to tell me that Mr. Krane was out there.

Q. Did he tell you anything else in the course of that call apart from the fact that Mr. Krane had called on him?

A. I don't recall that he did.

Q. Do you recall whether he called expressly to advise you that Mr. Krane was then there?

A. I think he did. Now, whether that was the same day or the day after, I don't know.

Q. Don't you remember that he told you that Mr. Krane was right there as he was calling?

A. I think that is correct, that is my opinion of it.

Q. Do you recall why it was of sufficient importance for him to call you in New York and tell you Mr. Krane was there?

A. Well, I think that Mr. Krane was there investigating one of our customers which would be of sufficient importance in itself. If he hadn't done it, I 242 would have criticised him severely.

Q. Did Mr. Krane later contact you personally with respect to the same inquiry after your return?

A. Not to my knowledge.

Q. Well, directing your attention to approximately a week later at your office, at Cain & Culhane, did you not see Mr. Krane about that same matter there?

A. I could have.

Q. Do you recall that he was still inquiring about these shipments of chocolates?

A. I don't know what he was inquiring about at that time.

Q. Do you know whether or not you furnished him the information that he was seeking at that time?

A. I am inclined to believe that we did.

Q. Do you recall calling Mr. Sullivan while he was there and making an appointment for Mr. Krane to see him to find out if Mr. Sullivan knew anything about the shipment of chocolates?

By Mr. O'Brien: If the Court please, I think I will note an objection to it. I don't see the relevancy in this matter. The time is fixed undisputed and it is not
243 proper cross examination, certainly. It hasn't anything to do with any subject matter of the direct.

By Mr. Ryan: I think it bears to some extent on his state of mind whether or not he was resting on the disclosure at the time. I might drop the last question and ask this one further question:

By Mr. Ryan:

Q. Did you inquire of Mr. Krane when he saw you whether or not he was interested in your tax liability or the Shotwell Corporation tax liability?

A. I don't believe I did.

Q. Did you tell him anything about having made a disclosure or that you were in the process of making a disclosure?

A. I certainly did not.

Q. Who was present with you in the Waldorf-Astoria Hotel at the time you received that telephone call from Chicago?

A. In the suite that we occupied which was set up with a big display of candy it would be utterly impossible for me to tell you who was there, but occupying the suite and some adjoining rooms was Mr. Sullivan,
244 Mr. Huebner and myself, together with our wives. We were down there entertaining. We must have had a hundred and fifty—we had a thousand people in our room.

Q. At the time?

A. No, not at the time, but during the course of that convention, so I can't tell you who was there.

Q. Can you tell us who was present in your room that would have heard the call?

A. No, I couldn't.

Q. There were other people?

A. Could have been. There could have been a lot of people.

Q. Did you say anything to anyone after you received the call?

A. Not to my knowledge.

Q. About the call at all?

A. I don't recall saying anything to anybody.

Q. Now, you say that not until Mr. Sam Krane in February, January or February of 1952 told you that the report of your corporation's tax case had been forwarded to Justice, not before that did you have any
245 understanding that you might be prosecuted criminally?

A. That is right.

Q. Had you had conversations with Mr. Mammel prior to that time?

A. Quite a good many.

Q. Had he ever indicated to you that he didn't regard this as a disclosure?

A. On one occasion he would be lovely, and on the next occasion he would be very mean, so you couldn't tell what Charlie was doing.

Q. Did he ever tell you at any time while he was working there that when you said you were making a voluntary disclosure that you had not made a voluntary disclosure?

A. I don't believe he did. The only memory I have of discussing the disclosure with Mr. Mammel is when we were discussing it back and forth and I said it is my frank opinion it is our disclosure that caused the Lubben investigation and at that time he was agreeing with me.

Q. Did you in any of your conversations with Mr. Krane ever tell him that you were making a voluntary disclosure?

A. I was making one?

246 Q. Yes, that you were making one for the corporation.

A. You mean when he came in on this—

Q. At any time that you saw him in the course of the period during which he was investigating?

A. Well, he knew about it.

Q. Did you ever tell him that you were making and relying upon the fact that you were making a voluntary disclosure?

A. Well, he was out there investigating on the fact that we made a voluntary disclosure.

By the Court: You are not answering the question.
By Mr. Ryan:

Q. Did he ever tell you, or did you ever tell him that any time when he was out there investigating that you were relying upon the fact that you were making a voluntary disclosure of the corporation's tax liability?

A. No, but I don't think that was necessary. He never told me that he wasn't recognizing our voluntary disclosure so I don't know why I should become upset about it.

Q. He never told you that he was recognizing—

247 A. He never told me he was not.

Q. And he never told you that he was?

A. I didn't think he was the officer that I was going to be responsible to. I thought we made our disclosure downtown.

Q. Did Mr. Lima ever tell you that he was recognizing a voluntary disclosure which you were making?

A. I don't believe I ever talked to Mr. Lima.

Q. Did Mr. Mammel ever tell you that he was recognizing a voluntary disclosure which you were making?

A. Nor did he tell me that he was not. Neither one.

Q. Did you consider the type of investigation that the agents were conducting of the corporation's tax liability to be any different than the type of investigation they would conduct in the case of any corporation's tax liability?

A. I so reported to Mr. Wright at one time during the course of the investigation and testified about it this afternoon.

Q. I mean, as to purpose.

A. No, I didn't. I thought they were trying to force me to find out who, that is all they wanted to know,

248 who got the money. In other words, my theory on this thing is that they want to know so they can go out and do to other people what they have done for us. They want to find out who those guys are and get them over the barrel, and I haven't been too helpful on it. I have done the best I could, but I haven't been too helpful. They want to know who got the money and that seems to be their only purpose.

Q. Well, did it occur to you that perhaps the agents were only trying to verify whether or not the money had ever, in fact, been paid out?

A. I don't think at any time along the line, they said, "Mr. Cain, who got the money?"

And I said to them, "I don't know who got the money."

Q. Did you consider that they were seeking to find out actually whether or not the money had in fact ever been paid out?

A. I thought they were trying to wear us down to the point where we would put on a strenuous effort and call back all our salesmen that had gone and try to find out some more names for them, that is what I thought.

249 Q. Did you have any notion why they wanted the names?

A. My theory was they wanted to go out and investigate them, and I had—

Q. It didn't occur to you that perhaps they just wanted to find out whether in fact you had made these disbursements?

A. Mr. Ryan, I was told to begin with it didn't make any difference whether I made the disbursements or not, that they weren't going to be allowed.

Q. Did the agents ever tell you that?

A. I think Mr. Mammel told me that.

Q. Did you continue to believe it didn't make any difference to the Bureau whether or not you paid it out?

A. I think that was the ruling up until about two weeks ago, wasn't it?

Q. Well, did you continue to believe that the agents investigating your case weren't interested in whether or not you had in fact paid the money out?

A. I continued to believe that. I thought they were more interested in to whom we had paid than we were trying to substantiate where it had gone.

250 Q. Were you under the impression that they were satisfied that the money had been paid?

A. I think, of course, agents are hard to figure out. One time they are perfectly satisfied and everything is fine; the next time they are jumping down your throat and kicking you, so it is hard to say whether an agent is ever satisfied, but I think these fellows were reasonably well satisfied in their own mind from just the mass of merchandise of raw materials that came into that plant that money had to be paid out.

Now, whether they were ever satisfied as to whether all of it was paid out, I don't know. I can't read their minds.

Q. None of them ever told you they were satisfied that money had in fact been paid out?

A. Oh, I don't think they had any doubt in their mind money had been paid out. Neither one of them.

Q. And you considered their seeking of the names only an effort to harass those people who had received it?

A. I don't mean harass them. I mean go out and
251 collect more taxes for the Government.

Q. That was your construction of the persistency in trying to get those names?

A. That is correct.

Q. Did you ever make any other overtures to the Bureau of Internal Revenue along the lines of possible disclosure than to Mr. Sauber?

A. No.

Q. You never had sent any emissaries to any other officials of the Bureau?

A. Oh, you mean since that time, or prior to that time?

Q. Since the time that you sent emissaries and went to Mr. Sauber?

A. I have not rested any six months period that I haven't been trying to get the Government to do something about this case to get it settled.

Q. Have you ever sent any other emissaries to the Government apart from Mr. Busby to Mr. Sauber subsequent to that time looking toward the making of a disclosure or the settlement?

A. Not a disclosure, certainly, but I have gone myself to Mr. Wright, Mr. Sullivan and I went to Mr. Wright
on two or three occasions. I went to see Mr. Ol-
252 son.

Q. Who else have you ever sent to any Bureau officials?

By Mr. O'Brien: I will object to that, if the Court please. It is way past the point of disclosure.

By the Court: I don't recognize the materiality of that.

By Mr. Ryan: Well, if he did send anybody else it might throw light whether he considered he made a disclosure.

By the Court: Whether he sent somebody else with reference to this matter?

By Mr. Ryan: Yes.

By the Court: He may answer.

By Mr. Ryan: I mean the Shotwell tax liability.

By the Witness:

A. The Shotwell case tax liability?

By Mr. Ryan:

Q. Yes.

By Mr. O'Brien: I object to the question.

By the Court: He may answer.

By Mr. O'Brien: The reason I object, if he sent
253 someone in on disclosure, that is one thing, I can see the materiality of that.

By the Court: He may answer.

254 By the Witness: A. I personally went to Mr. Schoeneman.

Q. And did you ever send anybody to anybody else in the Bureau?

A. Not to my knowledge, Mr. Ryan.

Q. Do you think that you might have and forgotten about it?

A. No, no. I have a lot of friends, and this case after four or five years, we had discussed it back and forth, but I don't believe anybody ever went to the Bureau. I went to Mr. Schoeneman myself. If I went to him myself, and my only purpose in going to him, and I so reported to the agent when I came back, and the agent at that time was Charlie Mammel, that I had talked with Mr. Schoeneman, I said my only purpose in going was "For goodness sakes to get the thing out of our hair. It is ruining our business. Let's get it done," and he said, "What did Mr. Wright say?" And I told him what Mr. Wright said on that occasion and he said, "I am sorry, Mr. Cain, you will just have to go on and fight the thing out on that field in Chicago," or something to that effect. "You are not cooperating with your gov-
255 ernment in giving them the information that they want."

Now, we did employ counsel.

Q. Who?

A. We employed Dan Taylor—no, prior to that, about six months prior to—I can't say it was six months—maybe three months prior to the time.

Q. Did you employ any other counsel in connection with this tax problem?

A. William J. Frolich represents me personally.
Q. No, in connection with the tax problem?
A. Mr. O'Brien.
Q. Apart from Mr. O'Brien?
A. Mr. O'Brien, Mr. Taylor and Mr. Frolich.
Q. They are the only ones, only attorneys whose aid you ever enlisted in connection with this tax matter?
A. That is right. Some of the men from their office might have done something on the case, I don't know.
Q. I believe you said, did you not, that you had learned nothing considering the New York investigation prior to Mr. Krane's call, or Mr. Gratlund's call, in
256 New York on June 21st?
A. That is correct.
By Mr. Ryan: That is all.
By Mr. O'Brien: That is all.
By the Witness: One thing, Mr. O'Brien.
By the Court: That is all.
By Mr. O'Brien: Just a second, Mr. Cain. Was there any answer or statement that you wanted to correct?
By Mr. Ryan: I think there should be a question.
By the Court: If he wants to talk to you, all right, I haven't any objection, but I don't like volunteered statements. If you want to talk to him—
By the Witness: It has to do with the last question asked by counsel on the other side.
By the Court: If you think you haven't answered the last question sufficiently complete, you may add whatever you want to.
By the Witness: There is a possibility. I don't recall this of my own knowledge, but it has been told
257 to me that we have received some information that there was going to be an investigation of Mr. two or three or four days or maybe as much as a week prior to our going to New York, but I don't know it of my own mind.
By Mr. Ryan:
Q. Going to New York?
A. To that candy convention in July 21st of 1948.
Q. From whom was that received, Mr. Cain, if you know?
A. From whom was the information received? One of the boys in our office received the information from a Mr. Tobias.

Q. Who was that in your office?
A. Stanley Graflund. Now, whether that was before—
Q. Who is Mr. Tobias?
A. He was a bookkeeper for Mr. Lubben.
Q. Did you know him?
A. No, I do not.
Q. You never met him?
A. Pardon?
258 Q. Have you ever met him?
A. I met him at that candy convention in New York.
Q. For the first time?
A. For the first time, to my knowledge.
Q. On what date?
A. It would probably be the 22nd or the 23rd.
Q. Was he with you on that occasion?
A. He came into our rooms and I don't imagine he stayed over ten minutes.
Q. That was the first time you have ever seen him?
A. To my knowledge.
Q. Or had been introduced?
A. That is right.
Q. Did you see him there after?
A. Not until we went on these depositions.
Q. That was the next time. Then you saw him only on one occasion, is that right?
A. That is right.
Q. And that occasion was in New York on June 21st?
A. It was between June 21st, some time during the candy convention. I can't peg it to the 21st.
259 Q. And that information, that rumor, was transmitted to you by Mr. Graflund?
A. That is right.
Q. Was that he received that information from Mr. Tobias a few days before that, that you went up to New York where you were on the 21st?
A. That is right.
Q. When did you leave for New York?
A. I can't tell you. I would have to check my records whether we flew or we went by train. We were there on the 20th, so we left on the 19th if he went by train. If we went by plane, we could have left on the 20th, so it is pretty close.

Q. Well, that was the extent of your contacts and dealings with Mr. Tobias, is that correct?

A. Yes.

By Mr. Ryan: That is all.

By Mr. O'Brien: That is all.

(Witness excused.)

By the Court: We will resume again tomorrow morning at 9:30. What do you say about that?

By Mr. O'Brien: That is all right with me.

By Mr. Ryan: That is satisfactory with me.

By the Court: Off the record.

260 (Discussion off the record.)

(Whereupon an adjournment was taken until November 13, 1952, at the hour of 9:30 o'clock a.m.)

261

(Caption — 52 CR 143)

Chicago, Illinois,
November 13, 1952,

9:30 o'clock a.m.

Court convened pursuant to adjournment.

Present:

Mr. Ryan
Mr. O'Brien
Mr. Hess
And other Counsel.

And thereupon the following further proceedings were had herein:-

By the Clerk: No. 52 CR 143, United States of America against the Shotwell Manufacturing Company, et al.

Hearing on motion of defendants to suppress certain evidence.

By Mr. O'Brien: Judge, we have been talking about the parts of this book which we would like to offer
262 and last night I went through the book and made a memorandum of the places.

That part in the middle, page 140 down through page 150, I believe is already in on the prior agreement. Those pages contain the statements of policy in full.

By the Court: I don't know whether you identified it.

By Mr. Ryan: Yes, I identified it.

By the Court: Oh, did you?

By Mr. Ryan: I read each statement.

By Mr. O'Brien: I wasn't entirely sure either, but we meant to put those in.

Now, that is 140 through 150.

I think also that there was put in a short statement on abandonment, which must be 151. So that is already in, from 141 to 151.

Now, at page 78, however—I mentioned yesterday that I thought there was a longer statement on abandonment of the policy, and I find that at page 78, right under the subject of Voluntary Disclosure, is the press release of December 11 relating to that abandonment. That is at page 78 to 80 of the book.

By the Court: Well, have you listed here the 263 pages?

By Mr. O'Brien: I have listed these. I am now saying that those are the things I would like to put in evidence. I don't think that Mr. Ryan has any opportunity, has had any yet to see these or to look at them, with reference to this list, other than the things I have mentioned. But those are the ones.

By Mr. Ryan: I would like to do that. He has just designated them. I would like to look at them and then I will tell you.

By the Court: Very well.

By Mr. O'Brien: And this again, to state briefly my position, was that if these things were to go in, I would have no need of the testimony.

But in any event. I would have offered the book, but I am saying if it is offered and received, to that extent I do not need the testimony.

By the Court: Very well. You may proceed.

By Mr. O'Brien: If the Court please, I shall not have any more witnesses on our case in chief. Technically, as I suggested last night, I shall keep it open, with your Honor's permission, for the matters that we are to look at, the documents.

264 By the Court: That may be so understood.

By Mr. O'Brien: And also for the disposition of the items we were just talking about and consideration of what, if anything, we should do about the witnesses.

By the Court: Very well.

By Mr. Ryan: Then, I take it, the defense is resting on the motion?

By Mr. O'Brien: Yes, with the exception of what we should do about the witnesses and—

By Mr. Ryan: Yes, I understand your reservations.

By the Court: Yes.

The Defendants Here Rested Their Case In Chief With Certain Reservations Made Of Record.

Whereupon The Government, To Maintain The Issues In Its Behalf, Introduced The Following Evidence, To-wit:

By Mr. Ryan: Mr. Sauber.

265 ERNEST J. SAUBER, called as a witness on behalf of the Government herein, being first duly sworn, was examined and testified as follows:

Direct Examination By Mr. Ryan.

Q. State your full name, please.

A. Ernest J. Sauber.

Q. Where do you reside, Mr. Sauber?

A. 209 East Washington Street, West Chicago, Illinois.

Q. What is your business or occupation?

A. I am the Director of Internal Revenue for the Northern Illinois District.

Q. How long have you occupied that position?

A. Since May 20, 1952.

Q. And that was when the office was created?

A. That is correct.

Q. Prior to that date, what was your occupation?

A. Assistant Collector of Internal Revenue, from May of 1951 to May of 1952.

Q. And prior to May of 1951 were you in the Internal Revenue Bureau?

A. I held the position of Chief Field Deputy from November of 1946 until May of 1951.

266 Q. And that was Chief Field Deputy of the First Internal Revenue Collection District of Illinois?

A. That is correct.

Q. With offices in Chicago?

A. That is correct.

Q. How long have you been with the Bureau of Internal Revenue?

A. March of 1935 I entered the service.

Q. In what capacity?

A. As a deputy collector of internal revenue.

Q. How long did you serve as a deputy? I believe you did tell us when you were made Chief Deputy, didn't you?

A. I held other positions in the office.

Q. Now then, directing your attention to the year 1948, during that year you occupied the position of Chief Deputy Collector, is that correct?

A. Chief Field Deputy.

Q. And as such, very briefly, what were your duties?

A. Responsibility for the operation of the Field Division and the Office of the Collector of Internal Revenue.

267 Q. Now then, do you know one Leon Busby, a certified public accountant in this city?

A. Yes, I do.

Q. How long have you known him?

A. I would say six, seven years.

Q. And he has had occasion, or has he had occasion from time to time to have contact with your office in connection with his profession?

A. I met him in the office on various occasions.

Q. Did you ever have occasion to discuss with him the tax liability of The Shotwell Manufacturing Corporation, a corporation, in this city?

A. I discussed The Shotwell Manufacturing Company with Mr. Busby, yes.

Q. When did you first have a conversation with Mr. Busby relative to the tax liability of The Shotwell Manufacturing Company?

A. March 15th, approximately, of 1948.

Q. Where did that conversation take place?

A. In my office.

Q. Who was present at that time, if anyone, besides yourself and Mr. Busby?

A. No one.

Q. Now, will you proceed and tell the court what 268 Mr. Busby said to you and what you said to him in the course of that conversation, as best you can recall?

A. Mr. Busby said that he had a client; that he had

been requested to prepare amended returns for this client, and the client had engaged in over-the-ceiling sales and over-the-ceiling purchases, and the over-the-ceiling sales and over-the-ceiling purchases were not reflected in the books of the client; and that he had been asked to prepare amended returns for this client; that he had been unable to determine or ascertain the exact figures that were represented by the over-the-ceiling sales and over-the-ceiling purchases, and he did not know how he could prepare amended returns without having the figures, and he asked my advice on how to proceed.

Q. And what, if anything, did you say?

A. I asked him about the details of the transactions.

Q. Just what did you say? Try to avoid generalizations like that, if you can, and just tell us what you said to him, as best you can recall.

A. I asked how these transactions were handled.

269 He said they were handled all in cash; that the sales were made, and the part that represented the over-the-ceiling payment on the sale was accepted in cash; the cash was kept in a cash box, and when they were required to purchase over-the-ceiling raw materials, they used the cash from the cash box to make the purchase for the over-the-ceiling purchases; and when the situation existed that it was no longer necessary to make over-the-ceiling sales and over-the-ceiling purchases, the balance that was left in this cash box was taken into the corporation records and declared as income in that year that the OPA ceilings ceased to exist.

Q. Was there any further conversation that you recall.

A. I told him he could not prepare amended returns on the basis of the knowledge that he had; that the amended returns would be just as wrong as the original returns; and I suggested that he call all the people together in The Shotwell Manufacturing Company that had anything to do with the over-the-ceiling purchases and over-the-ceiling sales, and to get statements from

270 each one of the individuals in The Shotwell Manufacturing Company that had anything to do with these transactions, and from their statements to reconstruct the figures that would be necessary in order to have an accurate income tax return, and after the figures had been reconstructed, to ask the Internal Revenue Agent's

office to audit The Shotwell Manufacturing Company return.

Q. Was there any further conversation at that time, if you can recall?

A. That was the gist of the entire meeting.

Q. Well now, did you have any further conversation with Mr. Busby after that relative to The Shotwell Manufacturing Company's tax liability?

A. Within a week Mr. Busby brought Mr. Byron Cain into my office and introduced Mr. Cain as the president of Shotwell Manufacturing Company, and said that Shotwell Manufacturing Company was the client that he had referred to in the previous meeting.

Q. And that was about within a week after March 15, 1948?

A. That is correct.

Q. Well, will you proceed now and relate to the
271 court what conversation took place upon the occasion of that meeting, what you said, what Mr. Busby said, what Mr. Cain said, if anything?

A. Mr. Cain told me the same story that Mr. Busby had.

He told me that Shotwell Manufacturing Company had engaged in over-the-ceiling sales over-the-ceiling purchases; that the over-the-ceiling sales and over-the-ceiling purchases were not reflected in their tax returns; that they were handled in cash; that he had retained Busby to prepare the amended returns; that they did not have the exact knowledge of the total amount of the transactions; that quite a few people in The Shotwell Manufacturing Company had taken part in these black market activities, and they had no way of ascertaining the exact amount that was involved, and they did not know how to proceed in order to correct their tax returns.

I gave Mr. Cain the same advice that I had given Mr. Busby, to call all the members of The Shotwell Manufacturing Company together that had participated in this activity and secure statements from them, and from
272 the statements that he secured from them, to prepare or reconstruct the figures that would represent the over-the-ceiling sales and over-the-ceiling purchases, and to ask for an audit of their returns.

Q. Do you recall any other conversation at the time?

A. Well, I know that we had a very lengthy discussion regarding the case.

Q. Well, to refresh your recollection, was there anything said about publicity?

A. Yes.

Q. Would you tell the court now what conversation you further recall, if any?

A. Well, Mr. Cain told me that he had two boys in school and he was worried about publicity.

He asked me if there would be any publicity on the case.

Q. What did you say?

A. I told him no, there would not be.

Q. Well, was there anything further?

A. I told him the only time publicity was issued, or the only time an income tax case received publicity was
when there was an indictment. But an audit of a tax
273 return did not involve publicity of any kind, and the
only time there was publicity in connection with a tax case was when there was an indictment.

Q. Was there anything said about a civil case?

A. Well, I told him in my opinion this was strictly a civil case and that it was not a criminal case, and that he had nothing to worry about so far as publicity was concerned.

Q. Now, was anything said about the subject of who made a profit as a result of these transactions?

A. Mr. Cain told me that no one in Shotwell Manufacturing Company profited by these transactions; that it was handled strictly on the basis of keeping all the over-the-ceiling sales in this cash box, making all the over-the-ceiling purchase payments out of the cash box, and at the end of the period the amount of money that was left was taken into the corporate records and declared as income, and that no one in Shotwell Manufacturing Company profited by these transactions.

Q. Now, then, did you thereafter have any conversation with Mr. Cain relative to this same matter?

A. Mr. Cain called me on the phone numerous times
after that, wanting to know—well, I am a little
274 bit ahead of myself here.

He called me I would say within thirty days after the meeting with Mr. Busby and Mr. Cain.

Q. Did you recognize his voice?
A. Yes, I did.
Q. As Mr. Cain's voice?
A. He may have identified himself, but I would still recognize him.
Q. Then go on and relate what that telephone conversation was. You say about thirty days later?
A. I would say thirty days later.
Q. Go on.
A. He said that they had followed my advice, that they had had the meeting of all the people in The Shotwell Manufacturing Company that were connected with these black market transactions, and that they had prepared the figures, and he wanted to come in and turn the figures over to me; and I told him I had no jurisdiction in the case; that the Revenue Agents handled the examination of corporation income tax returns, and that he should call the Revenue Agent's office and request an audit of the returns of The Shotwell Manufacturing Company.
Q. Well, was that the extent of that conversation?
275 A. Well, he asked if I would take care of it for him.
Q. Take care of what?
A. Of having a man come out to audit the returns of The Shotwell Manufacturing Company, and I said I would see and I would let him know.
So I called the Revenue Agent's office and asked if they would audit the return or schedule the return of The Shotwell Manufacturing Company for audit, and they said they would.
Q. Whom did you talk to?
A. I talked to Ralph Johnson.
Q. Who is he?
By the Court: I didn't get the name.
By the Witness:
A. Ralph Johnson. He is a group chief in the Revenue Agent's office.
By Mr. Ryan:
Q. I am sorry. I may have interrupted you in the course of your conversation. Did you complete it?
A. He said he would take care of it then, schedule the returns for audit.

Q. Well, then, when did you next hear about this 276 matter, if at all?

A. Probably thirty days later Mr. Cain called me and said he had heard nothing, that there had been no one out to the company to make the audit of the records, and I told him to be patient, that they had a lot to do, and just to sit back and wait, that it would be taken care of, the man would be out and audit the books, and he had to sit back and wait.

I explained the work load that we had in the Internal Revenue Office and how they couldn't take one return and schedule it for an audit immediately, and went on and explained, tried to explain the reason for what he thought was a delay.

Q. Did that represent the extent of that conversation?

A. It did.

Q. Did you hear from him thereafter?

A. He called me two or three times, asking each time when the man was going to come out, and I kept giving him the same answer, that we had a lot of work to do, and he would just have to bide his time, and it would be taken care of.

Q. Did you ever thereafter recontact Mr. Ralph 277 Johnson relative to the matter?

A. At one time when Mr. Cain called me, he was very insistent and he said that The Shotwell Manufacturing Company had to prepare their financial statements and that they were going to have to have a statement on their balance sheet, that their figures were dependent upon an audit by the Internal Revenue Department, and he also said that they wanted to make a change in their capital structure.

As I recall, they wanted to issue some other stock or to add some capital, and he said it was very important to them to have this audit made so they could go ahead with their plans as far as the financial structure of The Shotwell Manufacturing Company was concerned.

He was very insistent that the audit be started.

At that time I recontacted Mr. Johnson to ask him when the man would be out there to make the audit.

Mr. Johnson advised me—

Q. This is over the telephone?

A. That is correct.

Q. You had called him over at the Revenue
278 Agent's office?

A. That is right.

Q. Go ahead.

A. Mr. Johnson advised me that I had given him the wrong name originally, and that he had done nothing as far as having the return assigned for audit, and I asked him if he would have it assigned immediately, and he said, yes, he would.

He said he would have it assigned and have a man out there in a very short time; and I called Mr. Cain and told him of my conversation with Mr. Johnson, that the case had not been assigned due to an error or a misunderstanding between Mr. Johnson and myself as far as names, and the man would be out there in a very short time.

Q. Now going back to the conversation with Mr. Johnson, did you relate all the conversation that you can recall that you had with him on the phone in this last call?

A. I think I did.

Q. Well, to refresh your recollection, was there anything said by Mr. Johnson about Shotwell Manufacturing Company?

A. He said that I considered the name of the
279 company Shotwell Candy Company and I had given him the name Shotwell Candy Company, and he said there was no account Shotwell Candy Company; that there was an account of Shotwell Manufacturing Company.

Q. Did he say where there was such an account, as you put it?

A. Well, he said, "We have an account," or "We have a return for Shotwell Manufacturing Company, not Shotwell Candy."

Q. In the Revenue Agent's office?

A. That is right.

Q. And to refresh your recollection, was there anything else said by Mr. Johnson respecting assignment of that return, in connection with assignment?

A. Well, he said that he had done nothing about it and the return was not assigned, and he would have it assigned to one of the men on his own group and send one of his own men out there immediately.

Q. Now go on with your conversation, then, with Mr. Cain after your call to Mr. Johnson. I interrupted you, I believe.

A. I told Mr. Cain that I had called Mr. Johnson
280 and due to a mix-up in the names, the case had not been assigned for audit, and that Mr. Johnson would have it assigned immediately and the man would be out there very shortly.

Q. Now, did you thereafter hear from Mr. Cain in connection with this matter?

A. Yes, I did. Mr. Cain called me and said that they had had three men, I believe, out there auditing the—

By Mr. O'Brien: When was this?

By Mr. Ryan:

Q. Tell us as best you can place the date.

A. I would say that was a year later.

He said that they had had three men out there auditing the returns, and he wanted to know what they could do to expedite the closing of the case.

I told him to see Mr. Wright, the Internal Revenue Agent in Charge and explain his problem to him and it was entirely up to Mr. Wright, and I had nothing to do with the case.

Q. Is that the extent of that conversation?

A. That is right.

Q. Did you thereafter hear from Mr. Cain again?

281 A. He called me I would say within a week, and said he had been in to see Mr. Wright and he had, I believe he said, gotten nowhere with Mr. Wright, and he asked me if I would find out why that case could not be expedited and closed, and I told him that I would see Mr. Wright and find out what the difficulty was.

Q. Did you have any further conversation then with Mr. Cain?

A. Well, I stopped to see—

Q. Well, did you contact Mr. Wright?

A. I stopped to see Mr. Wright.

Q. Did you then, after that contact with Mr. Wright, have any further conversation with Mr. Cain?

A. I called Mr. Cain back.

Q. What did you say?

A. And I advised him of the result of the conversation that I had had with Mr. Wright.

Q. Did you tell him what the conversation was?
A. I told him.
Q. What did you tell him?
By Mr. O'Brien: I object to the conversation. I think that Mr. Wright's testimony—
282 By Mr. Ryan: No. I am asking him for what he said to Mr. Cain.
By the Court: He may answer.
By Mr. O'Brien: He is saying what Mr. Wright told him.
By Mr. Ryan: Well, this is what he said to the defendant.
By the Court: Proceed.
By the Witness:
A. I told Mr. Cain that I had talked with Mr. Wright and he advised me that the difficulty in The Shotwell Manufacturing case was that The Shotwell Manufacturing Company would not tell the Government to whom the over-the-ceiling purchase payments had been paid, and until such time as The Shotwell Manufacturing Company would tell the Government or identify the persons receiving the over-the-ceiling purchase payments, the case would not be closed, that they would be required to cooperate with the Government before they would consider closing the case.
By Mr. Ryan:
Q. Was that the extent of that conversation, Mr. Sauber?
283 A. Mr. Cain told me he could not identify the persons receiving—
By the Court: State that again.
By the Witness:
A. Mr. Cain told me he could not identify the persons receiving these payments; the only persons that he knew of was a Dr. Doe in the Board of Trade Building, that someone had sent some money to, and that he himself thought it was a fictitious name and he would not appear ridiculous naming a Dr. Doe, and that was the only person he knew that had received any of these payments, and he would not reveal that name because he himself thought it was fictitious.
By Mr. Ryan:
Q. Was that the extent of the conversation?
A. That was the extent of the conversation.

Q. Now, at any time in the course of any of these conversations with Mr. Busby or Mr. Cain, did you ever tell either of them that what they were doing constituted a timely disclosure under the voluntary disclosure doctrine?

A. I did not.

Q. Did you ever at any time during the course of
284 these conversations with Mr. Busby or Mr. Cain tell either of them that what they were doing constituted a sufficient disclosure under the voluntary disclosure doctrine?

A. No, I did not.

Q. Did you ever at any time tell them that you had ascertained that no investigation of the Shotwell Corporation had been commenced?

A. I related that when I talked to Mr. Johnson I had said the case had not been assigned for audit.

Q. To any particular Agent?

A. To any particular Agent.

Q. Beyond that, did you ever make any statement?

A. No, I did not.

Q. Did either Mr. Busby or Mr. Cain ever ask you to inquire and ascertain whether or not any investigation had commenced against the Shotwell Corporation?

A. No, they did not.

Q. Did Mr. Cain or Mr. Busby ever at any time advise you that The Shotwell Manufacturing Company had made sales of merchandise, of products, that were not recorded on the books?

A. No, they did not.

285 Q. Did you ever advise Mr. Cain or Mr. Busby that there would be anything different about the proposed audit by the Revenue Agents from any other audit that might be made of any other corporation tax return?

A. No.

By Mr. O'Brien: I object to the nature of the question. It is a leading question.

By the Court: I think the answer may stand.

By Mr. Ryan: You may cross examine.

Cross Examination By Mr. O'Brien.

Q. Mr. Sauber, I take it that you talked to counsel about your testimony before your appearance here today, did you not?

A. Yes, I did.

Q. How many times? I don't mean recently, but how many times did you talk to Mr. Ryan or his office about this case?

A. Twice.

Q. Over what period?

286 A. The past week, two weeks—last week.

Q. Outside of that, you had no other talk with Mr. Ryan's office?

A. That is correct.

Q. Prior to those talks and prior to the indictment in this proceeding, had you been requested by one of the Agents to give a statement?

A. Yes, I was.

Q. And did you give such statement?

A. Yes, I did.

Q. In writing?

A. Yes, I did.

By Mr. O'Brien: If the Court please, I should like to see that statement. It has not been given to me. I think it is not only essential for cross examination that I have it, but I am prepared also to show that I have a right to have it.

I know the statement because Mr. Ryan told me about it the other day when we were on the general subject of things of that sort, and I told him that—

By Mr. Ryan: There is such a statement. The court has it.

287 By the Court: I have some recollection of running across it in some files that are in my office.

By Mr. Ryan: That is right.

By Mr. O'Brien: At the time I talked to Mr. Ryan he said—

By Mr. Ryan: I did not consider it evidentiary since it was a hearsay recital of a statement taken from a witness.

By Mr. O'Brien: I said that I would have the right to it for the purpose of cross examination, and the authorities so hold in 145 F. 2d, page 76.

By the Court: What do you think about it?

By Mr. Ryan: Well, I think I was correct in withholding it at the time I did, it not being evidentiary.

I haven't any particular objection.

By the Court: I think it may be in my files probably

that were turned over by Mr. Ryan. I have no objection now, if you do not. I think I can find it very quickly.

By Mr. Ryan: All right.

288 By Mr. O'Brien: Thank you.

(Whereupon a short intermission was had.)

By Mr. Ryan: Sorry, I found out I had a copy.

By Mr. O'Brien: May the record show that the memorandum the court has just handed me is dated October 16, 1951.

By Mr. O'Brien:

Q. Were there any written statements or memoranda which you gave other than the one I have just referred to, Mr. Sauber?

A. No.

Q. And at whose request was this one given?

A. Mr. Krane.

Q. That is Krane sitting behind Mr. Ryan?

A. Yes.

Q. The copy which I have shows or purports to show that you signed—

By the Court: What is that?

By Mr. O'Brien:

Q. The copy which I have purports to show that you signed an original copy.

Where is the original?

289 By Mr. Ryan: Isn't that the original the Judge gave you? Maybe there was more than one copy. Well, they they are all copies of the same thing.

By Mr. O'Brien: Well, I am inquiring for the original one.

By Mr. Ryan: Well, doubtless the original is in a different file. I mean, there are originals and copies. I would be happy to—

By Mr. O'Brien: Well, subject to checking with the original—

By Mr. Ryan: I think we can get it produced later and check it. I think they are all carbon copies of the original, and we can confirm that later, and if it turns out to be to the contrary, why—

By the Court: All right.

By Mr. O'Brien: The thing that disturbs me is the first sheet is green and the others are white tissue.

By Mr. O'Brien:

Q. Did you prepare this statement yourself?

A. Yes, I did.

290 Q. Or did Mr. Krane write it out?

A. I prepared it myself.

Q. And you signed it and gave it to him?

A. That is correct.

By Mr. O'Brien: Will the reporter mark this copy of the statement Defendants' Exhibit 3 for identification?

(Whereupon said document was marked Defendants' Exhibit 3 for identification, as directed.)

By Mr. O'Brien:

Q. Now, at the time Mr. Busby talked to you at your office—and your recollection of the time was about March 15th, was it, Mr. Sauber, 1948?

A. That is correct.

Q. —he told you that he had a client who wished to file amended returns, and he told you in a general way the reasons why the client wanted to do that, is that right?

A. Yes, the reasons.

Q. Now, from your experience as an officer in the Collector's office, did you then know that amended returns, the need for amended returns implied filing of a false return?

291 By Mr. Ryan: I will object to what he knew. It makes absolutely no difference; his state of mind is not important.

By the Court: Well, I don't believe I comprehend the question.

By Mr. O'Brien: I will withdraw the question.

By Mr. O'Brien:

Q. Ofttimes, Mr. Sauber, or at least sometimes when amended returns are filed, there has been fraud in the filing of the original return?

A. I can't answer that question. I can assume that there would be.

Q. Yes. I am not speaking of any particular case, but sometimes that is so, is it not?

A. Well, I don't know. I assume it is so in some cases.

Q. And in your view, in 1948, did you regard it as potentially fraudulent—

By Mr. Ryan: Objection as to what his view was. It makes no difference what his view was.

By the Court: Let him complete his question.

292 By Mr. Ryan: I am sorry.

By Mr. O'Brien: Will you read the question?

(The pending question as above recorded was read by the reporter, as follows:

"Q. And in your view, in 1948, did you regard it as potentially fraudulent—")

By Mr. O'Brien:

Q. (Continuing) —for a taxpayer to omit from his return or to fail to include in his return premium receipts for goods sold by him?

By Mr. Ryan: Objection. What his view was is not important.

By the Court: Yes, I will sustain the objection.

By Mr. O'Brien: I think it is material, your Honor, particularly on cross examination. They were permitted to go at length into the question of the state of mind of the man who talked to them.

By the Court: We were in an entirely different situation there, about making a voluntary disclosure, and

293 I suppose the state of their mind and what they knew might have some bearing upon that question.

In so far as this witness is concerned, we have gone into the conversations he had with these parties, and to that extent and only to that extent I assume should he be cross examined.

By Mr. O'Brien: Well, it has to do with the conversations and with his state of mind at the time the conversations were had with him.

By Mr. Ryan: I think his state of mind is unimportant, unless the cross examination throws some light on whether his testimony was not complete or was not truthful or something.

Why, the examination has no office.

By the Court: Yes. I will sustain the objection.

By Mr. O'Brien:

Q. Mr. Sauber, did Mr. Busby tell you, when he first talked to you, that his client wanted to make a disclosure of the intentional omissions in its original returns?

294 A. No.

Q. Sir?

A. No, he did not. He said they wanted to file amended returns.

Q. Did you interpret that to mean that he was disclosing that there were omissions in the original return?

By Mr. Ryan: Objection. The same objection, what his interpretation was.

By the Court: He may answer.

By the Witness: Will you repeat the question, please?

(Question read.)

By the Witness:

A. I would say, yes.

By Mr. O'Brien:

Q. I notice in your statement, right after Busby left your office and on that day you called Revenue Agent Ralph Johnson on the telephone and told him what Busby had said and what you had said.

Is that true?

A. That is correct.

Q. And then you say that within a few days Mr.
295 Busby brought Byron Cain, who was also personally known to you, into your office and told you that it was The Shotwell Manufacturing Company who was the client, is that right?

A. That is correct.

Q. Now, they didn't tell you it was the Shotwell Candy Company, did they?

A. I don't know exactly.

Q. You don't now know?

A. I don't know whether it was Shotwell—it was mostly just using the word Shotwell.

Q. In your memorandum which you prepared, you say Shotwell Manufacturing Company.

How did you learn that Shotwell meant Manufacturing Company, while it is generally understood by the folks to be a candy company? How did you learn that?

A. I would say that at the time I talked to Mr. Johnson and he told me that I had given him the name of Shotwell Candy Company and they had a return for Shotwell Manufacturing Company and gave me the address, I said that is one and the same taxpayer.

Q. You just said that naturally and without any
296 further investigation, did you?

A. That is right.

Q. Did you say to Johnson that he might have done the same thing?

A. Will you repeat that?

Q. Did you say to Johnson that he could have acquired it in the same way as you did?

By Mr. Ryan: I object to that. I don't think anybody can understand what it meant. I can't.

By the Court: Read it, please.

By Mr. O'Brien: Well, let me rephrase it.

By Mr. O'Brien:

Q. You knew, without looking the matter up, that it was Shotwell Manufacturing Company, and that Shotwell Manufacturing Company or Shotwell Candy Company, as you put it, was likely to be one and the same company, is that true?

A. I would say yes.

Q. I just wanted to know if later on, when you talked to Johnson, who said that he got the names mixed up and therefore had sent no one out, whether he didn't know that that was true, that the companies were one
297 and the same company?

By Mr. Ryan: Objection to asking him what Mr. Johnson knew.

By Mr. O'Brien: I am asking him if he told Johnson that.

By the Court: I think he did tell him that. He so stated he told Johnson The Shotwell Manufacturing Company and the Shotwell Candy Company were the same taxpayer.

By Mr. O'Brien: All right.

Do you have the original documents that you gave me yesterday, Mr. Ryan?

By Mr. Ryan: Which documents are you referring to?

By Mr. O'Brien: The ones you produced under the court's order.

By Mr. Ryan: You mean the ones that you returned to us?

By Mr. O'Brien: Yes.

By Mr. O'Brien:

Q. Now, Mr. Johnson kept saying that they would have an Agent out there shortly to make the audit?

A. Mr. Johnson? No.

298 Q. You said that?

A. I said that.

Q. Was that based on your talks with the Agent's office?

A. It was based on my original conversation with Mr. Johnson regarding having the case assigned for audit.

Q. Yes, and is that the only conversation you had with him, your original one?

A. No.

Q. I can't hear you.

A. I would say I had three conversations with him.

Q. Yes, sir; and in those conversations did he tell you that he would send someone out to make the audit?

A. In the second conversation he said he would have the return audited.

Q. And that involved sending someone out?

A. Yes.

Q. And do you know whether someone was sent out?

A. I don't know, no, not personally.

Q. You never heard it?

By Mr. Ryan: That is a different question from the first one.

299 By Mr. O'Brien:

Q. Well, did you ever hear that someone was out there?

A. Yes.

Q. Who was first sent out there?

A. I think Revenue Agent Lima.

By Mr. O'Brien: Your Honor, I asked for some papers and I was handed some. We have been all through them and we made a memorandum of them, but I can't find anything in the papers that were handed me concerning the admitted visit of the Agent Lima to the premises and his audit. There is no paper in those that Mr. Ryan has given me about that.

By Mr. Ryan: About the admitted visit of Mr. Lima to the Shotwell Corporation?

By Mr. O'Brien: That is right.

By Mr. Ryan: There is not necessarily a document in the Bureau's files as to when an Agent—no official formal document as to when an Agent goes out to a taxpayer. There is a formal record made of the assignment of returns for examination.

300 Now, Mr. Lima might have put a recitation in a report that he made as to when he first called on the taxpayer. He might have done that.

By Mr. O'Brien: There isn't anything in these papers about that.

By the Court: Well, do you need that now for the cross examination of this witness?

By Mr. O'Brien: Why, I certainly do. Of course I would like to have those papers.

By Mr. Ryan: This witness doesn't even have any knowledge he went out there. He admits he heard he went out there.

By the Court: I don't think it is necessary now.

By Mr. Ryan: I might say that Mr. Lima will be called and such inquiries can be put to him.

By Mr. O'Brien:

Q. When Mr. Cain first came to your office with Mr. Busby, Mr. Sauber, your memo says that was on or about March 15th.

How did you place that time?

A. No, I said when Mr. Busby came to my office 301 it was on or about March 15th.

Q. How did you place that time?

A. I recalled the conversation, asking Mr. Busby why this had not been taken care of earlier, and he said that he had only learned of it recently, and that he had been busy during the income tax filing period with his regular work and he had not had too much time to spend on this.

He said he had been working on it and had not been able to get very far as far as ascertaining the exact figures, and it was due to the income tax filing period that he had not been able to spend more time on it.

I also checked back with Mr. Johnson as far as dates are concerned and tried to work back from the time that the records would show that Mr. Johnson had the case assigned and tried to work back to see what transpired before that, and I came up to March 15th as the approximate date of the visit.

Q. When you asked Mr. Busby why he hadn't taken care of it before, what did you mean by that?

By Mr. Ryan: Objection.

302 By Mr. O'Brien:

Q. What did you mean by "taken care of it"?

By Mr. Ryan: What difference does it make what he meant by it?

By the Court: He may answer.

By the Witness:

A. Why he had not gone to work and prepared the amended returns, or whatever he was trying to do at that time, why what he was trying to do at that date had not been done at a prior date.

By Mr. O'Brien:

Q. And he said he had just heard of it recently and from that time he had not been able to get anything much together?

A. Well, he said he had been working on it, but he had not been able to devote his full time to it.

Q. That he was very busy getting in tax returns?

A. That is right.

Q. Did Mr. Busby tell you during March of 1948 that he was going to take his vacation at that season, right at the tax return season, do you remember that?

A. I don't recall any discussion with him about
303 vacations.

Q. You don't remember that?

A. No.

Q. And you don't know as a fact whether he was on vacation at that time?

A. I don't know.

Q. You never heard that?

A. No.

Q. During the time of your talk with Mr. Cain, when he appeared, either on the first occasion or the second occasion, when he was in the company of Mr. Busby, do you remember Cain saying that he had to return west, that he was giving a party out there?

A. No.

Q. You never heard of that?

A. No, sir.

Q. He never made any such remark that you can now recall on the occasion of his visit to you, on any of his visits?

A. No.

Q. At the time that you first talked to Mr. Sauber about this matter, and on a hypothetical basis, without the name having been revealed—

304 A. Talked to whom?

Q. Mr. Busby, I am sorry.

—did you know of the disclosure policy of the Bureau or of the Treasury?

A. Will you repeat that question, please?

(Whereupon the question as above recorded was read by the reporter.)

By the Witness:

A. Yes.

By Mr. O'Brien:

Q. Were you familiar with a statement which had been made on that subject by Mr. Wenchel during the year 1947?

A. Generally, yes.

Q. Now, I believe you testified that Mr. Busby told you that the cash or residue of the cash which was in the box was put into the company's account when it became no longer necessary to keep it after the termination of the OPA limitations.

Did Busby tell you that?

A. Yes, he did.

Q. Do you remember, Mr. Sauber, whether at that time Busby also told you that the reason it was there in the first place, I mean that he expressly told you
305 that the reason it was there in the first place was because of the criminal sanctions of the OPA, that is why they had done that? Did he tell you that?

A. I don't recall him saying that.

Q. Did Cain say anything to that effect when you talked to him?

A. I can't recall the conversation regarding OPA.

Q. There was some, but you can't recall just what was said?

A. I can't recall the conversation. We discussed when OPA ceased to exist and then it was at the termination of the OPA regulations that this money was taken from the box and reported as income, that it was at that point that they set the money up in their income account, and that is my only recollection of OPA being discussed.

Q. How long was it after Mr. Busby first saw you that he came back with Mr. Cain?

A. It was a matter of a few days. I would say within a week.

Q. Well, that was March 15th when Busby was in, and then within a week, which would be about the 22d, Cain was there, is that correct?

306 A. I would say that.

Q. I asked you if you knew about a party, if Cain mentioned anything about a party.

Don't you remember his being in, when he was in to see you, and he said he was going back to California where he had a large St. Patrick Day's party?

By Mr. Ryan: Objected as asked and answered.
By Mr. O'Brien: I didn't ask him that one.
By the Court: He may answer.
By the Witness:
A. I do not recall a conversation about a party.
By Mr. O'Brien:
Q. Or anything stated about his return to California for St. Patrick's Day, whether for a party or not?
A. No.
Q. Sir?
A. I do not recall mentioning that.
Q. Now, prior to the time that you first saw Cain in your office about the matter, how many times did you talk to Busby about it?
A. Once.
Q. And then pretty quick he came in with Cain, 307 is that it?
A. That is correct.
Q. Did you have any talks with him outside your office?
A. With whom?
Q. With either Busby or Cain.
A. I may have. I can't recall any particular time.
Q. Now, when you talked to Ralph Johnson and he said that there had been some misunderstanding as to the name of the company, did he say he would do anything about it?
A. Yes. He said he would have the case assigned to one of his men on the group and take care of it right away.
Q. Do you remember when that was about? Let us say when it was with reference to the March 15th date.
A. Well, I know when it was, from our records, it was in July.
Q. What day in July.
A. I don't know the day.
Q. But sometime in July?
A. Yes. I called Mr. Johnson to ask him and he 308 told me it was in July.
Q. By your records, do you mean the records of the Agent? I am not clear. It must be this way: You called Johnson, he told you it was in July that it occurred, and you noted it that way in your records?
A. It was noted in his records, put it that way.

Q. Before that Johnson had not called you back at all to tell you there wasn't any such outfit as Shotwell Candy Company?

A. No.

Q. Sir?

A. No, he had not.

Q. It was you who called him to stir it up, after Cain had importuned you to do something about it?

A. That is correct.

Q. Now, there isn't anything different about an audit that is made under these circumstances and any audit of a return, is there?

A. I don't know how I can answer that question. I would say, no.

Q. If you can't answer it, all right.

By Mr. Ryan: He said he would say no.

By Mr. O'Brien: Sir?

309 By Mr. Ryan: He said he would say no.

By Mr. O'Brien:

Q. In your talk with Mr. Johnson, this talk in July, he said that they did have a return of Shotwell Manufacturing Company, is that right?

A. That is correct.

Q. What did he mean by that—that such a company had filed a return for those years?

A. That is right. There would be a record in the Revenue Agent's office.

Q. Of everybody who files?

A. No, not of everyone who filed.

Q. Of whom?

A. Only the returns that would be sent back to the Revenue Agent's office for potential or possible audit, only the returns that would be up for audit would be in the Revenue Agent's office.

Q. Did Johnson say that he had a return from Shotwell in his office?

A. He said there was a return for Shotwell Manufacturing Company in their office, yes.

Q. Well, what did that mean to you? I don't understand the terms of the Department. What did that mean to you when he said they had such a return in their

310 office?

A. Well, it meant it was there for assignment to be

audited or to be surveyed. I would have, to properly answer your question, I would have to go into the operation of the Department as far as auditing and surveying of returns.

Q. He didn't say at whose request it was there?

A. It wouldn't be there on a request of anyone.

Q. Well, I am confused, Mr. Witness. Why would it be there, then, if it wasn't there on request?

A. Well, it is the auditing organization in the Internal Revenue Department, and all the returns that are up for audit or that will be audited are sent in to the Revenue Agent's office and they survey the returns to decide which ones are going to be audited.

Q. And Johnson said he would take care of it and assign it out?

A. The last time, yes.

Q. At the time that Mr. Krane requested the statement which I have marked Defendants' Exhibit 3, Mr. Sauber, did he tell you that the Agents were contemplating the recommendation of criminal prosecution?

311 A. No, he did not.

Q. Did he tell you for what purpose he wanted the statement?

A. For the record.

Q. For his record?

A. For his record.

Q. That is all he said about it? He just said he would like to have a statement for the record and you gave him a statement?

A. That is right.

Q. Did he first talk to you about or as to what the situation was before you made the statement?

A. No. He cautioned me to be accurate in the statement and to take my time and think the entire situation over and try and make a statement to the best of my recollection of what the facts were at that time.

Q. Well, that might be and I have no objection to your saying so, but my question, Mr. Sauber, is, did you talk over with him what the facts were, as you understood them, before you made the statement?

A. At that time, no, not at the time he requested the statement.

312 Q. I say before you made the statement, the written statement.

A. Quite a while prior to the written statement, yes.
Q. Well, how long before?
A. Oh, I would say a year and a half before; just a part of the original investigation that Mr. Krane was working on.
Q. A year and a half before; that must have been along about in 1949 sometime, Mr. Sauber?
A. To the best of my recollection. It may have been 1950.
Q. How extensive were your discussions with Mr. Krane at that time?
A. Well, he merely asked me the circumstances and I related what I knew about the case.
Q. This is on the occasion a year and a half before?
A. I would say yes.
Q. Did you tell him everything you knew about it?
A. Yes, I did.
Q. At that time?
A. That is right.
313 Q. Was that over the phone or in his presence?
A. I would say it was in his presence.
By Mr. O'Brien: I would like to ask counsel if he has a statement covering that conversation.
By Mr. Ryan: The conversation he had prior to this statement, with Mr. Krane?
By Mr. O'Brien: Yes, about a year and a half before.
By Mr. O'Brien: There is no memorandum of such a conversation. There was such a conversation before this was prepared, but this apparently was the formal writing up of the statement by Mr. Sauber.
There is no other statement of memoranda of conversations with Mr. Sauber. There is none that I know of.
Mr. Krane tells me that he has no other memorandum or statement of Mr. Sauber, or never received any other.
By Mr. O'Brien: I mean that was written up as a result of the conversation with him a year and a half before, not by Mr. Sauber, but by Mr. Krane or anybody else.
314 By Mr. Ryan: There was no memorandum you have ever written up other than this one?
Mr. Krane: No.
By Mr. Ryan: You have no memorandum you wrote up about your conversation with Mr. Sauber?
By Mr. Krane: No.
By Mr. O'Brien: And there is none in the Bureau?

By Mr. Krane: There is none I ever wrote up.

By Mr. Ryan: I can't take an oath there isn't, but if he says he did not write any up, I can't see how there could be any.

I am advised there may be one that Mr. Mammel wrote up.

By Mr. O'Brien: I know that.

By Mr. Ryan: I thought you said Mr. Krane.

By Mr. O'Brien: I said that, but then I said anyone in the Bureau.

By Mr. Ryan: I understand there is one that Mr. Mammel wrote up.

315 By the Court: We aren't making a lot of progress here.

By Mr. O'Brien: I am eliminating a good many of my notes here, Judge.

There are some differences, your Honor.

By Mr. Ryan: Differences where?

By Mr. O'Brien: Between the statement and some of the things which the witness has said. That is, he said in the statement, or what he said in the statement is different than what he stated here.

So I would like to offer it so we have the complete story.

By Mr. Ryan: I haven't any objection and will be very happy to have the court read it. There are no significant differences.

By the Court: It may be received.

(Whereupon said document was received in evidence as Defendants' Exhibit No. 3.)

By Mr. O'Brien: That is all.

By the Court: We will take our morning recess.

(Whereupon a recess herein was taken.)

316 By the Court: You may proceed.

By Mr. Ryan: I have no redirect.

(Witness excused.)

By Mr. Ryan: Dr. Doe.

ADOLPH CHRISTY DOE, called as a witness on behalf of the Government herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ryan.

Q. State your full name, please, sir.
A. Adolph Christy Doe.
Q. Where do you live, Dr. Doe?
A. 541 Aldine Avenue.
Q. What is your business or occupation?
A. Dentist.
Q. How long have you been a dentist?
A. It will be thirty-five years this next January.
Q. You have an office?
A. In the Board of Trade.
Q. How long have you had an office in the Board of Trade Building?
317 A. Just about ten years.
Q. Do you know a man by the name of Byron Cain?
A. No, sir.
Q. Do you know or have you ever had any contact with a corporation by the name of Shotwell Manufacturing Company?
A. No, sir.
Q. Have you ever received any money from The Shotwell Manufacturing Company for any purpose at any time?
A. No, sir.
Q. Have you ever undertaken to procure any raw materials for The Shotwell Manufacturing Company?
A. No, sir.
Q. To be specific, corn syrup or corn?
A. No.
Q. Did anyone ever seek to have you do so?
A. No, sir.
Q. Have you ever been paid any mysterious sums of money—
A. No, sir.
Q. —that you didn't know the source of?
A. No, sir.
Q. To your knowledge, did you ever receive any
318 envelopes in your office containing sums of money from mysterious or unknown persons?

A. No, sir.

Q. Do you know a man by the name of John Kelly formerly associated with The Shotwell Manufacturing Company?

A. No, sir.

Q. Do you know a man by the name of Frank Huebner, formerly associated with Shotwell Manufacturing Company?

A. No, sir. I went through that list with Mr. Krane.

Q. I know, but I must ask you these in court.

Do you know a man by the name of Howard Roeser, associated or formerly associated with The Shotwell Manufacturing Company?

A. No, sir.

Q. I will ask you the same question concerning a Mr. Emmett Hogan?

A. No, sir.

By Mr. Ryan: That is all.

By Mr. O'Brien: That is all.

I think, Judge, I will make a motion to strike the doctor's testimony, as being immaterial.

319 By the Court: I will deny the motion.

(Witness excused.)

FRANK J. HOLZ, called as a witness on behalf of the Government herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ryan.

Q. State your full name, please, sir.

A. Frank J. Holz.

Q. Where do you live, Mr. Holz?

A. 5433 North Campbell Avenue.

Q. Chicago, Illinois?

A. Chicago, Illinois.

Q. What is your business or occupation?

A. I am the head of the Audit Division in the Director's office.

Q. What Director?

A. The Director of Internal Revenue, Chicago.

Q. That is Mr. Sauber's office?

A. That is right.

Q. How long have you been with the Bureau of
320 Internal Revenue?

A. March 30, 1920.

Q. Since that date?

A. That is right.

Q. What is the nature of your duties now?

A. The nature of the duties now consist of seeing that the audits are made of all types of income tax returns, excess tax returns, estate and gift tax returns, all tax returns other than alcohol and tobacco tax cases.

Q. Directing your attention to the years 1945, 1946 and 1947, what were your duties then?

A. I was then one of two assistants to the Internal Revenue Agent in Charge in Chicago.

Q. Were your duties similar at that time?

A. Similar. I participated in the overall management of the Internal Revenue Agent's office.

Q. Were your duties similar in 1947 and 1948 to what they are now?

A. Yes, that is correct.

Q. Are you familiar with the procedure followed by the Bureau of Internal Revenue in determining what tax returns will be audited?

A. I believe I am, yes.

321 Q. Would you tell the court as briefly as you can what that procedure is?

A. Well, after returns are filed—

By Mr. O'Brien: That it is, or what it was?

By Mr. Ryan:

Q. Well, tell the court what the procedure was in the years 1947 and 1948.

A. After returns are filed with the Collector of Internal Revenue, I am speaking of corporate returns—

By Mr. O'Brien: A little louder, please.

By the Witness:

A. I am speaking of corporate returns.

By Mr. Ryan:

Q. You might carry that back through the year 1945. Then we will have it all covered.

A. All right.

The procedure has been for years, many years, that after returns are filed and with the Collector, they are sent to the Bureau at Washington for statistical purposes and for classification purposes.

The Bureau would make a survey of the returns and select those which it believed were worthy of exam-
322 ination in the field.

Those returns would then be sent to the office of the Internal Revenue Agent in Charge.

The Agent in Charge, or rather, under the supervision of the Agent in Charge, or directly under my supervision; let us put it that way, there was a further classification made of those returns in the local office, Chicago office.

Those returns which we believed—

By the Court: I am sorry.

By the Witness:

A. (Continuing) Those returns which we in the local office believed required investigation were retained, sent to our record section for carding, in other words, make a card record, an office record of it, and then they would be sent to the various groups for assignment for investigation by their agents.

By Mr. Ryan:

Q. Now then, these cards that you mentioned, pursuant to that custom it was the regular practice to make such a card as a record in the office of the Internal Revenue Agent, for the purpose for which you indicated?

323 A. Oh, yes.

By Mr. Ryan: Would you mark this document Government's Exhibit 2 for identification, and this second card Government's Exhibit 3 for identification.

(Documents so marked.)

By Mr. Ryan:

Q. I show you now Government's Exhibit 2, marked for identification, and ask you to examine it and state whether or not it is a record produced from the files of your office, the office of the Internal Revenue Agent in Chicago.

A. That is correct. This is the original record.

Q. And is that a card of the type which you have just described?

A. That is.

Q. And was the card which you have in your hand made pursuant to the practice which you described?

A. That is correct.

Q. I show you Government's Exhibit 3, marked for identification, another similar card, and if I ask you the

some questions about that card as I did about the other, would your answers be the same?

A. Exactly the same.

324 Q. I direct your attention to the various entries on Government's Exhibit 3 for identification and ask you if you understand the significance of those particular entries on that card.

A. Yes.

Q. Would you explain what the different entries on the card reflect?

A. This card indicates—

By the Court: Which card?

By Mr. Ryan: Government's Exhibit 3 for identification.

By the Witness: 2, Exhibit 2.

By Mr. Ryan: Oh, Exhibit 2. I am sorry.

By the Witness:

A. That is right. It indicates that the case was originally assigned to a group chief named James Granahan.

By Mr. Ryan:

Q. The card appears to bear the typewritten name Shotwell Manufacturing Company, 3501 West Potomac Avenue.

What is the significance of that entry?

A. That is the name and address as shown on the return filed for that year.

325 Q. This is a card record pertaining to that return, is that correct?

A. Yes, sir.

Q. And the "1946," what is the significance of that?

A. That means it is the return for the year 1946, and amended; and this is the serial number (indicating).

Q. Of the—

A. Of the original return.

Q. And directing your attention to the—you say that when the card is made, that the card is made after the return has been surveyed and it has been determined that it will be audited, is that correct?

A. That is right, after it is classified, then it is retained.

Q. Is there any entry made on the card to reflect that determination, or does just the existence of the card reflect that?

A. The mere fact the card was made out is an indication that the return was retained for audit.

Q. Directing your attention to the numbers at the bottom, "dh12-11-47," in the manner in which a date is customarily expressed, what does that mean?

326 A. This "dh" represents the initials of the clerk who prepared this card.

The "12-11-47" indicates the date upon which he made this card.

Q. That means that card was made on December 11, 1947, is that what it indicates?

A. That is right.

Q. Can you tell us what would be the next entry that would be made on that card from your examination of it?

A. The next entry would indicate that on December 16, 1947, this return was assigned to Group Chief James Granahan.

Q. For what purpose, from your knowledge of the procedure in the Revenue Agent's office?

A. For investigation in the field by one of his agents.

Q. And that would be the same as what has been referred to as audit?

A. That is right.

Q. Can you find what would be the next entry in point of time that is on that card?

A. The next entry indicates that the return was
327 sent to Group Chief Johnson. That is this letter "J" signifies that.

Q. Upon what date?

A. On July 22d, I think it is.

Q. Of what year?

A. 1948.

Q. What would the next entry be in point of time?

A. The next entry would indicate that it was sent to another Group Chief Raymond Williams, now deceased, on February 4, 1949.

Q. Now I show you Government's Exhibit 3, marked for identification. That also bears the name Shotwell Manufacturing Corporation, with the same address, does it not?

A. That is right.

By Mr. O'Brien: Have you been talking about No. 2 or 3?

By Mr. Ryan: I have been talking about No. 2.

By Mr. O'Brien: All right.

By Mr. Ryan:

Q. Does the existence of that card represent the determination that a certain return of The Shotwell Manufacturing Company was surveyed and it was deter-
328 mined that it should be audited or investigated?

A. That is true.

Q. Does it reflect on what date such determination was made, or what is the first entry that you find there in point of time?

A. It doesn't show the date, but the initials of the party who made this card are P.L. That is on here, but the date isn't shown.

Q. Now, what is the first date in point of time that is shown on that card?

A. January 15, 1947.

Q. And what is the significance of that entry?

A. That is the date upon which this return was assigned to Group Chief Magnus, assigned to him—

By the Court: Assigned to whom?

By the Witness: Group Chief Magnus, for audit in the field.

By Mr. Ryan:

Q. What is the next entry in point of time?

A. The next entry indicates that Mr. Magnus assigned it to an agent by the name of A. S. Korman.

Q. On what date?

A. On January 20, 1947.

Q. And is there a subsequent date?

329 A. A subsequent date indicates the date that Agent Korman's report was received. That was on August 5, 1947.

Q. Now, does the record—

By Mr. O'Brien: When what report was received?

By the Witness: The examining revenue agent's report.

By Mr. Ryan:

Q. That was who, Mr. Korman?

A. Mr. Korman.

Q. That he filed his report on August 5, 1947?

A. That is correct.

Q. Does the card indicate whether or not that operation was ever concluded?

A. Well, at that time there was an agreement signed as to the deficiencies that were found.

Q. That is as of August 8, 1947?

A. Well, either he may have gotten it with the report or the agreement may have come in later.

Q. And have all the Bureau proceedings with respect to that examination been terminated, if you can tell from the card?

A. From the looks of this card, yes. There is
330 only one thing this card does not show.

First of all, this card, I might say, this shows two returns, the income tax return for 1945 and the excess profits tax return for 1945. There were two separate returns.

Q. They were required to be filed for that year, separate returns for those different kinds of taxes?

A. That is correct, and this one report Mr. Korman submitted covered both types, the income tax and the excess profits.

Q. Would this card reflect the existence of termination or conclusion of the post audit review?

By Mr. O'Brien: I object to that. He has answered it. He says it does indicate it.

By Mr. Ryan:

Q. Well, my question is would this card indicate the completion of or the commencement of the completion of what is known as a post audit review?

A. Oh, no.

Q. It does not?

A. This card merely shows the report was submitted,
an agreement was received, and the agreement would
331 specify that the taxpayer waives his right to petition
the tax court and consents to an immediate assessment of these deficiencies.

Q. And so far as you can determine from the card, that may have occurred on August 8, 1947, or later?

A. That is correct.

By Mr. Ryan: Your Honor, I offer Government's Exhibit 2 for identification and Government's Exhibit 3 for identification into evidence as Government's Exhibits of the same number.

By the Court: Well, Gentlemen, I assume the only question we have now is whether or not you have any objection to the foundation or the materiality of it.

By Mr. O'Brien: We have a right to cross examine the witness.

By the Court: Indeed you do, if you ask for that right. But I haven't heard your desire in that regard. If you want to cross examine as to the foundation, you may.

By Mr. O'Brien: I was trying to determine, your Honor, because I see some notes on the back, to which no
332 reference was made.

By Mr. Ryan: I am sorry. I didn't even know there were any notes on the back, and I presume we should iron out what the significance, if any, of those are. I have no objection to counsel going into that, but I am not offering what notes appear on the back. They have no materiality.

By the Court: Is there any objection?

By Mr. O'Brien: No.

By the Court: They may be received.

(Whereupon said documents were received in evidence as Government's Exhibits 2 and 3, respectively.)

By Mr. Ryan: You may cross examine.

333 *Cross Examination by Mr. O'Brien.*

Q. Mr. Holz, I think you said that after the returns go to Washington, it is common to select those of the corporate taxpayers particularly and to have an audit made?

A. The reason I mentioned corporate, because it is corporations involved here, and I just did not mention individuals, but the idea is the same.

Q. And you have many thousands of such?

A. Oh, yes.

Q. That is sort of a spot check that is made as to returns in excess of a certain amount?

A. Well, no, I wouldn't say that.

By the Court: Counsel, if you stand there he is going to talk to you and I can't hear him and counsel can't hear him.

By Mr. O'Brien: You are right, Judge.

By Mr. O'Brien:

Q. I say that is done in an effort to spot check returns which on some basis or another you would like to audit?

A. Meaning the Bureau selects them, the Bureau classification?

334 Q. Yes, in Washington. How do they determine which returns are to be sent out for audit?

A. I imagine they take a number of things into consideration, such as we do here. They may see—

Q. Well, do you know what they take into consideration in Washington or do you know what they take into consideration here?

A. I know what we take into consideration here, and that is based largely on instructions we receive from Washington as to what we should take into consideration.

So I am assuming Washington is doing the same thing.

Q. That you assume, but don't know?

A. Pardon me?

Q. You don't know?

A. Oh no, not definitely, because I haven't been down there to watch any of this classification.

Q. But there are many thousands of returns on some basis that are sent out by Washington to the various agencies every year for examination?

A. That is correct.

Q. And for audit of some kind or another?

A. That is correct.

335 Q. Now, does the fact that a return is submitted for auditing on the basis which you have just described, an annual practice, indicate a special investigation of any sort?

A. Oh, no.

Q. In the case of Exhibits 2 and 3 here, I am a little confused from the standpoint of time.

Which is first in point of time?

A. You mean received first?

Q. Yes.

A. Well, I would imagine the 1945.

Q. And that is Exhibit 3?

A. That is correct.

Q. I think that is what threw me off, the 3 and the 2. Now, this card doesn't show—

By Mr. Ryan: Which card?

By Mr. O'Brien:

Q. (Continuing) Exhibit 3—

—whether any payment was made by the taxpayer according to the agreement, does it?

A. No. Our cards never show payments.

Q. Do you happen to know that in the month of May,

1947, there was a payment by Shotwell in respect of
336 this audit by Mr. Korman, and that in the month of September of that year the final payment was made in accordance with that agreement? Did you know that?

A. We in the Agent's office know nothing about payments at any time.

Q. Do you preserve any sort of record in the office that would show that or would that be reflected only in the Collector's office?

A. Only in the Collector's office.

Q. Is there anything on this card that would indicate to us the fact, if it is a fact, that Mr. Korman had finished, had left the premises in July of 1947?

A. No, the card doesn't indicate that. It merely indicates his report was submitted.

Q. Does it show when his report was submitted?

A. Yes, on August 5, 1947.

Q. I see, and then the card further shows at the bottom

"Disposed of September 26, 1947,"

does it not?

A. That is when the report leaves the Revenue Agent's office.

337 Q. I just want to know if that isn't what the card says.

A. That is correct, September 26, 1947.

Q. Are the notations on the back of Exhibit 3 any part of the formal record?

A. No. I have an idea—I may be wrong, but I have an idea this is Bureau information. What leads me to believe that, the section in the Bureau that reviewed Revenue Agent's reports of the Chicago Division was called Section D in the Bureau, and I see it says D4, and the 4 was a unit of Section D that reviewed corporation returns.

Q. I see.

A. I think that is what it means. It is not our record.

Q. Take Government's Exhibit 2 for identification. I notice three dates.

A. Yes.

Q. The first of which is December, 1947. Can you tell by looking at the card whether anything was done about that or the matter was assigned out at that time?

A. No. This date, December 16, 1947, is associated

with the initials J.G., which means that that is the
338 date upon which the return was assigned to Group Chief Granahan for field investigation.

Q. And is there any indication that he made an investigation or made a report?

A. No. He did not, apparently.

Q. Then in July, 1948, the matter was assigned out, was it not?

A. It then was transferred from Group Chief Granahan to Group Chief Johnson on July 22, 1948.

Q. Let's see, Group Chief Johnson, is that in the agent's office?

A. That is right. These are all in the Agent's office.

Q. In your office too?

A. That is right.

Q. Have you anything in your records to show what Johnson did with it?

A. It doesn't indicate as though a report was submitted by Johnson.

Q. Is there anything on the card to show the assignment of Mr. Lima on this return to investigate?

A. No, not on here.

Q. Do you know whether Mr. Lima worked under
339 Group Chief Johnson?

A. He did.

Q. And then the next assignment and last assignment here noted is February 4, 1949.

Now, who was that assignment to?

A. That was assigned to Group Chief Raymond Williams, now deceased.

Q. And who replaced Mr. Williams in your office?

A. Temporarily there is a man detailed by the name of John Rover.

Q. At that time, 1949, was Mr. Maimmel in your office, the Agent's office?

A. Yes.

Q. Was he connected with that group?

A. 1949? I believe at that time he was connected with the Williams group.

Q. And there has been no report from that group, according to this card?

A. Not to my knowledge.

By Mr. O'Brien: That is all.

By Mr. Ryan: No redirect.

(Witness excused.)

By Mr. Ryan: Mr. Joseph Lima.

340 JOSEPH M. LIMA, called as a witness on behalf of the Government herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ryan.

Q. State your full name, please.
A. Joseph M. Lima.
Q. Where do you reside, Mr. Lima?
A. 1700 Rainbow Drive, Clearwater, Florida.
Q. What is your business or occupation?
A. Internal Revenue Agent.
Q. How long have you been employed as an Internal Revenue Agent?
A. Since July of 1942.
Q. Where are you presently stationed?
A. Tampa, Florida.
Q. How long have you been there?
A. Since January of 1951.
Q. Where were you stationed prior to that time?
A. Chicago, Illinois.
Q. In what office did you work here?
A. Internal Revenue Agent in Charge.
Q. And in what capacity?
A. As an Internal Revenue Agent, field audit.
341 Q. Were you assigned to any particular squad in the Internal Revenue Agent's office here in Chicago?
A. I was assigned to the squad of Ralph Johnson.
Q. Did you ever have occasion in the course of your duties as a Revenue Agent to conduct an examination or audit of any of the tax returns of The Shotwell Manufacturing Company, an Illinois corporation?
A. Yes, I did.
Q. Do you recall when you first entered upon that examination?
A. Sometime subsequent to July 30, 1948.
Q. Do you know a Mr. Leon Bushy, a certified public accountant in this city?
A. I do.
Q. And did you have any contact with him in the course of your investigation, such investigation as you

conducted of tax return or returns of the Shotwell Manufacturing Company?

A. I did.

Q. Incidentally, what return or returns did you have of The Shotwell Manufacturing Company?

A. I believe it was the fiscal year of 1946.

342 Q. I show you what has been marked as Defendants' Exhibit—the first sheet previously referred to as the summary sheet of Defendants' Exhibit 1, which appears to be a photostatic copy, and ask you to look at it and tell the court whether or not you have ever seen and if you know the original of that?

A. This isn't familiar.

Q. Will you examine it carefully before you answer and be sure whether you have seen it before, if you can recall?

By Mr. Ryan: Counsel, I will direct your attention to what I will have marked as Government's Exhibit 4 for identification, and will ask counsel if you will stipulate that that is the typewritten material, which is identical with the handwritten material in the document the witness is now examining, Defendants' Exhibit 1.

By Mr. O'Brien: Yes, that is it.

(Whereupon said document was marked as Government's Exhibit 4, for identification.)

343 By Mr. Ryan:

Q. I show you Government's Exhibit 4, marked for identification, appearing to be a typewritten document, accounting document, with figures on it, and ask you if you have ever seen that document or the original of it before.

It appears to be a copy.

A. I believe this is the copy of the original. It appears to be the same.

Q. Have you seen the original of that?

A. Yes.

Q. Where did you first see the original of that document?

A. I was given that document at The Shotwell Manufacturing Company.

Q. By whom?

A. By Mr. Busby.

Q. Now, did you have a conversation with him at that time and place?

A. I did.
Q. Or at that time?
A. I did.
Q. Approximately when was that, if you can recall?
A. Some time after July 30th of 1948.
344 Q. Can you tell approximately how long afterward?
A. No, I can't. It is between July 30th and October 1st, somewhere in that period I made my examination. I can't pin point the exact date.
Q. Was there anyone else present at the time that you received the document from Mr. Busby?
A. No, there wasn't.
Q. Would you proceed and relate the conversation you had with him on that occasion at that time?
A. As near as I can remember, Mr. Busby stated that he had been an auditor for the company for some time, and a while previous to this examination he had been told that there had been some over-ceiling prices, money paid for raw materials, and there had been some over-ceiling payments received, and that he had taken the necessary steps and found out from the necessary people just what he had to do, and that he had prepared this statement to the best of all the knowledge to be had at the company at the time and that represented the income as near as they could figure.
Q. Well, you say the income. Will you look at the sheet and see whether it reflects anything other
345 than income?
A. Well, it reflects both receipts and disbursements for different years.
Q. Well now, if you recall, was there anything said about the disbursements?
A. The disbursements?
Q. You said Mr. Busby said that it reflected the income a closely as they could compute it.
A. I mean by that, the payments received and the disbursements made.
Q. Well, did he say that?
A. Yes, he did.
Q. Did you have any contact, in the course of your investigative work in this matter, with Mr. Byron Cain?
A. I met Mr. Cain out at the plant.

Q. Did you have any contact with any of the other officers or officials of the corporation?

A. I met Mr. Huebner and the lady that had charge of the books, I believe is the only people I dealt with. I don't remember her name.

Q. Those were the only individuals you dealt with?

A. That is right.

Q. Now, did you ever at any time tell any of the
346 individuals whom you dealt with in this investigation that you understood that they were making a voluntary disclosure?

A. Will you repeat that, please?

(Question read.)

By the Witness:

A. I only discussed this matter with Mr. Busby and it was understood to be a first disclosure made to myself of the figures.

By Mr. Ryan:

Q. Well, was there anything said about disclosure, or was it just a case of your referring to the turning over of this document to you?

A. This document represented a disclosure.

Q. That is what you referred to as a disclosure?

A. That is right.

Q. Or are you repeating something that was said to you?

A. I referred to it as a disclosure.

Q. Is that the extent of any discussion you had with any of these people about disclosure?

A. That is right.

By Mr. Ryan: You may inquire.

347 *Cross Examination by Mr. O'Brien.*

Q. Before you went out there, Mr. Lima, did you talk to Mr. Williams or Mr. Johnson, rather?

A. No, I didn't.

Q. You had no conversation with him at all?

A. Other than the assignment of the case.

Q. He was your group chief?

A. That is right.

Q. What did he tell you he wanted done?

A. All he did was ask me if I had time to field the case, if my inventory was in such a position that I could work the case.

Q. And you were to make an audit?
A. That is right.
Q. You were to make an audit of the return or returns?
A. That is right.
Q. When you got to the premises, or after you had gotten there and talked to Mr. Busby, did you tell Mr. Busby that you knew that a disclosure had been made to Mr. Sauber?
A. No.
Q. Who, if anybody, used the word "disclosure"?
348 A. I said I don't think it was used at all.
Q. And this paper that Mr. Busby handed you, you say you called that a disclosure?
A. I did.
Q. Well, when, you mean here on the witness stand or in talking to Busby, or where?
A. When I received it, I was told the story of the operations of this over-the-ceiling prices, both for purchases and disbursements.
By the Court: A little louder, Mr. Lima.
By the Witness:
A. (Continuing) I was told, after I was told the story by Mr. Busby of how the operations of this over-the-ceiling prices, purchases and disbursements and receipts of cash, were, why, then the figures were submitted to me on a sheet of paper and that represented to me a disclosure.
By Mr. O'Brien:
Q. You treated it in that way?
A. That is right.
Q. As though it were so. Then you were going on to audit for whatever you considered necessary in that situation?
A. I just made a preliminary audit to determine
349 certain facts that I might deem pertinent before I would discuss the matter with my group chief.
Q. You were there from July to about October 1st?
A. Somewhere in that time.
Q. And you can't say, though, how long it was after your arrival on July 30th that Mr. Busby handed you that paper?
A. The first day.
Q. You now say it was the first day?

A. Yes, it was the first day.

Q. Is there any special reason why you remember that right now rather than on your direct?

A. Well, when I began the audit, Mr. Busby and I went into an office and we discussed the entire situation. That was in the morning, I believe, the first day, he made the first disclosure.

Q. And he had that all ready for you when you got there, didn't he?

A. That is right.

Q. Now, did he on that day show you any of the sheets which are attached, or was it on some later date?

A. I don't recall seeing the work sheets of how
350 he got the figures. I am not sure of that. I don't even remember. Just the first page.

Q. The first page sticks in your mind?

A. This sticks in my mind, but not the work sheets.

Q. Do you know whether Busby or some member of his staff submitted the work sheets to you?

A. I never had the work sheets.

Q. Is the same true of Defendants' Exhibit 2, which purports to be a typewritten copy of the summary sheet? How about the work sheets attached to Defendants' Exhibit 2?

A. I don't recall any work sheets of any kind in that particular matter.

Q. Well now, the summary sheet, that is the first sheet, pertains to how many years?

A. I believe three years.

A. 1944, 1945 and 1946?

A. That is right.

Q. And it shows a total of unreported receipts?

A. Whatever it is.

Q. Yes, a total. I didn't say what it was. Did you ask for any supporting data to show how that was reached?

A. No, I didn't.

351 By the Court: Well, Gentlemen, I think we will be in recess now until two o'clock.

(Whereupon a recess herein was taken to 2:00 o'clock p.m. of the same day, November 13, 1952.)

352 * * (Caption—52 CR 143) * *

Chicago, Illinois,
November 13, 1952,
2:00 o'clock p.m.

Met pursuant to recess.

Present:
Mr. Ryan
Mr. O'Brien
Mr. Hess
And other counsel.

And thereupon the following further proceedings were had herein—

By the Clerk: 52 CR 143, United States v. Shotwell Manufacturing Company. Motion of defendants to suppress certain evidence.

By the Court: You may proceed.

JOSEPH M. LIMA, called as a witness on behalf of the Government herein, having been previously sworn and examined, resumed the stand and testified further as follows:

353 *Cross Examination (Ctd.) by Mr. O'Brien.*

Q. Mr. Lima, you told us that on the day you got out to Shotwell, Mr. Busby gave you the typewritten sheet, a copy of which is the first page of Defendants' Exhibit 2.

A. That is right.

By the Court: Is that 2, or Exhibit 1?

By Mr. Ryan: 1.

By Mr. O'Brien: Exhibit 2.

By Mr. Ryan: The typewritten sheet is 2.

By Mr. O'Brien: The typewritten sheet is Plaintiff's Exhibit 4. It is also contained in our Exhibit 2.

By Mr. Ryan: The copy of the typewritten summary is marked as Government's Exhibit 4 for identification.

By the Court: That is right.

By Mr. Ryan: And it is also a part of Defendants' Exhibit 2 for identification, or in evidence, I believe.

By Mr. O'Brien: In evidence.

By Mr. Ryan: And it apparently has been stipu-
354 lated it is the same as the handwritten summary sheet in Defendants' Exhibit 1. Is that correct?

By Mr. O'Brien: That is true.

By the Court: All right.

By Mr. O'Brien:

Q. Now, that is what they gave you at that time. When you were assigned to that audit, were you given anything by your own office to bring with you?

A. No.

Q. Any file or reports, or anything else?

A. Just the income tax return folder.

Q. And nothing more?

A. Nothing more.

Q. You were not at that time given the reports of any investigators or prior agents or anything else?

A. No.

Q. You didn't have any ports or files or directions from New York?

A. No.

Q. Or from New York through the Chicago office to you?

A. No.

Q. And in addition to Mr. Busby, during your
355 visit you talked to Mr. Cain, Mr. Huebner, and the bookkeeper?

A. That is right.

Q. Was that Mrs. Morrill, if you remember?

A. I am not sure of the name.

Q. Is it the lady sitting in the end of the jury box there?

A. I believe so.

By Mr. O'Brien: And you are Mrs. Morrill, for the record?

By Mrs. Morrill: Correct.

By Mr. O'Brien: That is all.

By Mr. Ryan: No redirect. You may step down.

(Witness excused.)

By Mr. Ryan: I will call Mr. Mammel at this time, to avoid a delay.

356 CHARLES J. MAMMEL, called as a witness on behalf of the Government herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ryan.

Q. State your full name, please, sir.
A. Charles J. Mammel.
Q. Where do you live, Mr. Mammel?
A. 7639 Colfax, Chicago, Illinois.
Q. What is your business or occupation?
A. I am an Internal Revenue Agent.
Q. How long have you been so employed?
A. Since February 1, 1920.
Q. Now, have you had occasion in the course of your official duties to make an audit or examination of any of the tax returns of The Shotwell Manufacturing Company, an Illinois corporation?
A. Yes.
Q. What returns of that corporation did you have occasion to examine?
A. Well, on February 14th I appeared at the Shotwell plant—
By the Court: February 14th?
By the Witness: 1949.

357 By the Witness:
A. (Continuing) I appeared at the Shotwell plant to make an examination of the tax returns of The Shotwell Manufacturing Company for the years 1943 through 1947, inclusive.
By Mr. Ryan:
Q. And, if you know, had an examination of those returns, or some of them already come in?
A. The returns up to and including 1945 had been examined and reports rendered. The year 1946 had been somewhat examined by Mr. Lima.
Q. Now directing your attention to the first 5½ months, we will say, of your investigation of these particular returns of The Shotwell Manufacturing Company, just in general, if you can describe it, in what particular activity were you engaged during that period?
A. Well, of course, I appeared at the Shotwell plant knowing of these black market transactions. I saw Mr. Grafiund and told him I was there for that purpose.

Q. I don't want you to go into conversations with persons other than the defendants, but I want you to tell, if you can, what particular type of work you
358 engaged in initially during that period.

A. Well, this being known as a fraud case—

By Mr. O'Brien: I—

By Mr. Ryan: I will agree that that be stricken out.

By the Court: Yes.

By Mr. Ryan:

Q. I want you to just tell, Mr. Mammel, what type of work, what particular phase of investigation work you were doing during this first six months.

A. Well, I started out to reconcile all the assets, liabilities, income and expense accounts on the records from 1943 through 1947, inclusive, to the tax returns.

Q. In simple language, were you tying the tax returns in question to the books?

A. Exactly.

Q. Now, did you during this six months period, this first period when you were engaging in this particular activity you described, have occasion to have a conversation with Mr. Cain about your doing that type of work?

A. I did.

Q. Now, when, to the best of your recollection?

359 A. Well, I would say in March of 1949.

Q. Now, where did that conversation take place?

A. Well, it took place in either his private office or the private office of Mrs. Morrill.

Q. Now, who was present, if you recall, besides Mr. Cain and yourself?

A. Well, I don't recall that.

Q. You don't recall if there was somebody else present or not?

A. I don't, no.

Q. Will you proceed and tell the court as best you recall what was said in that conversation?

A. Well, I told Mr. Cain it was fundamental for me to tie all the accounts of the corporation to the tax return in this investigation, and that I was doing that, and I don't know but because of what was involved in this particular case, but that there might possibly be prosecution, and therefore, I had to do the job, do a perfect job—it was a tremendous job—so that I wouldn't have to do the work over again.

Q. Was there anything that Mr. Cain said at that time apropos of that conversation, of that subject?

A. Well—

360 Q. If there was.

A. Not that I recall. I had many conversations with Mr. Cain and Mr. Huebner almost every day, and also with Mr. Busby.

Q. Did you ever at any time, in any conversations with Mr. Cain or anyone else, say that you understood that the Shotwell Corporation had made a voluntary disclosure?

A. Never at any time did I consider—

Q. I am not asking you what you considered. I am asking if at any time you ever said that you understood, to any of the people, to Mr. Cain or to anybody; that you understood that they were making a voluntary disclosure?

A. Well, not just in that way, no. Of course, I had a document, which is that summary sheet that has been, that is in evidence around here, a similar document?

Q. I understand you say you had a document. What I am trying to find out here, what I am asking is if at any time you ever said to Mr. Cain, to any officer of the Shotwell Corporation, to any of the defendants in this case, or to anybody, that you understood and consid-

361 ered that what they were doing constituted making a voluntary disclosure or that what they had done constituted making a voluntary disclosure.

A. No.

By Mr. Ryan: You may inquire.

Cross Examination by Mr. O'Brien.

Q. Mr. Mammel, before you went to the plant did you know that Mr. Lima had been assigned?

A. I knew that Mr. Lima had the case before, yes.

Q. How did you know that?

A. Well, I believe it is on the card, on the record card, or I may have been told by Mr. Sam Krane.

Q. Would that normally be on a card of some kind kept in the Agent's office, if Mr. Lima had been assigned?

A. Well, he would have to sign for the tax return.

Q. No. But my question is would it be on a card?

A. He would sign for the tax return on a card.

Q. Are you talking of cards like Government's Exhibits 2 and 3?

A. Something like that.

362 Q. But not the same card?

A. Well now, I don't recall now just what the card looks like.

Q. Well, I will show it to you.

A. Let me see what it looks like.

I am not sure, but it is a card of this nature. We sign down here (indicating) for this tax return, you see, because that makes us responsible for the tax return.

Q. Well now, after a matter is assigned to you, you pull the tax returns, is that the idea?

A. No.

Q. Well, what do you do to get possession of it?

A. Well, the squad chief comes with the return and he says, "This return has been assigned to you, Mr. Mammel," and there is a card with the return.

Q. Right.

A. And I sign on the card for that return, and then the return is handed in to his secretary, and I am responsible for that tax return.

Q. Where does the squad chief get the return?

A. Well, he gets it, of course, from the office.

Q. And is the process by which he gets it called 363 pulling the return?

A. I don't know of such name, no.

Q. If Mr. Lima was assigned at any time to this case to make an audit, you can't tell it from these cards, can you?

A. No. That is, I don't see his name on there.

Q. Except as the witness Holz—you heard him testify?

A. Well, I don't remember just what he said in that respect there.

Q. Except for what he may have said about it, as to the indications of the squad chief which appear on this card or the squad chiefs?

A. Oh, yes, that of course.

Q. And that is by code of some kind, is it?

A. I don't think so. I never paid much attention to these cards, as a matter of fact. But I could, of course. I know these dates, I can see these dates here, and R.W. I imagine would be Ray Williams, but I wouldn't know it specifically.

Q. Prior to the time that you receipted for the re-

turn, do you know whether Mr. Krane had requested that a file be made and an investigation be commenced?

364 A. I don't think so. I tell you, the first I knew anything about this case was on February 7, 1949. Then is when it was assigned to me. That is the first I know of it.

By Mr. O'Brien: Just a second.

By Mr. Ryan: Don't volunteer information, Mr. Mammel, unless some question is put to you.

By the Witness: Oh, I beg your pardon.

By Mr. O'Brien:

Q. Mr. Krane is not in the same office or section as you, is he?

A. No.

Q. Mr. Krane is in the Intelligence Unit?

A. That is right.

Q. And you are in the Agent's office?

A. I am in the Agent's office, in the fraud squad.

Q. But not in the Intelligence Unit; you are not and were not then in the Intelligence Unit?

A. No.

Q. Now, before you ever got the file—Well, I guess you wouldn't know about this. I will ask someone else.

One of the papers that has been produced here, and
365 which I would like to have the reporter mark for identification as Defendants' Exhibit 4, is the document signed by Mr. Krane and approved by A. P. Madden. Do you know A. P. Madden?

A. Yes, sir, very well.

(Whereupon said document was marked Defendants' Exhibit 4 for identification.)

By Mr. O'Brien:

Q. It is dated September 22, 1948, in which he asks the Collector of Internal Revenue for the income tax record of Shotwell Manufacturing Company.

A. I don't know.

Q. You didn't know anything about that?

A. No.

Q. It was not in your office?

A. No.

Q. But following that, and early in February, 1949, you came to do your work?

A. I got the case February 7, 1949.

Q. Now, Mr. Mammel, you say that you told Mr. Cain

that there was a possibility that the company or its
366 officers would be prosecuted?

A. I said that there was a possibility that there might be prosecution in this case.

Q. Prosecution of whom?

A. Well, the company, of course, its officers.

By the Court: Just what you said, not what you conclude.

By Mr. O'Brien:

Q. Tell us what you said.

A. Well, I said just exactly that, what I said a moment ago. I went no further than that.

Q. Now, do you have anything to do with the decision as to whether there should be a recommendation of prosecution?

A. I do not.

Q. And the discretion in that, in your office, in the year 1949, was vested in whom?

A. Well, that is the Intelligence Office.

Q. In other words, it would be the Intelligence Office which would have to do with the recommending or withholding of prosecution?

A. That is correct.

Q. And in 1949 you were not in that office?

A. I was not, but in my reports—

367 Q. Just a minute. I just want to know where you were. You were not in that office?

A. No.

Q. And in any case, the question whether there is to be criminal prosecution or not, any fraud case or any case which is deemed a fraud case, that is a discretion which is vested in different people along the line, all the way up to the Department and through the Department of Justice, isn't that true?

A. It is, but if I think there is prosecution, I recommend it.

By Mr. O'Brien: Just a minute.

By the Court: You have answered the question.

By Mr. O'Brien: I didn't ask who could recommend it. I asked who could decide and exercise the discretion.

By Mr. O'Brien:

Q. It is also true, is it not, Mr. Mammel, that you can recommend prosecution and they can refuse to prosecute?

A. Right.

Q. Now, have you in your experience seen some
368 disclosure cases in which there has afterwards been a prosecution?

A. This is the first disclosure case I have ever had.

Q. Now, I understood you to say, however, that you yourself did not consider that there had been a disclosure made in this case?

By the Court: I don't think he said that.

By Mr. Ryan: I asked him if he had ever said that he considered that a disclosure had been made.

By the Court: Yes.

By Mr. O'Brien: Well, I stand corrected on that. I didn't mean to mislead. You are right, Judge, that is what he did say.

By Mr. O'Brien:

Q. Let me ask, Mr. Mammel, did you consider that there had been a disclosure in this case?

By Mr. Ryan: Objection. Absolutely immaterial.

By the Court: Yes. I will sustain the objection.

369 By Mr. O'Brien:

Q. In any of your talks with Mr. Cain or with Mr. Huebner, did they tell you that they had been in to see Mr. Sauber?

A. No.

Q. Did anyone tell you that?

By Mr. Ryan: Well, I will object to whether anyone did, since I can't see what difference it makes.

By Mr. O'Brien: I just want to know if he knew.

By the Court: You mean at what time, later or before?

By Mr. O'Brien:

Q. While you were working at the plant.

A. Oh, no, no. No, not while I was working.

Q. Where did you get the sheets, Defendants' Exhibits 1 and 2? Who gave those to you?

A. Mr. Krane.

Q. He had them in his file?

A. Why, I expect.

By Mr. O'Brien: That is all.

By Mr. Ryan: No redirect.

Oh, one moment.

370 *Redirect Examination by Mr. Ryan.*

Q. Mr. Mammel, when you said this was the first disclosure case you ever had—Well, strike the question. Let it go. He has answered it satisfactorily.

By Mr. Ryan: That is all.

(Witness excused.)

By Mr. Ryan: Mr. Toohig.

JAMES J. TOOHIG, called as a witness on behalf of the Government herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ryan.

Q. State your full name, please.

A. James J. Toohig.

Q. Where do you live, Mr. Toohig?

A. 172 Sterling Place, Brooklyn, New York.

Q. What is your business or occupation?

A. Special Agent, Racket Equad, Intelligence Unit, Treasury Department.

Q. Now, do you know a man by the name of David
371 Lubben?

A. Yes, sir.

Q. Did you ever have occasion in the course of your official duties to make an examination of either his tax returns or the tax returns of any corporation or company in which he was interested?

A. Yes, sir.

By Mr. O'Brien: I will object to it, if the Court please, on the ground that is immaterial.

By the Court: Overruled.

By Mr. Ryan:

Q. What returns falling into that category—

By Mr. O'Brien: May I have a standing objection, your Honor, to the questions directed to those subjects?

By the Court: Very well. I will overrule the objection.

By Mr. Ryan:

Q. What returns falling into the classification I gave you have you had occasion to examine?

A. Well, when you are referring to whether I have, sir, the Revenue Agent who was working with me—

372 Q. I mean that you had occasion to work on and investigate.

A. Yes, sir. From 1943 up to around 1948.

Q. Of what companies?

A. David G. Lubben, doing business as Eatsum Food Products Company; David G. Lubben, principal partner,

one of the principal partners in Eatsum Food Products; and General Confections, Inc., New York and Hillsdale, New York.

Q. In other words, David G. Lubben, General Confections, Inc. and two partnership returns?

A. One partnership.

Q. When did you commence your activities?

A. There are others he was interested in, and I don't know whether you want me to name them.

Q. That is sufficient unless counsel cares to go further.

When did you commence your investigative activities in connection with these Lubben enterprises? When did you first come into that matter?

A. It was first assigned to me in November, 1945.

By Mr. Ryan: Mark this Government's Exhibit 5 for identification, please.

(Document so marked.)

373 By Mr. Ryan:

Q. Mr. Toohig, I show you a document which I have had marked as Government's Exhibit 5 for identification and ask you to examine it and state whether you have ever seen it, it purporting to be a photostat in handwriting, or whether you have ever seen the original of it before.

A. Yes, sir, I have seen the original of this.

Q. And have you seen that one, do you know?

A. Sir?

Q. Have you seen that one?

A. Well, I may have. I just don't remember.

Q. You are satisfied from looking at the contents that you have seen the original of this?

A. Yes, sir, I have.

Q. When did you first see the original of that document?

A. On March 4, 1948.

Q. Where did you first see it?

A. The office of the Intelligence Unit, New York City.

By the Court: March 4, 1948?

By the Witness: March 4, 1948, sir.

By Mr. Ryan:

374 Q. Now, prior to the time that you received this document, Government's Exhibit 5 for identification,

had you learned of any connection whatever between the Lubben Companies and the Shotwell Company?

A. I did.

Q. In the course of your investigation of the Lubben companies you mentioned?

A. I was investigating the Lubben Company at the time I learned of this connection.

Q. Did you read this document, Government's Exhibit 5 for identification, after you received it on March 4, 1948?

A. Yes, sir.

Q. And you were then aware of its contents, is that correct?

A. Yes, sir.

By Mr. Ryan: If the Court please, I offer this document Government's Exhibit 5, into evidence as Government's Exhibit of the same number.

It contains, as it will disclose, information concerning over-ceiling payments to The Shotwell Manufacturing
375 Company by the Lubben Companies.

It is offered for the purpose of showing the acquisition of knowledge of that on the part of these agents, and for no other purpose. It puts them on notice as to the information contained therein.

By Mr. O'Brien: We object to it; your Honor, on the ground that there is nothing here—it is not a document kept by their office. It is one of obviously a number of sheets which are not attached, and if they are going to disclose anything about it, it all ought to be there. We ought to have a chance—

By the Court: I can't hear you, Mr. O'Brien.

By Mr. O'Brien: I am sorry.

It is only one of several sheets, and it is not a document made by the Government, but one produced from where, I don't know. It is apparently from their file, and it is a statement made by someone else, whose name does not appear. I can't tell anything about it.

376 By Mr. Ryan: I agree that there were other sheets, and I have no objection to their being put in, but I can see no materiality they have to this matter. They deal with other matters.

By the Court: Well, I don't understand that you are objecting because this is a photostat?

By Mr. O'Brien: No. No, I am not.

By the Court: Your objection is directed to the fact that this document isn't complete, is that it?

By Mr. O'Brien: That was one objection.

By the Court: What is the other?

By Mr. O'Brien: And also to the fact that it does not purport to be a record made by the Government or by Mr. Toohig's department, but something which comes from someone else who is not produced here.

By the Court: Well, I don't believe that makes any difference. If there was any memorandum made at the time, a memorandum he had written, or if somebody had written him a letter about some connection between
377 the Shotwell Company and Lubben, and he received the letter at that time and identified it as the original letter he received, whoever it may have been written by, it may have some bearing upon the alleged information contained in the letter.

By Mr. O'Brien: Also, the part that I have here bears no date that I can see.

By Mr. Ryan: That is right, it doesn't. It is simply offered for the purpose of showing that on that date—

By Mr. O'Brien: On what?

By Mr. Ryan: The Agent came into possession of that information as it is written down on that document.

By Mr. O'Brien: Is that on March 4th?

By Mr. Ryan: On March 4, 1948.

By Mr. O'Brien: Is that what you said, Mr. Toohig?

By the Witness: Yes sir, that is what I testified.

By Mr. O'Brien: There is no date on the instrument itself. All right.

378 By the Court: I will receive it in evidence.

(Whereupon said document was received in evidence as Government's Exhibit No. 5.)

By Mr. O'Brien: Do you have the rest of the sheets on that so that we may see them?

By Mr. Ryan: Yes, I do have them. I should like to submit the other sheets to the part for his determination as to whether they are of any use to counsel, since they do represent confidential information which I can see no need in this case to divulge, if they have no materiality, and this is one of the documents which counsel—well, I am willing to submit the rest of the sheets to the court.

By the Court: I hope you can continue with your examination of this witness:

By Mr. Ryan: That is all. You may inquire.

379 *Cross Examination by Mr. O'Brien.*

Q. You are sure that this sheet marked Government's Exhibit 5 was in your possession by March 4th of 1948?

A. Yes, sir, March 4th.

Q. Now, how do you fix the date March 4?

A. Well, I kept a diary of what happened that day, and in the diary it states that this information was obtained and the notes were taken.

Q. Where is that diary? Is that here?

A. In my office or in the office downstairs.

Q. Did you make any record at your office, other than that contained in your own personal diary, Mr. Toohig?

A. Not on that day. I discussed this with the chief of the racket squad I believe on the 8th of March, a few days later, and he made a contemporaneous memorandum of our conversation regarding this.

Q. Was that Mr. Cordez in that year?

A. Yes, sir.

Q. As a matter of fact, didn't you see the man who wrote this memo?

A. Yes, sir.

380 Q. Did you see him at that time?

A. Yes, sir.

Q. And was it written on that day?

A. Yes, sir, right in my presence. I should say at another desk, but right alongside.

Q. Was he alone or someone with him?

A. No, alone.

Q. Is this the only memo which you had from any person regarding the same subject matter at or about that time?

A. No, sir. There were other memoranda at the same time regarding this same subject matter of over-premium payments by Lubben and his companies.

Q. Was Lubben present at this time?

A. No, sir, he was not.

Q. But you had met Lubben?

A. Subsequently.

Q. How long after?

A. I would say about either the latter part of June or early July, 1948. I think it would be the latter part of June or early part of July.

Q. And not until then?

A That is right, when Mr. Cordez and I met him together for the first time, I am almost positive.

381 Q. Now, the Racket Squad, you were still on that, you were on that squad in 1948?

A. No, sir, I was not.

Q. Then I misunderstood.

A. No. I am in the Racket Squad now. I was transferred around 1949. But I was working in two squads, in the textile squad and in the racket squad. I was on a different floor than the racket squad in 1948 when these notes were taken. I was on the tenth floor, my official floor.

Q. Was the same true of Mr. Cordez or was he just in the racket squad?

A. He was in charge of the racket squad, yes.

Q. So on this occasion you were working under or with him, in 1948?

A. Yes, sir.

Q. On this particular thing, and prior to that time—

A. Although not attached to a squad officially, and there was a reason for that, sir, too.

Q. I am not curious. But I mean, you were interested in the racket activities during 1948?

A. That was the idea, sir.

Q. But not quite so extensively as beginning in

382 1949?

A. I would say that is correct. All my activities then were shifted to the racket squad.

Q. And as far as Lubben is concerned, your communications and contacts with him personally starting in June of 1948 or so—

A. To the best of my recollection, sir, the latter part of June.

Q. That is all right, Mr. Toohig, I don't care about the time.

But about that time, that led you into many other situations in the East, did it not?

A. Well, not at that time.

Q. No, but since?

A. Oh, since, yes, sir.

Q. And one of the most extensive of those is the one having to do with Giglio, who was Lubben's partner in Eatsum Food Products, the partnership, right?

A. I would say that is correct.

By Mr. Ryan: I will object.

By the Court: I will sustain the objection.

By Mr. O'Brien:

383 Q. And in 1948, even, your attention was focused largely on those matters in the East, was it not?

By Mr. Ryan: Objection. It is not proper cross examination.

By Mr. O'Brien: It is a preliminary question. I am not going to pursue it.

By the Court: Preliminary as to what? Something material?

By Mr. O'Brien: Yes, I think so, Judge. Oh, yes. I am not having fun.

By the Court: All right. If you say it is, go ahead.

By the Witness:

A. I would say that is correct, sir.

By Mr. O'Brien:

Q. Now, you went ahead with that work pretty promptly after March 4, 1948, didn't you?

A. I was working on all phases of it, not just one part of it.

Q. And as far as Shotwell is concerned, did you or Mr. Cordez, to your knowledge, communicate with Chicago or the agency here when you became aware of its connection?

A. Not immediately, sir.

384 Q. How much longer was it before you did that?

A. June 21, 1948.

Q. And in what form?

A. Telephone call to Chicago.

Q. When, if ever, was your first written communication to Chicago?

A. Shortly thereafter, when we confirmed the telephone conversation.

Q. Do you have that letter?

A. I believe it is here.

By Mr. O'Brien: May I have it, please?

By Mr. Ryan: I believe it is among the files that Judge Nordbye has.

By the Court: It may be.

By Mr. O'Brien:

Q. Now, did you write that letter by choice or in accordance with the regulations of the office?

A. Well, there is no regulation that I know of that says you must immediately confirm anything.

Q. I agree.

A. And we confirmed it when we thought that the information we had to send to Chicago was sufficient enough to make out, start out investigation.

Q. I am not being critical, sir.

385 A. I understand. I was trying the best I can.

Q. I merely wanted to know whether you had a specific reason for notifying Chicago.

A. I would say we had some.

Q. What was it?

A. In the development of the part of the case, we thought that by notifying Chicago and giving them certain information to act on, that it would further the development of the case, to the best interests of the Government.

Q. And did you in any written notice to Chicago ask them to pull the Shotwell returns?

A. At that time, sir?

Q. Yes, sir.

A. No, sir.

Q. How much longer was it before you did that?

A. We never requested them to do that, that I can recall. That is not something we would have asked Chicago to do at that time. They would have determined what to do when the information was received by them, if they thought it was necessary and deemed it advisable.

Q. You say there was no regulation, is that correct, there was no regulation which required you within a

386 certain time to communicate with an outside agency?

A. That is correct, that I know of, and I am referring to telephone, letter or something else, and not requesting returns. That is a different thing. There is no regulation, except what we heard discussed here today or during the week.

Q. Was there any, if not a regulation, was there any order of any kind from the Treasury to the Agents, telling them what they were to do when they had a matter under investigation in which the name of some other taxpayer arose?

A. Not that I can recall.

Q. Didn't the Assistant Commissioner or Deputy Commissioner issue an order to that effect, following the Wenchel statement?

A. Are you referring to tax returns, sir, or to telephone and other communications?

Q. I am referring to tax returns.

A. That may be true, sir, but I was not referring to tax returns.

Q. Well, now let us go to tax returns for a minute. It is true, is not not, Mr. Toohig, that if an investigation commences in New York in your office and it takes
387 you to another company, that the order I am speaking of requires you to notify the Agent within the jurisdiction of the other company and to request that Agent to pull the file, the return, and to advise the New York agency in writing that it has done so? Do you remember that?

A. I am afraid I must plead ignorance to that. I don't know if that is that way. You might have read it lately. I don't remember if that is it.

Q. Tell me how you recall it.

A. If there is a tax case that we feel should be brought to the attention of the Government, we can do one of two things, either request the returns ourselves and notify the other agency, or send a telephone communication or communication by letter, because we don't know what is going on at that end. They may have all knowledge of what we are transmitting to them, they have already pulled the return, they might be working on the case. We have no way of knowing that. There is no central file I can refer to.

Q. But you, Mr. Toohig, would do one or the other?

A. I did what I thought best in making a tele-
388 phone communication on that date, June 21, 1948.

Q. And by so doing, you elected not to pull the return yourself?

A. At that time, yes, sir.

Q. But did you later pull the return?

A. No, sir. I don't believe—Well, wait a minute, now. I believe that, it was my policy at the time to request the returns anyway, to see just where they were, and I believe, if I am not mistaken, that I did the following month or so. That I am not positive of the date, but I

believe I did that on every case, 'most every case. I don't remember a case that I didn't do it, so I think I did it in most cases.

Q. If you did it in this case, would you have the document with you evidencing that?

A. I may have it in the file that is here. As our United States Attorney said, the files are with the Judge and it may be in there.

Q. Did you take whatever you had in your file and bring it to the United States Attorney for that purpose?

A. Yes, sir. Whatever the summons or the subpoena requested, we tried to comply with it fully.

389 Q. Mr. Toohig, I have forgotten, did you say that you first called Chicago and then wrote Chicago?

A. I believe a letter followed within a short time, sir.

By Mr. O'Brien: Do you have such a letter or is that among the court's papers?

By Mr. Ryan: It isn't separated.

By Mr. O'Brien: It isn't here.

By Mr. O'Brien:

Q. But you did call Chicago. What Agent did you call here?

A. We don't call any particular Agent, sir. We call the division, the Intelligence Unit.

Q. Now, you say "we." In this case did you do it?

A. Well, Mr. Cordez happened to do the calling. I was there. We drafted the message together and he happened to pick up the phone.

Q. The two of you drafted it and he called, rather than you?

A. That is right. He did the speaking, yes.

Q. Can you remember whom he was speaking to?

By Mr. Ryan: I object. I think that this line of
390 examination has gone far enough. We put in that certain information came into their hands on a certain date, and I don't know that there is any purpose in pursuing it beyond that. The question of what he would have done or what he did do later—

By the Court: I think this purports to inquire as to with whom they were speaking in Chicago.

By Mr. Ryan: I mean, he brought that out himself. I didn't cover that portion of it. All I covered was that he received this document in New York on March 4th, and he has now gone quite extensively into this.

By the Court: This may have a bearing upon the March 4th date.

By Mr. O'Brien: That is what I am doing. Not only the March 4th date, but the applicable law controlling this situation, which we will come to. Mr. Ryan can't shut me up on cross examination by asking just a
391 couple of sentences on a vital thing like a date. He has a March 4th date, and there is the question of time limit involved.

By the Court: He may answer the question as to with whom they were speaking in Chicago, if he knows.

By Mr. O'Brien:

Q. Do you know?

A. I believe it was Mr. Olson or Mr. Madden. But Mr. Cordez could tell you exactly.

Q. Now, you were present when the call was being made?

A. I am not sure whether I was in that room exactly at that time. I believe that I had stepped out, and the call was made by Mr. Cordez from the memorandum we prepared.

Q. But you did help prepare the memo?

A. Yes, sir.

Q. Now, did that memo have to do with an investigation of Shotwell or did it have to do with specific information that you wanted about Lubben or his companies from the Shotwell file?

A. The message requested that Chicago obtain information that was in the files or in the Shotwell
392 Company, or information that they would look for in the files of the Shotwell Company. That was the message to Chicago.

Q. Right. In other words, Mr. Toohig, you wanted the cooperation of Chicago, instead of sending a man here to Chicago to check something on the Lubben companies, you wanted Chicago to cooperate and go on over and get it for you?

A. No sir, that wasn't the idea. We had already received the information regarding premium payments to Shotwell and unbilled shipments to Shotwell, which looked fraudulent, and we were investigating it, and that is why we sent, to start, if it needed starting, or to give the information to Chicago that we had learned—let me see, I think that came a little later, around March 12th or

14th, I forget—the particular request that we made, a little later, and we submitted it on the June 21st conversation.

By Mr. O'Brien: Will you mark this Defendants' Exhibit 5 for identification.

(Document so marked.)

By Mr. O'Brien:

Q. Did you get the information which you requested?

393 A. I believe we did.

Q. How long after?

A. That I don't remember exactly, sir, but it was assigned to Special Agent Krane, and whatever he sent.

Q. And he sent it?

A. That is right.

Q. And he sent it the same month, didn't he?

A. He may have. I don't remember. I was working, sir, at that time on three or four fraud cases in textiles, and that is what I can't say exactly that I did it the next day or within a few days, because I was working on other cases.

Q. Well, Mr. Toohig, there has been handed me from the plaintiff's files an instrument I have marked Defendants' Exhibit 5 for identification, which purports to be a memo transcription of a phone call received from Walter Murphy of the New York Division on June 21, 1948. Will you look at it and see if it correctly reflects the substance of what you helped Mr. Cordez to prepare and to inquire of Chicago about?

A. I would say, sir, that is the message that was 394 telephoned to Chicago on June 21st, 1948.

Q. Now, are you able to say from memory when the first written communication to Chicago occurred?

By Mr. Ryan: Well, I again object, your Honor.

By Mr. O'Brien: I just want to know if he can.

By Mr. Ryan: I can't see how this throws any light on whether he got a certain document on March 4th.

By the Court: Well, I think you have gone into that. He said they later wrote Chicago on this matter. He said he didn't know the exact date.

By Mr. O'Brien: I will get it from the file.

By Mr. O'Brien:

Q. Did you have, or do you have any entry in your

own diary, Mr. Toohig, about Shotwell prior to this March 4th date?

A. I don't think I have the—

Q. Have you looked?

A. I believe I have. I don't think I have the name. 395 I just have discussions with the person that I was having the discussions with, and I didn't list any names.

Q. Now, I noticed that this first page of a long-hand memo, which is Government's Exhibit 5, whoever it was who wrote that says, among other things, down towards the bottom of this memo, that in March of 1948 certain things were done.

A. In March of 1948?

Q. That is what he says, or she, whoever it is.

A. I see.

Q. Now, as I understand you, this memo was written—

A. On March 4th.

Q. Right there on March 4th?

A. That is right. That is correct.

Q. But the writer is talking, if you will look at it, as though of a month that had elapsed or passed.

Do you know why that is?

A. What paragraph? Would you point that out?

Q. It is about five lines, starting about five lines from the bottom, right in here (indicating). It is telling about something that happened in March, as though March 396 was a month which had gone by.

Do you see that?

A. Yes, I see that. That may be for this reason. I guess—I don't know whether you asked me or not whether this was my handwriting. It isn't mine. I said, "Write it out because it is too much to listen to," and what was put down is exactly the way it was put down.

Q. It was put down by whoever it was that you had talked to?

A. That is right.

By Mr. O'Brien: I don't like to interrupt, Judge, I do want to get along, but sometimes I worry about the papers, not that I am not ultimately protected, but on the examination of the witnesses, before they leave or go away.

By the Court: Well, what are you asking for now?

By Mr. O'Brien: I am referring now to the papers which you still have.

By the Court: Which one particularly?

By Mr. O'Brien: Well, any letters or communica-
397 tions which have come out of Mr. Toohig's office to Chicago, along the line that he has been describing, and apparently those letters and things are amongst—

By Mr. Ryan: I am sorry?

By Mr. O'Brien: Those letters which Mr. Toohig was speaking of are amongst the papers which the Court has. I don't doubt anything Mr. Toohig tells me, incidentally. I know he is truthful. I just want the letters.

By Mr. Ryan: I assume if we could have access to the documents, that Mr. Krane probably could locate them quicker than almost anybody else, or if they are in Mr. Toohig's file he may himself find it.

But this is a letter, the original of which would be received in Chicago?

By the Court: Suppose we take a ten-minute recess.

By Mr. O'Brien: Yes.

(Recess taken.)

By the Court: Mr. Ryan, I think I will turn these
398 back over to you. You may want to review them.

I may say to Mr. O'Brien, in looking over the rest of the documents that were attached to Government's Exhibit 5, a sheet was found that apparently belongs to Government's Exhibit 5. It was inadvertently, as Mr. Ryan says, left out, and that should be attached to Government's Exhibit 5.

By Mr. Ryan: That is right.

By the Court: The other documents which I have here are all pertaining to other concerns and make no reference to the Shotwell Company. In fact, they are listed under different names and in no way refer to the Shotwell Company, nor do they in any way refer to any testimony that this witness has given.

By Mr. O'Brien: All right, sir.

By the Court: I understand that Mr. Ryan has some letters they found.

By Mr. Ryan: Yes. Well, I would like, your Honor—
I mean, I have to see what is in them, so I can be
399 sure if there is any reason why we shouldn't turn them over.

On the confirmation of the phone conversation, there is one paragraph in the letter that does not appear to have any materiality to the matter at hand, and it re-

lates to no matter so far as the defendants are concerned, but the personal business of someone else, and I would suggest, I would tender that paragraph to the court for him to read and then, because we don't have a copy at hand, just cut that off at the bottom and the top of this page and submit the balance of the letter to counsel.

The paragraph I am directing attention to begins at the bottom of the second page.

By the Court: You mean beginning "The present inquiry—"?

By Mr. Ryan: Yes.

By the Court: Yes, you may leave that out.

By Mr. Ryan: Then we will just physically remove that and give the letter to Mr. O'Brien. We can
400 restore it to its former condition afterwards.

By the Court: You want to cut it off?

By Mr. Ryan: Yes. That is the only thing I can do in order to give it to them.

By the Court: Well, can't you explain to Mr. O'Brien what you have in mind and what there is in that letter you want to refer to?

By Mr. Ryan: He is the one that is seeking to refer to it. I don't know what use he wants to make of it, but there is only that one paragraph—

By Mr. O'Brien: If it is a paragraph which the court says has nothing to do with this matter, I will accept it.

By the Court: Well, you can show it to Mr. O'Brien, and let it be made a part of the record, and later on put in a substituted copy.

By Mr. O'Brien: Be glad to do that.

By Mr. Ryan: As far as I am concerned, I don't know what the significance of it is anyway. The Special
401 Agent knows more about it than I do.

By the Court: Well, if you want to eliminate that portion of the letter by some means, I haven't any objection to it, if that is what you want to do.

By Mr. Ryan: Well, I am not sure myself what the significance of it is, and I haven't time enough to go into it now.

By the Court: Well, it hasn't any bearing on this controversy.

By Mr. Ryan: No.

By Mr. O'Brien: How about the other letter?

By Mr. Ryan: Well, Mr. Krane has read that one and wants to speak to me about it.

I will give you this one.

By Mr. O'Brien:

Q. Who is Walter Murphy, Mr. Toohig?

A. He was the Assistant to the Special Agent in Charge of the office in New York.

By Mr. O'Brien: Will you mark these three sheets Defendants' Exhibit 6 for identification.

402 (Documents so marked.)

By Mr. Ryan: With respect to the second communication, only the first paragraph, which confirms the fact that reference was made to a telephone request of the office, it seems to me, has any bearing on the case.

If the Court wants to have that read into the record, I have no objection to it.

The rest of it I don't see any reason why it should be disclosed.

By Mr. O'Brien: Is it considered irrelevant?

Apparently this first letter, I don't know what is excluded, but it must have something to do with the Shotwell situation.

By Mr. Ryan: The Judge read what was excluded.

By the Court: No, nothing at all. Entirely a different person was mentioned.

By Mr. O'Brien: Oh, with that, it is immaterial. I misunderstood.

403 By the Court: Well, you might be right as to the first paragraph being material only in so far as the examination of this witness is concerned. There may be matters in this letter that may be material as far as the general subpoena is concerned.

By Mr. Ryan: That is why the letter is with the group. That is why it was with the group.

But, as I understand it, he is seeking confirmation of a telephone conversation, and the first paragraph covers that, and the rest of what the Agent is communicating to Chicago, why, it seems to me is strictly department business, and I don't know—

By the Court: Well, at least it isn't a part of the cross examination of this witness.

By Mr. O'Brien: Well, I am thrown in the dark, but I can only say that there is already some disadvantage,

perhaps unavoidable, in the fact that I have not been able to look at all the documents that were produced
404 at the start of the trial.

Anyhow, I don't think it should be further cut up into sections, according to witnesses, with witnesses coming and going, so that I am untimately left with a group of documents and nobody to question them about.

By Mr. Ryan: All of these documents fall within a confidential area, and ordinarily counsel doesn't plow through all of the Government's files, and I don't have any authority to make them public. I can only express myself to the court and my feelings with respect to them and such observations as I make. I have no authority to turn any of this material over.

By Mr. O'Brien: Well, all I am observing is that the test as to whether I should see the documents should not be what witnesses on the stand.

It is whether the documents are revelant to the whole matter and which are without the bounds of any proper privilege.

By the Court: Well, I think I desire to give fur-
405 ther consideration to the balance of the letter, and the only materiality that I consider now pertains to the first paragraph.

This is a communication from Toohig to Murphy, is it?

By Mr. Ryan: Well, it is forwarded on to Mr. Arthur P. Madden in Chicago. That is the way in which Mr. Toohig suggested that this information to be transmitted to Mr. Murphy be forwarded to Chicago. That is the form it took. It was an enclosing letter here.

Well, is it suffice—the court has read it—if I read it for the record?

By the Court: Yes, read the first paragraph.

By Mr. Ryan (reading):

"Reference is made to the telephonic request of this office to the Chicago division—"

By Mr. O'Brien: What is the date of the letter?

By Mr. Ryan: September 13, 1948.

406 "Reference is made to the telephonic request of this office to the Chicago Division on June 21, 1948, that The Shotwell Manufacturing Company, Incorporated, North Adams Street, Chicago, Illinois, be immediately contacted to secure certain invoices evidencing sales to the above concern and to General

Confections, Incorporated, Hillsdale, New York, and New York. The records were subsequently furnished this office and having been photostated are returned herewith, pursuant to the request of Special Agent Sam Krane of the Chicago Division in his letter dated August 31, 1948."

By Mr. O'Brien: Whose letter dated August 31, 1948?

By Mr. Ryan: Mr. Krane's letter.

By Mr. O'Brien: Where is that?

By Mr. Ryan: Pardon me?

By Mr. O'Brien: Where is that letter?

By Mr. Ryan: Well, at the moment—

By the Witness: The one you cut, sir.

407 By Mr. Ryan: That is the one you have all except one paragraph.

By the Witness: That is dated the next day, sir. The typist was just a little late.

By Mr. O'Brien: The letter I have was dated July 1, 1948.

By Mr. Ryan: Apparently you are wrong, Mr. Toohig.

By the Witness: Yes.

By Mr. Ryan: This letter was dated September 13th and it makes reference to a request of Special Agent Sam Krane for the return of the photostats which Mr. Krane made in his letter dated August 31, 1948.

Now, that letter is not one of these two, and it is probably in the file. There has been no request for it.

By Mr. O'Brien: Do I understand that is a letter requesting the return of the photostats?

By Mr. Ryan: Yes, that is what it says here. That is all I know. I don't know if I have ever seen it. I

408 don't think I ever have.

By Mr. O'Brien: Well, I am not concerned with that.

By the Witness: I think the July 1st letter is the one you want.

By Mr. O'Brien: Yes.

By Mr. O'Brien:

Q. The July 1st letter, Mr. Toohig, is marked Defendants' Exhibit 6 for identification, and this is the response, is it not, which you received to the request of June 21, 1948, except for the portion which has been deleted?

A. This letter, sir, is confirmation of the telephone

call by Special Agent Sam Krane, complying with the request we made by telephone.

Q. Well, in addition to being a confirmation, is it also the letter which furnished you the data which you had requested?

By Mr. Ryan: If it did.

By the Witness:

A. I would say, yes, sir, in substance.

By Mr. O'Brien:

Q. Is there any other letter which you wrote to Chicago, you or your office, concerning the companies
409 which you were investigating in the East, I mean the Lubben companies?

A. The companies that traded with Lubben, sir?

Q. No, the Lubben companies.

A. I didn't understand your question.

Q. I will rephrase it.

Are there any other letters which you wrote to Chicago Agents for further data or information concerning the Lubben companies which you were investigating?

By Mr. Ryan: I will object. I can't see how this is proper cross examination.

All I asked this witness is if he got a document from somebody and when he got it.

By the Court: I will sustain the objection.

By Mr. O'Brien: All right.

By Mr. O'Brien:

Q. Was there any letter which you wrote to the Chicago Agent asking the Chicago Agent to pull the Shotwell Manufacturing Company returns?

By Mr. Ryan: Objection. It is improper, and it has been gone over already, anyway.

410 By Mr. O'Brien: I am asking for the letters, if the Court please. I have been over it, it is true.

By the Court: Are you asking if there are any letters on or about the time we are now considering, early in 1948?

By Mr. O'Brien: Yes, Judge. I have already asked the witness, and he said there was a telephone call which he said fulfilled that purpose.

I asked him if the telephone call was not merely a request for certain specific data that they wanted in their eastern investigation, and he said, no.

There was a notice to the Chicago office that was a substitute for a request that the Chicago office pull the return.

And then he gives me—

By the Witness: I didn't say that, sir.

By Mr. O'Brien: Then he gives me a letter of June 21st, which is a mere request. I am still trying to find whether there was any letter from New York to Chicago in the year 1948, informing Chicago that the name Shot-
411 well Manufacturing Company came up in the course of the investigation in the East of the Lubben companies, and requesting Chicago or advising Chicago to pull the returns.

By Mr. Ryan: I think he answered that. To the extent he didn't, I will admit right now there were no such communications.

By Mr. O'Brien: That is true, but the reason I have to ask him again is because he said there was a letter, a couple of minutes ago, in the Judge's chambers.

By the Witness: If I did say there was a letter, I didn't say we requested the Special Agent's office of Chicago to pull any returns at all of anybody. The procedure is not that way.

By Mr. O'Brien:

Q. And what is the procedure?

A. If we are interested in a return, we do not write to the Special Agents' office. We either write to the Bureau or the Collector or whomever we are interested in at that time, wherever the return may be located. We
412 don't ask for the Special Agent.

Q. Very well.

Is there any letter from you or your office to anybody requesting them to produce the Shotwell returns?

A. I already answered that, sir, in the previous answer when I said I do not think of a case I handled, where I was interested in developing it, either in this office or somewhere else, that I did not make a formal request to see if returns were filed, and that was done usually to a collector.

Q. Very well.

Then if you had such a letter in this matter in reference to Shotwell, I ask you to produce it.

A. The copy of the letter sent requesting any returns from anybody in Chicago?

Q. Yes, sir.

A. That would be in the file, I suppose.

Q. That is what you said before, and I am still trying to get it.

By Mr. Ryan: I don't know whether there is or not, if you are asking me, I am frank to say.

413 By Mr. O'Brien:

Q. Do you have any recollection or knowledge yourself, Mr. Toohig, beyond your ordinary practice, as to whether at or about the time that you had this memorandum delivered to you of March 4, 1948, which mentioned the name Shotwell, do you have any independent recollection of calling for the returns of Shotwell?

A. I believe they were requested from the Collector later on, subsequent to that time.

Q. Well now, you say—

A. You asked me the question, do I think.

Q. Do you base that belief on what you usually do?

A. I said I cannot remember a case in which I did not. If there is an exception, I don't know of it.

Q. Is that why you say you believe?

A. I think I would have done that in any case.

Q. Do you have any specific knowledge of the Shotwell Company?

A. I have no specific knowledge of that one company. I was handling a number of companies.

Q. But you do think if it was done in this case, 414 as it was usually done in other cases, it was done some time later?

A. I imagine that is so. If I did request it, if I did request it.

Q. And how much later, do you know?

A. How much later?

Q. Yes, sir.

A. Well, in the first place, sir, it was not a New York case. We are inquiring about something that happened in a Chicago company. So it might be when I could get to it, in maybe a month or two.

As I said before, I was working on four cases. I believe, at that time, and that is why I may not have acted immediately, I explained.

Q. It might have been as late as August, might it not?

A. It could be, sir. It could be three or four months, sir. It is very possible. I would say it is very possible that inasmuch as it was not a New York firm, I would have made a request at some later date, for the reason that it may be worked by that other office. I don't know. It was not a New York case.

Q. I understand. But if you did make such a
415 request, the letter should be in whose files—the Treasury Department?

A. It would be in Treasury's, yes, sir.

By Mr. O'Brien: Well, that is one of the things, if it is there, your Honor, that I should like to see.

By the Court: Is that on your theory as to the date of disclosure?

By Mr. O'Brien: Yes, sir.

By the Court: I don't suppose, according to your theory, it would be particularly material, anyway.

By Mr. O'Brien:

Q. Just one more question. The matter in Government's Exhibit 5 for identification, you yourself did not communicate to Shotwell or anyone connected with it, did you? The references to Shotwell contained in Government's Exhibit 5, you didn't tell any of the people at Shotwell about that?

A. Personally?

Q. Yes.

A. No, sir. I did not know anybody in Shotwell personally, sir.

416 Q. I understand, you didn't, sir, and you didn't tell anybody to tell them, did you?

A. Directly telling them to get in touch with Shotwell about this? No.

Q. To inform Shotwell.

A. No, sir.

Q. And I take it that the matter contained in this memo was given to you by an informer of some sort?

A. Yes, sir, confidential informer.

By Mr. O'Brien: I think that is all

Redirect Examination by Mr. Ryan.

Q. Mr. Toohig, just one thing. You made some reference in your testimony to unbilled shipments, you said, to Shotwell.

Is that what you meant?

A. Yes, sir.

Q. Unbilled shipments to Shotwell?

A. Unbilled shipments of Shotwell to the Lubben companies.

By Mr. Ryan: That is all.

By Mr. O'Brien: I offer in evidence, if the Court
417 please, these documents that have been identified as Defendants' Exhibits 4, 5 and 6.

By Mr. Ryan: No objection.

By the Court: They may be received.

(Said documents were received in evidence by the Court, and respectively marked Defendants' Exhibits 4, 5 and 6.)

(Witness excused.)

By Mr. Ryan: Oscar Olson.

OSCAR W. OLSON, called as a witness on behalf of the Government herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ryan.

Q. State your full name, please.

A. Oscar W. Olson.

Q. Where do you live, Mr. Olson?

A. 4837 Wellington Avenue, Chicago.

Q. What is your business?

A. I am the Assistant District Commissioner of
418 Audits, Chicago Division.

Q. And how long have you been so engaged?

A. Since May 20th, this year.

Q. Prior to that what was your occupation?

A. I was Assistant Agent in Charge, for about twenty-eight years, I guess.

Q. Now, have you ever met one Mr. Byron Cain?

A. I met him once. He came to my office about a year ago.

Q. In what month was that, that he came to you?

A. I don't know. Time flies so fast. I imagine it was about a year ago. Probably October, November. I don't just recall.

Q. Is that the only occasion on which you had a conversation with him in your office?

A. I think that is the only time. I don't think I talked to him before.

Q. Was there anybody else present besides yourself and Mr. Cain?

A. No.

Q. Would you proceed and relate the conversation that you had with Mr. Cain at that time?

A. Be glad to. Mr. Cain came into my office and he said he had just come from a political meeting, at
419 which he had been offered the chairmanship of some dinner of some kind, and that he called at our office, wanted to talk to Mr. Wright, and he not being in, why, he talked to me, about whether or not it was proper for him, because of the investigation of his income tax returns, to accept this chairmanship of this political get-together.

I told Mr. Cain that as far as we were concerned, that it was not up to us to decide whether or not it was proper, that it was up to him to decide whether or not it was proper, and that we could have nothing to say about it; that regardless of whether he accepted the chairmanship or not, that the case would go forward, the investigation would go forward until its final conclusion, and that was about the extent of the conversation.

Q. Is that all the conversation you recall?

A. Oh, there might have been some other talk about the weather and things like that.

Q. Did you at that time tell Mr. Cain that he had nothing to worry about?

A. I did not.

420 By Mr. Ryan: You may cross examine.

Cross Examination by Mr. O'Brien.

Q. From your position in the office, Mr. Olson, you knew, didn't you, that this investigation was going on of Shotwell?

A. Oh, yes, I had heard about it.

Q. And at that time, October of 1951, or November, whenever it was, a year ago, that Mr. Cain came in, the investigation was still in progress?

A. Yes, sir.

Q. Do you remember telling Mr. Cain about the various steps and levels to which the matter would have to go

before there could possibly be any publicity about it?

A. We never talked about that.

Q. You don't recall that?

A. No, sir.

By Mr. O'Brien: That is all.

By Mr. Ryan: No redirect.

(Witness excused.)

By Mr. Ryan: If your Honor please, at this time I have a document I would like to identify and
421 offer.

If the Court please, I should like to have the copy of the affidavit of Byron Cain, which is marked Government's Exhibit 1 for identification, received in evidence as Government's Exhibit of the same number.

By Mr. O'Brien: Well, I have no objection.

By the Court: It may be received.

(Said document was received in evidence by the Court, and marked Government's Exhibit 1.)

By Mr. Ryan: If your Honor please, that concludes the Government's evidence.

The Government Here Rested Its Case On The Above-Entitled Motion.

By Mr. O'Brien: We still have that book and the documents, and I would like to get through with those before I put on any witness that I might have.

Beyond that, I don't expect to have any witness, but perhaps one.

By the Court: I think Mr. Ryan was going to familiarize himself with that.

By Mr. Ryan: I am sorry, I was trying to get
422 the book in time. I didn't hear what counsel said.

I am willing to waive any question of competency with respect to these statements, these questions, testimony, or whatever it is, that you seek to have in, the testimony given before a Congressional hearing.

However, I do object to it on the grounds of the absence of any materiality, since these statements were made before a Congressional Committee in 1952 and could not possibly have come to the attention of the defendants at or prior to the time they were making the alleged disclosure. Therefore, they could not possibly have acted upon them.

For that reason, I say that none of the material, except the published statements that had previously been published, has any materiality in this matter.

By the Court: What do you have in mind in offering statements of this kind?

By Mr. O'Brien: Because they are statements of officials concerning the whole disclosure policy, not as of 1952—indeed, it was abandoned in 1951—but a discussion and testimony, which takes it right down through the 423 period that is involved here, takes it at either end of that period. This shows what the policy was at the beginning, how it shifted from time to time, what it was during years like 1948, and how it was construed and interpreted by the proper officials, and the difficulties which ensued, which is very plain were there right along, but not published.

By Mr. Ryan: The theory here is and is bound to be one of reliance.

By the Court: I would think so.

By Mr. O'Brien: No, that isn't necessarily so, under the cases. I have pleaded and I have a right to support my theory—

By the Court: This is being heard just by the court and I can receive it and give such weight to it as I think justifies the situation.

By Mr. Ryan: Yes. We have no jury here.

By Mr. O'Brien: The primary issue is the published policy, but if it is contended to be something over and beyond that, why—

By the Court: Well, I will receive the exhibit. I don't know in what way you have identified it now.

By Mr. O'Brien: Would it be satisfactory to the 424 Court, since there is no jury, and to Mr. Ryan, if I made arrangements with Mr. Ryan's approval, to have the pertinent parts which I have indicated copied in by the reporter?

By the Court: Well, is it sufficiently identified so I am able to take the document?

By Mr. O'Brien: Yes, I think it is.

By Mr. Ryan: Well, I haven't any objection. I mean, just so it is such that the Judge can find what it is. You can read the whole document, for that matter, since we are involved only with the court here.

By Mr. O'Brien: Well, the little table I have got gives the pages, starting with 78.

By the Court: Well, you say page 7.

By Mr. O'Brien: Page 7, yes.

By the Court: I assume you are offering that entire page, is that it, page 7?

By Mr. O'Brien: Yes, sir.

By the Court: Well, that apparently is a letter written to the Secretary of the Treasury.

By Mr. Ryan: On page 7?

By the Court: Page 7—No. That is a statement by the Secretary Snyder, in which he quotes on page 5 a letter from Robert Ramspeck, and then he goes on ap-
425 parently with his statement, and page 7 purports to reflect the statement by Secretary Snyder.

Is that correct?

By Mr. O'Brien: Yes, sir. It really jumps to 78, where there is the press release, which sums up the situation, on page 78.

By the Court: Well, you may take this for the time being.

By Mr. O'Brien: All right, Judge.

By the Court: Well, then it is understood that you are going to copy the portion that you have introduced and make it available as an exhibit for the record, and it will be identified by the stenographer as Defendants' Exhibit 7.

Is that right?

By Mr. O'Brien: Yes, sir, that is fine.

There are two other things, Judge.

Had you finished with this one?

By the Court: Yes, sir.

By Mr. O'Brien: I think that my order calls for this document, but I don't know whether it is there until we have a chance to see. But I am informed by Mr. Wenchel that there was an order to the various agents—it is really implementing the objective test laid down in
426 these published articles and binding on the agents, and without compliance with that, there would be nothing to stop a disclosure by someone, a taxpayer outside of the district, whose name came up somewhere in another district.

By Mr. Ryan: Is that order in here?

By Mr. O'Brien: No, it is not in here.

By Mr. Ryan: I mean, I don't know about such an order.

By Mr. O'Brien: Well, perhaps not.

By Mr. Ryan: I mean, if there is such an order.

By Mr. O'Brien: I am told that the order was signed by the Assistant or Deputy Commissioner to that effect, to the various agents.

Now, that order I am interested in finding in the papers, and which is not in the papers, and having these papers produced by the Treasury, it is sort of double-barreled—it is in my subpoena, and it ought to be amongst the papers that they produce.

By Mr. Ryan: You say that this particular order of general application in the Treasury Department is cov-
ered by this subpoena which had to do with the docu-
427 ments that have to do with the voluntary disclosure in this case?

I wouldn't think it would be interpreted by anybody along the line that way. I didn't interpret it that way.

By Mr. O'Brien: It has to do clearly with it.

By the Court: Is it a public document?

By Mr. O'Brien: No. It was sent to the agents in the Treasury. It would be published, but I haven't been able to find it so far.

By Mr. Ryan: I don't even know of its existence. I won't challenge it, if you have seen it, but I don't know.

By Mr. O'Brien: What I want to say is that if that is so, I would expect the Treasury to produce it, if it is not a public document, but one which the agents have.

By Mr. Ryan: Well, as I interpret the subpoena, it would not have been covered any more than would these official copies of pronouncements or something on the policy. I construed the subpoena and I assume the Treasury people have construed it the same way, as requesting documents which dealt with the disclosure in this case, and therefore, I wouldn't assume that it would appear in any
of this material or that it would be covered by the
428 subpoena, if they have such an order.

By Mr. O'Brien: Well, would you inquire, Mr. Ryan, and if there is such, if you folks have such an order, whatever it is called, bring it in?

By Mr. Ryan: Well, I will inquire. Apparently Mr. Toohig doesn't know of it. I will ask Mr. Krane and

the people I have here if they know of such an order, and find out if they are aware of the existence of any such order.

By the Court: It couldn't be covered by your subpoena.

By Mr. O'Brien: I see. I suppose not.

By the Court: It may be covered by some other order that the court has made.

By Mr. Ryan: I didn't know of the existence of it. We don't have it, unless the agents may have something in the manual of instructions or something.

By Mr. O'Brien: What should we do, Judge?

By the Court: Now, let's see, have we any further testimony?

By Mr. Ryan: I don't have anything further, Judge.

By Mr. O'Brien: I thought that I might possibly
429 have one more witness on rebuttal, but I do not want to go into that until I see the documents. I may not then go into it all. I would have to see the documents, in any event, what I am to see.

By the Court: I think it would be helpful if I had the benefit of counsel's respective positions, so I know just exactly where we are.

By Mr. Ryan: Well, I am assuming if counsel and if the court is willing to hear it, that counsel will urge his motion and argue it now, if he so desires.

By Mr. O'Brien: Urge what motion?

By Mr. Ryan: Your motion to suppress.

By Mr. O'Brien: Well, I am not finished. I have some documents yet.

By Mr. Ryan: I see. You just want to know our theory, to enable you—

By the Court: Well, none of these documents, by reason of your respective theories, may have any materiality or relevancy whatsoever.

By Mr. O'Brien: Well, I am beginning to understand why some of the officials have difficulty with this policy, in trying to state a theory, but I would say, Judge, as far as I can express it, that our position, our primary
430 position is that there was a voluntary disclosure made under the terms of published statements—for present purposes, the Wenchel statement made in 1947 would be enough to refer to.

The policy differed over the different periods.

So I am taking it as to that time, being the closest to 1948, the one made in 1947.

Now, that statement itself laid down certain conditions, and it was those that were held out to the public, or that group similarly situated.

It is my position that upon compliance with those conditions, that is, the thing that constitutes the disclosure is not the ultimate determination of the dollar amount of liability and not the preparation of any instruments, papers, summaries, or what have you, but the thing that constitutes the disclosure is the exposition of the taxpayer to tax authorities, bringing itself forward, putting himself in the way of whatever may ensue—if they have already started an investigation, the disclosure is untimely, of course—putting themselves forward and thereby making themselves liable to criminal prosecution, which they might have escaped had they stayed away; in
431 any event, identifying himself as one who is going to have to pay some additional taxes, with substantial penalties, that he might have avoided by keeping away; in other words, as the statement says, a simple thing, the mere act of coming in and telling, and from there on they will follow it, the amount will be determined, the subject of penalties, which could run as high as 70 percent in some cases.

Now, some people think of a disclosure, I have heard it so referred to here, as something which transpires only somewhere along the end of the line, when the papers are all completed and when the amount is determined.

There is nothing in the statements or in the law to warrant that conclusion, I think.

Now, on the point of timeliness, there is some ambiguity in that all of the statements say in effect before an investigation is initiated or before an investigation is commenced—and one wonders whether that means investigation of the taxpayer, investigation of someone else which might or might not ultimately lead to the taxpayer, and there is a view that it means the taxpayer, but there is some difficulty about that.

432 Now, there is that factual matter in the case.

Your Honor, clearly, if an investigation of Shotwell had commenced before it made the alleged disclosure, then the alleged disclosure, even if sufficient in every re-

spect, would be untimely. But there again, it is not every investigation which is included within the term. It must be an investigation of a particular kind, not a routine nor current audit, such as is made of a certain number of all the large taxpayers of the country—some percentage goes through automatically such an audit. They simply haven't the means to audit them all, because it would be quite difficult. They would like to audit them all, but they can't.

There is some ambiguity on the question of the kind of investigation, who is being investigated, and I think on the facts of the case here, there is no investigation of Shotwell which commenced prior to the time of the alleged disclosure by Shotwell itself.

Then as I pointed out in the last argument, there is a question which might arise as to whether the investigation of the people in the East, in connection with which
433 the name of Shotwell would and apparently did arise ultimately, whether it could be said in an investigation of Shotwell, it had commenced before it made its disclosure.

By the Court: May I interrupt, Mr. O'Brien?

By Mr. O'Brien: Yes, sir.

By the Court: I have been wondering just in my mind, perhaps we can work out a plan that would be satisfactory to counsel and to the court. I don't think this should be for the record.

(Whereupon a discussion was had off the record.)

By the Court: While I have a fairly good idea of your respective positions, I think it would be helpful if each one of you set forth in writing briefly your positions, or as fully as you desire, and then if you get it up to me by the middle of next week, I would come down next Friday morning and we can finish it up.

By Mr. O'Brien: Very well.

By the Court: Then I think I will turn these documents over to you, Mr. Ryan, so I won't have to have the responsibility.

By Mr. Ryan: All right, sir.

By the Court: We will make our date for Friday at two o'clock in the afternoon.

434 (Whereupon the further hearing in the above-entitled matter was adjourned to Friday, November 21, 1952, at the hour of 2:00 o'clock p.m.)

435

* * (Caption — No. 52 CR 143) * *

Chicago, Illinois
November 21, 1952
2:00 o'clock p.m.

Court met pursuant to adjournment.

Present:

Mr. Ryan
Mr. O'Brien
Mr. Hess
And Other Counsel.

By the Clerk: Number 52 CR 143, United States of America versus The Shotwell Manufacturing Company, et al; hearing on defendants' motion to suppress certain evidence.

By the Court: Gentlemen, I have looked over the correspondence that the Government has turned over to me, and I have concluded that of all the letters and documents, the following may possibly have some bearing on the issues that we are considering.

436 First, is this copy of a letter to Mr. McCahey, of September 7, 1950.

Then there is the letter written by Mr. Madden to Mr. Woolf, and the first paragraph is the only portion that I believe has any bearing on the issues. The rest of it is not evidentiary.

Then there is the letter written by Mr. Krane, Special Agent, to Olson, Special Agent, the first, third, fourth, fifth and sixth paragraphs, with the exhibit attached. I think I have eliminated the second paragraph.

And then there is the letter written by Mr. Krane to the Chief of the Intelligence Division, page 4 and the following matters which may have some bearing.

Then there is the letter written by Mr. Wright to the Deputy Commissioner under date of June 30, 1949.

A letter written by Mr. Krane to the Chief of the Intelligence Unit under date of September 19, 1950.

A letter written by Mr. Adair, Special Agent, to Mr. Palmer, Special Agent of Atlanta, Georgia, and the

437 affidavit of Mr. Lima is attached thereto.

By Mr. Ryan: Now, with respect to those, of course, my position stands with respect to all of them,

because I think the Court understands I haven't any authority to make the turnover. If they are turned over, it will be because the Court has determined that they have a bearing and they should be turned over.

Now, beyond that, however, I think perhaps this one entitled "Requisition For Return," I think perhaps that would be evidentiary. In other words, I am just going to express myself with respect to that, not on any matters of policy that might be involved; and I take it, as I say, this is evidentiary, and the Court is turning it over to Mr. O'Brien.

Now, with respect to the Revenue Agent's Report or the Special Agent's Report, that is a narrative of the things that happened. I don't see in what sense it is evidentiary.

Perhaps if it was a question of the impeachment of Mr. Krane, there might possibly be some merit to it.

He hasn't testified in this proceeding as yet, and
438 he is only relating certain things in a report.

A report of investigation is essentially a confidential sort of thing, and I don't think that—unless there is something that this report by its existence evidences, I don't see how it could be evidentiary.

Now, I don't mean to tell you—there is no reason why I want to keep these things from being turned over, and there is nothing in them that I am concerned about, but I have to take this position because of the fact that they are confidential records and documents.

It simply reflects a reference to the situation and Mr. Krane's appraisal of it, and I don't see how that is evidentiary here with respect to that.

In other words, the analysis or discussion of the facts or evaluation of them, it seems to me, is a matter of professional opinion and certainly not factual in any sense.

That is all I care to say. As I say, I feel it incumbent upon me to take that position, and there may be other things discussed in there that are not germane. There

are, doubtless, that have to do with the Government's
439 theory with respect to this case, generally, apart from the disclosure, and I don't think that type of material should be—of course, your Honor indicated before, the page following, and I assume you mean that is the only part you would consider turning over.

By Mr. O'Brien: I, of course, haven't seen the papers, Judge, but from what Mr. Ryan says, these things appear to me, first, as far as I can now think, I am not interested in proving as a fact, as true or false, many of the things which one might expect to find in these papers.

I don't think that is the issue, as to whether the thing is true or false.

The pertinent thing is in connection with the thinking of the Bureau and in connection with the repudiation of the disclosure or its effect, as well as the subject matter of timeliness, which the Court has to deal with.

Now, as I said, I don't know what the particular papers are, but I think that they have a bearing. If they show or tend to show the basis on which the Bureau acted in disclaiming or repudiating the disclosure, they would be pertinent to my theory of the case.

By Mr. Ryan: Well, I would disagree with that.
440 I don't think the thinking of anybody in the Bureau is material here.

There are certain things that happened and there are certain legal consequences that flow from it. How somebody in or out of the Government evaluated them, I don't see that that is material here or relevant to any issue we have here.

By the Court: What other observations have you with respect to these?

By Mr. Ryan: Well, with respect to the Adair letter and the affidavit, now, this is a work product that represents an attempt by the Government to find out what Mr. Lima had to say.

Mr. Lima was here on the witness stand.

The Government wanted to be informed on the premises and they sought to have Mr. Lima interviewed, and a statement was taken from him, and thereby the Government was informed as to what he had to say about it.

Now, Mr. Lima has been here and he has testified and he has been subject to cross examination, and unless there is something in here purportedly—

By Mr. O'Brien: It would have been of some advantage to have had that at the time of the testimony, al-
441 though it was admittedly not practical to do it.

By Mr. Ryan: That is the only observation I have about that.

About the letter from Sam Krane to the Chief of the

Intelligence Bureau, there again it is a narrative of something that happened.

To the extent that it reflects Mr. Krane's thinking or represents a communication from Mr. Krane to the Chief of the Intelligence Unit, I don't see how it could have any bearing on the facts in issue here. It would reflect only Mr. Krane's interpretation of things.

It is only second hand, in a sense, a work product, his work.

By Mr. O'Brien: On that point of work product, Judge, I again looked at the Hickman case, as I suggested in my letter, which I sent Counsel a copy of, I think we have a difference of legal understanding of that term.

I find no justification in the books for the assertion that intra-office or inter-office memoranda prior to the trial attains the status or acquires a degree of privileged communication of that nature.

By Mr. Ryan: It depends on what they are offered
442 for. If all the material they contain is by way of recitation or narrative, then I think it merely reflects the thinking of the author.

The same with respect to Mr. Krane's communication to Mr. Olson, with an exhibit attached, and again, that letter was written to advise Mr. Olson concerning the status of the case and the facts of the case, and I don't see how that communication could be evidentiary of anything here, and also the exhibit attached to it.

The same thing with respect to the other communications that are here.

Now, with respect to this letter of Mr. Sullivan's, again it may be evidentiary and I haven't any objection to him having it, except to the extent that it is a confidential record of the Department. Presumably he has a copy of it too.

By the Court: Well, I will overrule the objection, Mr. Ryan.

By Mr. Ryan: All right.

By the Court: And insofar as Mr. Krane's letter, which I referred to and which is dated February 8, 1952, addressed to the Chief of the Intelligence Division, I will overrule your objection to that portion of the letter which covers the item Voluntary Disclosure,
443 beginning on page 4 and ending with the so-called Exhibit 6 on page 5, and that portion of the letter

may be made available to Mr. O'Brien.

By Mr. Ryan: I will physically remove that.

By Mr. O'Brien: Then I had a motion, if the Court please, which I have transmitted to you and a copy to Mr. Ryan. I think I had two.

One we need not take the time here now with, except I note from Mr. Ryan's letter, and I think he otherwise told me, that he does not assert any objection.

By the Court: With respect to this motion concerning the General Commercial Acceptance Company, I have left the date blank as I was not informed as to what dates you had in mind, as to the return date of the subpoena.

By Mr. O'Brien: I think it would have to be Wednesday.

By the Court: You have seen this?

By Mr. Ryan: I have no objection to it.

By the Court: You have seen the form of the order?

By Mr. Ryan: Yes.

By the Court: The 25th of November, then?

By Mr. Ryan: That would be the 26th, Wednesday.

By Mr. O'Brien: Thank you, sir.

444 The other motion, if the Court please, has to do with papers which we think are pertinent to the proceedings here now, and was made because I did not think that the papers called for are to be considered within the provisions of the orders which you heretofore entered.

The motion has to do with orders or directives or mimeographs or manual procedure relating to disclosure matters or to the assignments of returns for audit or the procedures which are involved here.

Since it has been testified to, the transmission of corporate returns from Washington to the various agencies for audit, and the procedures by which that is carried out, the orders, mimeographs and directives have more particularly to do with situations where there is a case, such as Mr. Toohig testified to, communications to the agents in New York involving mention of a taxpayer in another district, what, if anything, is prescribed as to that.

By the Court: Well, let us go over your motion, so I may follow you.

By Mr. O'Brien: The motion itself?

By the Court: Yes. Your motion covers many things, and I don't—

445 By Mr. O'Brien: Section A covers orders, directives, communications and mimeographs from the Treasury Department to its—

By the Court: It is entirely taken care of by the subpoena which has been issued and return has been made and the order of the court is made and it has all been taken care of.

By Mr. O'Brien: I think not, Judge.

By the Court: I think that is the fact.

By Mr. O'Brien: In the sense that I do not understand the subpoena itself expressly stated that the subpoena was so understood by the Government.

By the Court: It was as broad and comprehensive as any subpoena could possibly be.

By Mr. O'Brien: I will have to look at the order to refresh my recollection.

I would say not, your Honor. It is broad as far as it extends, but your order reads this way: that there are to be produced from these files correspondence, memorandum, telegrams, copies of memoranda and transcription of telephone conversations relating to the subject-matter of the alleged disclosure.

Well, I do not regard—to be candid about it, I

446 think, and I said so before, I do not regard the unpublished orders or directives from the heads of the Treasury or the Bureau to the various agencies, as papers of that kind. They are directives and things which describe a procedure, which, in spots, may touch upon this subject, but I do not think it is in the nature that these items are.

By the Court: You mean generally, with reference to voluntary disclosures and not with reference to this specific matter?

By Mr. O'Brien: That is right, your Honor.

By the Court: What do you say?

By Mr. Ryan: My position with respect to that is simply that it is not relevant to any issue. It doesn't make any difference what somebody in the Bureau of Internal Revenue wrote or what the disclosure was. There were certain published statements and it is for the court to state to what extent you will accept those statements; not to accept the many instructions, inter-depart-

mental, with respect to what the people inside the Treasury Department would do, which could not be published, could not possibly be acted upon by the public.

Further, they were confidential in which they dis-
447 closed the purposes of the Internal Revenue and those things are not things which are common. They are procedures and the public are not concerned with those internal procedures. They are concerned with any policy that is held out to them and they may act upon and they are entitled to have the court interpret what they mean and what they can take out of it, but they cannot possibly act upon things they do not know about. They have no bearing on this.

There is no way. It makes no difference how somebody in the Bureau interpreted it throughout, if it never came to the attention of the public.

By Mr. O'Brien: As to the pertinency and the materiality, let me illustrate: the witness Toohig put in evidence through Mr. Ryan a memorandum from an informant disclosing, incidentally, the name of Shotwell and testified that he himself had made a memorandum on March 4th, the very day that this was brought in to him.

The purpose of that here, I suppose, has to do with the timeliness issue and it is intended to show that by reason of that occurrence, some investigation had
448 commenced and to which you could relate back the commencement of the Shotwell investigation.

By Mr. Ryan: That wasn't it.

By Mr. O'Brien: Let us assume it was, for a moment. And I say, and I have made inquiry to find out that there are directives and orders of the kind that your Honor characterized which tell the various agents over the country in a situation of that kind what they must do in respect to the taxpayer whose name is disclosed, who is from another district, what they must do in order to fix the time at which it may objectively be said that a commencement of the taxpayer so mentioned—a commencement of the investigation of the taxpayer so mentioned, has occurred.

That is merely illustrative. I am not debating that.

By the Court: Well, I will sustain the objection to paragraph A.

By Mr. Ryan: He has gotten into paragraph B, at the same time, on that.

I have a teletype on that from the Acting Commissioner.

By the Court: Let me hear about paragraph B.

By Mr. O'Brien: B is specific. It is a case of
449 the same nature, but specifically it is related to such directives or orders as there may be.

By the Court: Of course, I might say, counsel, that our adjournment to today was merely for the purpose of enabling the court to go into these documents that the government produced in response to your subpoena.

The testimony was closed and there was no further testimony to be offered on the motion to suppress and no further proceedings, as I understand it.

By Mr. O'Brien: That is not my understanding.

By the Court: That is the Court's understanding. I am telling you now how you can do it.

You are proceeding on this motion and it is untimely in view of the resting of both parties, except in so far as referring to the correspondence and documents and the Court made that available to you.

By Mr. O'Brien: Your Honor, I have the record on that. I did not rest. I said, and the record will show—the record said that I would have rebuttal and I said I did not want to go into it until I saw the documents.

450 By the Court: Well, I don't know about paragraph B. You are the only one that introduced any testimony as to the so-called policy of the Department. The Government didn't produce any witness in that regard. How can you say paragraph B of your motion, is by way of rebuttal. I don't understand.

By Mr. O'Brien: I think I can understand it. The pertinency of the rebuttal part arises out of the testimony that they put on through Mr. Toohig.

By the Court: You mean, we are talking about paragraph B now?

By Mr. O'Brien: I do. I asked Mr. Toohig if it was not true that there was such a directive and he would have to write such a letter to Chicago. He said that was not—there was no rule or order of that kind. I asked him if he had written. He said he didn't for a month.

By the Court: I understand that by paragraph B, it seeks to implement an order or directive, if any issued—

that part that is given by J. P. Wenchel, Commissioner from the Bureau of Internal Revenue, May, 1947.

451 By Mr. O'Brien: Yes.

By the Court: It is an implement.

By Mr. O'Brien: I meant to tell you, your Honor, it says that the time of disclosure and the time of investigation begins when it can be ascertained with complete objectivity and certainty. The thing which implements it and makes it possible is the directive and teletype.

By Mr. Ryan: I have a teletype that will throw light on it. It says there was no such implementation. Nobody I have found has ever seen such a document.

He says there was no such implementation.

By the Court: I will sustain the objection.

By Mr. O'Brien: I would like the record to show also the complete record of Mr. Ryan's assertion that there is no such item.

By Mr. Ryan: On the authority—of course, I haven't searched myself, but I have received that information.

By the Court: All right.

452 By the Court: What do you have to say about "C"?

By Mr. O'Brien: It is more specific on "B", your Honor. The disposition would have to be the same.

By Mr. Ryan: I didn't remember there was a "C"; no way of knowing such a document was in existence. It couldn't possibly make any difference. It would fall into the same category as "A", and it would be intra-departmental, not published, and nobody could rely upon it. For that reason—furthermore, when I put that testimony of Mr. Toohig in, Counsel misconceived my purpose.

The statement was made in court here that there was no communication from him prior to the date of the alleged disclosure even on the testimony of the Government's witness. I was making no point concerning that. I put that evidence in and that document in for another purpose.

By the Court: You don't contend there was any investigation by the Government as such by reason of any disclosure made to Mr. Toohig by the confidential informant?

By Mr. Ryan: No, I don't because it happened after the Wenchel Doctrine, and the Wenchel Doctrine speaks

of the manner and methods by which an investiga-
453 tion is commenced and I don't rely on it for that.

I have another purpose with respect to whether the corporate records are involved here or not.

By the Court: Does that enlighten you at all, Mr. Ryan, as to the Government's position?

By Mr. O'Brien: Yes, it does. It enlightens me in both respects.

We have one left.

By the Court: All right.

By Mr. O'Brien: And that has to do with the manual of procedure pertaining to the assignment of returns for examination and audit. The relevancy in that connection is the testimony of Mr. Holz on that subject. Your Honor may recall, will recall there were two cards offered in evidence through him, Plaintiff's Exhibit 2 and Plaintiff's Exhibit 3, some conversation about the assignment of the 1946 Tax Return of Shotwell. It was in that connection that there was testimony about some of the group leaders or squad chiefs or whatever they were called.

By Mr. Ryan: My position is the same with that. It is intra-bureau and it is for the Court to decide when an investigation has commenced within the meaning of the published statement.

454 I think that Mr. O'Brien would probably agree with me the nub of this is whether the assignment of a return to a group chief in 1947 can have the effect of an institution of the investigation under the Wenchel Doctrine.

By Mr. O'Brien: I think that was one of the purposes of the testimony.

By Mr. Ryan: To that extent my position is the Court has to interpret that doctrine.

By the Court: Your position is what, please?

By Mr. Ryan: That the Court is going to have to look at the Wenchel statement and say whether that constitutes an assignment of the return to a revenue agent, special agent, collector, or Bureau of Internal Revenue within the meaning of the Wenchel statement, and nothing anybody said or any procedures that are adopted in the Revenue Bureau, intra-bureau procedures, can have any effect on that question. That is a question for the Court.

By Mr. O'Brien: It is a question for the Court when the pertinent facts are in, and any regulation as to what shall be done in a case of an assignment and what constitutes an assignment, and so forth, is binding on all of the agents and is of very great probative value
455 on this question. I think this is the last one.

By the Court: Is there such a manual?

By Mr. Ryan: Well, there is a manual for special agents but it doesn't contain anything about as to what constitutes an assignment, when an assignment is made within the meaning of the Wenchel Doctrine, and it is most confidential since it has to do with government procedures.

By Mr. O'Brien: I am not interested in it if there is any part that is of that nature. If the statement is made by the United States Attorney that the manual that he has relates only to special agents and not to the office of the agent in charge, I am not interested in what it is.

By Mr. Ryan: This manual has only been produced very, very shortly. This is for special agents?

By Mr. Burman: That is right.

By Mr. Ryan: Is there another one for Revenue Agents?

By Mr. Burman: Yes.

By Mr. Ryan: Do you know whether that has any bearing—

By the Court: Well, you better confer with him and you may state what your position is.

456 By Mr. O'Brien: Judge, while he is doing that, in view of your statement about the rebuttal, I went to the record just to make sure.

By the Court: I think that is true. I merely made the observation, I don't think this is rebuttal.

By Mr. Ryan: I don't have the other manual. Of course, I did try to gather up and find out whether there are documents that existed. There was no order and I didn't have any instructions from the Treasury Department whether I could even make a tender of them, but I am hoping to get through this if we can without the necessity for delaying further the hearing, and I will say with respect to any such manuals I have no reason to know there is anything like that in them, but they are strictly intra-bureau and to the extent they deal with procedures within the Bureau, they are not mat-

ters that should be public property. They cannot affect the situation since they cannot possibly act upon those things, and the Court in the last analysis can only decide for the public what they are entitled to take out of the published statements.

In addition to that, as your Honor says—I put in
457 evidence about the same return on December 16th.

By Mr. O'Brien: If Mr. Ryan wants to strike the testimony of the witness, I have no interest in the question.

By Mr. Ryan: No, I can't do that.

By Mr. O'Brien: The Government has adduced the evidence for what it is worth.

By Mr. Ryan: I simply put that man on to identify records and to produce a record card which reflects under the assignment of return on a certain date to a group chief, and the only question that remains is whether in the published Wenchel Doctrine, that constitutes the commencement of an investigation, and what opinions may be held by anybody doesn't make any difference.

By Mr. O'Brien: I am not talking about opinions. I may say, Judge, that that question, not to hear the case on the evidence you got, but generally is the one which the whole disclosure policy as the report and other publications show, and it is so difficult that the Bureau itself, the officials are this way (gesturing) on some nice law question? Not at all. On the simple question as to what is it that marks the commencement of an investi-

gation within the meaning of those words. If you
458 have a manual effective with binding force on the people in the agent's office which says what shall be done in order to commence the investigation, I imagine that would be of a mild degree of interest on this question.

Now, if it isn't here, all right, say so, that they don't have such.

By Mr. Ryan: We have no order on us yet to produce anything. I have done this in an effort to expedite this thing should we be required to take any action on it. There has been no order yet. As I say, I fail to see how it makes any difference. The Bureau might even make an ultra conservative decision on the matter, but it still wouldn't mean that the doctrine wouldn't go a great deal further.

By Mr. O'Brien: I want to add one fact just to remind the Court one elementary bit of evidence and the very facts which are peculiarly within the knowledge of the other side, such as a fact of this kind. I have no burden of establishing, but I am inquiring into it in connection with the subject that they brought up.

By Mr. Ryan: The position of the defendants here is that there were certain published statements and
459 they acted upon them.

Now, as to what their published statements mean, it is for the Court to say what a reasonable person would be entitled to take out of them, not the construction that might be placed on them by different people within the Bureau, and until such time as the Court pronounced on these things, no one would know for sure what they did mean, even the man who made the pronouncement would not be competent for him to get on the stand and say what he meant by it, what construction he placed on it, because it isn't what he thinks it means, it is what the Court says a reasonable person can take out of it. He may say it means something entirely different from what it says, but that doesn't change it. It still means what it says and what the Court says the public is entitled to take out of it.

By the Court: While, on the other hand, you take the position in your brief that the assignment of the 1946 Tax Return of Shotwell to Group Chief Granahan constituted an assignment of the tax return to an Internal Revenue Agent or other Bureau Officer, that is your position?

By Mr. Ryan: That is right.

460 By the Court: Under the terms of the so-called Wenchel Statement. You contend that an investigation thereby was initiated. The Wenchel Statement, however, indicates that the mere record of a name does not mean that an investigation has been initiated. I take it that Mr. O'Brien is concerned with whether or not he would have any manual or any rules of procedure which would indicate what such an assignment means in the handling of tax returns. In other words, is it a mere routine affair that takes place in every tax return, or does it have some specific significance under your procedure?

By Mr. Ryan: Mr. Holz was here who introduced the cards and explained the making of that record and the returns are surveyed in Washington and sent out to the officers in the field for examination, and then they are surveyed again and then are assigned to groups in the office.

Now, the plain fact of it is as has been established in the record just what is done. They are sent out from Washington to be surveyed and assigned for investigation. Some of them they may not decide to audit in the field. They may send them back to Washington. Those that they do, they assign to group chiefs, who, in turn, give 461 them to agents to go out on.

The only question is whether an assignment to a group chief as distinguished from an assignment to the working agent constitutes the commencement of the investigation under the Wenchel Statement. I assume that is the crux of it, isn't it?

By Mr. O'Brien: All I want is to have the whole sequence of events before the Court, the facts from which the Court can draw the conclusion, whether a fact of law or mixed one as to when the investigation commenced.

By the Court: Your position is that the assignment of a tax return to Group Chief Granahan means what?

By Mr. Ryan: It means that an investigation was commenced, that irrevocably that return was—

By the Court: That may be a conclusion.

By Mr. Ryan: That is the cut-off point for disclosure.

By the Court: When it was assigned to Group Chief Granahan, what was Group Chief Granahan required to do?

By Mr. Ryan: He was required to turn it over to a working agent as soon as one was available to make the examination, have him go out and make an 462 audit.

By the Court: Are there regulations in any manual which indicates that that is the procedure that should be followed upon the assignment of the tax return to a Group Chief?

By Mr. O'Brien: That is all I am interested in, in the manual, not otherwise seeing it. I don't care to look at it. You can look at it.

By Mr. Ryan: I haven't seen—

By the Court: Might that not be of some significance?

By Mr. Ryan: I suppose conceivably it might, but Mr. Holz was here the other day on the stand to testify with respect to the practice which was in effect, and I think Counsel cross examined him. They were surveyed and then turned over to the Group Chief and he was to assign them or turn them over to an agent to go out and make the audit. That is my recollection of it. It may be nceivable that—it may be conceivable someone coming in here testifying what the significance of an assignment to a Group Chief is. I don't know what that might throw out, except whether the return was assigned to a Group Chief, it therefore meant an audit would be made. I presume that is the only thing. I don't even know if there
463 is any regulation that deals expressly with that.

Mr. Burman has sent for the manual and we can look at it and see if it says specifically that, but as I say, this order wasn't on us to produce yet, and while I tried to gather up some of the stuff and expedite the hearing, I didn't feel that we had been ordered to produce this material as yet, and I haven't even clearance from the Treasury Department that authorizes me to make a tender of it, and I must have that before I can—not myself, but the Bureau Representative must have that before he can make a tender to the Court, or otherwise he is in violation of the regulation and the statute.

464 By Mr. O'Brien: What is the violation there of the statute?

By Mr. Ryan: Well, if anybody in the Bureau turns over files of the Bureau without authority from the Secretary of the Treasury, he has violated the Regulation, not the statute.

The statute deals with returns only.

Mr. O'Brien: Well, I don't know whether you are speaking from your standpoint, I guess that is all you are speaking from, what you agreed to.

By Mr. Ryan: I have a manual here. At the present time, I cannot even tender it to the Judge. I have not yet received instructions from the Treasury Department whether I can. There has been no order yet in which I could.

By Mr. O'Brien: My motion in that connection is on the plaintiff to produce it, not on you, and the plaintiff, is prosecuting a criminal case. It is the plaintiff, in addition to being the United States.

The Court: Well, we first have to determine whether or not it is in existence before the court can make any order on it.

By Mr. O'Brien: Very well, I understood from
465 the gentleman—I don't know his name—Mr. Berman, was it that there is a manual in effect in the office of the Agent in Charge, just as the one you physically saw here is in effect pertaining to the office of the Special Agents.

I take it that would be the Intelligence Unit or other special agents, as distinguished from the ordinary revenue agents.

By Mr. Ryan: That is correct.

By Mr. O'Brien: And that it does, therefore, exist.

By the Court: Is there anything further we should now consider?

By Mr. O'Brien: One thing, Judge. What was the court's direction about the sub-section D, on the Manual?

By the Court: We are awaiting the return of the messenger that was sent out.

By Mr. O'Brien: Oh, I missed it. Then there was nothing on that.

I had one other motion that I sent you.

I had this to say, Judge, if I may, but I would like
466 to ask Mr. Ryan, first, concerning the matter that we discussed the last couple of days, whether there has been any word from Washington on the papers?

By Mr. Ryan: I haven't as yet. I am still awaiting word from New York that instructions have been issued by them to the Department: I have taken every step.

By Mr. O'Brien: I don't want to get deeply into that. I do want to say this, Judge, and then I will be happy to get the business at hand and finish it, but I don't feel free to do it without going at the earliest time into what has transpired in this case in relation to the orders that we had for papers.

That is, that Tuesday my people, my auditors and associates were in New York to look at the papers, and the United States Attorney's office in the Southern District of New York, in the first instance, and later the Bureau of Internal Revenue, in the second instance, refused to comply with the order, and I informed Mr. Ryan.

He took it up with Washington.

We found also, when we got there, that all these papers,

having been there so long, we had to discover them
467 on investigation, on deposition, and then produce them through your orders; that at that late date, when so close to trial, when my people sought to take off the figures, that all of a sudden Chicago wants the figures back here. Not all the papers, but some, and there is a situation which I do wish to discuss seriously.

I would have brought it up this morning when you were here, but I was in the Court of Appeals at 9:30 until 12:30 on two matters we had set for argument.

But I want you to know that. I want you to know it is something I wish to discuss before you get away. I would like very much, unless you direct something else, to go ahead and get done with this, this motion, whatever remains of it, and then to go into that.

Of the papers which were handed to me at the opening of this session, I should like to offer in evidence the Madden letter, dated August 30, 1950.

By the Court: Suppose you have it marked; that will be Defendants' Exhibit 7.

By Mr. O'Brien: Number 7, I think, is the excerpts from the book. You assigned that number, Judge, the
468 last time we were here.

This would be 8. Otherwise you are correct.

By the Court: Yes.

By Mr. O'Brien: I would like to have these sheets marked Defendants' Exhibits 8, 9, 10, 11, 12 and 13, respectively, for identification.

By Mr. Ryan: The same objection I made to the turnover.

(Whereupon said documents were marked respectively Defendants' Exhibits 8 to 13, both inclusive, for identification.)

By Mr. O'Brien: And will the Reporter mark Defendants' Exhibit 7 for identification the transcript of the excerpts from the committee hearings.

Number 7, I understand, your Honor, was received in evidence subject to verification by counsel.

By the Court: Well, I think I said subject to the objection. Of course, it is quite apparent that hasn't any evidentiary value, but is before the court.

By Mr. Ryan: It is in.

By the Court: That is right.

469 (Whereupon said document was received in evidence as Defendants' Exhibit No. 7.)

By Mr. O'Brien: I offer then the papers which at the Court's suggestion I had had marked for identification Defendants' Exhibits 8 to 13, respectively.

By the Court: Will you identify them, please?

By Mr. O'Brien: Yes, sir. Number 8 is the Madden letter of August 30, 1950, to Woolf.

I mean no disrespect in describing these gentlemen. I just want to make it short.

The second is a memo of August 30, 1950.

By the Court: Defendants' Exhibit 9?

By Mr. O'Brien: That is Defendants' Exhibit 9, yes, sir. In fact, it is one memoranda consisting of five sheets.

By Mr. Ryan: It is the Krane memorandum.

By Mr. O'Brien: It is the Krane memorandum, apparently.

By the Court: That is Exhibit 9?

By Mr. O'Brien: Yes, sir, 9 to 13. Each sheet bears a number.

By Mr. Ryan: The same objection. It is narrative. It is confidential.

470 By the Court: Well, it will be received in evidence.

(Whereupon said documents were received in evidence as Defendants' Exhibits 8 to 13, both inclusive.)

By Mr. O'Brien: I am not assigning a number, but I would like the record to show that the exhibit bears two attached slips. I suppose they could be marked 8-A and 8-B, respectively, to show that they are here.

By the Court: Very well.

(Said documents were marked respectively Defendants' Exhibits 8-A and 8-B.)

Thereupon The Defendants, Further To Maintain The Issues In Their Behalf, On The Aforesaid Motion, Introduced The Following Evidence In Rebuttal, To Wit:

By Mr. O'Brien: Mr. Graflund.

H. STANLEY GRAFLUND, called as a witness on behalf of the defendants herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

471 Q. What is your name?
A. H. Stanley Graflund.

By Mr. O'Brien: There is only one other thing on the papers produced, Judge. I would like to mark these Defendants' Exhibits 14 and 15 for identification.

By Mr. Ryan: Same objection.

By Mr. O'Brien: As a matter of fact, this is a duplicate. You can take that back. Is it all right to separate it?

By Mr. Ryan: It doesn't make any difference. You can separate it. It is the same thing.

By Mr. O'Brien: So it will be Exhibit 14 only. 15 is out.

By the Court: What is it?

By Mr. O'Brien: 14 is a letter from Mr. Krane to the Chief of the Intelligence Unit.

By the Court: It may be received.

(Said document was received in evidence as Defendants' Exhibit 14.)

By Mr. O'Brien:

Q. State your name?

472 A. H. Stanley Graflund.

Q. Were you formerly an officer of Shotwell Manufacturing Company?

A. I was.

Q. What office did you hold, Mr. Graflund?

A. Vice-President and Secretary.

Q. Did you have any occasion to take currency to the office of a Dr. Doe in the Board of Trade Building?

By Mr. Ryan: Objection to the form of the question, leading. You should start back a little further and lead up to this point.

By the Court: No. He may answer.

By the Witness: I did.

By Mr. O'Brien:

Q. Will you state to the Court the circumstances of what you did and the occasion in which you did it?

By Mr. Ryan: I will object to that. That is a little

too broad, the circumstances and the occasion. It may involve all kinds of conversations and everything.

I have no way of knowing what he is going to say, so I can object.

By the Court: Well, we will find out.

473 Go ahead.

By the Witness:

A. Toward the early part of 1946, I was approached by Mr. Huebner and told that the company needed corn syrup.

By the Court: A little louder, please.

By the Witness:

A. In the early part of 1946, I was approached by Mr. Huebner—

By Mr. O'Brien: Talk over this way, will you, so the Judge can hear you, Mr. Graflund.

By the Witness:

A. (Continuing) All right. I was approached by Mr. Huebner who said the company needed corn syrup and in order to obtain that corn syrup the company would first have to purchase raw—

By Mr. Ryan: I object to a recitation of what the company would have to do. It is hearsay.

By the Court: Yes. I sustain the objection.

By Mr. O'Brien:

Q. Just state what you were told to do and what

474 you did.

A. I was told to take some money down to Dr. Doe's office.

Q. For corn?

A. For corn.

Q. Where was the office?

A. In the Board of Trade Building.

Q. And did you go alone or were you accompanied?

A. Alone.

Q. Do you recall the office number?

A. I do not.

Q. What did you do when you got to the building?

A. I looked for Dr. Doe's number on the board in the lobby.

Q. And then?

A. I took an elevator up to his office floor.

Q. You entered the office?

A. I did.
Q. Can you describe it very briefly?
A. Two rooms, an outer room and an inner room; some dental equipment in the inner room.
Q. Anybody in there, in the office?
A. Two men.
Q. How were they dressed?
475 A. One man had on a white jacket, and I am not sure of the other, but I believe he had on a cocoa jacket, cocoa color.
Q. All right, sir. What did you do?
A. I extended the envelope to the man in the white jacket.
Q. What was said?
A. I said, "I am from Shotwell."
Q. What was done?
A. He took the envelope.
Q. What did you do?
A. I left.
Q. Did you have any occasion before or since that time to act in the same way with Dr. Doe?
A. No, sir.
Q. Did you ever meet him before or after?
A. No, sir.
Q. You appear here upon subpoena served upon you, Mr. Graflund?
A. Yes, sir.
Q. You were heretofore subpoenaed by the United States Attorney in this matter?
A. Yes.
Q. What day was it that you were down here?
476 A. I believe it was Thursday of last week.
Q. Was it the 12th or 13th?
A. That would have been the 13th, wouldn't it?
Q. All right, sir. Did you talk to the United States Attorney?
A. I did.
Q. Did you tell him what you have stated here today?
A. I did.
Q. At what time of the day?
A. In the noonhour.
By Mr. O'Brien: You may cross examine.
By Mr. Ryan: Well, I would like to say for one thing, I think this question about whether he talked to me in the noon hour leaves a little unfair inference in this

record, because under the circumstances I did what was the ethical and proper thing.

Dr. Doe had been on the stand.

I disclosed this man's testimony to counsel and I advised the court of it, and for the benefit of anybody that might have heard of this, I want the record to show that as soon as I learned of this man's testimony or be-
477 fore it could have affected this inquiry, I notified counsel and the Judge of it.

By the Court: I think that is true.

By Mr. O'Brien: There is no doubt about that. I should like to read the letter, however, of November 19th, by which that was done, which was the occasion for my mentioning the hour.

"This evidence was presented by the Government during the morning session on Thursday, November 13th."

I asked the court to take judicial notice of the fact that the official transcript shows that the evidence was produced at the opening of court at two o'clock, Dr. Doe's testimony.

By Mr. Ryan: What time?

By Mr. O'Brien: Two o'clock.

By Mr. Ryan: At two o'clock inthe afternoon?

By Mr. O'Brien: That is right.

By Mr. Ryan: I am sorry, that is wrong, counsel.
478 Dr. Doe was the last witness before noon.

By Mr. O'Brien: Well, I don't know that it makes any difference.

By Mr. Ryan: Well, it certainly does to me.

By Mr. O'Brien: Page 315 of the record:

"By the Court: We will take our morning recess."

Then a recess was taken.

By Mr. Ryan: The record appears that way?

By Mr. O'Brien: Yes.

By Mr. Ryan: Then the record is wrong. Dr. Doe was the last witness that testified.

By the Court: We recessed for noon. A morning recess means we recessed about 11:00 o'clock or 11:30. If the Court takes a morning recess, that is a morning recess.

By Mr. O'Brien: I may be mistaken.

By the Court: I don't remember when he was called.

By Mr. O'Brien: My record was that Dr. Doe was the first witness at 2:00 o'clock.

By the Court: If his testimony is before the noon
479 recess—

By Mr. O'Brien: Although, frankly, I don't know that it would make any difference.

By Mr. Ryan: I think it makes a difference to me. I learned what this man had to say to us after Dr. Doe had testified.

By the Court: Well, are there any further questions from this witness, Mr. Ryan?

By Mr. Ryan: Yes.

Cross Examination by Mr. Ryan.

Q. Mr. Graflund, do you know how much money was in the envelope you say you took to Dr. Doe's office?

By Mr. O'Brien: Mr. Ryan, excuse me a minute. The record does show that the adjournment to 2:00 o'clock was taken after Dr. Doe's testimony, as Mr. Ryan said.

By Mr. Ryan:

Q. How much money, if you know, was in this envelope that you say you took to Dr. Doe's office?

A. I have no idea.

Q. Do you know that there was money in the envelope?

A. Yes, sir.

480 Q. Did you see it?

A. I saw a glimpse of it, yes.

Q. In other words, it was not sealed so you could not see it?

A. No, sir.

Q. Do you know Dr. Doe?

A. No, sir.

Q. Do you know whether or not he was in the office?

A. I do not.

Q. Did you have any instructions to give the money to Dr. Doe?

A. Yes, sir.

Q. Then you don't know whether you did or not, is that right? You didn't know whether the man you gave it to was Dr. Doe; you assumed he was, is that it?

A. I assumed he was.

Q. Because he had a white coat on?

A. Yes, sir.

Q. Mr. Graflund, you stated on direct examination that you occupied an office in the Shotwell Manufacturing Company?

A. Yes, sir.

481 Q. And directing your attention to the years, well, 1945 through 1950, would you tell the Court what office you held, or offices, if you had different positions, with the Shotwell Manufacturing Company?

A. From 1945?

Q. On through 1950.

A. Well, I was Vice-President during that period and Secretary.

Q. All during that period?

A. Yes, sir.

Q. Were you also Comptroller during that period?

A. Not during 1945, no, sir.

Q. Well, during 1946?

A. Part of 1946, yes, sir.

Q. 1947?

A. Yes, sir.

Q. 1948?

A. Yes, sir.

Q. 1949?

A. Yes, sir.

Q. 1950?

By Mr. O'Brien: I think I will object, your Honor. What is the materiality of that?

482 By the Court: That is to identify him.

By Mr. Ryan: I was not in this office. I have to show the man's connection with the corporation, for the record.

By the Court: Go ahead.

By the Witness: May I make one point there?

By the Court: Well, if you want to clear up anything in your testimony you may, if that is what you have in mind.

By the Witness: My only point was I did not have the official title of Comptroller. I was Vice-President and Secretary.

By Mr. Ryan:

Q. Were you the Comptroller when you took the money over to Dr. Doe's office, as you say?

A. No.

Q. What were you then?

A. I was Vice-President and Secretary.

Q. Vice-President and Secretary?

A. That is right.

By Mr. Ryan: That is all.
By Mr. O'Brien: That is all.

(Witness excused.)

483 By Mr. O'Brien: Mr. Holz, will you step up here, please?

By the Court: He has been sworn, I believe.
By Mr. O'Brien: Yes, he was, Judge.

FRANK J. HOLZ, recalled as a witness, having been previously sworn and examined, testified further as follows:

Direct Examination by Mr. O'Brien.

Q. Mr. Holz, you appeared here today in response to a subpoena which my office served upon you?
A. Yes, sir.
Q. And you brought with you the papers, or some of the papers mentioned in that subpoena?
A. The only paper that I could obtain was this examination record card Form 1247 for the year 1946, because the rest of the file, I find is already over here. That was obtained, I think, by Mr. Krane previously.
Q. This is a photostat of the original?
A. That is correct.
By Mr. O'Brien: You have no objection to my using the photostat?
By Mr. Ryan: No, none at all.
484 By Mr. O'Brien: Would you mark the photostat, Defendants' Exhibit 15 for identification, please.

(Whereupon said document was marked as requested.)

By Mr. O'Brien:
Q. Referring to the card marked Defendants' Exhibit 15 for identification, I will ask you to state, Mr. Holz, if this is—if this is related to the card you brought in during your direct testimony?
A. Yes, sir, it is.
Q. But it is the card which shows the names of the field agents to whom the return is assigned for audit or investigation?
A. That is right.
Q. It is true, is it not, that the other day I asked you, or called your attention to the fact that Mr. Lima's name

did not appear on either of the cards which you had brought, Plaintiff's Exhibits 2 and 3?

A. That is right.

Q. And Mr. Lima's name does appear on this card, 485 does it not, Defendant's Exhibit 15?

A. Yes.

Q. And above it, Mr. Madden's?

A. That is right.

Q. And the respective dates to which the matters were referred to them for investigation?

A. That is correct.

Q. Were you asked the other day to bring this card in as well as those which you brought?

A. No. You see, the file—this—let me explain.

Q. No. I just want to know. I just want to know if you were asked to bring this card?

A. No.

Q. Now, in the year 1947, speaking of corporate returns, was it the practice of the Bureau at Washington to send those which disclosed the gross income of $75,000 for examination or audit?

A. That was the general rule, although there were others that showed less than that?

Q. Where there were special reasons?

A. That is correct.

Q. And in the case of all returns of corporations which disclosed a gross income over $125,000, was there a 486 practice during the year of 1947 to send those to the agencies for audit?

A. They would come in the category of those above 75,000, surely.

Q. Now, on your direct examination the other day, you testified that these corporate returns, when they reach your office, are distributed by you to various group chiefs for assignment for investigation by their field men, is that correct?

A. After, when they are received in our office—

Q. After you have screened them?

A. Oh, yes. I was going to bring that out. We classify them first.

Q. I will ask you about that later, but my question now, which I didn't phrase so well is whether you allocate or distribute the returns which you have screened or re-

tained for audit, to the various group chiefs for assignment for investigation by their field agents?

A. Yes, that is correct.

Q. Now, you have general supervision over the group chiefs?

A. That is correct.

Q. In any given year—let me ask you this first:
487 Do the group chiefs themselves, in turn, screen the returns to see which shall be returned without audit or shall be audited?

A. They do.

Q. And in any given year, it is true, is it not, that there are a good many corporate returns which you have retained for audit which do not get audited but which are returned, due to pressure of work and all that?

A. We always have more work than we can possibly deal with.

Q. Yes.

A. But our aim is to examine those which look most—well, fruitful, let us say, and yet, on the other hand, we also take those which show possible refund.

Q. I didn't want to inquire too closely into your practice, Mr. Holz. I just want to know this, as a matter of fact: After the allocation of the work or inventory to the group chiefs, is there, in any given year, always a group of returns which they are unable to get to and do the auditing on?

A. I wouldn't say always.

488 Q. Sometimes?

A. Oh, yes. That happens.

Q. The card which you brought in, is it sometimes referred to as an investigation assignment card?

A. We call it an examination record card.

Q. Yes, sir. Only that?

A. That's all.

Q. It bears no label, does it?

A. Yes.

Q. That is where?

A. On the left-hand corner. Do you notice that Number 1247 Examination Record Card?

Q. Yes. These cards do not have anything to do with investigations which are initiated by special agents, do they?

A. This card would indicate that an agent in our own office has this case.

Q. Yes, but I said special agents?

A. No.

Q. The special agents would be in the Intelligence Unit, for the most part?

A. That is correct. To that, may I inject something else?

489 Q. Defendants' Exhibit 4—

A. Could I inject something there? I might not have understood the second to the last question. You said something to the effect—

By the Court: A little louder, Mr. Holz?

By the Witness:

A. I am not too sure whether I placed the right construction on the second to the last question.

By Mr. O'Brien: Would you read the question for the witness, please?

(Whereupon the questions and answers were read as above recorded.)

By the Witness:

A. In other words, if a special agent initiates the investigation, this card has nothing to do with what he is doing.

By Mr. O'Brien: All right.

By Mr. O'Brien:

Q. Will you look at Defendants' Exhibit 4, and tell me whether that is a document coming from a special agent?

A. Yes, it is.

Q. The assignment shown on Defendants' Exhibit
490 15 under date of 7-30-48 was through Group Chief whom?

A. Johnson.

Q. The card does not show that there had been any prior assignment by Group Chief Granahan?

A. That is correct.

Q. Is it true, is it not, that at or about the 30th day of July of 1948, this return was redistributed or reallocated to Mr. Johnson, Group Chief Johnson, or some time prior to that?

A. Well, yes. Mr. Johnson received this first on July 21, 1948.

By Mr. O'Brien: I offer in evidence as Defendants' Exhibit 15, the document so marked for identification.

By Mr. Ryan: No objection.
By the Court: It may be received.

(Defendants' Exhibit 15 in evidence.)

By Mr. O'Brien: You may cross examine.
By Mr. Ryan: No.
By the Court: Do you want to cross examine?
By Mr. Ryan: I didn't know he was finished. Yes, sir.

491 *Cross Examination by Mr. Ryan.*

Q. Can you tell, Mr. Holz, from the card how long Mr. Granahan held the return before it was transferred to Mr. Johnson, the Group Chief?
A. According to this card, he held it from December 16, 1947 to July 20, 1948.
Q. Apparently without assigning it to a particular agent?
A. That is right.
Q. You said, I believe, that the Group Chief had the right to again survey these returns and return them if he didn't see fit to examine them?
A. That is right.
Q. Is the delay, or the fact that he held it for that length of time indicative of what his intentions would be?
A. No.
By Mr. O'Brien: I object to that, unless he knows.
By Mr. Ryan: If he knows.
By Mr. O'Brien: If the Group Chief is available.
By Mr. Ryan: Well, the Group Chief, his father
492 is dying right now. He is with him at the hospital. That is Mr. Granahan.
By the Court: Well, he may state whether in the ordinary course of handling matters of this kind, that delay had any significance.
By the Witness:
A. No. The mere fact that a Group Chief has a case for any length of time may mean he has no one available to handle this case where he has so many cases ahead of him to assign.
By Mr. Ryan:
Q. Would that delay be consistent, from your knowledge and practice, of an intention not to examine?
A. Well, no.

By Mr. O'Brien: I note an objection.

By Mr. Ryan:

Q. What was your answer?

A. That was a consistent practice.

By Mr. O'Brien: That is a conclusion of the witness, as I see it.

By Mr. Ryan: Well, if he knows and if there is any practice—

By the Court: Inasmuch as he is now testifying
493 as to the practice and custom, he may answer.

By Mr. Ryan:

Q. The fact of the delay, the period of time which Mr. Granahan held this return, under your understanding and practice in the office, does that indicate anything with respect to whether he was going to return, reject the return for examination or whether he was going to have it examined?

A. If anything, it would indicate he was going to examine.

By Mr. O'Brien: I think I move to strike that, if the Court please. He can't state what the practice is. I think the question of what it indicates is up to the Court.

By the Court: It seems to me it is a mere conclusion on the part of the witness.

By Mr. Ryan: Perhaps there should be something further.

By Mr. O'Brien:

Q. Are you familiar with the practice which you describe, of Group Chiefs themselves surveying returns assigned to them for examination?

A. Yes, as they have them, as these cases are
494 assigned to them in groups. There may be hundreds of them at a time. They will make their survey on their second classification at that time.

Q. At what time? As they are assigned?

A. As soon as they have an opportunity, as they are assigned to them, and I know some of the group chiefs make it a practice of setting aside those for examinattion which to them are the more substantial cases. Let us put it that way. And those with the least likelihood of change, they keep those to the last. So in the event their work becomes too heavy, they can take the minor cases at a later

date and send them back to Washington.

495 Q. Would your former answer be incorrect, previous to that, he was going to have them examined?

A. It would simply indicate he intended to have them examined, that is right, but he may not have had anybody to examine them.

By Mr. Ryan: No further questions.

By Mr. O'Brien: That's all, Mr. Holz.

By the Court: Mr. Holz, did I understand yesterday when you answered Mr. Ryan's question that the Group Chief screens the returns that are assigned to him?

By the Witness: Yes, sir.

By the Court: What do you mean by that?

By the Witness: Well, he looks it over again and the back of the card, for instance, will show if there is any prior history on the case. He may take it upon himself to go to the record section, or have one of his men go to the record section and look at the prior history, the prior history which may tell him something about whether this return is worth examining.

They, as a general rule, do their classifying as
496 soon as they can after they get the returns. Now, that may be a week or a month or two months. There is no specific time that they do it, and they can't do it all at one time. They do a few today and a few tomorrow and so on.

By the Court: On the other hand, supposing the Group Chief, as a matter of fact, assumes that it isn't worth while to have the matter returned, assigned to an agent who does an audit—does he?

By the Witness: Yes.

By the Court: Then, have they discretion to return it or what then will he do?

By the Witness: Oh, he still has discretion, but if he believes it is worth examining, he is going to keep it.

By the Court: Does he have discretion either to have it assigned later on or to have it referred back to the place from which he obtained it?

By the Witness: Oh, yes.

By the Court: Who sends it to the Group Chief?

By the Witness: I do. I should say, the Record
497 Section. Write down the Record Section.

By the Court: The Group Chief may send back an audit to you?

By the Witness: No, he doesn't.

By the Court: What does he do?

By the Witness: When he screens it, he sends it back to the Record Section with a return, to send a return to Washington without an examination.

By the Court: In other words, he is satisfied that the return is such that examination is not suggested and he returns it to the Record Section?

By the Witness: That is right, with a notation to return it to the Bureau.

By the Court: How is that?

By the Witness: With a notation to return it to the Bureau without an investigation.

By the Court: And what does that mean?

By the Witness: Pardon me?

By the Court: And what does that mean?

By the Witness: That means there will be no investigation made.

By the Court: But then the assignment to the Group Chief does not necessarily mean it wouldn't be sent
498 to an agent for audit?

By the Witness: Well, I think, yes, that is true.

By Mr. O'Brien: It is ambiguous. What is true?

By the Court: Yes. What do you mean by that?

By the Witness: Well, the way you stated the question—

By the Court: Perhaps my question is not too clear. The mere fact that the return was sent to the Group Chief, does that mean it is going to find its way—it will be audited?

By the Witness: Not necessarily.

By the Court: He then has discretion to determine whether or not it will be referred to an agent or whether or not he will screen it or make other determination and make such investigation as he may see fit to do or he has the discretion to return it back to the Record Section?

By the Witness: That is correct.

499 *Redirect Examination by Mr. O'Brien.*

Q. You said there were hundreds of returns, Mr. Holz. Not to be precise about it, but about how many returns would a Group Chief be allocated, say, in the year of 1947 or 1948, just approximately?

A. Well, it could be anywhere from oh, a thousand to four thousand.

Q. Now, the returns have to go back—you either have to set an amount for audit or you have to send them back by a certain time, don't you?

A. Well, there is no time limit. You send them back.

Q. Well, in practice, how long do you retain them?

A. Well, we usually send them back before the statute is going to expire.

Q. That is it. And up to that time, you may not know for sure whether you are going to reach it for audit or not, isn't that true?

A. If we have any idea that that return should be audited and we still can't reach it for investigation, we will have an agent go out and get a waiver of the statute of limitations.

500 Q. I don't know as that is my question.

What do you do with the returns that you are unable to reach for audit?

A. Just as I stated, if there is a return that indicates that it should be examined, we will send an agent.

Q. You are specific on that. Well, what do you do with the others?

A. Those that we believe should not be examined?

Q. Yes.

A. We send them back to Washington.

By Mr. O'Brien: I think that's all.

By Mr. Ryan: Just a moment.

That's all.

By the Court: We will take a recess.

(Whereupon a recess was had.)

501 LEON J. BUSBY, recalled as a witness on behalf of the defendants, having been heretofore duly sworn, was examined and testified in rebuttal, as follows:

By Mr. O'Brien: Does Mr. Krane have the photostat he showed me the other day?

(Counsel handing document to Mr. O'Brien.)

By Mr. O'Brien: Mark this Defendants' Exhibit 16 for identification.

(Document so marked.)

Direct Examination by Mr. O'Brien.

Q. I show you Defendants' Exhibit 16 for identification and ask you if that is the sheet or a copy of the sheet of the longhand figures prepared by Mr. Cain which on your last appearance here you said you did not have but thought that a copy had been given to Mr. Krane?

A. Yes, this is a copy.

By Mr. O'Brien: I offer it as Defendants' Exhibit 16, your Honor.

502 By Mr. Ryan: I don't think there is any objection. Well—

By Mr. O'Brien: I don't know whether it was given to Mr. Lima or Mr. Krane. I am not clear.

By the Witness: It was given to Mr. Krane.

By Mr. Ryan: No objection.

By the Court: It may be received.

(Whereupon the above-referred to document, Defendants' Exhibit 16 was admitted by the Court in evidence.)

By Mr. O'Brien:

Q. It was prepared by Mr. Krane's visit?

A. Yes.

Q. And before Mr. Lima's visit?

A. That is correct. It was offered to Mr. Lima but he didn't use it.

Q. Mr. Busby, when did you take your vacation in the year 1948?

A. March 16th through April 10th.

Q. Where did you go?

A. California.

Q. What day did you leave?

503 A. On the 16th of March, 1948.

Q. Between those dates, did you return to Chicago?

A. No, sir.

Q. Did you go alone or with—or were you accompanied by Mrs. Busby?

A. I was accompanied by Mrs. Busby and one other guest.

Q. Did you at any time in the month of March 1948, subsequent to the time that you left for your vacation visit Mr. Sauber with Mr. Cain?

A. I don't recall. No, I didn't.
Q. You say you don't recall?
A. I didn't. I wasn't here.
Q. Did you, with Mr. Cain on March 15, 1948, or alone, visit Mr. Sauber? I mean, in relation to this matter?
A. I don't—no, it would be almost impossible to visit him on the 15th. We are too busy with tax returns.
Q. And did you work on your regular matters, profession, right through the 15th?
A. Oh, yes.
Q. That was the deadline on the many tax returns?
504 A. Oh, yes.
Q. Have you at my request referred to your records to make sure when it was that you left on your vacation?
A. Yes, sir, I did.
Q. Do you have those here in court?
The answer is yes?
A. Yes.
By Mr. O'Brien: That is all.

Cross Examination by Mr. Ryan.

Q. Mr. Busby, did—you didn't make any memorandum at all of the dates on which you went to see Mr. Sauber, did you?
A. No, not written.
By Mr. Ryan: That is all.
By Mr. O'Brien: That is all.
(Witness excused.)

505 BYRON A. CAIN, one of the defendants herein, was called as a witness on his own behalf, having been previously duly sworn, was examined and testified in rebuttal as follows:

Direct Examination by Mr. O'Brien.

Q. You have been sworn and testified before, Mr. Cain, have you not?
A. I have.
Q. You said you returned to California leaving there March 3, 1948?

A. That is correct.
Q. And that you returned by plane?
A. That is right.
By Mr. O'Brien: Will you mark these items Defendants' Exhibits 17 and 18.

(Documents so marked.)

By Mr. O'Brien: These are the transportation papers.
By Mr. O'Brien:
Q. The instruments marked Defendants' Exhibits 17 and 18 for identification, are those papers?
506 A. Yes, sir, they are the airline charges.
Q. Copies of the originals which I hold in my hand?
A. That is right.
By Mr. O'Brien: I offer them as Defendants' Exhibits 17 and 18.
By Mr. Ryan: No objection.
By the Court: They may be received. I am not clear as to what they are. What are they?
By Mr. O'Brien: They are the receipts covering the plane transportation, Judge.
By the Court: Very well, they may be received.

(Whereupon the above-referred to documents, Defendants' Exhibits 17 and 18 were admitted by the Court in evidence.)

By Mr. O'Brien:
Q. Did you thereafter return to California?
A. On the 11th day of March.
Q. When did you next return to Chicago?
A. The latter part of April.
Q. Have you likewise consulted your records to
507 verify the March 11th date?
A. I have.
By Mr. O'Brien: I ask that there be marked as Defendants' Exhibits 19 and 19 A, B, C and so forth, the group of papers which I now submit to the reporter consisting of four checks and a copy of a letter of March 13, 1948 and a letter of February 20, 1948.)

(Documents so marked.)

By Mr. O'Brien:
Q. Calling your attention to the checks evidenced by 19 for identification, will you tell me where the first check in that list was drawn?

A. The check in the amount of $2,500 was drawn on Muriel—

Q. Where, I mean?

A. In Palm Springs, California.

Q. And the next check, 19-A?

A. On the 11th of March in Chicago.

Q. And the third check in the group?

A. On March 12th in Palm Springs, California.

Q. Those are all drawn by you, your own signature and handwriting?

A. That is correct.

508 Q. And they were delivered by you personally at those places?

A. That is correct.

509 Q. Is it true that in March of 1949, you had a conversation at the plant with Mr. Mammel?

A. I think that is true, yes, sir.

Q. Will you tell the court what was said in that conversation by you and by Mr. Mammel?

A. I went in and said, "How do you do" to Mr. Mammel.

By the Court: I don't hear.

By Mr. O'Brien: A little louder, Mr. Cain, please.

By the Witness:

A. (Continuing) I went in and said, "How do you do" to Mr. Mammel.

He was out there to audit the books, and he told me that he had a big job, he had been with the Government a long time, he was very meticulous in his audits, that he did things just one way, and asked if it would be possible for us to give him help in order to expedite this case.

By Mr. O'Brien:

Q. What did you say?

A. I told him we would certainly give him help; this was a disclosure case and we would be very happy to give him all the help that he needed.

510 Q. What, if anything, did you then do about it?

A. I instructed Mr. Busby and the office, the auditing staff in the office, to give Mr. Mammel every bit of help that could possibly be given to him.

Q. On that occasion or on any other occasion did Mr. Mammel say to you that this might be a case for criminal prosecution?

A. At no time.

By Mr. O'Brien: You may cross examine.

By Mr. Ryan: May I see the checks, please?

By Mr. O'Brien: I think I better offer it first. I will offer them as Defendants' Exhibit 19, the group, and under the numbers which have been assigned.

By Mr. Ryan: Will you defer action until I read them?

Well, I will object to them on this ground, that they serve no purpose in the re rd since they certainly do not tend to contradict any government evidence.

There is no evidence that Mr. Cain was in Mr. Sauber's office on any of these dates, and he might very well have been in California. Mr. Sauber said 511 Mr. Busby came in on March 15th.

By Mr. O'Brien: And a couple of days later—

By Mr. Ryan: No, within a week that Mr. Cain came in, and that these checks are dated March 3, 1948, March 11, 1948, March 12, 1948, so that I don't see how they tend to do anything in the record.

Apart from that, I don't have any objection. But I don't see what office they serve.

If they are offered to impeach anything, I don't think that they do.

By the Court: I will receive them.

(Said documents were received in evidence by the Court, and marked Defendants' Exhibit 19.)

By Mr. O'Brien: May I ask one question before you proceed, Mr. Ryan? I am sorry, I forgot it.

By Mr. Ryan: Certainly.

By Mr. O'Brien:

Q. Calling your attention to Defendants' Exhibits 512 17 and 18, will you tell the court the significance of the February 28th date on Exhibit 18 and the March 3d date on Exhibit 17?

A. The February 28th date means that I brought my transportation in Palm Springs, California, through to Chicago for March 3d.

This billing on March 3d means that I had some excess baggage to the tune of $12.65, and that they billed me for that on the 3d day of March when I did take the plane back to Chicago.

By Mr. Ryan: I make the same observation about those records. I haven't any particular objection, except I don't see what office they serve in the record.

By the Court: I think you said you have no objection to them, so I will receive them.

By Mr. Ryan: Well, I just wanted to make that point clear.

(Said documents were received in evidence by the Court, and respectively marked Defendants' Exhibits 17 and 18.)

By Mr. Ryan: Were these offered?

513 By Mr. O'Brien: Yes, they are part of the same Exhibit 19.

Cross Examination by Mr. Ryan.

Q. Mr. Cain, do I understand you testified with respect to the second check on Defendants' Exhibit 19, that you cashed that check in Chicago on March 11th?

A. That is correct.

Q. You cashed it at the Uptown National Bank?

A. I cashed it at the Uptown Federal Savings and Loan. It was canceled on the 12th, if you will look at it.

Q. Yes, I noticed it was canceled. You state you did this in person, yourself?

A. Yes. I don't draw checks to cash unless it is in person.

By Mr. Ryan: Now, there is a course of correspondence here offered as a part of Defendants' Exhibit 19, and I don't remember any particular foundation being laid for it.

By the Court: I thought just the three checks
514 were offered. I didn't understand anything more was offered.

By Mr. Ryan: There are some letters here from persons who are not present and who haven't identified them—any of the parties to this correspondence—and I have no way of knowing anything about it.

By Mr. O'Brien: Well, I have no interest in the correspondence. The first letter is the letter by Mr. Cain's office to another man, telling him that yesterday he left for California; and a letter from the other man.

But I don't know about them. They were all annexed with the group, and being in the same file, they are there. I don't care.

By the Court: Suppose we limit the offer to the three checks.

By Mr. O'Brien: I think there are four.

By Mr. Ryan: Four checks. There are four on the paper.

By the Court: Four.

By Mr. O'Brien: Very well.

515 By Mr. Ryan: They are in.

By Mr. Ryan:

Q. After you went to California on the 11th of March, Mr. Cain, as you testified, you say you returned in the latter part of April?

A. That is correct.

Q. And you remained in California all the time between those dates?

A. Continuously.

Q. And how did you return?

A. By car.

Q. By automobile?

A. That is right. It seems from my records that I left there about the 21st or 22d and was in my office the latter part of April.

By Mr. Ryan: That is all.

By Mr. O'Brien: That is all.

(Witness executed.)

By Mr. O'Brien: Mrs. Morrill.

And this is the last witness, Judge. She will be short.

516 GLADYS MORRILL, called as a witness on behalf of the defendants herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. State your name.

A. Gladys Morrill.

Q. Where do you live, Mrs. Morrill?

A. 5707 N. Kilbourn.

Q. You are connected with The Shotwell Manufacturing Company?

A. Yes.

Q. And were during the years in question here, I suppose, 1948 and subsequent years?

A. Yes.

Q. In what capacity in the year 1948?

A. Office manager.

Q. And as office manager did you have charge and custody of and familiarity with the books, accounting books of the company?

A. I did.

Q. And you were in that capacity continuously during and since the year 1948 while the company was operating?

517 A. Yes.

Q. And have been since, as a matter of fact, is that true?

A. That is right.

Q. Now, have you prepared at my request a list of the books, records and items which were exhibited to the agents on the occasion of their work out at the plant?

A. Yes, I have.

Q. Starting with the visit of Mr. Lima?

A. Yes.

Q. And down through the visits of Mr. Krane and Mr. Mammel?

A. Yes, sir.

Q. To a time shortly preceding the indictment?

A. Correct, I have.

Q. And do you have those lists with you?

A. Yes, I have. I have the original and one copy.

By Mr. Ryan: I don't know what the purpose of this is, but I can't see how it is rebuttal, Judge.

By Mr. O'Brien: Oh, that may well be, it is not rebuttal. This is my last witness. I am merely trying
518 to identify the papers which Mrs. Morrill knows were exhibited.

I would like to have the sheets marked Defendants' Exhibit 20.

By Mr. O'Brien:

Q. There is just this one exhibit, Defendants' Exhibit 20?

A. Yes. That is in greater detail. It has all the supporting papers.

(Document marked Defendants' Exhibit 20 for identification.)

By Mr. O'Brien:

Q. Calling your attention to Defendants' Exhibit 20 for identification, will you tell the court whether you know of your own knowledge that the items thereon listed were exhibited to or examined by the agents?

A. Yes, I do know that they were.

Q. And in some instances did they make copies of items.

A. Yes, they did.

Q. And notes from the records?

A. Yes.

By Mr. O'Brien: I offer the document as Defendants' Exhibit 20.

519 By Mr. Ryan: Are you through examining her on direct?

By Mr. O'Brien: I have just one more question, and let the offer ride until counsel's examination.

By Mr. O'Brien:

Q. Since the indictment and its return, there has been a further examination of books and records of the company under the court's order or subpoena?

A. Yes, there has been.

Q. And the agents since that time have been there and still are there in that work?

A. That is right.

By Mr. O'Brien: You may cross examine.

Cross Examination by Mr. Ryan.

Q. Mrs. Morrill, you state that you do know of your own knowledge that the records enumerated on Defendants' Exhibit No. 20 were turned over to the Revenue Agents or Special Agents that were conducting the investigation?

A. Yes.

Q. Is the court to understand by that, that you 520 turned them over to them?

A. Well, in most cases, yes.

Q. To the extent that you did not turn them over, what is the basis of your knowledge that they were turned over?

A. Well, Mr. Mammel always approached me for any requests that he had to make for books or records, and I would find them and give them to him.

Q. And then such, if any, books you would turn over

to him, then you would know you turned them over, is that correct?

A. That is right.

Q. How about the ones you say you did not turn over to him yourself?

A. Well, Mr. Busby found his own working papers, his audit papers, and gave them to him. I saw him lay them on the desk and they were there for days.

Q. Can you indicate to me anything on here which you yourself did not turn over?

A. Mr. Busby turned over some of the tax returns and I turned over a few. I am not too sure what year right now. Then Busby's analysis, working papers, were turned over directly by Mr. Busby.

Q. Those are the work papers. Well, was it only
521 with respect to these work papers and these returns that you indicated, that Mr. Busby may give, you say, turned over to the agent, only those items? You said some of the corporation—

A. Well, the corporation returns. We had a missing one. I know the year 1945 was missing.

Q. Where you retained copies?

A. Yes, and Mr. Busby supplied his copy.

Q. And then Mr. Busby's work papers?

A. Yes.

Q. Are those the only items reflected on there that you yourself did not turn over?

A. Well, if you want to be technical, I don't think I turned all the sugar rationing deposit slips. That was turned over by our purchasing agent who had charge of the rationing deposits, these receipts.

Q. You did not turn that over. Well, did you see that record turned over to the agent?

A. Oh, yes.

Q. You were present, and anything you say you did not turn over yourself, you say that you were present and you saw turned over, is that correct?

A. Yes, that is right.

522 Q. And you can identify it and you remember they were turned over?

A. Yes, I can identify it.

Q. Well, did you turn over to the agents all of the records—except for where you have indicated that you saw someone else turn them over—all of the records

of The Shotwell Manufacturing Company in the course of this investigation?

A. Well, all that they asked for, yes.

Q. Did they ever—

A. All that I could find.

Q. Did they ever ask for anything that you didn't turn over or couldn't find and didn't have?

A. Oh, I think that happened.

By Mr. O'Brien: I think I will object to that, if the Court please.

By the Court: She may answer.

By the Witness: Did you say I may answer?

By the Court: You may answer.

By the Witness:

A. Well, sometimes we couldn't find a canceled check.

By Mr. Ryan:

Q. Did you ever turn over any records of cash
523 received or paid out?

A. Well, I didn't have—I had cash remittance slips that I turned over, if that is what you mean.

Q. I am speaking of any records of cash received or paid out which was not entered upon the regular corporation books.

A. I didn't have any record to turn over to them.

Q. Did you at any time ever have such records?

A. I had a scratch paper that I kept one time of a record, yes.

Q. You had a scratch paper of what?

A. We had a record of some cash brought in and cash given out.

Q. And did you turn that over to the agent?

A. No. It was not there when the agent came.

Q. Where was it?

A. It had been destroyed.

Q. By whom?

A. I destroyed one paper and I don't know who kept the other or who destroyed it.

Q. Well, why did you destroy it? Were you told to destroy it?

By Mr. O'Brien: I object, if the Court please.
524 I don't see how it is proper cross examination.

By the Court: Well, of course, you are indicating that you exhibited good faith in turning over these books

and records to the agents, and I suppose if it appears that certain books and records were not turned over, that may have some bearing on the issue here.

By Mr. O'Brien: That still wouldn't make it proper cross, I respectfully submit. I simply asked for a list of what was exhibited.

By Mr. Ryan: That is the purpose this evidence was offered for, to show a turnover.

By Mr. O'Brien: Well, to show what we did turn over, so it is indentifiable.

By the Court: Well, she may answer.

By Mr. Ryan:

Q. On whose instructions did you destroy?

A. Mr. Cain.

By Mr. Ryan: That is all.

In respect to the exhibit; on the basis of the testimony, no objection.

525 By the Court: It may be received.

(Said document was received in evidence by the Court, and marked Defendants' Exhibit 20.)

Redirect Examination by Mr. O'Brien.

Q. Mrs. Morrill, I have one question.

Were those slips destroyed before or after the disclosure?

By the Court: I am sorry. I didn't hear that. Perhaps you better reframe your question.

By Mr. O'Brien:

Q. When were the slips destroyed?

A. Well, when you say disclosure, you mean—

By Mr. Ryan: Objection.

By Mr. O'Brien: I am not asking that.

By Mr. O'Brien:

Q. I am asking when were the slips destroyed?

A. I think they were destroyed before the disclosure.

By Mr. Ryan: Well, objection. I move it be stricken.

526 By Mr. O'Brien:

Q. I would like to know when was it, what year, or month or day, as near as you place it?

A. Well, it was either late 1947 or early 1948. I don't remember.

By Mr. O'Brien: That is all.

(Witness excused.)

By Mr. O'Brien: I think that closes our rebuttal and whatever remains of the case in chief.

By Mr. Ryan: I don't have anything further.

I don't know that I have any right, but the only witness I could produce would be Mr. Granahan, and his father just died, and I haven't disturbed him.

By Mr. O'Brien: What are your Honor's plans as to time? Did you intend—we got the impression from what was said last week that you might be here tomorrow, but I didn't know if that was for work.

By the Court: I think I said that when I would know how long the Government's case would take, and then when Mr. Ryan told me that their testimony would not take as much time as he anticipated, I assumed we could conclude today.

527 By Mr. O'Brien: I suppose that would be possible. We would like to argue the motion, Judge.

By the Court: Be glad to hear you.

By Mr. O'Brien: Unfortunately, there has been so much time in trying to get ready and doing this collateral work, it has not been possible to streamline it.

I was thinking if you would be here in the morning, perhaps we could have a definite allotted time, so as not to impose on you. Then I could proceed fast. I don't think I should do it this minute.

By Mr. Ryan: I will argue either time, any time that is acceptable to the court or counsel, tonight or tomorrow morning.

By Mr. O'Brien: I will be willing to start early in the morning.

By the Court: I think we will proceed now.

I haven't any objection if you want to take a short recess before you commence your arguments. Of course, if you would rather resume this evening, I have no objection to that.

If you want to recess now until 7:30, I haven't any objection.

By Mr. O'Brien: I would like it very much, if 528 that is satisfactory.

By Mr. Ryan: No objection at all.

By the Court: Then you may have a little rest.

By Mr. O'Brien: Thank you, Judge.

By the Court: All right, we will adjourn until 7:30.

(Whereupon a recess herein was taken to 7:30 o'clock p.m. of the same day, November 21, 1952.)

529 * * (Caption—No. 52 CR 143) * *

Chicago, Illinois
November 21, 1952
7:30 o'clock P.M.

Court met pursuant to recess.

Present:

Mr. Ryan,
Mr. O'Brien,
Mr. Hess,
And Other Counsel.

And thereupon the following further proceedings were had herein:—

By the Clerk: 52 CR 143. United States versus Shotwell Manufacturing Company, et al.

Hearing on defense motion to suppress certain evidence.

530 By Mr. Ryan: If the Court please, in talking to Mr. Holz during the recess, I discovered one additional fact which I did not know which I think in view of the examination of Mr. Holz is most important to the Court on this question, and I should like to recall him to elicit that fact. I will make an offer of proof as to what it is.

It is this: That Mr. Holz advises me that not only as the Group Chief does he have the right to survey and determine that he will not examine the return, but the working agent to whom he assigns also may survey and return the return without investigation, which I think renders the distinction between them that was made nil, since the one has as much right apparently to return the return as the other.

By the Court: Well, perhaps Mr. O'Brien will concede that Mr. Holz will so testify.

By Mr. O'Brien: Well, I don't know that it is material, but I can't tell. My mind is focused on some other things here. I can't tell, and I don't like to concede that.

By Mr. Ryan: Mr. Holz.

531 FRANK J. HOLZ, recalled as a witness by the plaintiff, having been previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination by Mr. Ryan.

Q. You are the same Frank Holz who was previously sworn and testified and gave evidence in this case, are you not?

A. Yes, sir,

Q. Now, Mr. Holz, on your direct examination you stated that the fact that a return was assigned to a Group Chief for examination didn't mean that he would necessarily have it examined, but that he might, upon survey, return it if he didn't think it was necessary to examine it, is that correct?

A. That is correct.

Q. Tell the Court, what if any, privilege or prerogative, or right, a working agent to whom it may be assigned for examination by a group chief would be able to survey a return?

By Mr. O'Brien: I will object to the cross examination.

532 By Mr. Ryan: It is cross examination.

By Mr. O'Brien: I will still object in the absence of the production of the manual.

By Mr. Ryan: As I explained, I haven't any authority to make any tender of the manual.

By Mr. O'Brien: The suit is maintained—

By the Court: He may state what the practice and custom is in that regard.

By Mr. O'Brien: By the manual, I mean, for the record, that which I asked to be produced.

By the Witness:

A. After a group chief assigns a case to an examining officer for investigation, the examining officer has the privilege of making a survey of that return and writing a survey report giving his reasons why he believes that an examination is not necessary.

By Mr. Ryan: That is all.

533 *Cross Examination by Mr. O'Brien.*

Q. In this case, Mr. Holz, there is nothing of record, nothing in Defendants' Exhibit 15, the original of

which you have retained, to show that either the group chief or any field agent surveyed the return, is there?

A. You mean if there is anything on the card to show that?

Q. Yes.

A. No, the card wouldn't show that.

Q. If such a survey was made, would there be a written report?

A. If the survey was made by the examining agent, not by the group chief—

Q Yes.

A. —he would make a survey report.

By Mr. O'Brien: That is all.

By Mr. Ryan: That is all.

(Witness excused.)

By the Court: Gentlemen, have you any suggestions as to the time you think you should have for your arguments?

By Mr. O'Brien: I think that what I have to say
534 ought to be within an hour, if the Court please.

By Mr. Ryan: I certainly won't exceed that.

By the Court: I think if you moved that table back a little, if you weren't so close to the bench, and speak a little louder, I think I could follow your arguments better.

Thereupon Mr. O'Brien addressed the Court in argument on behalf of the defendants, as follows:

By Mr. O'Brien: If the Court please, the matter comes on on the motion of the defendants for the suppression of the evidence referred to in the motion on the ground that the defendants in reliance upon a published policy of the Treasury, identified themselves, or rather, the corporations, as one whose returns failed to include or failed to accurately reflect or misstated income or receipts.

535 The policy was such regardless of which version of the policy be accepted that any taxpayer in that sort of a group who came forward before an investigation had commenced and admitted omissions or misstatements in his return would not be criminally prosecuted. I will come more precisely to the language and refinements of the policy in a moment, but I am speaking now primarily of the motion and its basis, and it is alleged by the defendants that in reliance upon that published policy they

came in and identified themselves, disclosed the corporation and thereby made it certain that they would be open to such assessment as might be determined with consequent penalties, and even with indictment or criminal prosecution should their disclosure prove to have been untimely.

In the first or primary part of the motion the promise of immunity and the reliance of the defendants upon that promise, and the subsequent repudiation of that promise is the basis for the motion to suppress the evidence which the facts show was obtained, not only the documentary evidence, but that revealed by the in-
536 dividual defendants themselves all, it is said, in violation of the Fourth and Fifth Amendments to the Constitution. That is the primary part of the motion.

The motion also says, however, that on the facts at bar and whether there be a sufficient or timely disclosure or not—or to put it the other way—even if the disclosure be regarded either as insufficient or untimely, nevertheless, the evidence should be suppressed; that there is an estoppel to use the evidence in view of the repudiation of the disclosure or alleged disclosure relied upon, and the failure of the plaintiff's representatives to give any indication at any time of any intent so to repudiate, but a continued utilization of the papers, records and books so obtained without any such indication.

Before coming to a definition of disclosure, as I understand it, an understanding I think justified by the words, and I would like to refer to some of the published statements in part, and in so doing I stress the fact that the basic policy, if you please, is that stated within the Bureau on July 2, 1934, and never thereafter changed, until the complete abandonment of the policy last year.

537 That, I think, your Honor, could follow better if you had the book itself, the excerpts.

At page 139 the matter is stated this way:

> "Where a violation of the internal revenue laws is deliberate and with intent to defraud and is discovered by internal revenue officers or is disclosed by a taxpayer after the Bureau had initiated an investigation, the criminal liability will in no case be compromised by the Treasury Department. Prosecu-

tion will be recommended solely on the basis of whether the evidence is sufficient to afford reasonable grounds for the belief that a conviction can be secured. In cases in which taxpayers make voluntary disclosures of intentional evasions before investigation by the Bureau has been initiated, the Bureau will not recommend criminal prosecution but will impose the maximum civil penalties unless there is substantial doubt as to collectability."

That paragraph, that statement, is, as a matter
538 of history, the representative of the basic disclosure policy as shown in the press release of a running account of the policy there contained which appeared, your Honor, at page 78 of the book which you have, and I think that press release issued at the time of abandonment of the policy gives you a pretty good picture of the history and evolution, and I would like to allude to that.

They say that the former voluntary policy, they mean the same one we have here,

"While first adopted in 1919 had its origin in the controversies as to whether criminal liability should be compromised under the law. As early as 1912 the Bureau followed a policy of not accepting monetary payments in compromise of criminal liability where the evidence was sufficient to afford reasonable grounds to believe that a conviction could be secured.

"On August 22, 1919, the first half of the policy statement respecting voluntary disclosures was issued. This was the result of successful criminal prosecutions in cases involving fraudulent tax re-
539 turns and the publicity attending the indictments in such cases.

"It was then found that the tax evaders were responding to the vigorous prosecution work of the Bureau and realized that such an enforcement program would eventually disclose the deficiencies in their returns and result in criminal prosecution.

"The Bureau then found that many of these tax evaders were coming forward and throwing themselves on the leniency of the Bureau with the hope that they would thereby escape prosecution.

"The conclusion was reached that the increasing enforcement activities would result in additional

criminal cases which would, in turn, induce additional voluntary disclosures.

"The initial draft of the policy statement provided that where voluntary disclosure was made of intentional evasions which, if discovered by internal revenue officers would be the basis of criminal prosecution it would be the policy to impose maximum civil penalties and to accept offers in compromise in criminal liability instead of instituting prosecution and possible jail sentence.

"Some three weeks later, on September 8, 1919, this policy statement was changed to provide that offers in compromise of criminal liability would be considered rather than accepted in voluntary disclosure cases.

541 "At the outset of the policy there was no outstanding public invitation from which tax evaders could imply a promise of immunity if they came in before the Bureau initiated an investigation.

"From 1919 until 1934 in voluntary disclosure cases, the Treasury entered into legal and binding compromises under the statute where the decision was made not to prosecute because of the circumstances surrounding the voluntary disclosure.

"On July 2nd, a decision was reached that the Treasury Department would in no case compromise criminal liability and prosecution would be recommended."

This is the section I read before.

"With the exception of the drive against black-marketeers by the Treasury Department in 1945, wide-spread publicity was given to various statements by Treasury and Bureau officials announcing the existence of the voluntary disclosure policy,"—not a new policy; the same one—"it was then hoped that such publicity would result in securing additional

542 revenue which would not otherwise be reached through investigation.

"As a result of this publicity, many tax evaders who were not under investigation came forth in good faith and in reliance upon the promise of immunity disclosed their deficiencies.

"There were also instances where tax evaders already under investigation came forward and attempt-

ed to secure immunity on the basis of the public announcements.

"In these cases, no difficulty was encountered where the investigations had proceeded to the point where the Bureau could establish that the disclosure was in fact made with knowledge of the investigation and not in good faith reliance on the immunity held out by the policy.

"The principal difficulty in the administration of the policy resulted where despite the prior initiation of an investigation, the Bureau was unable to clearly establish that the Taxpayer had knowledge that he was under investigation before he made his alleged
543 voluntary disclosure. In these instances, lack of knowledge on the part of the taxpayer was easy for the tax evaders to simulate, and the difficulty was with the Government to disprove the alleged lack of knowledge.

"In the administrative consideration of these cases, regardless of whether the question was raised in the Collector's Office, in the Office of the Revenue Agent in question, before the Intelligence Unit, or before the Chief Counsel's Office, the representative of the Bureau was faced with a border-line case.

"The cases which followed in this twilight somewhat depending on the decision made were usually susceptible of criticism that the administrative officer abused his discretion in resolving the case one way or the other.

"If the disclosure had actually been made in good faith reliance on the promise of immunity, the taxpayers confession and the self-incriminating evidence submitted by him could not be used against him because of the constitutional privilege against self incrimination.

544 The independent authority of the Office of the Collector, the Agent in Charge, the Special Agent in Charge to initiate investigations resulted in situations where the taxpayer under investigation by one of those offices would attempt to make a voluntary disclosure before an officer of one of the other two" et cetera.

And then they go on with further discussion and finally reached the conclusion that the abandonment should be recommended, and so on.

Now, as to the essence of disclosure or definition of it, as against that background, I say, and I don't know of anything in any reported case that contradicts this: The disclosure, as stated by Wenchel and the others, is not all of this subsequent action to which collusion is made here. That is not the overriding important thing.

The important thing, from the standpoint of either taxpayer or government, is the fact that the taxpayer comes forward and identifies himself.

It is plain that the reason behind that policy is really the pragmatic one of obtaining revenue, revenue which otherwise might go by from shortage of men to inves-
545 tigate, which was peculiarly true in the years in which this wide publicity was given. Those were the years of high brackets and high tax and assessment, the black market operations which made for large amounts and it is obvious from any reading of the material which was put in evidence in this exhibit 7, that the Government didn't want that to escape, or wanted to attract as much as it could.

Consequently, the invitation, public for the first time in 1925, revealed the essence of the policy and inviting people to come forward subject to the one condition that they do so before investigation had commenced.

Now what happened under that policy when a taxpayer would come forward?

What would or might happen if he stayed away?

If he stayed away, he might escape criminal prosecution. He might even escape payment of the tax and consequently have penalties, but he took the risk.

If he came forward and made the admission, he also took a risk, because if his appearance was untimely, if an investigation was already under way, he was re-
546 vealing information which could certainly do him no good if and when there was a prosecution.

If he came forward and submitted the basic records from which an assessment of a deficiency could be made, he very likely would become liable for penalties up to a very substantial percentage. My recollection of what is contained in books is as much as 70 percent.

So that the promise of immunity against criminal prosecution if he came forward before investigation commenced was not too much in the Government's view of the policy in exchange for what might be realized.

And neither would the Government, if it is of interest in the matter at bar, as I see it, and opinions differ, but I do not think, contrary to some of the views expressed here, that the Government was dealing with a malum in se. It was a malum prohibitum. It was not a contention of crime or universally conceded by man as crime at large.

So that there was nothing immoral about the policy,
547 though it was pragmatic and that was its base, the effort to get those taxes.

Now, in this situation, the Shotwell people came forward, identified the corporation and I can't say there is any real issue of fact on this record, if we break it down into segments.

As to this first segment, the outstanding fact is that they went in and they talked to one of the officers designated in the published policies.

They went through Busby, their auditor; through Cain, an official. The officer, the Chief Deputy Collector, I believe, acknowledged their presence. They differ only in this respect: As to date. And the Exhibit 11 which was put in evidence here, the memorandum from Mr. Krane, alludes to that visit, but I think it is sufficient to say that I find no dispute on the record as to the fact that they were there. It is not just simply, as they say themselves, coined.

The question of timeliness has been present throughout the hearing and even as late as the commencement of this session, another bit was added to it, but there are papers among these exhibits which certainly seem to me to
548 say that there just wasn't anything pending in this matter at the time these folks went in.

Now, I am looking for it. Let us take Defendants' Exhibit 5, produced for me by the plaintiff.

It is a transcription of the telephone message from Walter Murphy of the New York Division to Chicago in connection with which, if your Honor will recall from Mr. Toohig's testimony, Mr. Krane, as a matter of accommodation, went out to procure the information which they requested in their situation down there and concerning which Mr. Krane reported in writing as to what he procured for them in writing.

549 Now, this is in point because attached to this Exhibit 5 is a government memorandum—if your Honor please, I will take the liberty to hand it to your Honor.

It shows, as of June 21, 1948, a search was made at Chicago in respect of the named people, with a negative result disclosed on that paper.

It was not until September 22, 1948, that, as shown by Defendants' Exhibit 4, the special agent with the approval of Mr. Madden, commenced an investigation of Shotwell.

I don't know if your Honor has seen that close up. I think you have seen them all. Now, a little more detail on the matter of timeliness. At first, the thing went off in two directions. I suppose that Mr. Toohig was put on to show that there had been some investigation in the East of the Lubben companies on March 4th, or at least related to March 4th, in which, on that day, the name of Shotwell was mentioned and that that having occurred before the March 15th date, as fixed at or about March 15th by Mr. Sauber, that there would be a contention
550 of the commencement of a pendency of a prior investigation.

Well, I didn't think that what came out there showed that on the merits. Mr. Toohig had a memorandum in his book of the date March 4th. He said that that was the same day that this photostated longhand memorandum of the informant was written and handed to him which oddly enough—if you give me that exhibit, Mr. Ryan, that photostat—that memorandum of the informant showed that while allegedly written on March 4th—towards the bottom, about the sixth line from the bottom it showed that in March of 1948, David G. Lubben, through his—I can't read the next word—oh, his aunt, Janet Moran, purchased the mortgage, et cetera.

Now, I don't think that if the answer of that document really had written it on March 4th, that the statement would be made in that way.

It is about six lines from the bottom, and I think he would have said yesterday or two or three days ago or on March 1st, or whatever it is, that that event transpired, but I don't think that he would say that in March of 1948 that event transpired.

551 Moreover, I think Mr. Toohig was unable to produce his diary. I think he was mistaken in his recollection because he was mistaken in his recollection as to the context of the letter of June 21st, which again is this —not letter, but telephone conversation of June 21st, of which this is a transcription, because he told us that in

that communication, they were not merely asking for some items which they wanted Mr. Krane in Chicago as a matter of convenience to get for them; that they were telephoning to Chicago to tell them what the situation was and Shotwell, going on, reproduced the transcription of the telephone conversation.

We find that he was in error. We find that he was in error when he said, or rather, when Mr. Cordez, his associate, made the telephone call.

We find that Mr. Cordez didn't make it at all, that Mr. Murphy made it and Mr. Murphy is mentioned again in the Krane memorandum so that the man, I think, was clearly mistaken on that date and moreover, he later admitted that he didn't write Chicago until a month after anyhow, and that he undoubtedly wrote them to tell them about it and not because he specifically remembered
552 it, but that it was always his policy. But that writing, if any, occurred a month later. Mr. Krane said it didn't happen. I don't see need to dwell on that in view of the admission that they made by the United States Attorney that that is not the contention.

So again on the subject of timeliness, on the Chicago situation—incidentally, your Honor, the first page looks all right to me on that. That page looks long compared with the one I had. Is that the same one? Ed and I had one sheet instead of two.

By Mr. Ryan: The second sheet was found on the next page.

By Mr. O'Brien: I just wanted to be sure I was talking about the same one.

By Mr. Ryan: I think it probably bears an exhibit mark or something.

By Mr. O'Brien: All right. I was talking about the Chicago situation and I think the most conclusive thing that there is on it, the thing that carries the most sanction and is most objective, is the memorandum annexed to Defendants' Exhibit 5 and produced from the Government file.

553 But in addition to that, Mr. Holz came in to testify for the plaintiff and he was—I don't know whether he was requested to or not, but he brought with him two cards which are in evidence as Government Exhibits 2 and 3 and those are record cards which to anyone unaccustomed to the detailed agents procedure, would purport to

be the record and the full record having to do with the assignment of the return for audit or investigation.

554 And those cards, two of them, which appertained to the 1945 return and it showed only because of a report made by the field agent Corman—and that, I think, was Government's Exhibit 3—which showed a termination of that matter on the report of Corman.

And the other card, Defendants' Exhibit 2, showed an initial assignment to Group Chief Granahan under date of something like December 16, 1947, and then those figures are stricken and horizontally next are the figures 7/30/48 or thereabouts, and finally, at the end of the horizontal, February 7, 1949, approximately, as the last date indicated.

Above those dates were initials. The initial above the July date was "J" and was explained by the witness to refer to Johnson, Group Chief Johnson.

Well, I subpoenaed Mr. Holz. I didn't know what to ask him on cross. I am not familiar with the procedure but it happened that later when Mr. Mammel testified, he testified on cross that when a field agent receives a return, he receipts for it and gives that to the group chief or to someone and it looked like there must have been

555 some other card.

So, I subpoenaed Mr. Holz to appear as my witness and he produced that card, whereas the cards originally brought in did not even show the assignment to be admitted, assignment to Field Agent Lima by Johnson in July of 1948.

Exhibit 15, the date produced, shows that assignment and it shows the subsequent assignment to Mr. Mammel. And that is the card that shows the assignments.

In the absence of it, there might be an ambiguity. We would be left with the impression that an assignment or allocation of these inventories of returns to the group chiefs, is the equivalent of an assignment of the return for an investigation or that it would fulfill the condition or limitation of the published policy, which in varying terms, refers to commencement of investigation.

Those terms, your Honor, I say, are not like this. As that Exhibit 7 will show:

"Before investigation is started, before an investigation is under way, before the Bureau has begun

556 investigating their cases, before any investigation is initiated:"

Now, there is a troublesome question, admittedly, with that policy on the point, as the officials testify: When is an investigation considered to commence? What is it that marks the commencement of an investigation?

And it has been only the failure and refusal of the Bureau to define both before Congress or anywhere else that has made for such confusion as there is.

As shown by the report of the tax section of the American Bar Association of the comment of the lawyers and the committees, some of which are included among the papers in evidence as our Exhibit 7, but in reason, an investigation is under way or has begun or is started when the person who is doing the investigating has been delegated to go and to do it.

In some of the cases, the courts have moved a step closer than that. They are more liberal than anything that we need here.

In the Liebster case, the court will recall the investigation had admittedly already commenced but the taxpayer didn't know it and thereafter they went on taking
557 his material. He relied upon a supposed disclosure and at the end of the route, when the point was raised, the court said, "You can't do it."

Even if an investigation did commence before he went on without his knowing about it and before making his disclosure, he was barred from using the papers. The implied promise estops you and it is a violation of his constitutional privilege.

In another case, the question arose and turned on whether a call had been made to the taxpayer by the field agent who admittedly had been delegated to proceed with the investigation. Generally, after such assignment to the field agent, he makes an appointment, he makes a call and the question turned to the dividing line, the breakdown line. The breakdown line was dependent on whether he had or had not made that call.
558 The Court never wasted much time. The Court just didn't go in to a consideration of the question whether a mere assignment of that agent who might be walking around with twenty, twenty-five returns in his pocket marked an investigation actually underway.

But here we have not even the assignment. It isn't a question of matter assigned on a phone call. There

is no appointment. There was no appointment of anyone to do that until July of 1948. Johnston came and picked up the return in Granahan's inventory, handed it or assigned it to Lima who signed for it and sent him off about his task and he did that some four months out of time due to the confusion which was testified to between the names Shotwell Candy and Shotwell Manufacturing Company. So I don't think it can be seriously urged
559 that the disclosure which stands undisputed as having effect was untimely or occurred after any of the investigation was underway. If you take any other view in reason, if the Court please, if you go back of the time the delegation to the man who was actually to do the investigating, you could go back a long way. It would be equally logical to take it at any point along the line because the law compels the auditing of return of all corporations where they are over a certain amount as the agent admitted today.

From the very time you file a return, you would be forever precluded due to the pendency of such a return somewhere along the route for audit from ever making a disclosure.

If you are going to interpret a policy of this kind, you have to interpret it in the way that gives it some meaning and not in a way that would emasculate the thing, make it worse than it was, because it would be a gross misrepresentation to the people who are asked to come in and make that, or invited in, at least, and make that radical change in their position.

560 Now, that leaves the matter of cooperation and other subject things. In this case I haven't heard about the other things. I might say this, your Honor, it isn't in our written memorandum but I say it to you now: I filed the motion and in the last part of that motion it said that in view of the actual yardsticks, tests, and conditions which the various officials of the Treasury employ or use in determining whether there is a disclosure many of which are over and beyond any of the published statements, the conditions, requisites, requirements revealed to the public, that their action in accepting or inviting or accepting from a tax payer a disclosure under promise of that kind where they do not publish something else to tell the people about those various tests,

amounts to a withholding of material facts equal or equivalent to a misrepresentation or a lure to that taxpayer. I said so because it is a fact as shown by those papers, but I said it only to meet the theory alluded to by Judge Wyzanski in the Massachusetts case, in which he was overruled, by that I mean, the point being saved for the trial and proceedings in which it was sought to suppress evidence from the Grand Jury on a pre-trial basis.
561 What I mean is, the taxpayer came in and proved the facts and when he got all through in Judge Wyzanski's view, you didn't even need to hear from the Government, because he said there was nothing in the evidence to show that, granted a disclosure, and granted the Government had taken it, that there was any tinge of misrepresentation. Well, I don't think that that expresses the law. I think when you have a background of reservations and conditions different than those in the published policy and do not disclose them to the public, that is the equivalent of a misrepresentation. It is a non-disclosure of material facts which they should have.

But there was no publicity at all contained in that book. There was never anything to give any sanction to the additional conditions which you will find in the views that the men in the Bureau have imposed. That was the purpose and the only purpose of that averment in the motion and it explains also the reason why I wanted some of these items contained in Exhibit 7 in evidence here.

Coming to the particular case and away from the general, after these folks were in, on the general situa-
562 tion as to basic books and records they set about making these summaries. I doubt if your Honor would ever have occasion to look at them, but Mr. Busby described in detail what was done.

If you will look, if the Court please, at the second sheet, for example, and the succeeding sheets, I don't know how many of them there are, you will see a complete recap and tabulation of specific invoices, invoice numbers, dates and so on, and you will find the added figures, and the totals extended.

Now, all of that through those sheets, the second one and those following has to do with unreported receipts.

The basic fundamental records for determining that,

as I say, were not only recapped, but from the time that the first agent got there in response, really, to Cain's importunance to come and get the amount determined, and it was their job to determine the amounts, the company gave the utmost assistance, they had this ready, they had the invoices ready, they had all the data ready, and they had gone out, or went out, and checked with
563 the purchaser of the goods who had made those payments to get as close an aggregate figure as they could. I am not talking about the payouts. I am
564 talking about the premium receipts.

Now, I want the court to know that there never has been the slightest intimation in any exhibit—I haven't seen all that the court was privileged and rightfully so to look at—but in those I have seen and from their context I would hazardly state that there is nothing contained in any you saw which says that this company was guilty in any way of failing to do its best to show what the aggregate of the premium receipts were, so that the Commissioner, or whoever it was, could assess a proper tax which they said without dispute from anyone including Mr. Sauber, they stood ready and willing to pay.

Now, not only so, your Honor, but testing it out here against the bill of particulars. You will recall there is one in this case. And that bill of particulars adds up on the candy items, the sales, this is the Government's charge, a total of $455,643.01.

Now, what is in our disclosure statement?

I am calling it that because some of the witnesses referred to it that way.

565 There is one more thing I will want to come back to and that is the definition of disclosure, and the effect of it, but not to interrupt now these sheets that were prepared by Mr. Busby.

The total is $405,763.54.

Now, your Honor, contained in our figures is an item—or contained in the government figures in the bill of particulars is an item of about $49,000—to be precise, it is $49,076.51. That item is contained in our figures, but we deny any overage on that item.

The mention of the transaction is made but not overage.

The invoice numbers are given. There is no concealment of that fact.

Why does the Government say that there was $49,000 of overage in these Reserve Trading Company items? Because Mr. Lubben says so. But we never had and never claimed to have any dealings on our records with many others than as we set them out in these sheets.

Now, the point is, leading out a patently disputed item, and one which we did not conceal, but which we revealed, the difference in these figures, in these large amounts, 566 and over the years in question, after all of this work and investigation, just on the face of it is about $50,000 of unreported income, or a difference of 11 percent.

The Government has not claimed by any witness, it has not claimed in any document, that there was any failure on our part to give them the data from which, by audit checked with Lubben & Companies, an amount could not be arrived at on which an assessment could be based. I mean, assuming that there is anything in the policy it is to enable the Government after the event, after the change of the position of the taxpayer, to come forward and impose these different conditions and to pull strings if it is varying subjective tests or unannounced tests are not made.

The only claim made by the Government as shown from these various reports and as shown by the testimony of Mr. Cain, his conversation with Mr. Wright, his conversation with Mr. Schoeneman, the only thing they ever claimed was that we were uncooperative in that Shotwell or its officials could not or would not say to whom the 567 overpayments were made.

I shouldn't take the time in view of the limitation I have set to go into detail on the memorandum. I will be glad to hand Mr. Ryan a copy of what we have given your Honor, but I will go this far for continuity and coherency now.

In that memorandum we show that in the year 1948 and all the way down to a recent date, some date last September, I think, the Commissioner of Internal Revenue steadfastly maintained the position that there was no deductions which might be made on account of premium payments even though they were in fact a part of the cost of the materials acquired which went into the production, f the goods sold. There was no decision on that

subject even of the tax court until the month of December, as I recall it, of 1948.

Following that decision in the Selinger case there were a series of cases right down to recent times both in the District Courts and in two or more of the Courts of Appeals.

There was no controversy in the courts. Both the District and the Court of Appeals without any controversy held that items established, that if you could prove
568 they were moneys paid out as a part of the cost of goods even in the form of premium payments they were deductible, and finally the Commissioner last September acquiesced in that view, and did so in public statements which are quoted in our written memorandum.

I say even if it were permissible contrary to the declared terms of the published policy to impose conditions subject or otherwise different from those contained in the published policy that it was utterly immaterial and irrelevant at all times in question who the money was paid to, because the Commissioner did not need that information to assess and collect a tax. Not only so, but I tried to show not that it was legally material or relevant, but I made a brief attempt which was shut off ultimately on objection by counsel to show the nature of the transactions and the patterns of the transactions in connection with which those premium payments were made so as to demonstrate the inherent impossibility of saying it, and I have been doing it on the theory that if that kind of a subjective test on the part of the Commissioner long after the event has anything to do with it
569 that I, at least, ought to show your Honor what the picture was, how it was, that it was not possible to give names, street addresses, and the like of those people on those kind of payments, but there was objection.
570 I made an offer of proof. It was rejected too. So I don't see how that contention, and in view of the record here, is a proper one; that we could not say I do not think that fundamentally it is required by a policy. Nobody can point to a published word on it, and the controlling fact is that all of the material records of this corporation enabled the Commissioner or the agents to determine what the unrecorded income was, and to make an assessment.

We are only $50,000 apart on it, at that.

One more thing, if I may, your Honor. I feel I have gone somewhat over my time, but I wanted to say that the comments of the officials of the Treasury as shown on pages 91, 92 and 93 and 94 of that report of the Ways-and-Means Committee make it perfectly plain to the extent that this has anything to do with it that those officials were of the firm opinion that this policy which was abandoned was such as to give immunity when the people came forward before investigation commenced, immunity from criminal prosecution, not in the discretion of the Treasury officials, not in the varying tests that they may apply, but by fixed terms of words as they
571 put it—I can read you just one or two—Mr. Lynch, the Attorney for the Commissioner, at page 92 of the printed book, I think you will find the comment, your Honor:

"Mr. Lynch: Mr. Keogh," he says to the committee member—"I wonder if I could answer along a different line and then come to this. I think our difficulty with the voluntary disclosure policy has made it a fact it is an open promise of immunity. That means that it is fixed in terms of words so that anybody could say that there is an open statement from the Bureau of Internal Revenue that anyone who comes in and does that—" and then he is interrupted.

Now, that kind of statement—now, here is Mr. Dunlap who was one of the witnesses I subpoenaed. He didn't come, but I felt that the statement was just as good as any he could give here.

On page 94, he says:

"There is a directive, an explanatory mimeographed directive in preparation on that subject
572 now. That is right. That is our attitude towards it. Their right under the Constitution would provide our making it retroactive."

He is speaking of the abandonment of the policy.

By the Court: You probably have consumed your time.

My Mr. O'Brien: I thank you, Judge. You have been very patient. I am aware of that.

Thereupon Mr. Ryan addressed the Court in argument on behalf of the Government as follows:

By Mr. Ryan: If your Honor please, the issues have certainly been well clarified as to what the contention of the defendants in this case is. We have passed the question of whether a contract between the Government and the defendant as to prosecuting and not prosecuting, and on this motion you have only the question of whether there has been a misleading, an overreaching, a deception by the Government, the extraction of evidence by
573 trickery or false representation, the purpose in mind to use the evidence against the defendants.

Now, the basis of it being the voluntary disclosure and we have to examine what it is.

Now, I went into this before and I made myself fairly clear, I think, to the Court, that the Government takes the position that the doctrine of voluntary disclosure contemplated as one of the officials said even the willful evader may escape punishment if he repents in time, and it provides if a person makes a disclosure of tax evasion and comes in and says that he has evaded his taxes, that he owes some taxes, he tried to evade, but that he was willing to pay and do everything to re-establish himself with the Government to make the Government whole, then the Government says, as a matter of policy: "We will not prosecute that man if he does that timely."

From a general examination of the doctrine, it must be apparent that since what is promised is immunity that there must be the possibility of some criminal prosecution. Clearly, the Department doesn't contemplate that anybody will be even seeking immunity if all he has is some innocent mistakes on his return. If he owes no
574 tax, in fact, or feels he owes no tax, in fact, he had no intent whatsoever to evade, he wouldn't be concerned with a matter of voluntary disclosure. He
575 might come in and say that there are errors in his returns and then maybe the Collector or other officials would say, "Well, if there is no difference in the tax and saw no reason to investigate, well, maybe he will write us a letter or there might not be any necessity for investigating or for filing of amended returns. There would be no net loss of revenue to the Government.

Nobody would contemplate, and the official approach wouldn't contemplate that there was any question of voluntary disclosure because there wouldn't be any background

or any indicia of fraud. There would be nothing to indicate that there would be any prosecution or any need for immunity, so obviously when the Government promises immunity to someone for a disclosure it is for a disclosure on something on account of which they might be prosecuted. And that is the invitation that is held out to them.

Now, to say that this has application to any other type of situation or disclosure is to suggest that the Government is offering immunity to someone when there isn't any indication whatever for it, and it makes the doctrine senseless in that application because there is no occa-
576 sion to seek immunity where there is no wrong doing, where there is no tax owed, where there may be some errors in one's return.

Now, to demonstrate that that clearly was the fact, and it strikes me it is expressed in every one of the public declarations, I set them forth in my memorandum to the Court and I have argued them before, and Counsel even this morning as Counsel read from these various documents as your Honor doubtless noted, there was a constant reference by these people to a disclosure of intentional evasion, intentional evasion, and in the statement that were set forth in the defendants' motion the same thing is true.

The Wenchel statement from which I have quoted in my memorandum to your Honor and which the defendants set forth in their motion, they said:

> "The Department acting under that power,"—being the discretional power that Congress has sanctioned—"does not recommend prosecution of the evader who repents in time.
>
> "Voluntary disclosure of intentional evasion for years, the position of the Department has been that
577 where the taxpayer makes a voluntary disclosure of intentional evasion before investigation has been initiated, criminal prosecution will not be recommended."

In the Wenchel statement, in the Snyder statement that followed that by days, the Wenchel statement was May 14th of 1947, and the Snyder statement was made May 25th, 1947, Secretary Snyder said:

> "One of the important elements in settling cases with civil penalties and without prosecution has been the Treasury's policy of not prosecuting persons who

make a voluntary disclosure of their fraud before the Treasury begins an investigation of their cases."

This means that in order to assure himself against criminal prosecution, a repentent taxpayer must disclose his fraud to an official of the Bureau of Internal Revenue before the case has been assigned for examination."

And then further down in the statement it says:

578 "That prior to such action within the Bureau, a taxpayer may make a voluntary disclosure and escape criminal prosecution even though his name may appear in an active file of suspects. This presumes, of course, that the repentent taxpayer cooperates with agents of the Bureau in determining his true tax liability."

Now, referring to the testimony of Richard C. Schwartz, which has been offered by Counsel, an excerpt from the Congressional Hearings, I took the position that it wouldn't bind them since it wasn't set at that time, but since it is offered I will refer to it.

Mr. Schwartz in his testimony said, among other things:

"Incidentally, before I forget, in my description of the policy, I think I omitted to say that the disclosure must have been one of intentional evasion of the Internal Revenue Laws."

Now, that was put in evidence by Counsel. As I say, that wasn't a public statement at that time, and they

579 couldn't have seen that at that time because it was testified to later, but to the extent that it has any office in this record, it is there, and that is what it said.

Now, in all of the voluntary disclosure cases that have involved these questions, and there aren't very many, there is Lustig and Weissman and Liebster, White, Levy, I may have omitted one, but I don't recall offhand, I don't think so, not in a single one of them is there anything except the indication, either expressed in the opinion or directly implied that there were admissions or confessions of guilt, that the taxpayer owed taxes, that he withheld them, that he hadn't put them on his books, but that he owed taxes, and in many of them it refers to his confession, so that there is no disclosure case where evidence was suppressed.

580 Whereas here, as is evidenced by the record and even in the defendants' pleadings, I say by the testi-

mony of Mr. Sauber and by the pleadings in affidavit offered by the defendants,, where there was a negativing of tax due is it not in a single one of them. In every one of them it appears that there was an admission of wilful evasion. The only one in which there was an expression of evidence was the Liebster case.

Counsel has referred to the Liebster case here. I think it is important to bear in mind the distinguishing features of the Liebster case.

In the Liebster the disclosure was made, the alleged disclosure was made, in 1946. That was before the Wenchel doctrine. There it is true, as counsel says, that there had to be an assignment of a return before that disclosure was made. But it was also true that there was no Wenchel doctrine at that time. The Wenchel definition of when an investigation has commenced was not in existence at the time that disclosure was made and it was determined under the situation the law as it existed prior to the Wenchel statement and consequently
although the case was decided after the Wenchel
581 statement,—the Wenchel statement, which was not
retroactive, affected it in no way whatsoever.

And accordingly, it cannot be urged that the result in the Liebster case can be the law now or controlling in any sense because now the Wenchel statement definitely says when a return is assigned for examination that is the cut-off point. So that the Liebster case is no authority whatsoever in this case. It is the only case, however; the only case. It is a District Court opinion where any evidence was ever suppressed on this theory.

In every other case the motion to suppress was overruled.

Now, I concede in those other cases the court went in and made findings of fact which supported its decision. The court did not say in them as a matter of law in deciding them that evidence could not be suppressed on this theory if the facts were right, but they went ahead —in none of them is there any authority for the proposition that it would accept the Liebster case.

By Mr. O'Brien: The Court of Appeals in the
582 White case said it could.

By Mr. Ryan: They held in that case the evidence wouldn't be suppressed, but there is no decision

necessarily to the effect it would be. There may be language. It is the Fifth Circuit in the White case.

Now, in this case the question is what was disclosed?

Well, in Mr. Cain's affidavit in support of the motion to dismiss, he says under oath, and it is in evidence as Government Exhibit 1, Mr. Cain said there that:

> "Affiant further avers that although he and his associates have steadfastly maintained that the defendant corporation owes no taxes over and above the sum of x number of dollars which it paid for the year 1945, or over and above the sum of $457 some hundred thousand dollars which it paid for the year 1946—"

Now, owes no tax. At all times he and his associates have maintained that.

Now, in the motion to suppress, there is no indication except that the payouts they claim to have had exceed 583 in amount the gross receipts unrecorded.

In other words, the alleged unrecorded expenditures exceed the admitted unrecorded gross receipts and that statement appears on page 3 of the motion, the end of the first paragraph when speaking of those payments, the motion alleges such payments exceed any alleged unreported income on which the plaintiff bases its claim for additional taxes.

Now, what does that amount to?

That amounts to an allegation on this motion that the deductions which they have to balance the unreported receipts exceed those unreported receipts.

Now, what is the testimony?

Well, Mr. Sauber says that they told him that they washed—each, Mr. Busby and Mr. Cain, both testified they had unreported receipts and unreported expenditures and that the unreported receipts exceeded the unreported expenditures by five thousand some dollars, and that that money was picked up on the 1946 tax return.

Mr. Sauber says that that is what Mr. Busby told 584 him, and he says that is what Mr. Cain told him.

In view of the statement contained in the affidavits of those two persons in support of this motion that is certainly corroborated for they say—Mr. Busby says in referring to these black market transactions apparently the said statement, and referring not to the statement

that was made to Mr. Sauber, but the subsequent disclosure to the agents, the said statement among other things showed the net balance as a result of the operations therein referred to was $5,898.00 and that said sum had been deposited in the corporate defendant's bank account during the year 1946.

585 "Affiant further states that the amount so deposited was given effect to the income tax return of the corporate defendant for that year."

Now, that statement was furnished to the Government. That is the summary statement. It is in the affidavit. It is in Mr. Cain's affidavit, the same thing that Mr. Cain says also, phrased in much the same manner, I am sure. I have Mr. Cain's affidavit out here, Government's Exhibit 1, and he says:

"Affiant further avers that the said statement, among other things, showed that the net balance as a result of the operation reflected was $5,989.00, and that sum was deposited in the bank and picked up in the tax return."

Exactly the same language.

Now, what does that mean?

That means that the disclosure was a group of unrecorded receipts and balance or almost balancing unrecorded expenses and that the difference was placed in

586 the 1946 tax return, so therefore to the extent that those payments were actually made and to the extent that they were deductible there wouldn't be any tax liability. Whether or not they were deductible was a question of law. The courts have been ruling on it, and as far as I know what is alleged here there was no claimed ruling contrary that all the decisions, the tax court and the Court of Appeals, I think it is alleged in their motion, have been that they are deductible, but the Commissioner for a time did not acquiesce in them so it appeared that it might be necessary for the Supreme Court to pass upon the question, but I am advised, and I am advised very recently that the Commissioner has acquiesced in that a month or so ago and that he is conceding that they are deductible, and therefore the implication for this case would be that there wouldn't be any tax liability if those were the facts, because those are chargeable. If they were established they would be deductible. So

that would mean that there could never, there could never, be any successful prosecution in this case if it was established that they had made those payments because there could be no proof of a tax due and owing and it is necessary in a case of evasion that there be
587 proof of a tax due and owing.

Even if it was proved that they thought at the time they owed tax it would be akin to a case of a man attempting to kill somebody and shooting at the log. There would be a failure of the corpus delicti. There couldn't be such an act because there would have to be the subject of it, and there couldn't be a tax evasion if there wasn't a tax, even though someone thought that there was, so, therefore, there was no admission of tax evasion here. Not even any admission that the tax was due except in so far as testimony was given, somewhat equivocally by Mr. Busby and Mr. Cain on that subject when they testified here, but that testimony is contrary to the affidavit and motion and everything else, and of course came after the Government took the position that there couldn't be any evasion here unless there was an admission. There couldn't be a disclosure unless there was an admission of tax evasion.

Now, to go on to say there could not be any disclosure here, to move on to the next point, any disclosure that is made even if it is a disclosure of tax evasion has to
588 be made in good faith. The Government doesn't bargain for the privilege of being deceived. The Government doesn't offer immunity for someone who comes in and doesn't give them the facts or who gives them misrepresentative facts.

Now, if in this case those payments were made in fact and if they were made to the extent that they equalled or exceeded the gross recorded receipts there could never be a conviction in this case.

So to the extent that there is ever a conviction in this case that will be a determination that this disclosure was not truthful because they said they owed no taxes. At all times they maintained they owed no taxes.

Now, it may be that this is not the time on this motion to try and litigate the entire question of whether there is a tax evasion case here because that would have to be at a trial to see if you were going to have a trial and try

exactly the same things as I indicated at the outset, but to go along, at no time, there is no evidence here, that at any time during this alleged disclosure was there
589 ever any substantiation given of these payments.

Now, if they were made and if the defendant establishes them, then they prove that they are not tax evaders, but those things lie within the peculiar knowledge of the defendants. The law is in this type of matter that a taxpayer is bound by the deductions which are shown on his tax return. In other words, the tax return is an admission that he had those deductions and nothing more, and if it is proved that a taxpayer has unrecorded income, income that isn't on his books and therefore isn't on his tax return, proof of that unrecorded income if it be a substantial amount, plus evidence as to what deductions he claimed on his return, the fact that he didn't record that income makes out a prima facie case of tax evasion.

He must show that he did pay that money out and that must be substantiated. That is decided here in this Circuit in the case of United States v. Hornstein where the situation was similar so far as deductions were concerned. There was a claim of additional deductions,
590 additional cost of goods sold. He was a jewelry dealer and he claimed, he admitted those—he didn't admit, but it was proved he had the unrecorded sales and his contention was in defense that he had also unrecorded deductions. He never proved it. He never proved a
591 penny that he spent. There was no evidence indicating that he had them. He didn't sustain the burden. His admissions were there in the tax return, and accordingly, there was a conviction in the case, so that unquestionably is the law. The Government has no way of knowing unless the defendant can show them and demonstrate and establish they had those deductions. That is something for the trial. The issue of guilt or innocence is not what is involved here. It is a question of whether there is a good faith disclosure and so far there has been nothing to satisfy that burden on the part of the defendants other than to say the money was paid out by faceless men, two-faceless men, or strangers, or they don't know their identity except to the extent one man was named.

I would like to speak about that for a minute. One man was named by Mr. Cain on cross examination and just as soon as we could, we brought that man in and what did he say? He said he didn't know them, he didn't know the corporation. He never received any money from them, mysterious monies or from anybody, and that he had never undertaken anything on their behalf.

592 That was in the morning of Thursday of last week. He was the last witness before noon and at noontime I found Mr. Graflund whom we asked to come into my office. He was brought in there. He was identified with the defendants' firm. It was not known whether he would talk to us. There was some indication maybe he would. We brought him in because maybe he would be able to bring light on this.

In the course of the questioning, in response to some question, I don't remember either by myself or Mr. Krane, he said he had taken money over to Doctor Doe, to Doctor Doe's office. He didn't know if it was Doctor Doe. He assumed it was. It was a man in a white coat.

When I learned that and before there could be any decision in this case and before this Court could act, I notified both the Court and the defendant and I gave defendant a witness then if they didn't know about him before because I was on notice that maybe Doctor Doe wasn't telling the truth, and I don't know who is, and I can't determine that, but to the extent that Mr. Graflund's testimony was true—and before I go on, I

593 might say that I think that is eminently fair, and would come with ill grace without making a sufficient examination to indicate that instead of that I had him on in the afternoon and therefore I knew about it beforehand,—if what Mr. Graflund says was true, what was proved there, that simply money was taken over by them apparently for corn syrup, and that is what the record seems to indicate, how much that is is not established. Well, that isn't the rest of it. If some money was taken over there for corn syrup and there was no indication what was done with the money, and so forth, it either went back to the defendants or went for corn syrup. I don't know, and I don't say what was done, because I can't know. That lies within the peculiar knowledge of the defendants. Somehow, there had to be some contact with

these people, but the idea of spending thousands and thousands of dollars and not getting receipts and then waiting and hoping there will be delivery is, at least, out of the ordinary course of business.

So I say that without regard to whether these payments were made or they weren't, there is no sustenance of that burden in the disclosure at all, and the Govern-
594 ment can't concede them unless there is some substantiation.

Now, in addition to that, getting on to the subject of these payouts, what was offered the Government in the way of a good faith disclosure of the payouts?

The testimony came from the stand here and it was something that apparently would have been utterly of no value of them, and that was $45,000 for corn syrup. I am not sure that the amounts were right, but whatever they were, $35,000 for milk, and so much for chocolate, and we heard from this witness stand that that doesn't mean a thing. It just doesn't mean anything. It was just put down.

Now, the Government doesn't bargain for that type of thing in a disclosure, because if you don't know, then you say that you don't know, but when you say that so much was expended for this and that, you are making a representation. It misleads. At least, the kindest thing that could be said about it was the gravest mistake of judgment and it was not good information.

Now, I make reference to this statement again of Secretary Snyder in this connection of good faith which
595 says:

"This presumes, of course,"—speaking of the disclosure—"that the repentent taxpayer cooperates with the agents of the Bureau in determining the true tax liability."

Well, we certainly do not have a record of that here. There was no help to the Government in substantiating these expenses although there has been effort on the Government's part.

With respect to them, the only thing the Government has received is information that is not correct.

596 I refer again to the Centracchio case, and I think we discussed that with your Honor before, simply for the purpose of saying, and I know it was decided on other

grounds by the court, but the court did not denounce the language of the lower court.

The language of the lower court pertains to a different matter that I haven't reached yet.

This is the language of the reviewing court, and it isn't a decision, but it is a pronouncement of the Court of Appeals and it is as good as the White case from another Circuit.

> "If it be assumed for the moment that evidence disclosed to the Treasury officials on the faith of the announced voluntary disclosure policy and in compliance with its conditions should be excluded from evidence in a subsequent criminal trial it would seem that the taxpayer would have to satisfy the court that he made a voluntary good faith disclosure of all data necessary to a correct disclosure of all data necessary to a correct computation of his income tax deficiency and that he made such disclosure, before
597 an investigation before an investigation was under way."

I think that is a good sensible statement, even if there wasn't a decision in that case. Certainly the Government bargains for nothing less.

Now, in addition to that we have the fact that the indictment does charge that there was an evasion of income in excess of the amount admitted in the alleged disclosure by the defendants, not the amount—I have figured it up, and Mr. Kane has, and it is subject to refutation if it is wrong. The summary sheet shows they received $366,459.24. The indictment charges evasion of $500,719.52, so there is a discrepancy there between the summary sheet and what is charged in the indictment.

Now, certainly as to the extent that is true there wasn't a disclosure here, there is a substantial amount of income that is not accounted for even on the summary sheet. And the Government, of course, undertakes to prove that there was a wilful evasion with respect to that sum.

Now we come to the question of timeliness.

598 Now, maybe I should have made a statement at the outset. It might have saved some time, although I did make a statement in the course of the proceedings, perhaps it wasn't complete enough, but the Government with respect to timeliness in this case relies upon the

fact that there was an assignment on December 16, 1947, to Mr. Granahan. The Government did not offer evidence of this statement that Mr. Toohig received from an informant for the purpose of indicating that the express activity in New York represented a commencement of the investigation in this case for the reason that that appears to be preexcluded by the Wenchel doctrine. That was offered for the purpose of demonstrating that eventually in spite of this disclosure the Government was going to be examining these corporate books and records. That was the purpose for offering it. That is the reason it was never implemented with anything else, and there was never any contention made it was transmitted to Chicago at all. There was no such action with respect to it before this alleged disclosure such as would satisfy the Wenchel doctrine. The purpose of the Wenchel
599 doctrine is very apparent. It was to establish an objective test, an objective break-off point that wouldn't be affected by what the taxpayer knew or what his motives were, but just a time when after which there could be no disclosure, so that it would eliminate those arguments.

That certainly must be apparent from its very language.

Also in the case of the United States v. Levy, that doctrine was discussed by the court. United States v. Levy reported in 99 Fed. Supp. page 529, and it is a decision of the District Court for the District of Connecticut handed down June 15, 1951.

That is a case where the decision turned on the fact that returns had been assigned for examination prior to the disclosure, and the court in deciding it said with respect to the Wenchel doctrine—

By Mr. O'Brien: The assignment here was to a field agent.

By Mr. Ryan: Yes. There is no case I know of, Counsel, I will say, in which there was an assignment of return to a group chief.

600 When this case is decided, if it is decided on that basis, it will make the law on that, as far as I know.

The opinion refers to the Wenchel statement and says:

"It plainly, in unequivocal language limits the departmental policy to forego criminal prosecutions to cases in which voluntary disclosures have been made

before an investigation has been initiated. And it provides that an investigation is initiated when,"—among other things—

"an Internal Revenue Agent is assigned a return for examination. It is not necessary for me to decide from the evidence herein whether the lawyer knew of the statement either when he advised his clients to disclose or on June 9th when he made the disclosure in their behalf: The only reasonable inference is that the statement was available and I hold that the defendants are bound to have known its existence and contents.

601 Further on: "The defendants contend that the definition of the departmental policy should be interpreted to mean that the time for voluntary disclosures is terminated not by an assignment of a return for routine examination, as in this case, but upon the initiation of a fraud investigation which under departmental practice begins only if and when the return is assigned to the fraud section upon the uncovering, either in the routine examination or from other sources, of information indicative of fraud.

They point out that an assignment for examination is an intra-departmental piece of routine of which the taxpayer has no knowledge.

From this, they argue that a policy limited to a disclosure before the routine assignment would fail to achieve the objective thought in that taxpayers desiring to avail themselves of the policy could not know whether a present disclosure would be timely and hence would fail to disclosure.

This contention cannot be sustained as sound basis for the interpretation sought. True, an occasional delin-

602 quent may withhold a disclosure because, without knowledge that no assignment of his return has been made, he cannot be sure that he will earn the immunity afforded by official policy. But substantially the same results would occur if an assignment of the return to the fraud section were the event which terminated the "tempus penitentiae": Such an assignment is no more within the knowledge of the delinquent than the initial routine assignments. And thus the defendants in logic are forced to the extreme position that the official definition should be expanded to mean that any disclosure will be timely if

made before the delinquent has knowledge that his return has actually been assigned to the fraud section. That a policy of such scope would achieve the objective of bringing in more revenue with less expense is far from plain; it might well have the effect of inducing a delinquent to believe that he could safely await developments in the routine examination and then make a disclosure, in anticipation of an assignment to the fraud section, only if his observation of the course of routine examination gave him cause to fear that his exposure was imminent.

603 "If such a course were permissible, a loss of revenue might result from disclosures never made which otherwise would have been forthcoming. It is altogether reasonable to infer that the Wenchel definition was formulated because the Bureau saw the unwisdom of providing a tempus penitentiae, the boundaries of which depended upon an absence of knowledge of an investigation begun or imminent—a negative fact so easy for a delinquent to simulate and so hard for the Bureau to dispute. And that the Bureau has the power to broaden or narrow its policy as to disclosures thereafter made is too obvious to need demonstration. I have no power under the guise of interpretation to extend the official policy.

And I am far from satisfied that the plain language of the official statement of the policy was intended to cover a disclosure such as this made after the routine assignment of the return.

In support of their claim in this connection defendants cite in re Liebster, D. C. 91 F. Supp. 814. But this case involved a disclosure made prior to the Wenchel state-
604 ment of 1947. Even if the holding of the Liebster case may be deemed sound under the policy as then defined, the later Wenchel statement must be deemed as intended to sharpen and narrow the policy as it had theretofore existed."

I won't read the rest, but the Court in that case denied the motion to suppress.

Now, with respect to whether the assignment of those group chiefs constituted an initiation of the investigation: Well, the Wenchel Doctrine says that investigation is initiated when a special agent, an Internal Revenue Agent, a Deputy Collector or other Bureau officer is assigned to return for examination and other things that have to do with what Counsel is talking about, out-of-town investigations, likely.

Now, there are three specific types of agents, Revenue Agents, Special Agents, Deputy Collectors. They are the people who ordinarily, as we all know, conduct the field of examination, who go out and do the work. Bureau officials do not do that. They do not go out. They do not go out, certainly not as a matter of practice and audit people's books. They don't work on them.

Well, I submit to the Court, why is that in there?
605 If all of the working agents are only enumerated, what is the term "or other Bureau officer" doing in the statement?

Well, does it perhaps mean the assignment of return to another Bureau officer, even if he doesn't do the work on it, is a cold objective point that that can be a cut-off point?

So far as the defendant is concerned, it makes no difference. He doesn't know about it anyhow. It is a question of what that term is in there for. It must be there for some purpose. It is not to be presumed that Mr. Wenchel is just talking. He must have put it in there. He put it in there advisedly.

It appears to be a paper that was read and it says "other Bureau officer" after enumerating all the working officers, so it must have been intended to indicate that an assignment, even behind or before an assignment to the actual working agent is an objective act indicating the initiation or the indication that actual work of an audit is going to commence and that it is therefore, a cut-off point.

I submit this argument to the Court because of the
606 presence of that term "Bureau officer", that I don't know what else it could mean.

Now, it was brought out on cross examination of Mr. Holz apparently, that the group chief has the authority to serve the return and return it without an examination. And then I learned—I didn't know either of those facts but I learned then that the agent himself could do that. So I say, that renders that a negative fact. It is as true in the case of the working agent as it is in the case of the Bureau official.

So, that is a negative circumstance, if any assignment to an agent means that the cut-off point is there. It makes no difference whether they can return it or not because they can both do it.

Now, that is the argument with respect to time limit. As I see the New York situation, I can't see how it could

be since there was no communication of information, no request of New York to quote dates of the alleged disclosure. When I mention the dates of the alleged disclosure, I want to say that I don't think it makes any
607 difference whether it was January, February or March. I think those dates are after December 16th, and apparently nobody here made any record of when it was. Now, there was no testimony by Mr. Sauber that Mr. Cain was in his office in February or January—or February, when he shows evidence here that he at least flew back and forth to California and on the question of the evidence that he went back to California on the 11th of March and returned in the latter part of April, well, there is no corroboration of that as to when he returned, if he went on the 11th.

He returned by automobile. As to Mr. Busby's testimony today, he says that he went on a vacation on the 16th. He was away for two weeks. Now, when Mr. Sauber testified that on or about the 15th, the end of the file period came in and, he came in, and the reason he remembered it was because he had been doing a lot of work and because of the file period and having made up returns, he didn't come in as soon as he could.

Mr. Sauber says that the reason he remembers it was on or about the 15th, apparently—that was the reason
608 he remembers it. If that statement could have been made explanatory of a later appearance or an earlier appearance, it couldn't have been that.

Mr. Sauber says it was about a week after that. That is approximately, I think.

Mr. Busby came in again with Mr. Cain. According to Mr. Busby's story, if he was in California two weeks after the 16th, he couldn't have come in after the 15th. Maybe he came in two weeks after the 15th. That was the time he came from California. There wasn't any memorandum made by anybody. It doesn't make any difference, for the purpose of this argument, when it was made, January, February or March.

Finally, I would like to say that I don't suppose there is any particularly reason why I have to rely on it. I don't think it is the most essential thing here but it is true that there is no evidence in this case, I think, that is not subject to attack that Mr. Sauber said that this was a timely disclosure. He says he didn't say that. And they say he told them that everything was all right, nothing had been

done, or something like that over in the Internal Revenue Agent's Office.

609 Well, he says he didn't even determine that until later and he did say to them later, after the taxpayer was identified and all the steps had been taken and when they ordered him to have the audit commenced—that he told them that it hadn't been assigned as yet, it hadn't been pursuant to their request.

Now, that was after they had told him all of these things. It wasn't a case, as they said in their affidavits, that they went in and first meticulously made and ascertained it. They didn't tell anything until the return had been assigned.

Mr. Sauber told them there wasn't any activity. It couldn't be assumed he had been misled by Mr. Johnson by that fact or he had any reason to mislead the defendants. It was after these conferences with Mr. Busby and with Mr. Sauber and with Mr. Cain calling him on the telephone, Mr. Cain asked him if he wouldn't have the agents make the audit.

Now, as to sufficiency, Mr. Sauber says there wasn't any conversation about disclosure that he talked about or that he testified about. There was a question asked as to

610 whether there would be publicity. He said no, there was publicity only in criminal cases. This appears to be a civil case. That would be his frame of mind in a situation where they contended return washed out transactions, to the extent those were the facts.

I believe it was in Mr. Busby's or Mr. Cain's testimony. I think it was Mr. Busby that said those were the facts; there was nothing to be concerned about except collecting taxes, or something like that. That is even Mr. Busby's version, that if those were the facts, there wasn't anything to be concerned about.

Well, that hasn't been established that those are facts.

Now, there is no evidence here that Mr. Sauber sought to obtain evidence from these people upon a false promise of immunity which he then, or somebody in the Government, had a purpose to violate. There isn't any question of the Government misleading by statements, because I have read from the declarations of policy and they indicate that it is a repentant taxpayer they are talking about and one who makes a disclosure of tax evasion and I think it is clear enough in all those statements and certainly

611 I think there is no over-reaching by the Government. There is no deception. There is no conduct that can be described as illegal obstruction of information in violation of this privilege against self-incrimination and I submit, for all of these reasons, that the motion to suppress evidence should be denied and that this case should proceed to trial in order that the real issues here should be determined.

Thank you.

By Mr. O'Brien: Judge, I don't want to take any more time in argument, but I do have some cases that there was not time to go into, cases on the basis of the motion and relief and the connection between the promise of immunity and violation of the constitutional right.

If your Honor wishes to hear them—

By the Court: I am sorry. I didn't hear what you said.

By Mr. O'Brien: I have some memoranda of cases, your Honor, on the question of the constitutional provision and the application or analogies of illegal search and seizure as applied to the motion at bar and I would
612 like to submit that to your Honor with a copy to counsel in the morning.

If you would like to have it I can supply it. I find that I just didn't cover that point in the argument.

By the Court: Didn't I have some of these cases on the memorandum you left with me?

By Mr. O'Brien: No, sir. Those are not there.

By the Court: Well, Gentlemen, I have given very careful consideration to this motion and I have listened attentively to the arguments and considered the briefs which counsel have submitted and I am quite clear in my own mind that the motion should be overruled and the motion will be overruled.

The lateness of the hour does not permit that I should indulge in any lengthy discussions as to my own views in the matter and I have reserved the right, of course, to file an appropriate memorandum of findings of fact and conclusions of law, so that my views may be set forth in some detail.

Of course, if you go to trial, as you will, and you fellows are found not guilty, of course, there will be no ne-
cessity of the court filing a memorandum or making
613 any finding, so far as that is concerned.

On the other hand, if you go to trial and the de-

fendants are found guilty, the court shall express its views in an appropriate memorandum or appropriate findings of fact and conclusions of law.

I have some rather fixed views that I would want to express, but I would rather take the time to do so with more care than I can now.

Moreover, I have this feeling: I don't know this is just the appropriate time for the court to make any comments upon the credibility of any of the witnesses or my views in regard to good faith or other matters that may enter into this proceeding because if I will try this matter I believe it would be quite appropriate for me to indulge
614 in any comment on this matter which, of course, is not a trial on the merits.

In any event, as I stated, I have been quite clear in my mind that this motion must be overruled. If Counsel desire that I should file a memorandum forthwith, I have no objection, of course, to doing so, but I didn't see that there would be any haste about it and we are so close to the trial date that time is of the essence and I haven't completely time to spend in the preparation of a memorandum.

We are shorthanded in my own district and one of the judges being in the hospital is the reason I tried to take in so much work during the day.

Now, that record may disclose the ruling on the motion that the defendants have made with reference to the production of certain documents. I think I have already indicated in my ruling as to the majority of the sub-sections, but so the record may reflect my ruling, it was ordered that the motion is denied.

I think that disposes of all matters that I have now before me by way of any motion or any other proceeding that requires my ruling, and counsel will remember
615 that I have set this matter, the time of trial for December 1st, and I will expect that counsel will be ready to go to trial at that time and the Court will expect counsel to be ready to do so at ten o'clock on December 1st.

By Mr. O'Brien: If the Court please, on that last point, I wish to remind you of what I said at the opening of the argument—I wonder if there would be any time available in the morning to discuss that with you? By that, I mean the matter of the failure of the plaintiff to make available the books in New York.

By the Court: There isn't any time between now and tomorrow.

By Mr. O'Brien: Would you like time tonight?

By the Court: I can't be here in the morning. You mentioned something informal in your letter. I don't know.

By Mr. O'Brien: I didn't say anything in the letter about this subject.

By the Court: About what subject?

By Mr. O'Brien: At the start of the argument, I tried to say to your Honor that I had a very serious matter to discuss before you went back.

By the Court: It was something you haven't told me about before?

616 By Mr. O'Brien: Oh, yes.

By the Court: Oh, I didn't understand you.

By Mr. O'Brien: Yes, sir. I say, we have sent our auditors to New York and the United States Attorney had refused to make available the records of the partnership and I also said that a certain important set of records of the public companies which depend—

By the Court: Well, have you taken it up with Mr. Ryan yet?

By Mr. O'Brien: Oh, indeed, I have. I have done my very utmost in that way, practically, and I asked him as late as today if any word has been heard from Washington.

I say, if your Honor will get that train tonight, I suggest we communicate with you in writing. I have full-affidavits on the facts here now. I have worked on the thing right down in the midst of the preparation for this right through the last two days, the last two or three days, with Mr. Ryan. I don't think he has anything to do with the willful defiance of the order in the effort, although they have had his letter since December 10th, since that time.

Unless these records are available, it would be utterly 617 impossible to proceed.

By Mr. Ryan: Apparently on Tuesday of this week, or Wednesday of this week, as nearly as I am informed, representatives of the defendant went to the U. S. Attorney's Office in New York to examine such records as are there.

I have sent them a request and a copy of the order. The first I learned, I believe was what Mr. O'Brien told me

there was an indication an Assistant U. S. Attorney in charge of the tax cases was considered not complying with the order. That is, not considered not complying with the order, but he was considered as taking the position that the order didn't require him to turn over what was there and I immediately got in contact with him and I have done a great deal of telephoning on it, and I have talked to him and I have made my position clear and my opinions clear and informed him that I did not have sympathy with his position and that I felt he should comply with the order and the substance of the order.

He took the position that the order directed him to turn over documents obtained from Lubben and the named companies by seizure and by process did not require him to make the turnover since the documents he had,
618 none of them were acquired from those persons but rather, according to what he informed me, a person by the name of Gabliel; that they had been required by seizure but had been voluntarily turned over and that he felt it might prejudice his case to turn them over and that he didn't think it required him to. I told him it was a technicality and the substance of the matter was that the Court might have entered the order and requested the records of the companies that were in the office, and
619 that further, I couldn't see whether it made much difference whether they were turned over by seizure or process if they were turned over under Rule 16.

They were turned over, a good part of them under Rule 17, and certainly, if they couldn't be obtained prior under Rule 16, they could be obtained for the trial.

I talked to the Attorney General in Washington in the Tax Division and requested his cooperation in seeing that the order was executed. On his suggestion, I called the Chief of the Criminal Division at his office in New York and discussed it with him and made my position clear. He indicated he did take it up with the United States Attorney. He called me back about four-thirty or five o'clock on Wednesday, or was it Thursday?

It was Wednesday. And he said that he had referred the matter to the Criminal Division of the Attorney General's Office and I immediately then called back the Tax Division which has jurisdiction over the matter and asked them to get in touch with the Criminal Division and straighten the matter out. And I have received no word yet that that has been accomplished.

I have done all that I can as of this time to clear
620 that situation and I will continue and there is now being made an effort in connection with it, and I have adopted Counsel's suggestion and suggested to the Department that all work records be brought into Chicago and here we will make them, under the order, or the intent of the order, open for inspection.

As I say, as of this time, as a result of this position taken from other records which were already under inspection in the Special Agent's Office in New York were denied as a result of this interpretation down there, and I have worked on that problem and requested all those records be brought out to Chicago and I expect that the Department of Justice is going to concur with me and that that will be the result.

I just don't know whether they will be here Monday morning or when they will be here. I am trying to get them here as fast as I can.

By Mr. O'Brien: Not only that, but it isn't just the U. S. Attorney for the Southern District of New York. It is the Bureau of Internal Revenue on Broadway, in New York City.

621 I came over here. I spent a good part of two days here and was back and forth on the phone and I had my people there ever since Tuesday and had them until some time last night. It was my suggestion that all those papers be brought here because in addition to what you have been told, when my man got down there, the Government Agent was there from Chicago to bring certain material, papers back here for our own use at this late date, for our own inspection.

By Mr. Ryan: For use in the trial.

By Mr. O'Brien: We have plenty of time to get them back for the trial. Actually, I am informed from New York that Mr. Mammel brought them here. We have no way of coordinating our search down there.

Now, I have accordingly prepared and I give a copy to Counsel and I want to file a copy with the Court—a motion and affidavits to meet that situation. I say nothing specific but I certainly do not intend to have my people jeopardized in this trial by the unavailability of documents.

The essence of the motion is that arrangement be made under the circumstances. If we had the paper—by that I

mean, if we had the papers last Tuesday, our auditors
622 were prepared to finish. The matter is indispensable to the defense, as shown by my affidavit and by what occurred there and the other things are all there, but I certainly am not ready on the auditing phase of this case for trial without complete papers.

I also show, if the Court please, the pains I took to go to my time sheet to find out exactly what I have been doing right along the line. There has been no time wasted in any way and we have everything ready except that. That is not in our control.

By the Court: You had better have somebody in Washington get busy, Mr. Ryan.

Mr. Ryan: Judge, I have been working on it and certainly I have been doing, I think, everything possible.

By the Court: Something more is necessary than the telephoning. Perhaps somebody will have to go to Washington if we are going to trial on December 1st because we can't have shifting from one department to another.

By Mr. Ryan: The Tax Division has jurisdiction over cases and the matter, as I undertsand it, is being taken up with the Deputy Attorney General.

By the Court: What you are trying to do now is
623 to bring them here?

By Mr. Ryan: To have all of them brought out to Chicago.

By Mr. O'Brien: That was my suggestion and I offer to pay for all that to save time, to get them here and get them back.

Mr. Ryan agreed to that and said my men could go on and examine until it was cleared with Washington, until it was released.

623 By Mr. Ryan: I hadn't any idea at that time, as counsel knows, that there would be any interference with this.

The difficulty at the time was in the U. S. Attorney's office and I assured counsel at that time and I think he heard me talking to the Assistant U. S. Attorney, that I would do everything to get it.

By Mr. O'Brien: It isn't you but—

By the Court: Gentlemen, I don't know that there is anything I can do tonight.

By Mr. Ryan: I realize the importance of the matter and I am not going to relax in my efforts to see that the

records are brought to Chicago here at the earliest possible moment. I suppose if there are any other emergencies arising, such things as telephone calls or telegrams, your Honor can be communicated by counsel.

By the Court: Of course I will be available so that you can reach me every day next week by telephone.

By Mr. O'Brien: We will keep in touch with you.

By the Court: I don't know that there is anything I can do now. I have already passed on it.

By Mr. Ryan: I don't see that there is any reason
625 indicated.

By Mr. O'Brien: I would like leave to file my motion in support of the affidavits. I don't like to leave it with the Clerk. It is a matter which requires your Honor's consideration.

By the Court: I can't rule on it tonight.

By Mr. O'Brien: Not tonight, but may it be sent to you, your Honor?

By the Court: No. That will be all, Gentlemen.

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IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

CERTIFICATE.

I hereby certify that the above and foregoing transcript comprising pages numbered consecutively from 1 to 625 is a full, true and accurate transcript of the original shorthand notes of all the proceedings had on the hearing of the above-entitled cause, on November 12-13, and 21, 1952.

Roy E. Fuller,
Official Court Reporter,
United States District Court,
Northern District of Illinois.

Nov. 25, 1952.

152 And on, to wit, the 24th day of November, 1952 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion, Affidavit of Vincent O'Brien, with Exhibits, A, B, C and D; and Affidavits of George D. Sullivan, Jr., and John A.

Lynch, Attached thereto, in words and figures following, to wit:

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IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION

The defendants, by Vincent O'Brien, their attorney, move that the trial date of the above-entitled cause be continued generally on the ground that the plaintiff has failed to comply with the orders of this Court entered October 31, 1952, pursuant to the motions of the defendants made under Rules 16 and 17 of the Federal Rules of Criminal Procedure and has thereby prevented the defendants from examining, copying and analyzing matter indispensable to their defense.

Defendants also move for leave to file, within a short day to be fixed by the court, such motion or motions in respect of such noncompliance by the plaintiff as defendants may deem appropriate.

In the alternative, the defendants ask that in the event the plaintiff does comply with said orders on or prior to December 1, 1952, that then the trial of the above-entitled cause be continued for a time not less than the time during which the plaintiff has been in noncompliance with said orders.

154 In support hereof defendants submit the attached affidavit of Vincent O'Brien and the attached affidavit of George D. Sullivan, Jr., and John A. Lynch.

The Shotwell Manufacturing Company,
Byron A. Cain, Harold E. Sullivan,
and Frank J. Huebner, Defendants
By Vincent O'Brien
Their Attorney

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IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

(Caption—No. 52 CR 143)

State of Illinois }
County of Cook } ss.

AFFIDAVIT

Vincent O'Brien, being first duly sworn, on oath deposes and says that he is chief trial counsel for the defendants in the above-entitled cause, and that he makes this affidavit in support of their foregoing motion.

He avers that:

1. All of the books, records, documents and papers to be produced by said orders of October 31, 1952, are indispensable to the defense in the above-entitled cause by reason of the averments made in the indictment and in more detail in the bill of particulars filed herein.

2. During the early part of November, 1952, Special Agent Sam Krane made available for photostating and microfilming a large quantity of papers in his possession in Chicago, which required three days to photostat in part and to microfilm as to the remainder. During that time, the said Special Agent informed affiant that it had been necessary for the Bureau of Internal Revenue to reconstruct the records of Eatsum Food Products Co., a partnership, and to that end, to procure certain bank
156 statements and photographs of checks of said partnership in the City of New York which he was not making available to defendants because he considered said material to be work product within the meaning of said orders, but affiant contends that within the doctrine of the case of Hickman *v.* Taylor, 329 U. S. 495, said material and any like material, whether in Chicago or in New York, and otherwise within the compass of said orders, is not work product. Affiant so represented to the court in his letter of November 17, 1952, a copy of which is attached hereto, marked Exhibit A, and made a part hereof.

3. Said order of October 31, 1952, entered pursuant to Rule 16, required the plaintiff, through attorneys for the Government in this proceeding, to advise counsel of

record for the defendants of the places where the items so obtained by seizure or process from the said companies are held, and ordered the plaintiff to make them available to the defendants, their attorneys and agents for inspection and copying at the place or places so designated. On November 10, 1952, the United States Attorney wrote affiant the letter hereto attached, marked Exhibit B, and by reference made a part hereof.

4. As will more fully appear from the affidavit of George D. Sullivan, Jr., and John A. Lynch, also tendered in support of said motion, reference thereto being had and to which affiant refers, the plaintiff, in defiance of the Court's orders, on November 18, 19, and 20, 1952, failed and refused to make the books, records, papers and documents therein mentioned available for inspection and copying, not only those at the United States Attorney's office in the Southern District of New York, but also at the office of the Bureau of Internal Revenue. Affiant on Wednesday morning, the 19th day of November, 1952, 157 conferred with First Assistant United States Attorney Edward Ryan and Special Assistant Attorney General Arthur Cunningham, and in an effort to work the matter out on a practical basis in such way as not to inconvenience either the Government or the defendants, suggested that all of the papers in New York within the compass of said orders be immediately shipped to Chicago at defendants' expense, and assured said persons that defendants would likewise pay the charges for returning said papers to the East; and further suggested that they be sent to the United States Attorney's office in Chicago where the parties might have joint access. Affiant further avers that thereupon Messrs. Ryan and Cunningham said that they were agreeable to that suggestion and would try to clear it with their superiors in Washington, to the end that all of such papers at the Bureau of Internal Revenue and at the United States Attorney's office would be so sent to Chicago, and that, pending approval thereof, the accountants and the said George D. Sullivan, Jr. would be free to examine those at the Bureau of Internal Revenue, 253 Broadway, New York City. Affiant agreed that defendants would prepay such shipment in order to avoid the delay that would ensue if the charges had to be approved through the usual governmental chan-

nels. As of the close of the hearing on defendants' motion to suppress evidence Friday night, November 21, 1952, no clearance had been forthcoming and the United States Attorney admitted in open court that access to said items had been denied to the defendants—all of which will more fully appear from the official reporter's transcript of said proceedings.

5. At said hearing, the United States Attorney for the Northern District of Illinois stated that the United
158 States Attorney's office in New York had taken the position that the Court's order directed him to turn over only documents obtained from Lubben and the named companies by seizure and by process; whereas, the papers of the partnership in his possession were acquired from a person named Giglio and not by seizure, but voluntarily, but that Mr. Ryan advised him that, in any event, a good part of them would be required to be turned over under the order entered on Rule 17, and that, in any event, they could be subpoenaed in for the trial and thus would have to be here in any event.

Affiant heretofore procured and hereto attaches as Exhibit C, a certified copy of a sworn petition filed in the District Court of the United States for the Southern District of New York on behalf of the said Giglio showing that in July, 1952, the said Giglio was served with a subpoena duces tecum calling for the production of the books, papers and documents of some twelve corporations and partnerships, including those of Eatsum Food Products Co., and that pursuant to said petition the court ordered that said subpoena duces tecum be quashed as to the books, records and papers of certain partnerships, including Eatsum Food Products Co., except as to such books and records as had already been produced in response to said subpoena. Affiant further avers that the said William Giglio had been a partner of David G. Lubben in the partnership doing business under the name of Eatsum Food Products Co.

6. The motions on which said orders of October 31, 1952, were entered were transmitted to the Honorable Gunnar H. Nordbye on September 30, 1952, with a letter, a copy of which is attached hereto, marked Exhibit D, and by reference made a part hereof. In that letter affiant said:

159 "As I see it, the motions under Rules 16 and 17

are as of course. They are controlled by the decision of the United States Supreme Court in United States v. Bowmon, 185 F. 2d 159, 71 S. Ct. 675. * * * We hope that there may be orders as of course without need for argument because the sooner such material is exhibited, the sooner we can inspect and analyze it and use it in the preparation of the defense."

The Government desired argument, although on the argument it conceded that the decision in the Bowman Dairy case was controlling. The argument could not be had until October 17, 1952, because of the need to complete the depositions which were in process.

When the said orders were settled by agreement with the United States Attorney the date of November 5th, 1952, was inserted for the submission of said papers. In a letter of affiant written October 30, 1952, to the Honorable Gunnar H. Nordbye, a copy of which was sent to the United States Attorney, affiant said, without any subsequent objections or correction by the United States Attorney:

"Apparently, the records of Lubben and his companies in the East, which we traced down in the course of the investigation concluded just before the giving of the notice for the taking of depositions, are exceptionally voluminous and since their respective dates have been separated and grouped by the governmental agencies in the East for use in various local investigations or actions. Before they can be submitted to us, the Government desires to restore them to their proper places and to remove all compilations and other matter made for their own purposes. The agents earnestly insist that it will take up to as much as two weeks to fully accomplish that task. By November 5th, however, they believe that they will be ready to start exhibiting the material."

Affiant further avers that Special Agent Sam Krane informed him of his desire to go East to assist the agents there in and about the matter mentioned in said letter, but was prevented from doing so because his assistance was required in connection with the preparation and
160 hearing of the motion to suppress evidence. In addition, the presence at said hearing of Special Agent James Twohig, who is in charge of the same matter in

New York, was required, with the result that it was impossible to make arrangements for the inspection of the data in New York until after the time that said hearing was adjourned to November 21st.

The inspection and copying of the papers mentioned in the orders of this Court is but one operation. When that is done, the copies must be separated into those which are relevant and those which are not, for it is not feasible to do that at the places appointed in the orders; and then the accountants must study and analyze the same to arrive at a conclusion in respect of the averments of the bill of particulars and of the indictment as to moneys allegedly paid by or through said parties to the corporate defendants. Already, there are more than 5,000 items of microfilm copy and several hundred photostats so to be analyzed, and affiant is informed that the greater bulk of the material remains to be obtained in New York.

7. Affiant avers that the material turned over to the defendants in Chicago as aforesaid, contains nothing concerning the partnership, Eatsum Food Products Co.; that all of such papers are in New York with the United States Attorney for the Southern District of New York, and only a portion of the records, documents and papers of the proprietorship, Eatsum Food Products Co., and the corporation, General Confections, Inc., is in Chicago and that the remaining portions in the possession of the Government are in New York City. Affiant further avers that he is informed by his said accountants that all
161 of said books, records, papers and documents are essential to the preparation of the defense.

8. Affiant further avers that the books, records, papers and documents of the said companies in the office of the Bureau of Internal Revenue in New York aforesaid, have been there for approximately three years, during all of which time they were available to the agents in Chicago, and that said agents in fact selected from said material many items which were delivered to the defendants or their representatives here in Chicago early in November of 1952, as aforesaid, and which had been procured by said agents prior to the return of the indictment in this proceeding.

Vincent O'Brien

Subscribed and sworn to before me this 23rd day of November, 1952.

(Seal) George D. Sullivan, Jr.
Notary Public

162 EXHIBIT A

November 17, 1952

Honorable Gunnar H. Nordbye
United States Court House
Minneapolis, Minnesota

In re: United States v. The Shotwell Manufacturing Company, et al.

Dear Judge Nordbye:

At the last hearing, I orally requested the production of any order or directive that there might be to the agents by way of implementing the objective test as to the commencement of an investigation mentioned in Mr. Wenchel's paper. Since I am not sure that that item and similar items bearing upon the subject are within the scope of your orders of October 31st, I am enclosing a motion for an order on the United States to make available such items, if any. The reason is that they are not published documents so far as we have been able to ascertain. I am delivering to the United States Attorney a copy of that motion.

Notwithstanding my views on the disclosure and its effect, it would be less than prudent if we were to relax in our preparation for the trial. At all times I have endeavored to meet the schedule which is set, and I want to have everything that the lawyers can do behind them and on time. I am making the same effort in respect of the acccuntants. One of the things that I thought we had done was to procure an order under Rule 17 for the production by the Government of items it expects to offer in evidence, save for the work product of Government counsel.

A good deal of such material has been turned over to us in Chicago, although not yet in New York. We are about to procure the material in New York and have no question concerning it at this time. I do believe, how-
163 ever, that we have not been supplied with all of the material that is here according to our construction

of the order. I cannot be specific, except as to certain records of checks paid through the Manufacturers Trust Company of New York, and except as to documents, calculations and other papers evidencing the reconstruction of the patrnership records of Eatsum Food Products Co. Mr. Krane, the Special Agent, told me that due to the unavailability of the books and records they had reconstructed them. Moreover, I assume that there are compilations and sheets that were worked up by the agents which they will desire to offer in evidence pertaining to figures in general. I am speaking, of course, with reference to items that were procured prior to the suit and not by or under the instruction of the United States Attorney for the purpose of prosecuting the case. I consider that the matter of lawyer's work product is controlled by the decision in Hickman v. Taylor, 329 U. S. 495, and that, therefore, we are entitled to such papers; whereas, I think that the agents feel that since the items in question were those which they worked up themselves, rather than documents actually taken from the named companies, that they are beyond the purview of the order—even the order under Rule 17(c). It is likely that the same will be true as to the papers in New York. It might be helpful if you had the opportunity to give this some thought before the next session.

I am notifying the United States Attorney of the actual lodging of the depositions with the Clerk, and a copy of this notice is enclosed for your information.

I also enclose a motion and order for the production in advance of trial of certain papers or records of General Commercial Acceptance Company in New York. The depositions on file reveal that the invoices of the Lubben companies, that is, their accounts receivable, were hypothecated with that company which was acting as a factor. The materiality arises out of the fact that Lubben and certain of his representatives testified that the invoice prices were physically raised on the face of the invoices to an amount which would include alleged overage or premium payments. Thus, for example, in the case of a Shotwell invoice as to which premium payments are claimed, the invoice price would be stricken and the full price they say would be inserted.

164 We are sending you as soon as it is completed, a memorandum of our conception of the opposing theories,

the points and authorities, and pertinent excerpts from the record of the hearings of the Sub-Committee of the Ways and Means Committee of the House pertaining to the subject matter of disclosure. Unfortunately, there is not time for more until the argument.

Respectfully yours,

VOB:GM
CC: Mr. Otto Kerner, Jr.
United States Attorney
Chicago

165 EXHIBIT B

United States Department of Justice
UNITED STATES ATTORNEY
Northern District of Illinois
450 United States Court House
Chicago

In reply refer to
initials and number
EJR:LM

November 10, 1952

Via Messenger
Vincent O'Brien, Esquire
Defrees, Fiske, O'Brien & Thomson
105 South LaSalle Street
Chicago 3, Illinois

Dear Mr. O'Brien:

Re: United States v. Shotwell Manufacturing Company, et al

I wish to confirm the information communicated to you by Mr. Ryan of this office in a telephone conversation, in which you were advised that such of the records directed to be made available to the defendants by Judge Nordbye in this case, as are presently situated in New York City, may be examined at the Office of the Intelligence Unit of the Bureau of Internal Revenue in that city and the Office of the United States Attorney for the Southern District of New York, at the United States Court House in New York City.

As Mr. Ryan advised, it is suggested that you contact Mr. James Twohig at the Intelligence Unit first, since Mr. Twohig is more familiar with the records involved

than is the United States Attorney's Office at New York City.

Very truly yours,
(Sgd) Otto Kerner, Jr.
Otto Kerner, Jr.
United States Attorney

166 EXHIBIT C

United States of America }
Southern District of New York } ss.

I, William V. Connell, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 13th day of October in the year of our Lord one thousand nine hundred and Fifty-Two and of the Independence of the United States the One Hundred and Seventy-Seventh.

(Seal) William C. Connell, Clerk

167 At a stated term of the District Court of the United States of America for the Southern District of New York held at the United States Courthouse on the 15th day of September, 1952.

Filed
U.S. District Court
S.D. of N.Y.

Sept. 15, 1952. P. M.
Present: Hon. Sylvester J. Ryan, U.S.D.J.

United States of America,
Plaintiff,
- against -
William Giglio,
Defendant

Order
Docket Nos. C133-194 and 133-195

Upon reading and filing the notice of motion dated September 2, 1952, the affidavit of J. Gerard Cregan, Esq., duly verified the 8th day of September, 1952 in support thereof, and the informations previously filed in this court, bearing the above docket numbers, and after hearing J. Gerard Cregan, Esq., for the said motion, and upon consent of the United States Attorney thereto, now on motion of J. Gerard Cregan, Esq., defendant's attorney, it is

Ordered that the subpoena duces tecum heretofore issued in July of 1952 be and the same hereby is quashed as to the books, records and papers of the three partnerships recited in said supoena, to wit: Loraine Food Company, Tavern Fruit Juice Company and Eatsom Food Products Company, except as to those books and records of the foregoing three companies as he may have already produced.

Sylvester J. Ryan
U. S. D. J.

Consented to
Myles J. Lane U S. Atty
By .....

168

DISTRICT COURT OF THE UNITED STATES

Southern District of New York

Filed
U.S. District Court
S.D. of N.Y.
Sep 15 1952 PM

United States of America,
Plaintiff,

- against - C 133-194
William Giglio, 133-195
Defendant

State of New York }
County of New York } ss.

J. Gerard Cregan, being duly sworn, deposes and says:

1. That he is the attorney for the above named defendant, William Giglio.

2. That the defendant is charged in two informations filed September 14, 1950, with willful failure to pay income taxes.

3. That these informations are presently marked off the trial calendar but are subject to restoration in October of this year and deponent has been informed by the Assistant United States Attorney in charge of the case that he expects to move the said informations for trial in said October term.

4. That the defendant in September of 1950 entered a plea of not guilty to these informations and bail was fixed in the sum of $5,000.00.

5. That in July of 1952 defendant was served with a subpoena duces tecum calling for the production of certain books, records and papers of some twelve corporations and partnerships.

169 6. That this motion is made under Rule 17 of the Federal Rules of Criminal Procedure on the grounds that the said subpoena duces tecum is oppressive and unreasonable in that it requires the books and records of three partnerships, to wit: Loraine Food Company, Tavern Fruit Juice Company and Eatsom Food Products Company, which are the personal property of this defendant and which the said defendant requires for his defense of the aforesaid information. To require him to produce these partnership records would be tantamount to violating his constitutional privilege against crimination and he would be required, in effect, to be a witness against himself.

7. That it is well settled law that partnership books and records are privileged as to the partners when they properly assert they are privileged as the defendant does here.

Wherefore, deponent prays that an order be entered quashing the subpoena duces tecum of July 1950 in part and specifically as to the books, records and papers of the aforementioned three partnerships, to wit: Loraine Food Company, Tavern Fruit Juice Company and Eatsom Food Products Company.

J. Gerard Cregan

J. Gerard Cregan

Sworn to before me this
9th day of September, 1952
Mary Mason
Mary Mason

Notary Public in the State of New York
No. 31-7753000
Qualified in New York County
Cert., filed New York Reg. Office
Term Expires March 30, 1954

170 EXHIBIT D

September 30, 1952

Honorable Gunnar H. Nordbye
United States District Judge
Minneapolis, Minnesota

In re: U. S. A. v. Shotwell, et al.
Northern District of Illinois,
Eastern Division, No. 52 CR 143

Dear Judge Nordbye.

Enclosed are the following motions:

1. Motion of defendants to suppress certain evidence; to set same for hearing, and for issuance of subpoena for production of certain documents, etc., in advance of the hearing so to be set;
2. Motion of defendants for discovery and inspection pursuant to Rule 16; and
3. Motion of defendants for a subpoena for production of documentary evidence pursuant to Rule 17:

copies of which, together with a copy of this letter have been given to the United States Attorney. We should like to have the motions filed and to have you set a date for their disposition.

As I see it, the motions under Rules 16 and 17 are as of course They are controlled by the decision of the United States Supreme Court in United States *v.* Bowman, 185 F. 2d 159, 71 S. Ct. 675. If there is any question about it, we are prepared to argue the motions. We hope that there may be orders as of course without need for argument because the sooner such material is exhibited, the sooner we can inspect and analyze it and use it in the preparation of the defense. If we have to argue it, for reasons hereinafter referred to, it will not be pos-

sible to do so until the depositions presently scheduled have been taken.

171 The motion to suppress is of a different character. We are not entitled to the primary relief requested until the facts on which the motion is based are determined. To that end, there must be a hearing before the court (see Rule 41(e), Federal Rules of Criminal Procedure; In re: Liebster, 91 F. Supp. 814; In re: White, et al., 98 F. Supp. 895, 194 F. 2d 215; Burdeau *v.* McDowell, 256 U. S. 465; Go-Bart Importing Co. *v.* U. S., 282 U. S. 344; In re No. 32 East Sixty-Seventh St., 96 F. 2d 153, 156; United States *v.* Hashmall, 97 F. Supp. 42; McNabb *v.* United States, 63 S. Ct. 608; Glasser *v.* United States, 62 S. Ct. 457; United States *v.* Franklin, 188 F. 2d 182; Roberson *v.* United States, 165 F. 2d 752; and May *v.* United States, 236 Fed. 495), and a date for that purpose should be set as requested. To enable us to prepare for that hearing, we have asked that the documents in the Government's files pertinent to the alleged disclosure be ordered produced and that a subpoena issue for them returnable for same date in advance of the date set for hearing, at which time we may inspect them, etc.

The depositions which are to be taken are noticed to commence October 6th, in New York, and to continue during that week there, in New Jersey, and in Miami, and then, October 13th, in San Juan Puerto Rico. Nearly all of the witnesses have been subpoenaed and the other arrangements have been made. If the depositions proceed in a normal manner, we should be back in Chicago by the 15th or 16th of October.

Subject to the Court's convenience, we should, therefore, like to have the hearing on the motion to suppress and the date to be fixed in advance thereof for the production of documents, set for sometime as soon as possible after October 16th, but, preferably, not on October 20th, on which date we have motions specially set before Judge Barnes in two other cases, which I take it will be disposed of in a day, or a day and a half. I anticipate that Judge Barnes will hear them on the 20th, but if not, it will be on October 27th, because he hears such matters only on Monday as a general rule.

As far as the legal points are concerned, they have

been thoroughly briefed and we are ready to argue them as I have indicated.

172 We have not attempted in this letter to do more than cite some of the cases which we think are enough to show that the requested discovery should be ordered and that a hearing should be set on the motion to suppress.

Since we are to leave Sunday for the depositions, we would appreciate hearing from you this week if possible. When we do hear, if there is occasion to prepare any order, Mr. Wattling will take care of it while I am away.

Respectfully yours,
Vincent O'Brien

VOB:GM

173

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

AFFIDAVIT WITH RESPECT TO INSPECTION OF DOCUMENTS

State of Illinois }
County of Cook } ss.

George D. Sullivan, Jr., and John A. Lynch, being severally sworn upon their respective oaths, depose and say:

1. George D. Sullivan, Jr., is a licensed attorney, assisting in the defense of "United States of America *vs.* The Shotwell Manufacturing Company, et al"; John A. Lynch is a Certified Public Accountant who, with his staff, is working on certain factual accounting material for the defendants in the case; and that they, together with Joseph J. Fitzgerald (an accountant employed by the firm of John A. Lynch) went to New York City for the purpose of examining the records ordered to be made available for inspection by the defense under the order entered on October 31, A. D. 1952.

2. That they spent in New York the days of November 18 and 19, and George D. Sullivan, Jr., alone, the day of November 20, A. D. 1952, in an unsuccessful attempt to

obtain that examination which the order provided the defendants were to have.

3. That on the 18th of November, A. D. 1952, they 174 called at the Internal Revenue Offices and were allowed in a room in which were piled various records of the Eatsum Proprietorship, but none of the Eatsum Partnership; Reserve Trading Company; Cole Trading Company and some canceled checks, but none of the books, of General Confections Company. Their access to this material lasted for approximately an hour, when it was stopped by Agent Mammel, who said that all of the material which would be used by the Government as evidence, was being bundled and being shipped to Chicago for examination by the Special United States Attorney, Arthur Cunningham: that affiants protested that they could work neither in New York nor in Chicago because there would be parts of the records in each city; but all the affiants were allowed to continue to do was to make a listing of the books, this continuing for the afternoon of November 18, 1952, and being done by Fitzgerald, with the agents' physically taking away every book just as soon as it had been listed by Fitzgerald.

4. Sullivan and Lynch, seeking the whereabouts of the Eatsum Partnership records, were told by Agent Twohig that they had to confer with Assistant United States Attorney Leone; this conference took place at 5:00 P. M., and was inconclusive in the sense that Leone left the office, deferring any information or records for the time being.

5. The following day, November 19, A. D. 1952, Leone, at 11:00 A. M., told Lynch, Sullivan, Fitzgerald, Twohig, Mammel and Agent Mann, that he had had the Court's order since November 10, A. D. 1952, and that he had conferred about it with his superiors, but that he was not going to let them see any books, because, amongst other things, he considered the order to be:

175 (1) Not clear.

(2) Not binding on the New York District Attorney, in the absence of the New York District Attorney being made a party to the proceedings, which resulted in the order.

(3) Based upon the Bowman case, which he personally had theretofore studied and disliked.

6. Sullivan explained the proceedings which had been followed to arrive at the order, but Leone was adamant and insisted he would produce nothing.

7. In the early afternoon of November 19, A. D. 1952, Sullivan, having talked with Vincent O'Brien, Chief Counsel for the defendants, told Lynch and Lynch told Mammel that a tentative agreement has been reached between O'Brien, Arthur Cunningham and Assistant United States Attorney, Edward Ryan, of Chicago, that all of the records were being boxed and shipped air freight to Chicago at the defendants' expense. Lynch commenced arrangements to accomplish the physical shipment but was stopped by Twohig and Mammel, who said that such arrangements were not going to be carried out, and that Fitzgerald and Lynch were to leave the building, and, indeed, Mammel went and got Lynch's coat, held it for him, and told him to leave. Lynch and Fitzgerald left, as they were ordered to do, without at any time having had any actual inspection of the books accorded to the defendants.

8. On November 20, A. D. 1952, Sullivan asked Mammel again if inspection could be had and Mammel again refused, saying that he was going to select such papers as he felt would be used on the trial and he, personally, was going to bring them out to Chicago.

Affiants further state that they in all respects re-
176 lied upon and asked to have honored the order of October 31, A. D. 1952, but in spite of the best and most courteous efforts, have entirely failed in securing the provisions for inspection called for in the order.

Further affiants saith not.

George D. Sullivan, Jr.
George D. Sullivan, Jr.
John A. Lynch
John A. Lynch

Subscribed and Separately Sworn to before me this 21st day of November, A. D. 1952.

Marie E. Garvey
Notary Public
(Seal)

177 And afterwards, to wit, on the 25th day of November, 1952, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

178

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

ORDER

The above-entitled matter was by order of this Court on September 9, 1952, set down for trial on December 1, 1952. The defendants, under date of November 24, 1952, have presented to this Court a motion for an order continuing the trial date on the ground that the plaintiff has failed to comply with the orders of this Court entered October 31, 1952, pursuant to motions of the defendants made under Rules 16 and 17 of the Federal Rules of Criminal Procedure, and which failure has allegedly prevented the defendants from examining, copying, and analyzing matters indispensable to their defense.

After the motion was presented and before hearing thereon, the Court under date of November 25, 1952, was notified by counsel for the defendants that the records which should have been made available to them under the orders of this Court entered October 31, 1952, were now available for inspection at New York and requested a continuance of the date of trial for a period of ten days. Now, therefore, the Court being fully advised in the premises, and after due consideration,

It Is Ordered: That the date of trial of the above-entitled matter be continued from December 1, 1952, to December 9, 1952, at ten o'clock A. M., at the United States Court House, Chicago, Illinois.

Enter:

Gunnar H. Nordbye
Gunnar H. Nordbye
United States District Judge

November 25, 1952.

179 And afterwards on, to wit, the 26th day of December, 1952 there was filed in the Clerk's office of said Court a certain Affidavit Of Gerome J. Leone in words and figures following, to wit:

180

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

AFFIDAVIT

Gerome J. Leone, being duly sworn, deposes and says:

He is an Assistant to Myles J. Lane, United States Attorney for the Northern District of New York. His office is at the United States Court House, Foley Square, New York 7, New York.

In the performance of his official duties, affiant is in charge of the prosecution of indictment C139-206, C139-304 through 308, inclusive. Said 6 indictments charge various violations of the Internal Revenue Code (Title 26, U. S. Code), and a conspiracy in violation of Title 18, Section 371, U. S. Code, to violate various sections of the Internal Revenue Code. The aforementioned indictments name the following defendants: William Giglio, Louis J. Roth, Frank Livorsi, Howard Lawn, and American Brands Corporation.

On the 25th day of November, 1952 two subpoenas duces tecum, which are a part of the record before this court, were served upon Myles J. Lane, United States Attorney for the Southern District of New York. This affidavit is being submitted to this court to request this court to stay the production of the books, records, papers, and documents set forth in the bodies of the subpoenas in question.

181 Since certain motions have been made before this court in which it has been alleged that the Office of the United States Attorney for the Southern District of New York, generally, and affiant, specifically, have arbitrarily refused to comply with certain orders of this court, it seems only proper that the following facts be brought to the court's attention:

On November 10, 1952 a letter was received from Otto Kerner, Jr., Esquire, United States Attorney for the Northern District of Illinois, by the United States Attorney for the Southern District of New York. Said letter was received by the affiant on November 12th. There were enclosed with the letter copies of two orders of this court

made pursuant to the provisions of Rules 16 and 17 of the Federal Rules of Criminal Procedure and entered on the 31st day of October, 1952. Said orders required the production of certain books and records by the attorneys for the plaintiff for inspection and discovery by the defendants in this case. Affiant had not previously been made aware of any such order having been entered nor of the contents thereof.

Included in the body of the letter was a reference to Special Agent James J. Twohig of the Intelligence Unit of the Bureau of Internal Revenue located in the City of New York, and to the fact that Mr. Twohig was conversant with the material covered by the orders. Mr. Twohig at that time was not in the City of New York, and affiant did not speak to Mr. Twohig until either the afternoon of November 17th or the morning of November 18th, at which time Mr. Twohig advised affiant that he would call upon affiant in the company of Messrs. Sullivan and Lynch, of counsel to the defendants, from the City of Chicago. The gentlemen in question arrived with Mr. Twohig at affiant's office at approximately 5 p. m. on Tuesday, October 18th. Only a few minutes prior to their arrival affiant had received a telephone call to the effect that

182 his father-in-law was in a coma and would he please drive his wife to her father's home as quickly as possible. Affiant saw Messrs. Sullivan and Lynch, who to affiant's best recollection, may have been accompanied by a third gentleman, and explained to Messrs. Sullivan and Lynch that at that time he was unfamiliar with the order but assured them he would consider the matter that evening and would be able to give them some sort of an answer the following morning. Meanwhile, affiant's father-in-law having expired early in the a.m. of November 19th affiant advised Mr. Twohig to call the aforementioned gentlemen and request them to appear at affiant's office at about 11:30 a.m. Affiant then stated to Messrs. Sullivan and Lynch that he had discussed the matter with his superiors, namely, Joseph P. Martin, Chief of the Criminal Division, United States Attorney's Office, and that he was unable to comply with the order at that time until further word was received from the Office of the Attorney General of the United States. The request for instructions from the Attorney General was made at the first possible time, that is, on November 24, 1952.

Affiant while discussing the matter did state, academically speaking as an attorney, he did not agree with the law promulgated in United States *v.* Bowman Dairy. However, at no time did affiant's personal "like or dislike" for the Bowman Dairy decision, have any bearing on whether or not the records were to be produced in this case.

In view of the fact that affiant's wife was in a state of shock due to her father's death, affiant following the conference did not return to his office until Monday, November 24th. On that date a telephone conference took place with the Deputy Attorney General of the United States, Ross J. Malone, Jr., and Mr. Ryan of the United States Attorney's Office, Northern District of Illinois, and Special Assistant to the Attorney General Arthur
183 Cunningham in which the Attorney General advised affiant that he was not to raise any technical objections to the aforementioned order which he had received by mail from the United States Attorney for the Northern District of Illinois. Said order was complied with, and affiant is informed and verily believes that defense counsel was accordingly informed.

On November 25th a conference took place at Washington, D. C. between affiant and the Deputy Attorney General of the United States and Meyer Rothwacks of the Tax Division of the Attorney General's Office. At that conference it was decided that, in view of the situation regarding the books and records and the necessity of having those books and records to which reference is made in the aforementioned order in New York, for the prosecution of the pending tax indictments against William Giglio, et al, that a request would be made to this court for a stay of compliance with the subpoenas which were served upon the United States Attorney for the Southern District of New York.

Vincent O'Brien, Esquire, Chief Trial Counsel for the defendants, has alleged in a letter addressed to this court that the delay in the production of the records located in New York City and which are needed by the defendants in this case is but an attempt by the plaintiffs to delay the prosecution of the Shotwell case. Affiant avers that such is not the case. Rather, that the delay has only been due to an honest attempt by a public official to prosecute a case of which he has charge, and to expedite that prose-

cution. Further, the delay has not been arbitrary but is the result of the impracticability of having different and unrelated parties with divergent interests attempting to
184 have access to the same records at the same time. In fact, Mr. O'Brien has stated that people from affiant's office "were working on the books and records" in question at the time that he sought them.

The New York case has been assigned by the Honorable John G. Knox, Chief Judge of the District Court for the Southern District of New York, to the Honorable John F. X. McGohey for trial. Judge McGohey will be in criminal court in the Southern District of New York on January 3, 1953 and the trial of the case will commence on that date. The government in the Giglio case could proceed to trial tomorrow were the defendants ready to do so. However, since the defendants have been granted until December 19th for the making of motions, which means that the United States Attorney for the Southern District of New York must be served with Notice of Motion by December 9th, the Giglio case could not be tried prior to January 3rd. However, it is submitted to this court that it would be most impractical to have accountants and counsel from Chicago examining books and records which are located in the Southern District of New York, when said books and records are needed by the plaintiffs in the case of United States *vs.* Giglio.

Mr. O'Brien, at page 7, paragraph 6 of a motion entitled, "A motion to Reset (the trial) from the first day of December, 1952 to such date as the court may deem just . . ." has stated:

> ". . . greater bulk of the material remains to be obtained in New York. Affiant is informed by the defendants' auditors aforesaid that it is physically impossible . . . but that if 6 weeks additional time is allowed by concentrated attention, it can be completed."

This statement by counsel is not deemed by affiant to be an exaggeration of the facts since the records in New York are voluminous and extensive.

185 Affiant therefore submits that the request to stay compliance with the subpoenas for a period of 90 days, during which time the government will be able to proceed with the completion of the prosecution in the William Giglio, et al. case, is not unreasonable. It is fur-

ther requested that with the exception of the records which are not needed in the New York prosecution, that the defendants herein be ordered to desist from any attempt to examine any records which are located within the confines of the Southern District of New York and which are related to the William Giglio, et al. case in order that that prosecution may proceed unimpeded, until the completion of that case which it is estimated will be February 15, 1953.

Gerome J. Leone

Subscribed and Sworn to before me
this 1st day of December, 1952.
Ruth I. Quinlan
Notary Public
(Seal)

186 And on the same day, to wit, the 26th day of December, 1952 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Objections To The Relief Requested In The Affidavit Of Gerome J. Leone in words and figures following, to wit:

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IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

OBJECTIONS OF THE DEFENDANTS TO THE RELIEF REQUESTED IN THE AFFIDAVIT OF GEROME J. LEONE

The defendants, by Vincent O'Brien, their attorney, make the following objections to the granting of the relief requested in the affidavit of Gerome J. Leone:

1. There are two orders involved: One, pursuant to Rule 16, that the United States as therein directed make certain items available for inspection and copying; the other, pursuant to Rule 17, for the issuance of a subpoena to the United States of America for the production for examination etc. of the items therein mentioned "prior to the trial".

With the exception of certain documents and papers turned over to the United States Attorney for the Southern

District of New York by one William Giglio having to do with Eatsum Food Products Co., a co-partnership, all other items in said orders of October 31, 1952, referred to are in the possession of the Department of Justice at the office of the United States Attorney for the Northern District of Illinois, or in the possession of the Treasury Department at the office of the Intelligence Unit, 253
188 Broadway, New York City—and not in the possession of said affiant, Gerome J. Leone, or of any one in his office.

In addition to the said orders and subpoenas served for production for examination and copying of the items in question prior to the trial, and in addition to the subpoenas averred by said affidavit to have been served upon Myles J. Lane, returnable December 1st, 1952 (the then trial date), there were served, on the 26th day of November, 1952, returnable December 1, 1952, upon the United States of America and John Snyder, Secretary of the Treasury of the United States, and upon the United States of America and James P. McGranery, Attorney General of the United States, subpoenas duces tecum for the production of all of the items encompassed in the order made pursuant to Rule 16 and for the production of certain other items, all of which will more fully appear from the said subpoenas and the returns of service thereon ready to be produced in open Court, and similar subpoenas are in the course of being served upon the same parties for the same items to be produced at the trial as reset for December 9, 1952.

2. The said affidavit merely corroborates, in part, the claim already advanced of record by the defendants that the plaintiff has failed to comply with the court orders of October 31, 1952, entered pursuant to Rules 16 and 17, without good reason therefor and without the permission of the Court; and is, in effect, attempting to procure a continuance or to force a postponement without asking for it.

3. The affidavit in question and the motion therein continued does not expressly purport to be filed or made by or on behalf, or with the authority of the plaintiff, or of the Attorney General of the United States, or even of the United States Attorney for the Southern District of
189 New York—Myles J. Lane—, nor of John Snyder, Secretary of the Treasury of the United States.

Nevertheless, defendants' counsel was requested to appear before the trial court at Duluth, Minnesota, by Special Assistant Attorney General Arthur Cunningham, representing the plaintiff in this proceeding.

Assuming the validity of the procedure employed, defendants submit that the affiant lacks the capacity to request the relief asked for. In the alternative, they say that if affiant is acting under any color of authority from the plaintiff, then the plaintiff, in its failure to comply with the Court's orders, is attempting to hide behind departments or officials, and that the law recognizes "no such incommunicability between officials of the same government," and that since they cannot "administer the same law in accord," the plaintiff may not maintain this proceeding.

4. It is not stated when the indictments in said affidavit mentioned were returned, but defendants aver the fact to be that they were not returned until the month of September, 1952, and they reiterate that one of the defendants in said indictment, to-wit: William Giglio, is a material witness at the trial of the proceeding at bar in which the indictment was returned last March. Moreover, said affidavit does not show with any certainty that said New York proceedings will be reached for trial in January. It does show that that case is not even at issue, and, indeed, that the preliminary motions have been neither filed nor disposed of.

No reason beyond the mere expression of the desire of affiant is alleged to show why the right of these 190 defendants to a speedy trial and a prior jurisdiction of the Court in the above-entitled cause should be subordinated so as to prevent the trial of this cause until such time as the trial of the New York indictments is concluded.

5. Referring to the letter of November 10, 1952, the orders of October 31, 1952 required that such letter be provided the defendants within two days, or by November 2nd, 1952. The First Assistant United States Attorney Edward J. Ryan orally informed counsel for the defendants promptly upon entry of said orders that he had informed Special Agent James J. Twohig of the Intelligence Unit of the facts, and defendants aver that it is quite immaterial that Mr. Twohig was not in New York on November 12th insofar as the matter of notice of the entry and conditions of said orders is concerned.

6. The affidavit shows that at 11:30 A. M., Wednesday, November 19th, affiant after conference with his superiors stated that he was unable to comply with the orders. No reason whatsoever is averred for the failure of affiant to apply for instructions to the Attorney General's office until November 24, 1952, nor, in case of affiant's inability so to do, why his assistants, including Joseph T. Martin, Chief of the Criminal Division, did not do so, inasmuch as the Court's orders expressly referred to the United States.

7. It is clear from the affidavit that Deputy Attorney General of the United States Ross J. Malone, Jr. did, on Monday, November 24th, recommend or direct compliance with said orders, but it is plain from the context that only technical objections to compliance were discussed, and that, thereupon, affiant undertook to go to Washington to present the matter further on the question as to which case should first be tried. Following such conversation, on November 28th, Mr. Meyer Rothwacks, in person,
191 advised counsel for defendants that the orders would be complied with, and defendants had a representative in New York for that purpose on the same day and the orders were not complied with. If it was agreed between affiant and Mr. Rothwacks that a request would be made to the Court in this case for a stay, Mr. Rothwacks did not mention the matter to counsel for the defendants during his visit, or at any other time. Moreover, as above noted, such request would have to come from the plaintiff and on strong showing to interfere with the trial date heretofore set.

8. Plaintiff's actions have been such as necessarily to delay the trial of the Shotwell case, on the one hand, or, on the other hand, to force the defendants into trial at the appointed time without indispensable evidence that the Court ordered be made available to them and thus to maneuver the defendants into making a request for a continuance which would necessarily prevent a prompt trial in view of the condition of the Court's calendar, in which case, if made, it is apparent that the plaintiff would readily join.

9. The affidavit refers to the impracticability of having different and unrelated parties, with different and divergent interests, having access to the same records at the same time. It is respectfully submitted that the defendants could have completed their examination and

copying by November 28, 1952, had access been granted according to the orders, leaving the affiant and others free to work unimpeded. Not only so, but said books, records, papers and documents could afterwards have been produced at the trial date set by this Court in the office of the United States Attorney for the Northern District of Illinois as heretofore suggested by the defendants,
192 accessible to affiant, and returned to New York in ample time for the trial there, all under appropriate protective orders of this Court.

10. It is true that at one time the defendants' accountants stated that it would require six weeks additional time to complete their inspection, sorting and analyses of said items in such way as to be fully satisfactory to defendants and their counsel; but it is likewise true that the said accountants also stated that within three weeks they could provide for defendants and their counsel the minimum requirements for their purpose during defendants' case in chief, provided that the items in question had been separated, as was promised, and that they were made available to the said accountants in the order that they desired. Rather than seek a continuance, the defendants decided on November 14, 1952, to go to trial at the time then appointed on the basis of the reports which the accountants so undertook to have available by December 8, 1952. In this connection, defendants aver that they have never made any motion for a continuance, except their last request for a time equal to that during which they had been delayed due to the plaintiff's noncompliance with the Court's orders.

11. Finally, affiant asks that the defendants be ordered to desist from any attempt to examine any records located within the confines of the Southern District of New York, etc., as though the Southern District of New York was not in the United States, and as though affiant had some peculiar and exclusive jurisdiction of the items in the possession of the Treasury at 253 Broadway, New York City.

Defendants object to the filing of said affidavit, or, in the alternative, if filing is permitted, they ask that it
193 be stricken and that the relief therein requested, whether the request be deemed to be that of the affiant or of the plaintiff in this cause, be denied.

Vincent O'Brien
Attorney for Defendants

Nos. 11102, 11103, 11110, 11111

TRANSCRIPT OF RECORD

Office - Supreme Court, U. S.
FILED
OCT 17 1955
HAROLD B. WILLEY, Clerk

In the

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
THE SHOTWELL MANUFACTURING COMPANY,
Defendant-Appellant.

No. 11102

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
BYRON A. CAIN,
Defendant-Appellant.

No. 11103

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
FRANK J. HUEBNER,
Defendant-Appellant.

No. 11110

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
HAROLD E. SULLIVAN,
Defendant-Appellant.

No. 11111

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

TRANSCRIPT OF RECORD FILED MARCH 1, 1954
PRINTED RECORD

In the
United States Court of Appeals
For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11108 *vs.*

THE SHOTWELL MANUFACTURING COMPANY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11109 *vs.*

BYRON A. CAIN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11110 *vs.*

FRANK J. HUEBNER,
Defendant-Appellant.

UNITED STATES OF AMERICA;
Plaintiff-Appellee,

No. 11111 *vs.*

HAROLD E. SULLIVAN,
Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

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fendant Shotwell fined $10,000 on each of Counts 1 and 11 and costs. Defendant Cain committed to the custody of the Attorney General for a period of 3 years and fined $5,000 on each of Counts 1 and 11. Terms of imprisonment to run concurrently. Defendant Huebner committed to custody of Attorney General for a period of three years and fined $1,000 on each of Counts 1 and 11. Terms of imprisonment to run concurrently. Leave to defendants to file motions for acquittal notwithstanding the verdict, for new trial and in arrest of judgment within 10 days. On motion of defendants execution of sentence stayed pending disposition of motions. Present bond stands. Order in event defendants' motions are denied and appeals are taken, the appeal bonds are fixed at $5,000 as to each defendant 3220-3222

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194 And afterwards on, to wit, the 28th day of December, 1953 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On December 3, 1952, Before The Honorable Gunnar H. Nordbye, Judge at Duluth, Minnesota in words and figures following, to wit:

1 UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—52 Cr. 143) * *

The above entitled matter came on for hearing before the Honorable Gunnar H. Nordbye, a Judge of the United States District Court, in the Federal Building, Duluth, Minnesota, at 9 o'clock A.M. on December 3, 1952.

Appearances:

Arthur B. Cunnington, Special Assistant Attorney General, Washington, D.C., Attorney for the Plaintiff.

Jerome J. Leone, Assistant United States Attorney, Southern District of New York, United States Court House, New York City.

Vincent O'Brien, Esq., and William T. Kirby, Esq., Chicago, Illinois, Attorneys for the Defendants.

The Court: Well, gentlemen, I assume you are here in response to a telephone conversation that the Court had with Mr. Cunningham. I stated to him that if the parties were to appear before me they could come
2 here to Duluth on Wednesday, December 3rd, and this morning I am in receipt of a motion that has been filed by Mr. O'Brien, the attorney for the defendants. I am not clear as to just what was to be taken up before the Court this morning, whether the Government has a motion or whether you are here on Mr. O'Brien's motion. Perhaps counsel could indicate to me what matters we are to take up this morning.

Mr. Cunningham: If the Court please, as the Court well knows there has been certain conflicts that have arisen by reason of the motion filed by the defendants in this case in view of the fact that there are certain actions pending in New York, certain indictments pending there, and there have been certain complications and certain conflicts to obtain that evidence; and since both the New York cases are pending and this case, the Shotwell case is pending, and in that respect, Mr. Leone, who is in charge of the New York cases, has filed a certain affidavit. I believe Your Honor has a copy. We gave a copy to the Court yesterday.

The Court: Yes, I am in receipt of it.

Mr. Cunningham: And Mr. Leone desires the opportunity to be heard with regard to that affidavit, and at this time I would like to introduce Mr. Jerome Leone, the Assistant United States Attorney of New York.

Mr. O'Brien: May I ask whether the plaintiff in this action joins in the motion that is embraced in that affidavit?

Mr. Cunningham: May I state my position after Mr. Leone is heard, if the Court does not mind?

The Court: I haven't any objection to that procedure.

Mr. Cunningham: I will state my—the position of the plaintiff. I suppose the Court is aware that I have been assigned to try the Shotwell case.

Mr. Leone: May it please the Court, first of all I believe I should state to Your Honor that any request which is being made here is being made in an attempt to expedite the prosecution within the Southern District of New York. However, in view of certain motion papers which have been filed with this Court I feel I should apologize or perhaps indicate to the Court that any indications which have been suggested by defense counsel here concerning any records in New York is not an arbitrary thing, but rather, as I shall point out to this Court now, were due to circumstances which in effect were not entirely within my power to determine.

As Your Honor knows and as Your Honor apparently has seen from my affidavit and motion papers the de-

fendants have requested that certain records which are within the Southern District of New York and which
4 are necessary to the prosecution of the action of William Giglio and others, be produced in Chicago, and as defense counsel has stated the United States Attorney for the Southern District of New York was notified of a pending order in this court, which order to my knowledge was entered, I believe, on October 31st—rather the two orders, encompassing the production of certain books and records in the Shotwell case to make certain inspection and discovery.

As stated in my affidavit a letter was received on November 10, 1952 by the office, by the United States Attorney for the Southern District, which letter I have here and I offer to the Court and which letter bears a stamp of the United States Attorney's office acknowledging receipt as of November 10, 1952. As to what time that was received on November 10th, I can't tell Your Honor, except I first received it on the morning of November 12th, which was the day after. At that time, when I read the order, I was unaware of any order being entered and, further, I was unaware that the United States Attorney's office in the Southern District of New York was a party.

However, in view of the fact that the body of the letter referred to a special agent of the Internal Revenue Bureau, I felt in due time, whenever he appeared,
5 he would explain them to me. I attempted to contact his office but Mr. Twohig was in Chicago I believe on a motion that was pending to suppress some evidence at that time. Mr. Twohig returned to New York and to the best of my recollection called me by telephone either late November 17th or the morning of November 18th. When he called me he advised me—I asked him what it was all about and he reiterated to me he would appear in my office in the company of Messrs. Sullivan & Lynch,

who were of counsel in the Shotwell case. They appeared in my office and, as I relate in my affidavit, it was rather late in the day. To the best of my recollection it was approximately 5 P.M. I said, "Gentlemen, you come in and ask me to produce certain matters." "As a practical matter I have just been called, about five minutes ago by my sister-in-law, concerning my father-in-law who was in a state of coma and that my wife was alone at home with an infant and I was going to drive her to the home of my father-in-law." I explained that to the gentlemen in question and I said, "Gentlemen, I can appreciate your position." I said I can't consider this order at this time. I haven't had an opportunity to consider it." I said, "In the morning I will be more than happy to sit down and discuss the order with you." They agreed to do that. They left and I subsequently left and the
6 next morning I called Mr. Twohig the first opportunity I was able that my father-in-law had passed away in the night and I couldn't make it to my office until approximately 11:30.

At that time the gentlemen came to my office and I stated to them I had considered the demand but I was unable to comply with any order because under the directions of my superiors I was told that the order was not clear and, further, that it was not clear it applied to us; that we would ask the Attorney General of the United States for instructions and that at this time we would be unable to comply with it.

Mr. Sullivan, I believe, or Mr. Lynch at that time noted the reasons, which were three, as to why the order was not being complied with, and he said, may I put those down? I said you certainly may, and you may report back to Chicago accordingly.

During the time that they were there and following the time when he put down the reasons as to why the order was not being complied with, there was a discussion which took place concerning the Bowman Dairy case, and concerning the order entered in this court by Judge Perry, concerning the taking of certain depositions of Government witnesses, and in that discussion, which I am sure took some ten or fifteen minutes, it encom-
7 passed both those matters, I stated that I did not agree with the Bowman Dairy case; that as the

assistant United States Attorney, I felt in my own opinion it was bad law, but since the attorneys have stated I arbitrarily refused, I should point out to the Court that I was not considering it in the light that I could flaunt the law of the United States Supreme Court but rather I was speaking academically.

Going on from there, the first opportunity I had to speak to the Attorney General's office was on Monday, at which time Mr. Malone said that the order was to be complied with and followed. Following his directions I so advised my chief, who had heard part of the conversation, which conversation was between Chicago, Washington, and New York City on a conference phone. Mr. Malone said he would permit me to appear in Washington the following day with agents of the Internal Revenue Department. The following day I spoke to my office from Washington and they advised me that, I think, Mr. Sullivan or Mr. Ryan had appeared at the office and that they had been permitted to go into my office and search out records and examine records, and the same was true of another room. As I have read Mr. Sullivan's affidavit which has been offered to the Court this morning, it is indicated therein that many discussions took place on November 23rd and 24th with Mr. Martin in my office.

8 Mr. O'Brien: The 23rd?

Mr. Leone: I am sorry. I mean the 25th and 26th. And nowhere in that affidavit do I find any indication that Mr. Martin did not permit them to make an examination. There is couched, rather, within the confines of that affidavit, certain indications that those counsel were running back and forth and that they were explaining things to Mr. Martin and they were explaining the position of the Treasury to Mr. Martin; but nowhere in that affidavit does it indicate Mr. Martin opposed their examination of any records. As a matter of fact, he did attempt to assist them, but he stated he had no jurisdiction of the Treasury Department. I think Your Honor will agree with that. One agency is separate from the other and we could not advise the Treasury what to do.

Finally on Friday afternoon, at 5 P.M., I had returned to my office Friday morning—I returned to the City of New York on Wednesday evening. Friday I was in my

office and at 5 P.M. last Friday, the 28th, Mr. Christoph, appeared at my office and he stated, "I am here to examine certain books and records." I asked him who he was. He told me. I said that first of all it seemed rather strange he wasn't given a letter of introduction; and I might indicate to Your Honor all kinds of people have appeared at our office and say we are here to examine records. It is somewhat unusual procedure that people can go into a Government agency and say we want to look, without any introduction or any authorization to examine records. I indicated to Mr. Christoph, I said at 5 o'clock in the afternoon this office closes. He said he wanted to work that evening and he wanted to work Saturday. I said there will be nobody here. I said, "I can't assist you. I don't know about the Internal Revenue." I said, "However, if you are here Monday morning with a proper letter," and he then interrupted me and said, "Yes, I will have another gentleman with me." I said, "You can bring ten if you wish." I said, "I will appear here Monday morning." I asked him to appear Monday morning at my office with a letter of authorization, and I then brought him into the office of the Chief of the Criminal Division and introduced him to the secretary and I said, "Mr. Christoph will be here Monday morning at approximately 10 o'clock. I have asked another agent who has worked on this case." I said, "He will be here, Miss Klein. As long as Mr. Christoph has a proper letter of authorization he is to be permitted to examine all books and records which are located at both 418 and 438." At the same time I told Mr. Twohig he was to indicate to his office what we had done and further he was to see that his office permitted examination of all books and records. Monday afternoon, from Chicago, I phoned my office at approximately 4:30, New York time, and Miss Klein related to me that Mr. Christoph had not appeared; that Mr. Krane had waited all day. Mr. Christoph, who has not made an affidavit before this Court, said to Mr. Sullivan, as stated in one of the affidavits—

Mr. O'Brien: Yes, he has made an affidavit.

Mr. Leone: If he has I have not seen it. Of the affidavits, I have only seen Mr. Sullivan's. Mr. Christoph has said he was told to come back December 3rd. I submit to the Court that is all in error.

With that as background, this is the position we find ourselves in:

There is a case pending in the Southern District of New York which includes six indictments. The substance of the indictment charges various violations of the Internal Revenue Code and a conspiracy to violate the Internal Revenue Code and charges in essence the sum of $990,000.00 is owed by the defendants in various sums to the Government because of tax liability for the fiscal years 1945 and 1946; and further that the defendants have only paid to the Government the sum of $16000
11 odd dollars as their liability for those particular years.

That case has been pending, in a sense, for four years. It is true that the indictments were returned in September. I personally was before the Grand Jury at various stages during February, March, April, May, July, August, September and October of 1952. That case has encompassed work by agents, work by the office of the United States Attorney. It has not been an easy case to prosecute in a sense that it has to go beyond the normal steps of investigation which are usually conducted by the office of the Internal Revenue; rather they had to call for assistance upon our office. Of such magnitude is that case that there are approximately 85 cartons of files, of records which are rather voluminous, to say the least. Further, the Government has had great difficulty in obtaining those books and records; such difficulty that I felt it was entirely within my rights to protect the interests which I represent, not in the category of arbitrary refusal to cooperate with this Court, but in first obtaining instructions from the Attorney General as to what course I was to pursue; and it is with the authority the Attorney General has given to me through his deputy Attorney General that I am here this morning to ask that this Court grant a stay of ninety days to a subpoena which was
12 served on our office in order that we may prosecute our case and not jeopardize that case. I might say this, on my trip to Washington on the 25th of November, that trip was only for the express purpose of acquainting the Department of Justice in Washington, the office of the Attorney General, with what was involved in New York. I think, as the Court can appreciate, that office, because, of its magnitude of work, knows that there is a

case pending in a certain district in a certain United States Attorney's office, but what kind of case—what that case embraces, they do not know other than it might be a tax case, or fraud case, or other case. With that in mind I pointed out to the Attorney General what was involved and the Attorney General felt it was within his province to make this request to this Court. I don't feel it is an improper request or unreasonable one. It is not practical for one office to deliver a thousand miles to another office records which are needed in the prosecution in a different district. Without imputing anything to the defendants, that they would in any way attempt to destroy or lose any of the records—that is not in the mind of our office—and yet in traveling, it wouldn't be the first time, and I think Your Honor will appreciate, records were lost.

13 Certainly the defendants cannot be prejudiced by a continuance since they themselves have asked for it, and I have pointed out in my affidavit that counsel here, less than a week ago—rather two weeks ago asked a continuance of approximately six weeks, and I point out in my affidavit such is not unreasonable. And now counsel comes back with a motion and says, "Your Honor, we want to go to trial and we are willing to go to trial without examining the papers." I submit of course, counsel himself has pointed out he needs this time, and since the Government in no way wants to make the defendants go to trial without proper representation, without proper opportunity of examining all books and records, this is not an unreasonable request.

I therefore ask Your Honor a stay be granted concerning the subpoena for a period of ninety days.

Mr. Cunningham: If I may be heard just briefly.

I would like to call to the Court's attention certain events that transpired in Chicago prior to the time of the inspection of the books and records in New York. I believe that the order provided that the defendants in this case was to begin the examination of the books and records that were to be made available to them on November 5th. Mr. Krane, the special agent in this

14 case, has advised me that on October 30th, which was several days prior to November 5th, that he called Mr. O'Brien and told him that the records that

were then in Chicago would be available and could be examined at that time. That advice was given, as I say, on October 30th. There was no appearance on behalf of the defendant, either on Thursday or Friday of that week, but on Monday, November 3rd, Mr. O'Brien and Mr. Sullivan called at Mr. Krane's office where there was a number of records and at that time they made a rather cursory examination of the records to see what records were there and what were to be examined. On the following day Mr. William Sullivan and Mr. George Sullivan called at Mr. Krane's office, that is on the 4th, prior to the date that they were to begin inspection, and did start examining, photostating or microfilming these records. That continued in the afternoon of November 4th and also continued on November 5th and the 6th, and I might say throughout this period Mr. Krane had offered his assistance to them in enabling them to decide and pick out what records were then available or what records would be of greatest benefit to them in order that it would expedite their consideration. As I understand it, the examination of the records that were then available at Chicago was completed on November 6th.

There appears to have been no appearance by any-
15 body during the week of November 10th. Of course we did have the holiday that week and there was the hearing on the motion to suppress on the 12th and 13th, which was continued and concluded on November 21st. The first New York appearance, as I understand it, was on the evening of the 17th or the 18th of November. I understand there was an effort made by representatives of the defendants to appear in New York on the 17th but they had plane difficulties and could not get there until late that day. I know little about what happened in New York except as has been related by Mr. Leone.

As I stated to the Court heretofore, I am representing the Government in this case and assigned to try the case. Mr. Leone has, by his affidavit, requested a continuance in view of the pending cases in New York and the reasons for his request. Heretofore, and I believe it was just last week, Mr. O'Brien filed two motions, one motion was for a continuance commensurate with the time he said he lost in examination of the books and records in New York, and the other continuance was a continuance

generally because he would not have time or did not have time to examine the records that were available. I might say to Your Honor I haven't seen them, but I understand they are voluminous and it comes as no
16 surprise that he states he needs adequate time to examine these records.

I want to state now that I have been authorized by the Attorney General to join in Mr. Leone's request that this matter be continued to such time as indicated in the affidavit of Mr. Leone, and that the defendants, at the conclusion of the New York cases, have at that time a time that they believe is commensurate with their necessities to examine those records. It presents a rather unusual situation. I have not had an opportunity to study the motion filed by Mr. O'Brien this morning. He did serve me with a rough draft.

Mr. O'Brien: The same as the printed one except for the last affidavit.

Mr. Cunningham: I have had no real opportunity to examine it and study it thoroughly, but I do want the Court to understand my authority here is to join in the request made by the Assistant United States Attorney for the District of New York.

The Court: In what way will an examination of these books impede the United States Attorney in New York from preparing for trial?

Mr. Cunningham: Do you desire me to answer that?

The Court: Yes.

Mr. Cunningham: As I understand from Mr.
17 Leone, the books are of such type it will be necessary for him to be working on them in preparation of his case. I do not believe he stated it orally here today, but it is in his affidavit, that his case is set for trial for January 3rd. He advises me it is necessary for him, in view of the volume of the books and the extent thereof, that he have those books and examine them for preparation for his trial. I might say that it probably would be advisable if I also could examine those books for the purpose of trial, but I have not yet examined them, but I do have the benefit of the agents that have examined them and know of their contents, so I am not pleading that in my own behalf in that respect because I have been told what the books do contain. But as I understand it—have I stated your position correctly, Mr. Leone?

Mr. Leone: Not completely, but correctly, yes.

The Court: They are not going to remove them from your jurisdiction. All they are going to do is photostat or make such notations or take such other data that will enable them to obtain such evidence as they think is material from such books and records. Isn't that right?

Mr. Leone: In substance it may be, but may I point out the situation to Your Honor. First of all, there
18 are certain aspects of this case which are not public knowledge.

The Court: Of which case?

Mr. Leone: Of the case pending in New York. I only know of that case and I can only speak of that case. There was great difficulty in obtaining those books and records in this case. To give the background, first of all perhaps it might be necessary to tell who the defendants are in this case.

The Court: That difficulty will always be present, will it not?

Mr. Leone: It may and it may not. I think we will not find the difficulty in the Chicago case, because in the Chicago case, from what little I know of it, you have business men, responsible business men who are respected citizens in the community in the City of Chicago. I can't say the same for the members of the defendants in the New York case, and that is one of the things to which I am alluding. First of all there is involved a member who has been convicted for narcotics violation, of the Harrison Act. That same defendant has previously been arrested twenty times, including which, to the best of my knowledge, four or five of the arrests have been for homicide. However, there is still only that one conviction. The character and connections of that gentle-
19 man have been gone into rather thoroughly. I don't believe with his background I need to go into it to great extent to point out to the Court the whole of the examination.

Mr. O'Brien: Doesn't that appear in the Keafauver report?

Mr. Leone: Perhaps. I am only talking from what I know of the case pending before us in New York. Another gentleman has been indicted for making false statements to the R.F.C., causing the R.F.C. to disburse in excess

of $600,000.00, and that—the means by which that was done was not by any corrupt officers in the Government, with their assisting him, but rather by using the means of preparing false statements showing the position of these companies to be other than it actually was, and going so far as to falsify previous years' income tax returns.

The Court: In what way is that going to be involved in the examination of these books by defendants' counsel?

Mr. Leone: In this way—I don't know that the defendants in the New York case are acquainted with the defendants in the Chicago case. I do know this, that as of this time the defendants in the New York case, who have been just as much in jeopardy as the defendants
20 in the Chicago case, have not made one move although the indictment has been pending against them for two months, to aid their defense. I don't impute anything to the defense counsel, but the defendants in the New York case are attempting to devise means of obtaining evidence which is in New York and which the Government intends to use in New York, and I have been told, without again imputing anything, that Mr. O'Brien, when he went to Puerto Rico to take depositions from Mr. Lubben was with Mr. Long at the airport. So without imputing anything, and I am not imputing anything, but I do say this, that I am attempting to protect a case that is of vital importance to the State of New York and to the Federal Government to have narcotic peddlers and people that are thieves attempting to use means to hurt the Government. That is why, Your Honor, I say I am attempting to protect. I did not wish to go this far in making my application. The Attorney General said if it had to be I could offer that to the Court.

I will say this, the defendants will stop at nothing because of the vital importance of the New York case, because of the characters involved. I say that case should be tried first and the Government so requests. These business men in Chicago, can wait their turn, and since counsel has himself pointed out that he wanted a
21 continuance I cannot see how he can object to any continuance in view of what I have said here in court this morning.

The Court: Mr. Cunningham, what assurance does this Court have there is going to be compliance of this

Court's order if and when this Court does continue this matter?

Mr. Cunningham: May I add one thing before I answer Your Honor's question? I believe, although I have not talked to the Attorney General or the Deputy Attorney General personally about the matter—I get my directions secondhanded—but I believe that by reason of the persons involved in the New York case that the decision was made that I concur in the request of the United States Attorney's office in New York. I believe that has entered into their consideration.

Now, with respect to your question. I can only assure Your Honor that I will do everything within my power that as soon as those cases are ended, and Mr. Leone assures me that they will be heard in the very near future—that as soon as they are ended all these records will be made available forthwith as soon as the trial of those cases or the disposition of the cases otherwise than by trial is concluded, and I will assure you that I will give every power that I have with all the authority
22 that I can command to see that they have full and complete inspection of all the records. It has been called to my attention also by the Revenue Agent in this case and we certainly are not imputing anything to my honorable adversary, Mr. O'Brien or Mr. Kirby. I believe they are quite honorable and outstanding members of the legal profession of the City of Chicago, but there have been direct associations with counsel in this case with those involved in the New York case. I say it was called to my attention by the agents in this case, so I believe that Mr. Leone does have some apprehension about certain information being made available to the defendants in those cases as a result of the examination of the books and records in this case.

The Court: I suppose those defendants would have a right to obtain the books and records upon appropriate motion?

Mr. Cunningham: I am sure—I imagine they would. They have not see fit at this time to make such motion. I understand that they have up until December 9th to file appropriate motions and today is December 3rd and they have made no such motion.

The Court: They could obtain the same information

that the defendants in the Shotwell case are now assuming to obtain.

23 Mr. Cunningham: That may be possible. They have not done so and if they sought to do so I cannot be sure what the Court of New York might do in that regard. I assume in view of Rules 16 and 17-C and the Bowman Dairy case that those matters would be made available, but it would be mere speculation on my part as to what the orders of that Court might be.

The Court: Let me hear from Mr. O'Brien.

Mr. O'Brien: May I ask first, Judge, whether the condition of your plans are the same now as they were in September. Some of the things I have to say I can drop, if I know.

The Court: I am not so sure as to just what you are now referring to.

Mr. O'Brien: At the time the case was first set Your Honor said that you were unavailable in January and that in February you had an anti-trust suit set.

The Court: That situation still prevails but I have given some thought to trying to work out a plan that if there was a continuance here that I would try to obtain some date in February; though I confess I haven't made any definite arrangements to have anybody else take up the anti-trust lawsuit that has been set for February 9th. But I think if there was to be continuance, I would continue it to sometime in the latter part

24 of February and that I would do everything I could to get through with this matter. I am very anxious to have this matter out of the way expeditiously and it disturbs me a great deal to have these continuances. It not only disrupts my plans but I don't think it is a proper way to handle a lawsuit.

Mr. O'Brien: Thank you, sir.

I want to ask for the record whether Mr. Leone had his authority through the deputy Attorney General Malone to appear and make this motion. You said the deputy Attorney General. I don't know which one.

Mr. Cunningham: There is only one, Ross J. Malone.

Mr. O'Brien: Now, just a little on the facts, because I think they have been scrambled up here.

In the first place, on the papers in New York which Mr. Leone referred to as 85 cartons, he omitted to say

that there were subpoenaed late in September the books and records of some twelve corporations and partnerships going to make up those 85 cartons, in most of which I haven't the slightest interest. They pertain to sugar companies, jelly companies, other companies that we have nothing whatsoever to do with. We have nothing to do with them at all; except that one of those defendants,
Giglio was a partner with Lubben for a limited
25 period in Eatsum Food Products Company, a partnership, and it is only in respect of such records that were taken from that partnership and that are in New York in the United States Attorney's office that we are interested in at all. And we have seen, it is true, what is in his office, and he does not have books and records as such of that partnership, but merely a great volume of sales slips, invoices, and papers of that kind which we can never get anywhere with without first seeing the books. You start with the books, get the items in question, and trace them back to the supporting data. But over in the Treasury office on Broadway, wherever it is, the Intelligence office, over which he admits and we know the fact is he has no jurisdiction, are all of the records of the proprietorship General Confections, Incorporated, Reserve Trading Corporation, except for the few which were moved to Chicago long ago and which, as they say, we already in Chicago at that time.

Now, it is not just Mr. Leone's papers. When we go to the Treasury Mr. Twohig and all the other gentlemen mentioned in the affidavit, they say no, and the last time that we were there, last Friday, Mr. Christoph had to go over to Mr. Leone's office to see Mr. Twohig and when he got over there they said that they were work-
ing on the books and records in the Intelligence
26 Unit in New York and we would not be permitted to look at them until next Thursday. That is tomorrow. So that from the date of the entry of these orders, October 31st, we have seen nothing except the limited material in Chicago, and my affidavit says what that is. Lest you get any idea that the material in Chicago will suffice or is anything but a sketchy amount of the total which is required.

Assuredly I talked to Long. Long is an attorney who was in the United States Attorney's office in New Jersey. He is one of the people indicted. As I say in my papers,

before we took the depositions and before we applied to you for the discovery orders we had to find out where the papers of these different companies were and when we went to Bercu, who was formerly an auditor for Lubben's company, he said Giglio had part of these papers. We got hold of him to see whether he did or not and it was then that we found out that some of the papers were taken from Giglio, I mean of the Eatsum Food Products partnership and delivered to the Grand Jury but that in September there were certain others which he had not turned over and which Judge Sylvester Ryan in the United States District Court, by order, recognized his privilege to continue to hold, and we have been very much interested not only in those few papers of that partnership but also the other companies with which Giglio
27 and some of these people ever had anything to do.

We have gone every place we could to find all of those records and we traced them right down to the end and everything that is available ends up on Broadway in the Intelligence Unit and Mr. Leone's office or in Chicago with Mr. Krane and Mr. Malone. Those we have, nothing else.

My affidavit shows how they are material.

Now, Judge, I heard of this. This is an independent thing. I wrote you a letter Saturday after I learned of the refusal when I got back from Washington Friday night. I had seen Mr. Rothwacks. I tried to get something. He said that they would turn over the papers, but right in New York. He said you have Thanksgiving, but be in New York on Friday. We couldn't get any papers. Saturday I wrote you because I am concerned about the trial December 9th, and I wasn't going to ask for any continuance to get ready. We have taken literally what you said about that trial. I never made a motion for a general continuance. I thought of it but when we got through November 13th with that part of the documents here, as my affidavit shows, I had a full conference with all of the defendants and they unanimously directed me not to appear for a continuance but to get along with whatever the auditors could give us within the three weeks' time. That was on the 14th of November,
28 from then until December 8th. We would not have the stuff for cross-examination, but we would have it for our case, such as it was, and we decided we would

rather get along with that than ask for a continuance.

But when I couldn't get those papers I had to make a motion. I didn't make it on any broader basis, the time that I wanted in days, than I could, and only that, and surely that was fair and it was necessary. Then we don't get that. It was Monday. You said December 9th. I objected to the date. I didn't see how it was physically possible to do it the way we wanted, but everything that we can do has been done. We are ready in this case. We are just waiting for the books and we tried and tried and tried.

They knew that this matter was set for December 1st. They don't want to ask for a continuance. They never told us as late as Friday that Mr. Rothwacks, Mr. Kirby and I conferred with the prosecution, that they would do anything but turn over this stuff. He didn't say in New York he was authorized to come here and ask for a stay. Mr. Leone has no standing here. The plaintiff does not make this motion. Mr. Snyder doesn't make it. He is served with the subpoena. I have the original subpoena here with the return on it. Mr. Snyder is served.

Mr. McGranery is served, because I wanted those
29 papers here at the trial. I have to have them unless you make some pre-trial determination to the contrary, and even then I have to see what those papers look like—not all, but just this small part of the records that are not even in Mr. Leone's office, and I want the jury to see those sheets, I want to check them against our compilations. They would be under court custody in the United States Attorney's office, not with me. They would be under the protective orders of this Court while they are here, coming and going.

Now they come in here, not the plaintiff, not Mr. Snyder, not Mr. McGranery, but Mr. Leone—and he doesn't say so in the affidavit but he tells you orally that he is authorized, and Mr. Cunningham doesn't say in any affidavit that he is authorized, but this morning he goes along with that motion.

How about the priority in this thing? Your indictment was returned in March; theirs in September. Not only is their case not at issue but, as affirmatively appears in their affidavit, the preliminary motions have not yet been filed and are not due until December 15th or December 10th. You can't read that affidavit and decide their case

is even set for trial January 3rd. They say Judge McGohey will be there January 3rd to dispose of criminal cases. He hasn't set it for trial. How could he do
30 any such thing when he hasn't even the papers—hasn't even passed on motions they are going to put in? Yet they say this Court should hold up the matter in this connection when the only point of contact we have is that one out of twelve companies, and that is the partnership. I say there isn't the slightest showing why they should take precedence over us. I do not and these defendants do not want to be relegated to a trial in March or at any great distance off. Neither do we want to be tried on the 9th without the time to look in the papers. I am urging an objection it would be an unfair trial. I have thought about it and thought about it and I was thinking Saturday and Sunday and I interposed because this affidavit only corroborates what I said there, that they deliberately have refrained from complying with the orders for their own purposes. I surmised the purpose and here Monday, yesterday morning, independently, without ever seeing my letter, Mr. Leone is in town, in Chicago, preparing this affidavit which says in effect just what I said.

Now, sure, you can put this case over until February or March. If I am right and my defendants are right in their judgment, that will hurt us. My reasons are my own. We are entitled to a reasonably quick trial, subject only to our right to have the papers. We have
31 been entitled to that. You set a time. Are we to go over there? Should this Court permit that kind of action on its orders? I know of cases, I have seen them in Chicago, where there has been for a lot less reason very summary action taken by the courts. I know of Rule 48(b). I don't know anything about criminal cases. This is the first one I was ever in, but Rule 48(b) entitles you, in your discretion, if you think that the action of the Government is delaying this trial, to dismiss this case, the authority, 163 Fed. 2nd, in the District of Columbia, and the cited cases show that you have the power to do that. It would not be error to do it. Your orders have to be vindicated. Either you have to do something like that, I respectfully submit, or you would have to say that they have no such precedence in their case; that you will not be relegated to a time like that, but

will have a reasonable time between now and the end of January or the first of February, or something of that kind, but on condition not that there be a promise or assurance but on condition that the papers actually be made available so that we see them and have them and have them at the trial under your protective authority, or else it being plain that they are refusing, that they are holding up this case, then such a motion should be seriously entertained and granted. But there surely should be no continuance of this matter on any promise except on the actual production of the papers, opportunity to us to copy them and be prepared for trial whenever that date is set. I say that they are in this indefensible position and we feel it. It is not any individual. It is the Government. It is not Mr. Ryan. It is not Mr. Cunningham. I don't know who it is. But however the Government functions, somewhere up there is a balance and control and they decide what they are going to do. But there is nothing unclear about the order of this Court as to all of the papers in New York. In Chicago it covers as to the United States Attorney, but when it gets to New York your order says that the plaintiff, through the United States Attorney for the Northern District of Illinois, is within two days to notify us where the papers are, the remaining papers, by letter, and that the United States, not Mr. Leone; not Mr. Cunningham; but the United States shall forthwith produce those papers at the places indicated for our inspection and examination. They have not done it. There is no ambiguity. They say, as my prior motion sets up, that these papers were not taken by persons that Mr. Leone had. He come back with a certified copy of the petition and the order of the Judge, Judge Sylvester Ryan, which shows the picture clearly as to a partnership. I set up in my present affidavit that they got through process all of the books and records from the receivership in New Jersey of General Confections. I set up they got the properitorship records of Eatsum Food Products, the proprietorship, not the partnership, from the accountant of the company, through special agents Cordes and Twohig, that they came in and took them from the accountant, as I found out in my examination. They have got them. The United States was ordered to make them available forthwith. They push and push and push the thing around.

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Now we know that we will get a fair trial before this Court but I don't think that the Government should be permitted to act in this way. There should be a decisive plan and fixed order as far as the dignity of the Court requires and whatever in its judgment is proper.

We ask for the dismissal of the case. There are some people who would dismiss the case. I don't know how Your Honor feels about it, but I know that if that motion is denied and we ask that this affidavit be stricken or that you not permit it to be filed, whichever way it is handled. But if our motion is denied I say, while I am on my feet here, that there should not be any long continuance nor should there be any continuance without the condition precedent of the actual production of the records and if they are not then produced the Court
34 should act accordingly.

Mr. Cunningham: May I be heard briefly in reply? I might state, Your Honor, in the matter of the affidavit. Mr. O'Brien says that there is nothing before the Court. I will at this time make an oral, such oral motion that the matter be continued in the manner which is stated in the affidavit; that in support of the motion the affidavit may also be considered.

I would like to state to the Court that it was not the intention of the Government to maneuver Mr. O'Brien into filing a motion for a continuance. Mr. O'Brien, I believe, stated that only one motion for a continuance was made and that was for a short period, commensurate with the time he lost. It was my understanding, Your Honor, that two motions were filed.

Mr. O'Brien: One supplanted the other.

Mr. Cunningham: I have copies of only two motions and in the one motion it is for a time comparable to what was lost and the other motion I have here is one for a general continuance.

Mr. O'Brien: That was expressly for the purpose of continuing generally to enable us to, on appropriate motion having to do with the non-compliance. That is this one, in the alternative.

Mr. Cunningham: I understood both motions had
35 been filed, and for any technical objection that Mr. O'Brien has stated I also would like the record to show that the plaintiff in this case moves—will move orally at this time that the case be continued generally.

The Court: What have you to say, Mr. Cunningham, about Mr. O'Brien's suggestion that if there is going to be a continuance it should be conditioned upon some specific provisions that the books and records mentioned should be made available to defendants within a certain period of time? What have you to say about that?

Mr. Cunningham: If the Court please, I think that has been one of the fears of Mr. Leone. He stated his position, that he fears that certain information that he has might be available to the defendants in his case and in that way imperil his case. He has asked me to let him be heard on your question.

The Court: May I call this to your attention? When this order was entered—I don't remember all the details, but if my memory serves me right, Mr. Ryan fully approved the order. It was not an order that the Court adopted without Mr. Ryan's approval and Mr. Ryan has at all times recognized that these books and records come within the scope of the Court's order. I signed an order agreeable to Mr. Ryan. There is a dispute about the books and records. Mr. Ryan recognizes they come
36 within the ambit of my order and consequently we have this situation. Now, New York is a very busy court as I well know because I sat there on two different occasions. This matter may not be tried down in New York for six months. Of course Mr. Leone knows far better than I the congested condition of the calendar in New York. If the Court continues this matter generally, where are we? How are we going to dispose of the matter on some general continuance without a specific date?

Mr. Leone: May I be heard?

The Court: I would like to have Mr. Cunningham answer that.

Mr. Cunningham: I have talked to Mr. Leone about it and he indicates he believes these defendants—his case would go to trial in January of 1953 and that the nature of this case it would last a matter of some three weeks. As I understand it the cases will be joined and be heard as one and it is anticipated that they will, because of the nature of the offenses, and the nature of the business engaged in, that that case would probably be completed in February. In view of that this affidavit sets a ninety-day period and that will give the defendants what they

believe and which I do not object to, adequate time to examine the books and records after the conclusion of that case until this case is set for trial, and I think
37 these ninety days was determined in that way.

Mr. O'Brien: That will take us at least three weeks.

The Court: Mr. Leone, you wanted to say something?

Mr. Leone: The only thing I wish to state, Judge Knox assigned Judge McGohey to try this case. In other words, Judge Knox has deemed it of such importance he is going to see it is moved speedily to trial, as speedily as can be without prejudicing the defendants.

As to some of Mr. O'Brien's remarks, may I make one statement? Mr. O'Brien has stated, and perhaps rightfully so, I have no standing before this Court. If Mr. O'Brien feels that way now then how can he complain when I read that order and I felt I had no standing and I was not the plaintiff? I felt when I read that order, I said at that time that I had no standing and therefore the order did not apply.

One additional fact, Mr. O'Brien said he saw Mr. Long, and I don't doubt that for one moment. But I do say this, there are certain matters which have come to my attention previously concerning where the Government in the case in New York obtained the books and records they have been attempting to find that out and as to means which have been used to determine what wit-
38 nesses have been before the Grand Jury and I say Mr. O'Brien must have been in communication with those people.

The Court: Mr. Cunningham, is it your idea this case should be continued for a period of ninety days?

Mr. Cunningham: That is correct.

The Court: Then do you recognize if I continue it for a period of ninety days that the order should provide that within a certain period prior to the date of trial that these books should be made available to the defendants, regardless of the then situation in the New York trial?

Mr. Cunningham: I think perhaps Your Honor should—

The Court: Does Mr. Leone recognize that?

Mr. Leone: I recognize it and I will go one step further and I now state to this Court as to all records which are located within the confines of the Southern

District of New York I will assist in permitting the defendants to examine those records, with the exception of any of the records which are vital to the prosecution in New York. The defendants will be permitted to examine as to the individual proprietorships, the research trading, if I am not mistaken, and General Confections, and this leaves only one item. As Mr. O'Brien stated a few minutes ago, if this Court would grant an adjournment until March 9th for the production—adjourn until March 9th I believe there would be production of these records prior to that date and they could examine all the records, and if they need—if they get some of them by February 25th or so, they can examine the rest and if we are not able to go to trial, then of course we will be put in the position where we will have to comply.

The Court: Did you make some limitation on the statement that you made?

Mr. Leone: Yes, the only limitation I made is that we turn over to them all the records except those which will be used in the prosecution in New York.

The Court: What about the documents that are vital to the prosecution in New York? They may also be vital—

Mr. Leone: May I say this: Defendants can go in and examine all the records in New York. That would be a small amount of records, as Mr. O'Brien put it. As to those so-called additional records that the Government relies on, they need certain additional time prior to the hearing, so that by, as I understand, the 1st of March, they should be given adequate time. The others they can examine in February.

Mr. O'Brien: Are those at the Treasury or at your office?

Mr. Leone: I believe they are in both places.

Mr. Kirby: The basic proposition that Mr. Leone puts forth is one that has been passed upon by a couple of cases. In the language of one of these courts they keep certain of the records in obscurity, is the language that is used, and we wish certain of these records not be looked at or seen until a prosecution in which they are vitally interested in in New York proceeds. In United States vs. Andolschek, 142 Fed. 2nd, 503, they say, "So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character

the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The Government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively."

So the Courts have held that if the Government
41 refuses to produce its documents it is proper, and indeed required for a court to dismiss the prosecution.

Your Honor asked the question whether or not there should not be a condition, and indeed these cases all hold that if it is not complied with there should be a dismissal. So to go directly to Your Honor's question should there not be a condition, I think unquestionably, and Mr. O'Brien does to, and the cases all says so—there is a number of them—that it would certainly be proper to provide that if they did not turn over these documents the prosecution would be dismissed.

We have a series of cases.

The Court: I will be glad to go over that with more—

Mr. Kirby: The Government is put to that position. It either turns—it produces the documents or the prosecution must be dismissed.

Mr. Leone: We intend to produce them before trial and give the defendants adequate time to examine them.

The Court: I understand now it is the position of the Government that the documents that are not now imminent in the New York trial are going to be made available to you in such time as you may desire to examine them or photograph them. The documents that are
42 crucial in the New York trial will not be available to you now but will be made available to you a reasonable time before such continuance date as the Court now has in mind.

Mr. Leone: That is correct.

Mr. Cunningham: That is correct.

The Court: Well, gentlemen, not that I want to fore-

close any further argument, but we have a jury here and we are in the middle of a trial and I can state now that Mr. O'Brien's motion for dismissal will be denied; that I will continue the matter to some date in the future and will file a formal order to that effect so that counsel will know that the matter will not go to trial on December 9th. It undoubtedly will not go to trial for some appreciable date after that date, but I am unable now to determine just what the date will be. It may be that I will continue it for a period of about ninety days. The exact date I will give you in a formal order and also will indicate such conditions as I think are proper in the order.

Mr. Leone: May I thank you for the courtesy of appearing before you.

(Thereupon an adjournment was taken and counsel again appeared before the Court at 12:30 o'clock P.M. the same day, and the following proceedings were had:)

Mr. Kirby: And not only is the question which
43 Your Honor will decide by your order as to when the material will be available, but there also are questions as to what material should be turned over and this seemed like an appropriate time to mention that so that when you write the order, as to what shall be turned over.

I call to Your Honor's attention, in your paragraph 4—first of all the order says that there shall be turned over to the defendants items which will be used as exhibits in the trial against them. Of course in the nature of a trial of this type there will be certain exhibits which will be presented which are computations of the amounts of money which the Government says were earned by these defendants. That we conceive not to be work product of the attorneys.

The Court: You can do that as well as the Government.

Mr. Kirby: I beg your pardon?

The Court: You can make such computations as well as the Government men.

Mr. Kirby: The order provides that if it is intended—if they intend to offer it in evidence against us that it shall be made available. Now they say that they do not need to turn over anything which is a computation or a recapitulation or summary bit of evidence.

The Court: The evidence, of course, is to be found
44 in the general records. The computations are merely to aid in the understanding of what the books and records disclose. There isn't any reason why you should expect to have the benefit of the work that may be done by Government auditors when you are equipped to obtain that same information and make the same computations from the books and records which will be made available to you.

Mr. Kirby: Well, let me say two things about that. In the first place, out of the welter and the letters, literally thousands of them, the Government has elected to charge certain transactions and they always, as I understand it and as I have often seen in court, they offer in evidence a sheet and that sheet is supposedly the result of their accountant's studies and conclusions and they offer that in evidence against us, and quite commonly it is admitted in evidence as a piece of paper, as an affirmative piece of evidence usable against us. It is true, as Your Honor says, that it is conditional upon—its validity is conditioned upon the true representations in the original books and they only can introduce such summary if we are allowed to cross-examine with respect to the original books. But in so enormously complicated case as this it is proper, we believe, that if they have already prepared a piece of evidence which they intend to
45 offer against us it be made available to us so that we can, in the course of our study of these books, make any checks. Your Honor will appreciate having such a big volume of documents as that to check against the books and records the minute that he gets finished with his direct examination, Your Honor can appreciate. I understand both by agent Krane and the United States Attorney in Chicago that there are other items in them, ascertained, which the Government would adduce in evidence at the trial and such items, whatever they may be, have not been made available. They, we think, should be told not only that they should produce the documents but that all the documents including those that they have now determined that they intend to offer in evidence shall be made available to us. Your order said it should be done November 5th, but it has not been done yet. We wanted to make it plain. We didn't come back this noon

to consume your time or to reargue the things this morning. It is only these things being called to Your Honor's attention, in a manner, let us say, that you might have it clearly in mind, that that remained to be decided by you. Of course I may be in error in the argument I make, but it is not so easy for all of us to get together. We need these work papers. Let me say this, as far as the Eatsum Food partnership is concerned, that is important, and as far as that is concerned the records that we have
46 here and what they say they indicate, that is purely reconstruction by the Government accountants. That is the very essence of their evidence on that. We should be able to learn what the charges against us are based on.

The Court: What have you to say about that?

Mr. Cunningham: Such work sheets, such computations will be made but those things are the work product of the Government agency. I haven't yet decided in what manner I intend to introduce that, whether I intend merely to introduce it verbally or to introduce the summaries. I haven't yet reached that in the case, and that such work papers, whether or not produced in the course of the trial, I say they aren't, have not been prepared and will not be prepared, that is items we saw go to make up net income that was unreported in this case. We have not yet prepared those summaries, but I intend to have them prepared, but I still feel they are the work product of the agents.

The second matter Mr. Kirby referred to was the matter of—was also work product, the reconstruction of the books and records which will be made available to the defendants.

The Court: What do you mean by reconstruction?

Mr. Cunningham: We are going to attempt to determine from the books and records what took place.
47 Mr. O'Brien: That is not my understanding. I understand there is a portion of it, like ledger sheets and journal sheets and things like that, which are unavailable.

Mr. Cunningham: They are unavailable to us.

Mr. O'Brien: That is right. Therefore they have to recreate something out of the materials they have at hand that will stand in lieu of those and that is the reconstruction.

The Court: What do you mean unavailable to you?

Mr. Cunningham: They are records lost, destroyed or we have never seen all of those.

Mr. O'Brien: And we haven't either.

Mr. Cunningham: Certain records have disappeared. There are some original documents and other papers that are available. The agents are going to try to attempt to reconstruct the books and records that have disappeared from everybody. I believe that they will have the same source material to make that reconstruction, which has not yet been made, as we will attempt to make. We don't know now if we can make it, but we are going to attempt to do so from the fundamental records, from which the records were first produced but they are not now available to anybody.

The Court: These so-called reconstructed records,
48 do you assume that you will be able to lay sufficient foundation they will be received in evidence?

Mr. Cunningham: Based on all the miscellany of documents that are available to go into the reconstruction of the records, we hope to be able to do so.

The Court: What have you to say about counsel's position that he can't know all the sources you are going to rely on and the data you may assume to utilize; that they should be informed and have an opportunity to see the reconstruction you are going to offer as an exhibit a reasonable time prior to the trial.

Mr. Cunningham: We don't know if we can reconstruct it.

The Court: I am assuming now you do.

Mr. Cunningham: We are going to make an effort at reconstruction.

The Court: What have you to say as to the rights of the defendants to see such an exhibit a reasonable time prior to the trial.

Mr. Cunningham: I believe that that itself, the reconstruction, would be the work product from the same basic information that they have available to do the same thing, to see if our reconstruction is proper. They have the same basic material and information available to them, the same basic material we will use in such an effort.

49 The Court: I am not clear what your basic material is.

Mr. O'Brien: I want to say on the record here, as I did in my letter to you of November 17th, and as we do in the motion, that we were advised that such a reconstruction has already been made. We were advised by agent Sam Krane. I am telling you what we were—we understand that this already exists, and was made by the agents prior to the indictment and not under the direction of the United States Attorney and that therefore within the meaning of the Hickman case and within the meaning of Your Honor's order it is not work product.

The Court: I haven't made any order which defines work product.

Mr. Cunningham: It does not define but it says attorney's work product.

The Court: Have you a copy of that order?

Mr. Cunningham: Yes, sir.

The Court: I don't know whether I am in a position to make any ruling at this time unless I am informed what the Government has done in this regard.

Mr. Cunningham: Mr. Krane has advised me he has not made such reconstruction.

Mr. Krane: And I never so advised counsel. I said we were going to attempt to.

50 Mr. Cunningham: Whether such reconstruction will be admissible, we don't know that, but we are going to try to make an effort to try to so reconstruct.

Mr. O'Brien: You have a specific figure in the bill of particulars and I understood that that came from a reconstruction by Mr. Krane.

The Court: Counsel, I don't know that we are able to thrash out this matter now. Mr. Cunningham tells me that they haven't any such exhibit available, and when and if they will have it available and the nature of it and the circumstances of making up such exhibit is too indefinite to make any ruling on. I don't see how I can make any definitive ruling now on that. If and when the evidence obtained by the Government through their efforts in trying to reconstruct certain data is available, I assume that question will have to be presented, unless counsel have some other suggestion in that regard.

Mr. Cunningham: The only thing I know, once we make our effort I would be glad to advise defense counsel that we have or have not been able to so reconstruct, and then let him move at that time for consideration.

The Court: You see, you have two different situations. You have books and records of various types and character. Now they are made available to the defendants, we will say. You have made certain exhibits from
51 such books and records. Well, I say to the defendants, "You can do the same thing. Why capitalize on the work of the Government auditors?" That is one thing.

On the other hand, if you make up certain exhibits from certain unknown sources that you have access to and you are reconstructing data that are not available to the defendant, they don't know what you are utilizing. If we have ledgers and account books and checkbooks and what not and we make up certain data by way of clarification and simplification, sure I say to the defendant, "You do the same thing." But if you make up certain exhibits from certain intangibles that the defendants don't know what they are and you may be able to lay foundation when you get to court by reason of oral testimony or what not, but the defendants will have no opportunity of meeting that testimony without having the benefit of the reconstruction figures that you are going to introduce. Isn't there some merit to my observation as to the difference between these two situations?

Mr. Cunningham: And we intend to make all basic information available to them. As long as we are reconstructing those they will have the same opportunity to reconstruct from the basic evidence.

The Court: The so-called reconstruction that may be based on data other than books and records, re-
52 ferring to the Eatsum Company.

Mr. Cunningham: Eatsum partnership. That is my understanding. Isn't that true? Certain of the records have disappeared and we are going to attempt to reconstruct them based on the basic documents that are available and will be available to the defendants.

The Court: You say all of the basic documents are those which will be made available to the defendants?

Mr. Cunningham: That is correct.

The Court: Are you going to make or attempt to make reconstruction of other data which are not made available to defendants?

Mr. Cunningham: We are not.

The Court: Well, Mr. O'Brien has indicated part of those records have been destroyed.

Mr. Cunningham: We will use no data which will not be made available to the defendants. They can do the same job of reconstruction. I have always felt the Government should not supply them the results of their investigative information. They can go to the same source.

The Court: That has always been my view. No hardship is placed upon the defendant if they are afforded the same opportunity to make up exhibits and schedules and what not that is made available to the Government.

You may read Hickman versus Taylor many ways and
53 it will support many theories and I don't know that it lends much aid to us in this type of a situation.

I think all I can say to you now is this, Mr. Cunningham will make known to the defendants, if and when such reconstructed data has been accumulated either by counsel or by the Government auditors, and if and when that takes place I will afford counsel an opportunity to be heard.

Mr. Kirby: One reason why we are particularly anxious about it, Judge, is this. As these people have indicated, the transactions were very large and many of them are simply checks to cash. If all of the checks to cash were to be charged to these defendants, these were checks to cash that were cashed in New York. If all of those were charged to these, one looks just like another, but the total in this case would be enormous if none of them should be completely exculpated. Now, if one document looks like the other, each check being to cash and each check being cashed in New York; they are going to exercise power of selection which may or may not be sound. In order to be able to meet that type of a case—we will not be in a position to know what to meet. We need to know which ones do they say belong to us, and which ones belong to this case in New York. Where they are charging $900,-
54 000.00 to these hoodlums, these checks are going to be charged to one or the other, and we have to know which the Government is charging to us before we can take any defensive action.

The Court: To be entirely frank with you, I don't suppose I do comprehend your problem or the Government's problem.

Mr. Kirby: The man that makes decisions they are going to charge us with these things, we ought to be advised.

The Court: I have Mr. Cunningham's statement when and if such reconstructed data or exhibits have been devised or made up by the Government agents or the Government attorneys he will promptly notify you of that and you may make such motion in respect thereto as you desire and I then will come to Chicago and give counsel an opportunity to be heard.

Mr. Kirby: That relates to all the questions, is that right.

Mr. Cunningham: All the questions that are involved in this case.

Mr. Kirby: That is fine.

Mr. Cunningham: I might say this, although we use the basic material, there will be certain oral evidence of witnesses that will have to testify about the results of what we have determined.

55 The Court: I am afraid we will be doing nothing more than some shadow boxing now.

I certify the foregoing is a true and complete transcript of the shorthand notes taken by me at the above time and place.

/s/ Frank A. Massey
Frank A. Massey,
Official Court Reporter.

195 And on, to wit, the 12 day of December, 1952 there was filed in the Clerk's office of said Court a certain Certified Copy Of Order Of December 3, 1952, From The United States District Court For The District of Minnesota, Fifth Division, in words and figures following, to wit:

196

In the District Court of the United States
In and for the District of Minnesota
Fifth Division

Criminal Term Minutes December Term, A. D. 1952
Dec. 3, 1952

Wednesday morning:

Present: Honorable Gunnar H. Nordbye, Chief Judge.
(Before Nordbye, J.)

* * (Caption—No. 52 CR 143) * *

The above-entitled matter coming on this day for hearing on defendants' motion to dismiss, and on the affidavit of Gerome Leone, Assistant United States Attorney for the Southern District of New York, in which he moves for the continuance of 90 days on the subpoena for production of certain documents, and on the objections of defendants to the requests made in the affidavit of Gerome Leone, Arthur B. Cunningham, Special Assistant Attorney, appears for the plaintiff, Gerome Leone, Assistant United States Attorney, appears for the United States Attorney, Southern District of New York, and Messrs. Vincent O'Brien and William T. Kirby appear as attorneys for the defendants, and the following proceedings are had:

Said motions are argued by counsel for the respective parties, are submitted to, and are by the Court taken under advisement.

A true copy

Witness
Chell M. Smith, Clerk
Lawrence R. Tapper
Deputy Clerk

197 And afterwards, to wit, on the 24th day of December, 1952, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following, to wit:

198

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

ORDER

On presentation of withdrawal of appearance in the above-entitled cause and substitutions therefor:

It Is Ordered that the appearance of Edward J. Hess and Vincent O'Brien for the defendants, Byron A. Cain and Harold E. Sullivan, be and they hereby are withdrawn.

It is Further Ordered that the appearance of Thomas J. McConnell as attorney for Byron A. Cain, and of William T. Kirby for Harold E. Sullivan, be and they are hereby entered of record.

Enter:

Gunnar H. Nordbye
Judge

Dated: December 24th, '52.

199 And afterwards, on, to wit, the 26th day of December, 1952 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion, With Affidavit Of Vincent O'Brien, Attorney and Exhibits A, B and C; Affidavits of George D. Sullivan, Jr., John A. Lynch and John R. Christoph, Jr., Attached Thereto, in words and figures following, to wit:

200 * * *

201 IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

* * (Caption—52 CR 143) * *

MOTION

The defendants, by Vincent O'Brien, their attorney, move that the Court, pursuant to its inherent power and pursuant to Rule 48(b) of the Rules of Criminal Procedure, dismiss the indictment herein on the ground that because of plaintiff's noncompliance with the orders of the Court entered October 31, 1952, there has been unnecessary delay in the trial of the above-entitled cause; and in support of their motion they submit the affidavits of Vincent O'Brien, George D. Sullivan, Jr., and John A. Lynch and John R. Christoph, Jr. hereto attached.

202 In further support hereof, they adopt and by reference make a part hereof the motion filed by the

defendants November 24, 1952, and the affidavit attached in support of said latter motion.

The Shotwell Manufacturing Company,
Byron A Cain, Harold E. Sullivan,
and Frank J. Huebner,
By Vincent O'Brien
Their Attorney.

203 IN THE UNITED STATES DISTRICT COURT.
Northern District of Illinois,
Eastern Division.

* * (Caption—No. 52 CR 143) * *

State of Illinois }
County of Cook } ss.

AFFIDAVIT.

Vincent O'Brien, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendants in the above-entitled cause, and that he makes this affidavit in support of their foregoing motion for the dismissal of the indictment, and says:

1. That the subject matter of the orders entered by the Court on October 31, 1952, pursuant to defendants' mo' ons made under Rules 16 and 17 of the Federal Rules of Criminal Procedure, is indispensable to the conduct of the defense of this case, in that, as will more fully appear from the record of this cause, both the first and second counts of the indictment herein charge an attempt to defeat and evade a large part of the taxes due and owing by the defendant corporation by the filing of returns which allegedly understated the net income of the corpora-
204 tion for the years 1945 and 1946, and the plaintiff's bill of particulars avers that $177,146.23 of income for the year 1945 was unreported, and that such income resulted from the failure of the defendant corporation to record on its books and to report in its income tax returns for the calendar year 1945 the receipt of over invoice premium payments on sales of merchandise, which receipts allegedly were derived from Eatsum Food Products Co., a sole proprietorship, and its successor company, Eatsum Food Products Co., a partnership, both then located in New York City, New York. As to the year 1946,

said bill of particulars avers unstated income of $323,573.29 in its entirety allegedly to have resulted from the failure of the defendant corporation to record on its books and to report on its income tax return for the year 1946, the sum of $212,315.56 in over invoice premium payments on sales of merchandise allegedly received in part from General Confections, Inc., a corporation, in New York City, New York, and from Reserve Trading Corporation, New York City, New York, together with the sum of $111,257.73, allegedly received from General Confections, Inc., from unrecorded sales. That all of the books, records, papers and documents of said proprietorship and of said General Confections, Inc., are, and at the time of the entry of said orders were, in the possession of the plaintiff and that some of the documents and papers of Eatsum Food Products Co., a partnership, were at said time in the possession of the plaintiff, and that affiant was informed by an agent of the plaintiff, Mr. Sam Krane, of the Intelligence Unit, that the books and records of said partnership had been reconstructed by the plaintiff in the course of investigation preceding the return of the indictment in this proceeding. The inventory made by defendants' auditors of the items submitted to them previously in New York City pursuant to the Court's orders of October 31, 1952, did not include the books and records of General Confections, Inc., but affiant avers the fact to be that said books and records were surrendered to the plaintiff by or through the receiver of General Confections, Inc. early in the year 1949 in proceedings in the case of Harry M. Simon, Inc., a corporation, complainant, and General Confections, Inc., a corporation, defendant, in the Chancery Courts of the State of New Jersey, numbered 158-522; and that affiant was informed by the accountants for said General Confections, Inc. that the books and records of Eatsum Food Products Co., a sole proprietorship, then in his custody, were taken from his office by representatives of the plaintiff in the month of September, 1948, by Agents Twohig and Cordes.

Affiant avers that the figures set forth in the bill of particulars are based upon the books and records, papers and documents of the companies mentioned in the Court's orders of October 31, 1952, and that the witnesses, David G. Lubben, Beatrice Feldman, and Bernard Bercu, as will more fully appear from the depositions now on file with

the Clerk of this Court, show that the alleged premium payments are allegedly all carried into and made a part of said books and records of the respective companies, aforesaid, according to a set method and pattern by each of said witnesses described upon the said depositions. Defendants deny receipt of said payments as averred, and neither they nor affiant believe that said books, records, papers and documents reflect such payments, and that if they do, they were made long after the event, contrary to the facts and at the direction of the said David G. Lubben, for the purpose of avoiding payment of taxes for which he would be liable because of the large amount of cash charged to him upon the books and records of said companies. Although affiant in and about the preparation of this case for trial has procured, or has been furnished evidence tending to support the belief of him-
206 self and of the defendants, as aforesaid, it was and is essential that all of the items mentioned in said orders be made available as directed to enable the defendants to check them against such evidence and also to enable them otherwise to test the veracity and authenticity and accuracy of said records.

2. The data admittedly made available to the defendants through the United States Attorney and through Special Agent Sam Krane in Chicago early in the month of November, hereinafter mentioned, did not include any materials on Eatsum Foods Products Co., a partnership, and as to the remaining companies, consisted only of certain invoices, papers, documents, checks and partial ledger and journal sheets relating solely to Shotwell Manufacturing Company and to certain other persons or companies in Chicago, and did not include the books, records, documents and papers of the companies generally so as to enable the defendants to ascertain the amount of cash which was available to the said Lubben, the overall disposition of said cash, the supporting papers in reference thereto, nor the actual and original ledger and journal sheets for examination not only as to the overall picture, but as to their authenticity and validity. All of the items mentioned in said orders, with the exception of the narrow and limited portion made available in Chicago aforesaid, are in New York, primarily at the Intelligence Unit of the Bureau of Internal Revenue, and as to the residue, in the possession of Assistant United States Attorney

Leone in the United States Attorney's office for the Southern District of New York.

3. Affiant caused inquiry to be made of the United States Attorney at Chicago as to whether any of the papers in New York at the time of the entry of said orders were thereafter brought to Chicago, and was told that only eighteen or nineteen checks were so brought to
207 Chicago, of which copies were thereupon furnished to affiant's representative; but that no other items mentioned in said orders had been transferred from New York to Chicago since the date of the entry of said orders.

4. Affiant's letter of November 17, 1952 (Exhibit A to the defendants' motion filed November 24, 1952), as well as said motion itself, refers to certain items which plaintiff, under erroneous claim that they are work product within the meaning of the orders of October 31, 1952, was withholding from the defendants, and affiant avers that plaintiff continues to withhold said items; and also that although the orders of October 31, 1952, require that all evidence to be adduced by the plaintiff at the trial be furnished to the defendants by November 5, 1952, that that has not yet been done, because early in November of 1952, when Agent Sam Krane turned over the papers aforesaid, it was asserted, both by him and by the United States Attorney at Chicago, that there were other items, not then ascertained, which the Government would adduce in evidence at the trial; but affiant avers that since said time, such items, whatever they may be, have not been made available, but that only the said eighteen or nineteen checks, aforesaid, have been given to the defendants since.

5. That on Sunday, November 23, 1952, affiant mailed the motion of the defendants, aforesaid, filed November 24, 1952. On November 24, 1952, at 2:35 o'clock in the afternoon, Edward J. Ryan, First Assistant United States Attorney for the Northern District of Illinois, advised affiant that the Deputy Attorney General informed him that he had directed that the records in New York be made available for inspection to the defendants; that they would not be moved to Chicago, but that the defendants might proceed immediately to continue to or resume their inspection in New York, both in the Special
208 Agent's office and at the United States Attorney's office. Accordingly, affiant wrote the Honorable Gun-

nar H. Nordbye the letter attached hereto, marked Exhibit A, and made a part of this affidavit.

On the morning of November 25, 1952, affiant had George D. Sullivan, Jr. and certain of the accountants aforesaid in New York to inspect the items mentioned in said orders, but they were not made available and access was refused. Affiant, immediately on learning of such refusal, at 12:00 Noon, November 26, 1952, phoned the First Assistant United States Attorney and informed him, and was told by him that both Agent Twohig and Assistant United States Attorney Leone were in Washington in conference about the matter (notwithstanding the prior disposition by the Deputy Attorney General), and that the United States Attorney here was expecting a call from Mr. Rothwacks. Affiant informed the United States Attorney's office here that he had just received Judge Nordbye's order of November 25, 1952, and that, in view of the circumstances, he was considering writing the Judge or presenting a motion. Affiant avers that thereafter, at 4:15 P. M., Chicago time, he was informed by George D. Sullivan, Jr. that access according to the Court's order was still refused, except that Agent Twohig had phoned to say that it was all right to inspect the records in a certain room at the Special Agent's office, but none others—said records in said certain room being the same as those which they had seen briefly on their first visit on or about November 18, 1952, but there were no books and records contained amongst them or in that room. Thereupon, affiant wrote the Honorable Gunnar H. Nordbye the letter hereto attached as Exhibit B, and by reference made a part hereof.

6. On November 28, 1952, affiant personally conferred with Mr. Meyer Rothwacks, the Chief of the Criminal Tax Section of the Department of Justice, who in- 209 formed affiant that there had been conferences in Washington immediately prior to Thanksgiving day at which Mr Leone was present, and that, as a result thereof, compliance with the said orders had been directed. Affiant says that Mr. Rothwacks asked him if his representatives were in New York on Friday, the 28th of November, 1952, and affiant informed him that they were and that he had instructed them, notwithstanding the prior refusals, to go back and to endeavor to procure compliance.

On affiant's return to Chicago Friday night, he was informed by the said George D. Sullivan, Jr. and others of the matters set forth in their affidavits, also submitted in support of said motion and thereto attached; and he thereupon wrote the Honorable Gunnar H. Nordbye the letter of November 29, 1952, hereto attached as Exhibit C.

Affiant is advised by the defendants, and, therefore, represents the fact to be, that the expense incurred by them in and about the trips of the said lawyers and accountants to New York and Washington in an endeavor to proceed according to said orders of October 31, 1952, have necessarily exceeded the sum of $5,000., which is only a portion of the total expense which the defendants incurred in their preliminary investigations in respect of said books and records and in the taking of said depositions having to do primarily therewith and with their location and their general makeup as claimed by said witnesses, Lubben, Feldman ad Bercu—all of which expense has been completely without avail insofar as the ultimate end of the inspection and copying of said items is concerned.

7. That not withstanding the representations aforesaid of Mr. Rothwacks made on two different occasions, affiant has not been informed that the refusals and actions of the United States Attorney's office for the Southern District of New York have not been sanctioned by others in
210 the office of the Attorney General; nor has affiant been informed of any disciplinary action or effective action of any sort on the part of the United States of America to see that the Court's orders would in fact be complied with; and affiant avers that the said orders in respect of said papers are directed to the United States of America, and the said non-compliance exists not only through the United States Attorney for the Southern District of New York, but through the Bureau of Internal Revenue, which has refused to make items in its possession available. Affiant believes, and therefore states the fact to be, that the plaintiff desires to try the indictment returned against Giglio and others before any trial is had in this case, although said indictment was not returned until many months after the indictment in the case at bar, and although said case is not yet at issue, and that the United States Attorney for the Southern District of New York and, as affiant believes and therefore avers the fact

to be, some one or more of his superiors, and the Bureau of Internal Revenue, through its agents in New York, is wholly sympathetic to and cooperative with the plaintiff to that end. By its actions aforesaid, plaintiff is in effect endeavoring to procure or to force a postponement of trial in this case until the conclusion of the trial of the indictment which it returned against Giglio and others. In this connection, affiant avers that the said Giglio, formerly a partner of the said Lubben in Eatsum Food Products Co., a partnership, has been subpoenaed by the defendants in the case at bar as a material witness on their behalf, and that the defendants had also subpoenaed for physical production on the trial of this case all of the books, records, papers and documents of the companies aforesaid through subpoenas served upon the Attorney General of the United States, The United States Attorney for the Southern District of New York, and the Secretary of the Treasury of the United States.

211 8. That when this cause was set for trial for December 1st, the trial Judge stated that he would be unavaliable in January, and that he had an anti-trust case set for hearing during February; that the production of the voluminous records, aforesaid, at the trial itself without prior and adequate opportunity to the defendants to inspect and to analyze them, would be unavailing and would leave the defendants defenseless insofar as objective evidence is concerned. That by reason of the premises hereinabove stated, the plaintiff has not only manifested an unwillingness to comply with the orders, but its actions have made it impossible to try this case at any time that would accord with the Court's engagements, and that at the same time would adequately protect the defendants and would vindicate the dignity of the Court and its orders. At the same time, the defendants, subject to reasonable opportunity to prepare, are entitled to a speedy trial, but, under the circumstances, would be relegated to a trial no earlier than March of 1953.

9. That in respect of the defendants' activities and those of their counsel in and about the defense of this case and their endeavor to prepare for the trial which the Court set for December 1, 1952, affiant says:

(a) The indictment in the above cause was returned on, to-wit: March 14, 1952, and the cause assigned to the

Honorable John Peter Barnes, Chief Judge of the United States District Court for this District; that at that time Judge Barnes was absent from the jurisdiction and did not return until the middle of April, 1952. During this absence, no other Judge would hear motions in the case. There was a motion for a bill of particulars interposed March 24, 1952, before Judge J. Sam Perry, who entered and continued it to be heard before Judge Barnes. Judge Barnes, on his return to the City, through the United States Attorney, made an appointment with him and
212 with affiant, and informed them both that he had declared his unwillingness to sit in judgment in the case because of his long and favorable acquaintance with and his regard for the Honorable Philip L. Sullivan, brother of the defendant, Harold E. Sullivan, and that his colleagues felt the same way, and that he had, therefore, requested the Chief Judge of the Court of Appeals for the Seventh Circuit to assign a judge without the District, but that he had consented to hear certain motions which might be made. It was not until August 20, 1952, that affiant was informed of the appointment of a trial judge for the case, who, shortly thereafter, informed counsel for the parties that he would be in Chicago September 9, 1952, "to dispose of the matters which are set."

(b) Promptly, upon the return of Judge Barnes to the City, affiant presented, on April 16, 1952, a new motion for a bill of particulars which the Court set for disposition May 27, 1952, at which time said motion in all essential respects was granted. At the same time, affiant voluntarily represented to the Court that he would file by June 2nd a motion to dismiss the indictment which was and for some time had been in course of preparation. It was presented and filed June 2, and the plaintiff was ruled to answer by June 5th. Instead of answering, plaintiff demurred generally, and, thereupon, the defendants prepared their motion in writing for one hearing on their motion to dismiss, asking, on the basis of the suggestions supporting the same, that argument of the demurrer be deferred; that the Government join issue on such facts as might be controverted; and that a hearing be had thereon so that there would be an entire rather than a piecemeal record, and presented said motion, suggestions and supporting author-

ities June 13, 1952, on which day it was denied and the hearing on the demurrer set for June 19, 1952. An ex-
213 tensive brief was prepared and the matter was argued June 19 and 20, 1952, taken under advisement, and on June 23 it was decided,—the demurrer to the motion being sustained and the motion to dismiss overruled and denied, at which time, June 26, 1952, was set as the date for arraignment, and the defendants duly appeared and all pleaded not guilty. At the time of arraignment, the Judge announced (Transcript 143) that he was leaving for 10 weeks and would not be back until September. At the same time, he publicly stated in open court the request which he had previously made of the Chief Judge of the Court of Appeals, and continued the matter to September 9, 1952, then to be set for a future date for trial. At the time of the rendition of the opinion on the motion to dismiss, the United States Attorney had stated that he understood there were to be other motions. The Court asked what sort of motions, and affiant said: "It may well be, and undoubtedly will be, that at some time prior to the trial we will have a motion to suppress the evidence but that it is not in the chain of pleadings nor in the matters that are involved here." At the time of arraignment, the Court also said, speaking of the Chief Judge of the Court of Appeals: "He asked me to dispose of the preliminary motions, and I feel that I have done that."

(c) On July 1, 1952, this Court was in adjournment until September by reason of the summer vacation except for emergency matters.

(d) At all times in question, affiant believed (and with all respect to the Court, still believes) that the motion to dismiss the indictment on ground 3 was well founded, and that, therefore, no trial to the court or jury should be required. Indeed, Judge Barnes in his opinion (Transcript 129) stated that that point was urged with sincerity. Nev-
214 ertheless, as will hereinafter more fully appear, affiant and those associated with him have at all times been diligent in their attempts to prepare for trial.

(e) Due to the nature of the case and due to the unique circumstances of the case, as a practical matter, with one exception, there was no Judge to whom motions could be presented with any hope of disposition until the time of the appointment of the trial judge. Illustratively, the

Government's motion in respect of a subpoena *duces tecum*, presented during the summer vacation, was passed by two Judges and ultimately heard only when the trial judge was appointed. The one exception was defendants' motion for leave to take depositions—an emergent matter if any progress was to be made in the case. That motion was presented to the Honorable J. Sam Perry, and, as the record shows, decided August 11, 1952, after full argument, but disposed of finally only by order of the trial judge entered September 11, 1952, denying plaintiff's motion to vacate Judge Perry's order.

(f) Judge Perry's order required that notice for such depositions be given not later than September 10th. The reason for the allowance of thirty days beyond the date of his order was that the defendants were at the time of its entry, and had been since July 1, 1952, engaged in an investigation in the East in preparation for trial which was not yet concluded, although it had revealed many facts which they wished to preserve for the trial as against the unavailability of the witnesses in question. During the months of July, August and the early part of September, counsel working on such investigation resided in New York City for that purpose, and, among other things, endeavored to locate the books and records of Lubben and his companies, of primary materiality because of the averments contained in the bill of particulars in this cause. As far as such books and records are concerned, at the
215 end of each avenue of exploration they were always informed that they had been obtained by the Government through seizure or process. They also interviewed and took statements from many witnesses and potential witnesses. Affiant was thereby enabled to proceed with the said depositions and present the discovery motions filed on or about September 30, 1952. Since September 30, 1952, the said depositions have been concluded. In addition to the matters aforesaid, their conclusion required the establishment by agreement of an itinerary and a schedule, determination of the places at which said depositions could be held, the employment of counsel, and locating and subpoenaing of the witnesses as well as an outline of the subject matter for interrogation. Such depositions were noticed for New York, New Jersey, Florida, and Puerto Rico, and were taken in respect of witnesses at or from

those places. The taking and travel time ran from October 5 through October 14, 1952.

Said depositions have all been returned and are now on file in the office of the Clerk of this Court, and notice of that fact was heretofore given the United States Attorney.

10. At the same time that the said discovery motions for orders under Rules 16 and 17 of the Federal Rules of Criminal Procedure were presented, the defendants interposed their motion to suppress evidence, which was set for hearing November 12, 1952. Argument was had on the discovery motions October 17, 1952, and also on the motion for the production of certain items as requested in the motion to suppress evidence, which was taken under advisement, with the result that orders were entered October 31, 1952, pursuant to Rules 16 and 17, aforesaid, and also requiring the production at the said hearing of 216 November 12, 1952, of the items set forth in the motion to suppress evidence. The items to be produced at Chicago under the order made pursuant to Rule 17 were exhibited to the defendants and copied by them early in the month of November, 1952, on or about November 3rd, 4th and 5th.

In the meantime, affiant has caused auditors employed by the defendants to procure for him in his preparation for trial such data from the books and records of the defendant corporation as he desires, and he is assured by them that their work in that regard has been finished. From the time of the alleged disclosure in 1948 to some time late in the year 1951, the books and records of the corporate defendant have been under examination at the plant of the corporation by agents of the Bureau of Internal Revenue, and said agents during said period have made extensive and prolonged examinations of the books, records and papers of the Lubben companies situate in New York. But with all of the facilities and manpower at the plaintiff's command, it has not been able to complete its investigation because affiant avers that since the entry of this Court's order on or about September 9, 1952, for the production of the voluminous papers directed in the subpoena referred to in said order, anywhere from five to ten auditors or agents of the Bureau of Internal Revenue have been almost constantly at the plant of the corporate defendant engaged in further examination of said books, records and papers.

11. The inspection and copying of the papers mentioned in the orders of this Court is but one operation. When that is done, the copies must be separated into those which are relevant and those which are not, for it is not feasible to do that at the places appointed in the
217 orders; and then the accountants must study and analyze the same to arrive at a conclusion in respect of the averments of the bill of particulars and of the indictment as to moneys allegedly paid by or through said parties to the corporate defendant. Already, there are more than 5,000 items of microfilm copy and several hundred photostats so to be analyzed, and affiant is informed that the greater bulk of the material remains to be obtained in New York. Affiant is informed by defendants' auditors that it would require six to eight weeks of examination and analysis to do and t furnish such inspection and analysis in any way that w ald be complete and adequate for purposes of cross-examination of the Government witnesses and for defendants' defense, but that in three weeks they could provide affiant with a minimum study which would not be complete but which could be utilized to establish some, but not all, of the facts concerning said books, records, papers and documents required in the defense of the case, and affiant, with the approval of the defendants, rather than to request a continuance instructed said accountants to proceed on the latter basis.

12. Affiant has had the assistance of two lawyers in his firm and of four outside lawyers. During the months of April to October, inclusive, he himself has spent about 977 hours of time on matters to which he has given attention for all clients, of which 523 hours have been spent on this matter. No hours were spent on other matters at the expense of anything to be done in this case. His associates in his firm have spent during said months 455 hours in addition. Figures for the month of November are not yet available, but affiant avers that he has spent substantially all of his time during the month of November in and about this case, with the services on most days extending far beyond the usual business hours, and including Saturdays and Sundays as well. He does not know, since they
218 have kept no record, the precise number of hours spent by the four outside lawyers, but he does know and represents the fact to be that three of them have de-

voted their time almost exclusively to the requirements of this cause and have virtually abandoned any attempt to do any other work.

Vincent O'Brien

Subscribed and sworn to before me this 2nd day of December, 1952.

Alexander Newman
Notary Public.

(Seal)

219 EXHIBIT A.

November 24, 1952.

Honorable Gunnar H. Nordbye,
United States Court House,
Minneapolis, Minnesota.

In re: United States of America *v.* The Shotwell Manufacturing Company, et al.

Dear Judge Nordbye:

I just talked to Mr. Ryan, who advised me that the Deputy Attorney General has directed that the records in New York be made available for inspection according to your orders, but that they will not at this time be moved to Chicago.

Accordingly, I am sending my people back to New York to be there tomorrow morning to resume inspection. It is unfortunate that they would not consent that the records be sent here where we would have joint access and where the working conditions would be infinitely better and where all of the records would be in one place instead of three places to aid in the already difficult task of examining these voluminous papers. Also, the matter is complicated by the Thanksgiving Holiday.

This leaves pending the second part of the motion which I sent to you yesterday in which we ask a postponement equal to the time during which the records were not available to us under your order. Technically, your order provided that they be submitted November 5th. We were told it would actually take the Government agents until November 14th to sort and screen them and when our people got there on the 18th they were prevented from seeing them.

Everything considered, I should say that we are fairly entitled to a postponement of ten days, which would
220 still leave our accountants with a job that is physically impossible, in any way that we regard as adequate, to perform and which will not be of much help to us for use during the Government's case in chief.

We shall appreciate hearing from you at your earliest convenience so that we can correctly advise our witnesses.

Yours very truly,
Vincent O'Brien.

VOB:GM
CC: Mr. Otto Kerner, Jr.
United States Attorney,
Chicago.

221 EXHIBIT B.

November 26, 1952.

Honorable Gunnar H. Nordbye,
United States Court House,
Minneapolis, Minnesota.

In re: U. S. A. *v.* Shotwell Manufacturing Company, et al.

Dear Judge Nordbye:

In my last communication to you, I reported that we were then advised that the books and papers would be made available to us in New York. While we were all under that impression, you entered your order noting in the order that you were "notified by counsel for the defendants that the records which should have been made available to them under the orders of this court entered October 31, 1952, were now available for inspection at New York. • • •"

I regret to advise you that we have had a series of refusals of access to the items covered by the orders at the Treasury Department in New York, except that late this afternoon we were allowed into a room for a short time of perhaps two hours to inspect only what we had already seen, but with a prohibition against looking at any of the other items called for by the orders which were also there in other rooms in large volume. I have talked with Mr. Ryan and he has talked with Washington, but the results are, as I have indicated, wholly disappointing.

Recalling that you suggested on the hearing to Mr. Ryan that if telephone calls and letters did not work, a trip to Washington might get results, I made arrangements through the Attorney General for a conference in Washington Friday morning, November 28th.

If the situation is not worked out satisfactorily in Washington, it is my present intention to verbally advise
222 the Attorney General that I shall immediately return to Chicago, prepare a petition and travel to Minneapolis and appear with the petition before your Honor at your court there either on Monday or Tuesday for such relief as might be appropriate in the light of the facts by then developed.

I am sending a copy of this letter to Mr. Ryan.

Respectfully yours,
Vincent O'Brien.

VOB:GM

223 EXHIBIT C.

November 29, 1952.

Honorable Gunnar H. Nordbye,
United States Court House,
Minneapolis, Minnesota.

In re: United States of America *v.* The Shotwell Manufacturing Company, et al.

Dear Judge Nordbye:

Supplementing my letter of November 26, 1952, when Mr. Kirby and I were in Washington yesterday, we specifically took up with Mr. Myer Rothwacks the matter of the noncompliance with your orders of October 31st. He told us that they had been in conference in Washington on the matter immediately prior to Thanksgiving, and that as a result of that there would be compliance. It is only fair to add that Mr. Rothwacks told me that Mr. Leone, the Assistant District Attorney for the Southern District of New York, had been told to ignore any technical objections. It is necessary to add also, however, that I told Mr. Rothwacks that I didn't think there were even any colorably good technical objections. I remind your Honor, that my last motion made that point clear and showed the order to be applicable notwithstanding anything which had been said.

I also told Mr. Rothwacks that we had our people back in New York yesterday with what result I had not had time to find out. When I got home last night, I was told that access to all of the books and records themselves was again denied. There was a proffer of cases of invoices and correspondence and like items that were of no use to us until we first see what the books and records say. Our people were told that Mr. Leone's people from his office were working on the books and records and that we couldn't have them.

In this connection, I direct your attention to the fact that Mr. Leone is handling a suit against Giglio, Livorsey, Roth and Lawn in which the indictment was not returned until last September, and in which the time
224 for the filing of preliminary motions does not expire until December 15th or 16th as I am told, so that there can be no doubt that whatever they are doing is no excuse for noncompliance with the orders of your Court.

This is the third refusal which we have had of matter previously pointed out to be indispensable to our defense. In my humble judgment, no private litigant would be permitted so to disregard the orders of the Court, and I know of no law which places the plaintiff in any different position. The primary effect is to delay the trial of our case by keeping from us material indispensable to our case and thus to procure a continuance without asking for it and without any attempt to justify noncompliance with the Court's orders. Secondly, we have been, as you can see, put to great expense in sending people back and forth to New York and in paying them for their time and in communicating with your Honor and with others. Moreover, we had to call off subpoenas that were served and reserve others. No litigant, except the Government, can stand expense of that sort.

I see no solution in any way adequate to the situation by way of continuance; nor will the problem be solved merely by the production of these extremely voluminous records at the trial itself; nor will it solve anything for the Government to say that the records will now be available, for what assurance will either we or the Court have in the light of the three prior refusals, unexplained to the Court; nor do I intend to ask that this case be continued until next March.

In this situation, I do not presently know just what motion would be appropriate. If I did, I would send it on today. I shall consider the matter and present whatever I determine to be appropriate I trust not later than Wednesday morning, with appropriate affidavits to support what I have said. In the meantime, I feel that you are entitled to be advised.

Respectfully yours,
Vincent O'Brien.

VOB:GM
CC: Mr. Otto Kerner, Jr.

225

IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

State of Illinois }
County of Cook } ss.

AFFIDAVIT.

George D. Sullivan, Jr., being first duly sworn on oath deposes and says that he is an attorney licensed to practice law in the State of Illinois, and is assisting in the preparation of the defense in the cause entitled "United States of America *vs*, The Shotwell Manufacturing Company, et al."; and that pursuant to directions received from Mr. Vincent O'Brien, an attorney of record for the defendants, at about 5:00 P. M., on Monday, November 24, 1952 to immediately journey to New York City, together with the Chief Accountant employed for the defense, Mr. John A. Lynch, he procured airplane reservations for the evening of the same day, arriving in New York City at about the hour of 3:00 A.M., November 25, 1952; that at about 9:45 A. M., he telephoned James J. Twohig, Special Agent in Charge of such books, records and papers encompassed by the Court's order of October 31, 1952. Be-
226 ing informed that Mr. Twohig was not in his office, he left a message for him, and thereupon telephoned Assistant United States District Attorney Leone immediately thereafter. Upon being informed that Mr. Leone was also not in his office, affiant also left a message, and immediately left his hotel and proceeded to the Office of the

Special Agent in Charge of the Intelligence Division, 253 Broadway, New York City, arriving at about the hour of 10:30 A. M. Presently Special Agent Paul Mann came into the ante-room and introduced himself, stating that Agent Twohig was in Washington, D. C., with Assistant United States Attorney Leone, having left just the night before; that since Agent Twohig was in personal charge of the books and records which affiant sought to inspect and examine, and since Agent Twohig was the only person who could properly identify and separate such records, and since Agent Twohig had left no instructions, Agent Mann told affiant, who was accompanied by Mr. John A. Lynch, to return the following day. Affiant protested that the delay involved would seriously jeopardize the preparation of the defense and, more so, since Agent Mann was unable to definitely say that Agent Twohig would be in his office the following day. Thereupon Agent Mann asked Assistant Group Chief Edelman to explain further to affiant and Mr. Lynch. Assistant Group Chief Edelman again stated to affiant that Agent Twohig was the only man in the Office of the Special Agent in Charge of the Intelligence Division who knew exactly where to find the books and records which affiant sought, and that since Agent Twohig was in Washington, D. C., neither he, Edelman, nor Mann, wished to take the responsibility of delivering such books and records to affiant.

Affiant inquired if Agent Twohig was a member of the Group, of which he, Edelman, was the Assistant Group Chief. Edelman stated that he was, and that Agent Mann was working on "other aspects of the case" and,
227 therefore, could not properly segregate, separate and identify such records as affiant sought.

Affiant stated that he was seeking to inspect such books and records by virtue of the Order of Court entered October 31, 1952, as aforesaid. Assistant Group Chief Edelman stated that he was aware of this fact, and suggested that we confer with First Assistant United States Attorney Joseph Martin, in charge of the Criminal Division of the United States District Attorney's Office for the Southern District of New York, insomuch as Martin had exclusive jurisdiction of the subject matter because of another criminal cause then pending in the Southern District of New York having to do with the same books and records, or at least a great part of them.

Affiant offered to telephone Assistant Group Chief Edelman within a few hours, during which time Edelman would have an opportunity to identify such books and records above referred to. Edelman replied "I can't help you" unless he received specific instructions from Assistant United States District Attorney Joseph Martin.

Edelman stated to affiant that possibly Mr. Martin might telephone Washington, D. C., to talk with Agent Twohig.

Affiant stated to Agent Mann, after Assistant Group Chief Edelman had left the waiting room, that affiant arrived as soon as possible from Chicago, Illinois, after receiving directions the previous day, and that affiant had arrived at his hotel at about 4:00 A. M., November 25, 1952. Agent Mann replied "Yes, I understand, hours are now important".

Affiant immediately proceeded to the office of Assistant United States District Attorney Joseph Martin, arriving at the hour of 11:30 A. M., and was admitted to Mr. Martin's office at 11:55 A. M.

Affiant informed Mr. Martin of the purpose of his 228 visit and of what had transpired that morning at the Office of the Special Agent in Charge of the Intelligence Division of the Internal Revenue Bureau. At 12:02 P. M., Mr. Martin, in affiant's presence, telephoned Assistant Group Chief Edelman and informed affiant that Edelman had gone to lunch, and that he had asked for Mr. Edelman's Group Chief, one O'Donnell, and had been informed that he also had gone to lunch. Leaving word for Edelman and O'Donnell to call him upon their return from lunch, Mr. Martin asked affiant to return to his office at 1:00 P.M.

Mr. Martin stated to affiant and to Mr. John A. Lynch that he was aware of a three-way telephone conversation which had taken place the previous day between Assistant United States Attorney General Malone in Washington, D. C., Assistant United States District Attorney Leone in New York City, and Assistant United States District Attorney Ryan in Chicago, Illinois, and that as a result of said telephone conference, it was decided by the three men that representatives of The Shotwell Mfg. Co., would be allowed to examine and inspect such papers pursuant to the order entered, as aforesaid. Mr. Martin further stated to affiant that the representatives were entitled to see the records and papers described by the order, as aforesaid,

"without doubt". He further stated that he understood that the records involved were quite voluminous.

Affiant further stated to Mr. Martin that he had been informed by Agents of the Internal Revenue Bureau that the United States District Attorney for the Southern District of New York had exclusive jurisdiction of the subject matter.

Affiant further stated that he, together with Mr. John A. Lynch, wished to be permitted to inspect records, both at the Office of the Agent in Charge of the Intelligence Division of the Internal Revenue Bureau at 253 Broad-
229 way, New York City, and also those records which he had been informed by Agents of the Treasury Department were in the possession of Assistant United States District Attorney Leone, who was a member of Mr. Martin's staff. Mr. Martin stated to affiant that he would instruct the Agents of the Internal Revenue Bureau to comply with the Court's order aforementioned, and that such books and records as were at that time in his office would be delivered to affiant for examination as soon as an Agent of the Internal Revenue Bureau, familiar with the said records, could be made available to assist affiant.

Affiant returned at 1:15 P. M., together with Mr. John A. Lynch, to Mr. Martin's office and informed Mr. Martin's secretary of his presence. At 2:15 P. M., affiant was introduced to Special Agent James King, who accompanied affiant in an inspection of such papers as were made available to affiant at the United States District Attorney's Office.

Affiant, together with Mr Lynch, took an inventory of such papers, both in the Office of Assistant United States District Attorney Leone, and in another storage room in the suite of offices occupied by the Criminal Division of the United States District Attorney's Office. While affiant found no books of account of any of the companies' partnership or corporations mentioned in the Order of October 31, 1952, as aforesaid, he was shown approximately 75 transfer file cases containing approximately 300,000 documents such as sales slips, bank reconciliations, purchase orders, accounts receivable, slips and the like, which affiant inventoried. Affiant completed this work in about 5½ hours leaving the office of the United States District Attorney at about the hour of 7:45 P. M., and informing Special Agent King that he or his Chief Accountant Mr.

Lynch, would appear at the Office of the Agent in Charge of the Intelligence Division, at the opening of office hours on the following day to continue with such inventory and examination.

230 On the following day, having been informed by John A. Lynch that he had been denied access to the books and records contained in the Office of the Agent in Charge upon his arrival at such office, affiant immediately journeyed to the Office of the Agent in Charge, and requested an interview with the Agent in Charge, a Mr. Latham. Being informed that Mr. Latham was out of town, affiant requested to see the next senior officer present, Mr. Francis Kennedy. Being informed that Mr. Kennedy had left the office for the day, affiant asked to see the next senior officer present, and was presently admitted and introduced to Mr. Charles Doberman. After affiant informed Mr. Doberman of the difficulties he had encountered in seeking compliance with the Court's order, as aforesaid, both upon his visit of the previous week and upon his present visit; Mr. Doberman, at 1:30 P. M., called a conference between Group Chief O'Donnell, Assistant Group Chief Edelman, himself and affiant. Affiant states that he further protested to the three officers of the Internal Revenue concerning the treatment he had received, and that because of such denials and refusals, the defendants had been unable to properly prepare their defense, and that such refusals were contumacious and unreasonable, but that, nevertheless, affiant, together with accountants designated by the defendants, stood ready to continue with the examination.

Assistant Group Chief Edelman stated that 20 minutes earlier he had received an order personally from Assistant Agent in Charge, Kennedy, not to allow representatives of the defendants to see any records or papers then in the custody of the Intelligence Division in New York City.

Mr. Edelman further stated to affiant that Mr. Kennedy had informed him that the order which he was transmitting to him had been received by him from Washington, D. C.

231 Mr. Edelman further stated to affiant that it was his general information, further, that the Attorney General of the United States intended that very afternoon to give his personal attention to the matter and that until this had been done, the Intelligence Division in New York

City could not act or, as he put it, "our hands are tied".

Affiant stated to the three Agents that this information was contrary to that which he had received the previous day from Assistant United States Attorney Joseph Martin, and the further information which he had just received from Agent Doberman, who had stated to affiant that Mr. Martin, as head of the Criminal Division of the United States District Attorney's Office for the Southern District of New York, had exclusive jurisdiction of the subject matter, because of a "companioned case" entitled "United States *vs.* Giglio, *et al.*" then pending in the Southern District of New York.

Affiant stated that he had been misled by Mr. Edelman the previous day when Edelman stated to him that the only reason such books and records at the Office of the Intelligence Division were not being made available to the defendants' representatives, was because Agent Twohig was not present and that he, alone, could properly designate and separate such papers and books.

Affiant requested of Mr. Doberman that he telephone Washington, D. C., to ascertain whether or not a practical solution could be had. This, Mr. Doberman declined to do, stating that he, however, could not prevent affiant from telephoning, if affiant thought it necessary. In concluding the conference, Mr. Doberman suggested that affiant again visit Mr. Joseph Martin to inform him of what had transpired.

Affiant arrived at Mr. Martin's office within 10 minutes, to-wit, at about 2:00 P. M., and was admitted to Mr.
232 Martin's private office at about 2:30 P. M. Affiant informed Assistant United States District Attorney Martin of what had transpired, particularly the refusals and of the reasons that had been assigned for the said refusals. Mr. Martin replied to affiant "that's not true". Mr. Martin telephoned Mr. Doberman in affiant's presence and stated to Doberman that he had just talked with United States Attorney Leone in Wasihngton, D. C., and that because of such telephone conversations defendants' representatives were to be allowed to examine the books and records without further delay.

Mr. Martin stated to Mr. Doberman, in his telephone conversation in the presence of affiant, that he, Martin, would take full responsibility which might be occasioned by the turning over of the records then in the Office of the

Special Agent in Charge of the Intelligence Division, and that he, Martin, would so inform any other person in that office, in addition to Mr. Doberman, of his intention so to do. Mr. Martin informed affiant that Mr. Doberman had requested a short time to confer with his superiors, and that he would telephone him within a few minutes.

Affiant then stated that the continuous refusals and vacillations which he had encountered were seriously jeopardizing the defendants' ability to properly prepare their defense, both for the purposes of their case in chief, but also in view of the trial date set by the Court, of their ability to properly cross-examine witnesses presented by the Government in their case in chief. While affiant was so speaking, Mr. Martin interrupted him and asked if he would wait in his outer office until he had received the return telephone call from Mr. Doberman, insomuch as Mr. Doberman "did not want to take the responsibility".

At about 3:15 P. M., affiant was again called in to Mr. Martin's private office and Mr. Martin stated that he
233 was then speaking to Mr. Doberman on the telephone. Mr. Martin stated that he had no jurisdiction over the Treasury Department and that he had no authority to order them to do anything. Affiant stated that this was contrary to information affiant had received directly from Assistant Group Chief Edelman, and also Assistant Agent in Charge, Doberman, on several occasions. Mr. Martin replied to affiant that such statements were incorrect, and that affiant could so inform the Agents of the Treasury Department. Affiant stated to Mr. Martin that he was immediately returning to the Office of the Intelligence Division of the Internal Revenue Bureau.

A short time later, at approximately 3:45 P.M., affiant again appeared at the Office of the Agent in Charge of the Intelligence Division in the company of a Certified Shorthand Reporter, one Garfield Silverstein, and was admitted to the office of Mr. Doberman. Mr. Doberman stated to affiant that he would make no statement which could be taken down in shorthand by the Certified Shorthand Reporter, but that he had just received word from Agent Twohig by long distance telephone in Washington that defendants' representatives could be shown only such books and records as were located in one of the rooms occupied by the Intelligence Division, and that Agent Twohig would return to his office on Friday, November 28, 1952,

at which time all books and records would be made available to affiant or other representatives of the defendants.

Thereupon, affiant was taken to a room which contained various records which affiant immediately recognized as those which he had seen on his visit the previous week prior to the time defendants' representatives were asked to leave the office of the Agent in Charge of the Intelligence Division.

Affiant offered to work that night, to-wit, the evening
234 of November 26, 1952, and also the following day and evening, November 27, 1952. Mr. Doberman stated that he would not order any Agent in his office to work with affiant on Thanksgiving Day, but that if any Agent volunteered to, he would see to it that compensatory time off be given to said Agent. A short time later Mr. Doberman informed affiant that he had inquired for a volunteer but that no one in his office had done so.

Affiant stated to Mr. Doberman that the books and records presently in the room which he had been shown appeared to be the same records that affiant had seen the previous week, but that affiant would make an inventory of such records at that time and would return to continue his examination on Friday, November 28, 1952. Mr. Doberman replied to affiant that he would instruct Agent Twohig on Friday to assist the representatives of the defendants in sorting from the great number of documents then in his office as such representatives might request, and that further he would assign an Agent from his department to work with defendants' representatives on Saturday, November 29, 1952, in continuing their examination of the books and records. At about the close of office hours, namely at about 5:00 P. M., after affiant had confirmed his impression that the books and records then in the room assigned to him were the same records which he and his accountants had been shown the previous week prior to being requested to cease their examination, affiant left the Office of the Agent in Charge of the Intelligence Division.

On Friday, November 28, 1952 affiant was informed by one John Christoph, an accountant assigned to assist affiant in the preparation of the defense of the cause now before the Court, that he had journeyed to New York and had asked Group Chief O'Donnell, at the Office of the Intelligence Division of the Internal Revenue Bureau, to per-

mit him to examine such books of account of the vari-
235 ous companies, partnerships and corporations as are named in the Order of October 31, 1952, but that in reply he was directed to the Office of Assistant United States District Attorney Leone in the Federal Court House, Foley Square, New York City.

Affiant further states that Mr. Christoph informed him that Mr. Leone and Agent James Twohig, who was at that time in Mr. Leone's office, refused his request, stating that he would not be permitted to examine the said books of account until December 3 or December 4, 1952, because the Agents of the Intelligence Division were at that time working on them.

Affiant further states that he was informed by Mr. Christoph that at that time he, Mr. Christoph, offered to work the evening of Friday, November 28, 1952 and Saturday, November 29, 1952, on such books and records, but that Assistant United States District Attorney Leone refused such offer, stating that the Office of Intelligence Division was closed in the evenings and also on Saturdays and Sundays.

Further affiant saith not.

George D. Sullivan, Jr.

Subscribed and sworn to before me this 2nd day of December, A. D. 1952.

Alexander Newman
Notary Public.

(Seal)

236

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * * *

State of Illinois, } ss.
County of Cook, }

AFFIDAVIT.

John A. Lynch, being first duly sworn, on oath deposes and says that he is a Certified Public Accountant with offices at 231 South LaSalle Street, Chicago, Illinois, and that he was heretofore engaged by Vincent O'Brien, one of the counsel for The Shotwell Manufacturing Com-

pany and others in case pending in the United States District Court for the Northern District of Illinois, Eastern Division, entitled United States of America *vs.* The Shotwell Manufacturing Company, et al., No. 52 Cr. 143, to examine and analyze certain books, records, papers and documents required in the defense of said case, including those mentioned in the orders entered by the Court in the above-entitled cause October 31, 1952, pursuant to motions of the defendants under Rules 16 and 17 of the Federal Rules of Criminal Procedure, and that he makes this
237 affidavit in support of the foregoing motion of the defendants to dismiss the indictment pursuant to Rule 48 (b) of the Federal Rules of Criminal Procedure.

Affiant avers:

1. That at the request of said Vincent O'Brien, accompanied by George D. Sullivan, Jr., he went to New York City, New York on the night of November 24, 1952, and arrived there early in the morning of the 25th of November, 1952, and that the occurrences which transpired on the 25th day of November, 1952, are as set forth in the foregoing affidavit of George D. Sullivan, Jr.

2. That on Wednesday, the 26th day of November, 1952, at the hour of 9:30 in the forenoon, affiant contacted Group Chief O'Donnell of the Special Intelligence Unit of the Treasury Department, 253 Broadway, New York City, and asked permission to examine the books, records, papers and documents at said office mentioned in said orders; that Mr. O'Donnell advised him that all files in connection with the case were under lock and key and that James Twohig, Special Agent, had the key; that there were many cases, numerous books and records and that he did not know one from the other and further did not know what books and records were desired. Affiant then advised Mr. O'Donnell that he could identify the books and records, but Mr. O'Donnell still stated that he was unable to accommodate affiant, but stated that he would have to await the return of James Twohig from Washington, D. C. with Assistant United States Attorney Jerome Leone. Mr. O'Donnell stated to affiant that he could remain in the reception room and await Mr. Twohig's return in a couple of hours or his return in the evening of that day. As an alternative, Mr. O'Donnell suggested contacting Special Agent Lathem.

3. Affiant attempted to contact Special Agent in
238 Charge Lathem, but upon ascertaining that Mr. Lathem was out of town, the said affiant contacted Assistant Special Agent in Charge Francis Kennedy, who told him that he could not give anything to him unless Assistant United States Attorney Leone directed his office to do so.

4. On being advised that Assistant United States Attorney Joseph Martin, in charge of the Criminal Division, had personally contacted Group Chief Edelman on the previous day, Kennedy stated that order applied only to data in the United States Attorney's office. Mr. Kennedy then telephoned Group Chief O'Donnell in regard to Assistant United States Attorney Martin's conversation, following which he refused to authorize affiant's examination of the books and records and referred affiant back to Group Chief O'Donnell for the reasons for the refusal.

5. Affiant returned to Group Chief O'Donnell's office, where Mr. O'Donnell reiterated his previous conversation with affiant and suggested that affiant remain in contact with the office throughout the day to be appraised of Special Agent Twohig's return, at which time the matter would again be considered.

6. At 1:05 P. M. affiant contacted the Treasury Department and conversed with Assistant Group Chief Edelman, who forthrightly stated that Special Agent Twohig had called Assistant Special Agent in Charge Francis Kennedy from Washington, D. C., and they had discussed the matter, and as a result of that conversation, Edelman stated that he refused access to the records upon the advice of the said Kennedy.

7. That on Thanksgiving Day, affiant was in Chicago and received directions from George D. Sullivan, Jr. to have someone from his staff in New York at the opening of business on the morning of Friday, the 28th day of November, 1952. Accordingly, affiant directed Mr. John
239 R. Christoph, Jr. to go to New York for the purpose of renewing demands for access to and inspection of said books, papers, records and documents.

John A. Lynch

Subscribed and sworn to before me this 2nd day of December, 1952.

Alexander Neuman
Notary Public.

(Seal)

240

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois,
Eastern Division

• • (Caption—No. 52 CR 143) • •

State of Illinois, }
County of Cook. } ss.

AFFIDAVIT.

John R. Christoph, Jr., being first duly sworn, on oath deposes and says that he is a member of the staff of John A. Lynch & Co., Certified Public Accountants, with offices at 231 South LaSalle Street, Chicago, and that he makes this affidavit in support of the foregoing motion of the defendants to dismiss the indictment.

Affiant avers:

1. That at the hour of about 4:00 o'clock in the afternoon, on Friday, the 28th day of November, 1952, at the direction of John A. Lynch, he called upon Special Agent James Twohig at the Intelligence Unit, 253 Broadway, New York City; that Twohig was out and he contacted his Group Chief O'Donnell, who got in touch with Mr. Twohig at the United States Court House by telephone in his presence, and that Mr. O'Donnell suggested that
241 affiant see Mr. Twohig who was then at the office of the Assistant United States Attorney Leone at the United States Court House.

2. That affiant thereupon went over to the United States Court House to see Mr. Twohig; that he went into the Assistant United States Attorney's office where Mr. Twohig was present; that he said he wanted to examine the books and records of the companies mentioned in the orders of the court entered in the above cause on October 31, 1952, and that Mr. Leone advised affiant that the Special Agents in the Intelligence Unit were working on the books and records and would not be through with them until Thursday, December 4, 1952, but Mr. Leone said that affiant could examine certain documents and papers in the United States Attorney's office but not any books and records or any other papers which were over at the Intelligence Unit. Affiant avers that the documents and papers so proffered for examination at the United States Attorney's office were the same a those which Mr. John

A. Lynch had already seen and did not contain any books or records of any of the companies mentioned in said order.

3. Affiant further avers that as to the books, records, papers and documents at the office of the Intelligence Unit, although he was then denied access to all of them, both he and the said John A. Lynch were and at all times had been desirous of examining first the books and records themselves to determine the entries in which they might be interested before looking at the supporting invoices and other documents and papers.

4. Affiant further avers that before such final refusal affiant requested that he be permitted to work on the books and records at the Intelligence Unit Friday night and Saturday and Sunday, and told said Special Agent Twohig and Assistant United States Attorney Leone that
242 he was prepared to do so, but the said Leone would not permit any examination until their own examination should be completed.

John R. Christoph, Jr.

Subscribed and sworn to before me this 2nd day of December, 1952.

Alexander Neuman
Notary Public.
(Seal)

243 And on the same day, to wit, on the 26th day of December, 1952, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

244

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER

This cause came on to be heard on December 3, 1952, on the motion of the defendants for an order dismissing the indictment herein upon the grounds that because of plain-

tiff's non-compliance with the orders of this Court entered October 31, 1952, there has been unnecessary delay in the trial of the cause. There also was presented at that time the oral motion of the plaintiff for the continuance of the trial of this action from December 9, 1952, to a date to be fixed by the Court not less than 90 days from the date of this hearing. The Court at the conclusion of the hearing announced that the motion for dismissal would be denied and that the motion for continuance would be granted, but that a formal order herein would be entered as soon as a transcript of the proceedings was available.

Mr. Arthur B. Cunningham, Special Assistant Attorney General, Washington, D. C., appeared in behalf of plaintiff;

Mr. Gerome J. Leone, Assistant United States Attorney, Southern District of New York, New York City, with the consent of Court filed an affidavit herein and was heard orally;

Mr. Vincent O'Brien and Mr. William T. Kirby, of Chicago, Illinois, appeared in behalf of the defendants.

245 The defendants in their motion set forth in considerable detail the difficulties which they have encountered in obtaining for inspection certain records in the possession of the United States Attorney for the Southern District of New York and in possession of the office of the Treasury Department in the City of New York. The records consist of various items of books, papers and documents allegedly obtained by the United States by seizure or by process from David C. Lubben, Eatsum Food Products Company, a sole proprietorship, Eatsum Food Products Company, a partnership, General Confections, Inc., Reserve Trading Company, and perhaps others, and which are now in possession of the plaintiff and are subject to the orders of this Court, entered on October 31, 1952, pursuant to Rules 16 and 17, Federal Rules of Criminal Procedure. No doubt some of the confusion and delay which has resulted in complying with the orders of this Court has been due to the fact that so many of the records subject to the Court's order are not located in the Northern District of Illinois, and hence the United States Attorney in charge of this case, as well as the Special Assistant Attorney General assigned to try

the matter, have had to depend upon other agencies of the Government for expeditious and helpful cooperation. And then there is an apparent reluctance upon the part of some of the government officials and agencies to recognize that when the Government is involved in litigation, criminal and civil, it is subject to all valid orders of the Court in the same manner and to the same extent as a private litigant. But, in addition to these circumstances, there does appear a substantial reason why the inspection by the defendants of some of the books and records subject to this Court's orders and located in New York City should be deferred. There is pending in the Southern
246 District of New York certain criminal proceedings, consisting of six indictments charging various violations of the Internal Revenue Code and a conspiracy in violation of Section 371, Title 18, U. S. Code, against William Giglio, Louis J. Loth, Frank Livorsi, Howard Lawn, and American Brands Corporation. Some of the books and records located in New York City now subject to this Court's order under Rules 16 and 17 and subject to subpoena duces tecum, issued by the defendants in pursuance of such orders, are vital to the Government in the trial of these matters pending in the Southern District of New York.

By reason of the pendency of the New York proceedings and the unsavory character and reputation of some of the defendants involved therein, it seems not only impractical but of doubtful wisdom to permit defendants in the Shotwell case and their agents access to these particular records at this time when the United States Attorney for the Southern District of New York is utilizing and safeguarding such records in connection with the prosecution of the New York defendants. The circumstances surrounding the New York proceedings would suggest the propriety of deferring any examination of such records by the defendants herein until after the New York trial has been completed, if that trial can be held and terminated within a reasonable time. It was made to appear to the Court that the proceedings in the Southern District of New York will be called for trial in January, 1953, and would last some three weeks.

The trial of the Shotwell case was first set for December 1, 1952, and then, by reason of the delay that the defendants encountered in obtaining access to the records in

New York, the matter was, at the defendants' request, continued until December 9, 1952. The Government now moves that, on account of the practical difficulties in making available to the defendants certain of the records
247 in New York City by reason of the imminence of the trial in the New York proceedings, the trial of the Shotwell case should be continued for some 90 days. Defendants object to a continuance although they recognize that they are not ready to proceed to trial until they have been accorded an opportunity to examine the records located in New York. They contend, and they urge, that this matter should be dismissed under Rule 48(b), Federal Rules of Criminal Procedure, by reason of the fact that, due to the delay of the Government in responding to the Court's order of October 31, 1952, they have been denied a speedy trial. But the exigencies and complications confronting the Government seem to justify the granting of its request that it be accorded a reasonable time to complete the New York proceedings before access to certain of the books and records located in New York City be granted to the defendants. It does not appear that the requested delay will deprive the defendants herein of any evidence in meeting the charges contained in the indictment against them, nor does it appear that any of their rights in that regard will be impaired by a reasonable continuance. It is to be regretted that there is this conflict between the pendency of these two proceedings, and although the indictment in the Shotwell case was returned before the indictment in the New York proceedings, it is the Court's opinion that, in view of the unusual circumstances surrounding the New York proceedings, that trial should be given precedence at this time. Obviously, if there is a protracted delay in the trial of the New York case, the defendants in this proceeding should not be deprived of access to evidence necessary to enable them to prepare for a reasonably early trial.

It follows, therefore, from the premises that the motion of the defendants to dismiss the indictment against
248 them pursuant to Rule 48(b), Federal Rules of Criminal Procedure, must be denied. It is so ordered. An exception is allowed.

The motion of the Government for a continuance is granted, and the trial of the above matter is continued from December 9, 1952, to April 6, 1953, at ten o'clock A. M. It is so ordered.

At the hearing of these motions, it was stated to this Court by counsel for the plaintiff that only a part of the books and records located in New York City are vital to the trial of the New York case and that the balance of the records, documents, etc., subject to the Court's order of October 31, 1952, are available for inspection by defendants' attorneys and agents at any reasonable time. Moreover, it was represented to the Court by counsel for the plaintiff that the books and records which will be used in the New York case or in preparing for that trial will likewise be made available to the defendants' attorneys and agents for inspection a reasonable time before the continued trial date herein regardless of whether the New York case is concluded. In accordance with that understanding and stipulation, it is ordered: That as to the books, records, etc., subject to the Court's order of October 31, 1952, and which are now in possession of the United States Attorney for the Southern District of New York or of the Treasury Department located in the City of New York or in possession of other agencies of the Government, and which are to be used in the trial or in preparing for the trial of the New York case, examination of such records by the defendants, their attorneys and agents, by subpoena or otherwise, be deferred until March 9, 1953, or until such earlier date which may be agreed upon between counsel for the parties herein. Except as
249 stated herein, the orders of this Court of October 31, 1952 are unmodified.

Enter:

Gunnar H. Nordbye

Gunnar H. Nordbye
United States District Judge
Northern District of Illinois.

Dated this 26th day of December, 1952.

250 And afterwards, to wit, on the 29th day of January, 1953, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit: Order With Memorandum Attached Thereto:

251

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

ORDER

This matter having come on to be heard upon the motion of the defendants for the entry of an order pursuant to Rule 16 of the Federal Rules of Criminal Procedure directing the United States of America and the attorneys for the Government to permit the defendant, their agents and attorneys, to inspect and copy or photograph books, papers, documents or tangible objects obtained by the Government by seizure or by process from General Commercial Acceptance Company, New York City, New York, and it appearing to the Court that such items may be material to the preparation of the defense;

It Is Ordered, that the United States of America and the attorney for the Government, permit the defendants, their attorneys and agents to inspect and to copy, photograph or photostat the books, papers, documents or tangible objects obtained from or belonging to General Commercial Acceptance Company, New York City, New York, pertaining to Eatsum Food Products Co. and General Confections, Inc., including, without limitation of the generality of the foregoing, four drawers of card index
252 records summarizing information in regard to accounts receivable of said Eatsum Food Products Co. and General Confections, Inc., which at some undisclosed time prior to January 19, 1953, were taken by Government agents of the Bureau of Internal Revenue from General Commercial Acceptance Company, New York City, New York.

It Is Further Ordered that all of the said books, papers, documents, records and tangible objects, including said four drawers of card index records, shall be made so available at the office of the Intelligence Unit of the Bureau of Internal Revenue in New York City, New York (or at such other place as they may be located), beginning on the 9th day of February, 1953, and from day to day thereafter (except Saturdays, Sundays and Federal holidays), during the usual hours of business on each day, until said inspection and copying shall have been completed. The

plaintiff and the attorney for the Government shall permit the removal of such of said books, papers, documents, or tangible objects as the defendants, their agents or attorneys, shall desire to be copied in the form of photographs, photostats or microfilm; and to that end, shall appoint a custodian to accompany the defendants, their agents or attorneys, who shall see that the items to be photographed, photostated or microfilmed are kept intact and returned to said office.

And this matter further coming on to be heard upon the motion of the defendants for the entry of an order amending the order entered by this Court on October 31, 1952, pursuant to the prior motion of the defendants under Rule 16 of the Federal Rules of Criminal Procedure; and it appearing to the Court that said order of October 31, 1952, remains in full force and effect by virtue of the Court's order of December 26, 1952;

It Is Ordered, that the United States of America
253 and the attorneys for the Government, on or before the 10th day of February, 1953, produce for inspection and copying by the defendants, their agents and attorneys, the books, papers, documents or tangible objects in its possession obtained by seizure or by process from David G. Lubben, Eatsum Food Products Co., a sole proprietorship, General Confections, Inc. and Reserve Trading Company, not including such books, papers, documents, or tangible objects which are to be used in connection with the criminal cases referred to in the Court's order of December 26, 1952, and which are now pending in the Southern District of New York, at the office of the United States Attorney for the Northern District of Illinois, in the United States Court House, Chicago, Illinois; and that when said items are so produced, the parties to the above-entitled cause, their agents and attorneys, be permitted to joint access thereto.

Enter:

Gunnar H. Nordbye
Judge.

Dated: January 29, 1953.

254 MEMORANDUM

Defendants have no unqualified right to have books, records, etc., subject to examination under Rule 16 of the

Federal Rules of Criminal Procedure, transported for their convenience for the purpose of inspection or copying. However, in view of the delays in affording the defendants an opportunity to inspect the documents in question, and the expense to which defendants have already been subjected in connection therewith, it seems that the requested order of the defendants for the transportation of the documents from New York to Chicago to the office of the United States Attorney there is reasonable and should be granted. It should be clearly understood, however, that the books, papers, documents, etc., referred to in the above order and which are to be transported to the United States Attorney's office at Chicago for such inspection do not include the books, records, etc., which are to be used in connection with the trial of the New York cases. Hence, the modification requested by the United States Attorney of the Northern District of Illinois in this regard, and as noted in the above order, seems desirable and necessary in order to avoid confusion. I see no necessity, in view of the order of this Court of December 26, 1952, of requiring the plaintiff to make a further showing as to the items which are vital in the prosecution of the proceedings in New York. The representative of the United States Attorney's office of the Southern District of New York, as well as Mr. Cunningham, Special Assistant Attorney General, assured this Court at the Duluth hearing that all books, records, etc., covered by the order of this Court of October 31, 1952, and which are not vital to the trial of the New York cases, would be available for
defendants' inspection at any reasonable time. It is
255 this portion of the books, records, etc., which are to
be transported to Chicago on or before February 10, 1953. The Court has no reason to assume that plaintiff, through its representatives, will not in good faith comply with the spirit as well as the terms of the order of this Court which reflects the understanding between the Court and Government counsel.

This memorandum is made a part of the foregoing order.

Gunnar H. Nordbye
Judge.

256 And afterwards on, to wit, the 6th day of April, 1953 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion in words and figures following, to wit:

257

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION

The plaintiff, by its attorney, moves that the trial of the above entitled cause, which is now set for Monday, April 6, 1953, be continued and be reset for trial for Monday, April 20, 1953.

In support of this Motion the plaintiff submits the attached affidavit of Arthur B. Cunningham.

The United States of America
By Arthur B. Cunningham
Its Attorney

258 And on the same day, to wit, the 6th day of April, 1953 there was filed in the Clerk's office of said Court a certain Affidavit Of Arthur B. Cunningham, Special Assistant To The Attorney General At Washington, D. C., in words and figures following, to wit:

259

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

State of Illinois }
County of Cook } ss.

AFFIDAVIT.

Arthur B. Cunningham, being first duly sworn, says that he is a Special Assistant to the Attorney General at Washington, D. C., and as such Special Assistant and as a part of his official duties he has been assigned the trial of the above named cause.

That Charles J. Mammel, CPA, age 63, is employed by the Bureau of Internal Revenue as a revenue agent and as such was assigned as chief revenue agent in the investigation of this cause.

That on Sunday, March 29, 1953, at approximately 9:00 o'clock P.M., while in the presence of the affiant and while

engaged in the preparation of the trial of this cause, Mr. Mammel suffered a complete physical and mental breakdown.

That since that date until the date hereof Mr. Mammel has been confined to his home, in bed, and has been receiving care and treatment from a Practitioner.

That on the date hereof, contrary to instructions but in view of the imminence of this case, Mr. Mammel attempted to return to his office but suffered a relapse, and is again confined to his home.

It is further averred that Mr. Mammel, in view of his investigative information obtained in the past four
260 years, is an indispensable witness and his presence is necessary for the conduct of the trial of this case.

The affiant further avers that David G. Lubben of San Juan, Puerto Rico, is a necessary witness of the plaintiff in the trial of this case.

That the affiant has been advised and therefore avers that David Lubben has been the chief prosecuting witness at the trial of Charles Welock, a former county official of Bergen County New Jersey, at Hackensack, New Jersey, and has been in attendance there since March 15th, and was not released as a witness in said criminal trial until April 1, 1953.

That as such chief prosecuting witness Mr. Lubben was harassed, vilified, slandered and defamed to such an extent that as a result thereof he is presently in such mental and physical condition that he will be unable to properly testify until he is given a reasonable opportunity to recover from the ordeal that he has been subjected to.

The affiant further avers that on March 30th at approximately 5:00 o'clock P.M. he was served with a motion relative to the taking of a deposition of Sidney Kurtz at Miami Beach, Florida, on April 8, 1953.

The affiant avers that in order that the plaintiff's interest be properly protected at the taking of such deposition it would be necessary for the affiant to be personally present which would necessitate the granting of a recess in the event the trial of this cause began on April 6, 1953.

Arthur B. Cunningham

Subscribed and sworn to before me
this 2nd day of April, A.D. 1953.
Ruth I. Quinlan
Notary Public.
(Seal)

261 And afterwards on, to wit, the 30th day of April, 1953 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On April 3, 1953, At Minneapolis, Minnesota, Before The Honorable Gunnar H. Nordbye, Judge, in words and figures following, to wit:

1

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 Cr. 143) * *

The above entitled matter came on for hearing before the Honorable Gunnar H. Nordbye, a Judge of the above court, in the United States Court House, Minneapolis, Minnesota, at 9 o'clock A. M., on April 3, 1953.

Appearances:

Arthur B. Cunningham, Assistant United States Attorney, Chicago, Illinois, Attorney for Plaintiff.

Vincent O'Brien, Esq., 105 South LaSalle Street, Chicago, Illinois, Attorney for Defendants.

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2 The Court: You may proceed, Mr. Cunningham. I assume you have given Mr. O'Brien a copy of the affidavit and notice that was left with me this morning.

Mr. Cunningham: If the Court please, yesterday I delivered to Mr. O'Brien's office, both a copy of the motion and a copy of the affidavit.

The Court: All right.

Mr. Cunningham: Now, the motion of course I will state briefly is a motion that this cause be continued from the 6th day of April until the 20th day of April, 1953, and the reasons I have requested this motion, Your Honor, are set out in the affidavit, but I would like to amplify the matters contained in the affidavit.

My motion for continuance in this matter is based on three grounds. The first ground being the matter of the illness of one Charles Mammel. Charles Mammel is the revenue agent that has been working on this case for approximately four years. He is age 63, a certified public accountant and is an employee of the Bureau of Internal

Revenue. We have been engaged for the past two weeks preparing for this trial and last Sunday night in the office of the United States Attorney in Chicago, after we had worked all that day, at about 9 o'clock, to the best of
3 my recollection, Mr. Mammel just utterly collapsed.

Mr. Mammel started to make some remarks that weren't too coherent. He was rational, but he was not responsive to questions that we put to him and certain remarks that he made indicated that he just wasn't himself. He had been—we had been working in a conference room. We moved to one of the offices. He called his wife and sat down in a chair and we couldn't move him. We couldn't get him up. We tried, we wanted to help him and he refused us our assistance. He wouldn't let us touch him, and we questioned him about matters. He said, "All I want to be is left alone. Leave me alone," insisted we go away from him and said a few things that indicated to me that, for instance, one remark about something he had to do that I knew he had already done, and at his insistence that he be left alone, and practically urged us away from him; we left; but left him in the care of one of the Assistant United States Attorneys. After this, I think he stayed there some three-quarters of an hour and finally made his way home. Monday and Tuesday and Wednesday he was confined to his home, and to his bed, and the first two days why we couldn't even talk to him, could get no response out of him. Yesterday, after I had talked to Your Honor on the telephone I called his home and found that he had left. He got to town, one of the special
4 agents talked to him, saw him in town, and he was just in no shape. He felt so terrible that he felt he must return to his home. I made inquiry relative to what medical attention he had and found he was administered to by what is known as a practitioner, by reason of his religious beliefs, he does not call doctors, but was administered to by what is known in the Christian Science belief as a practitioner, and it is my opinion in view of the investigative information that he has, that he is an indispensable witness in the conduct of this case. He has worked on the case, as I said, a great many years and he is the technician in the case. We do have the special agent or investigators of facts, but the technical matters, all those of revenue agents, it is he that has made widespread investigation, both of the various ventures that one of our

principal witnesses was engaged in and he is also the one man that can testify and be of technical assistance to the Government insofar as the records of the Shotwell Manufacturing Company are concerned; and in view of his illness, it is my feeling that his absence will affect the case materially, and I feel that the Government should not go forward at this time in his absence.

Now, with respect to the grounds No. 2, is a matter of one David Lubben who will be the chief witness, one
5 of the chief witnesses for the Government. Mr. Lubben has been engaged in the trial of the case in New Jersey as a principal prosecuting witness. The case at Hackensack, New Jersey involved misconduct in office by a man by the name of Charles Wells, a former county official there. David Lubben was harassed during the course of the trial by reason of his testimony there, he was defamed, he was villified, he was slandered, and his conversations with the special agent, he indicated that he is in such shape he didn't think he could possibly at this time go ahead in another case where he feels possibly the same situation might prevail.

I have with me a newspaper clipping of that case I would like to submit to the Court as some indication of the matters that he was subjected to during the course of that trial, and I know nothing about his physical condition except his statements that he is so wrought up, he doesn't feel like he could go forward without some time in this case, and he also is one of the principal witnesses in the case.

The third ground was the matter of the taking of a deposition on next Wednesday requested by the defendant.

The Court: I think I should tell you in that regard,
6 and I regret now I didn't send a copy of the letter to you, I wrote to Mr. O'Brien when Mr. O'Brien sent me that petition with reference to that deposition, I, of course, noted the date of April 8th, and knowing that it might be in the middle of the trial I suggested in my letter to Mr. O'Brien we defer the taking of that deposition until I had an opportunity to confer with both of you on April 6th, and then some date could be set that would be convenient to both counsel, but I neglected to send you a copy of that letter.

Mr. Cunningham: I mention that in my motion as the third possible ground of reasons, not knowing that, of course, Your Honor.

That is, in my statements now are the position of the Government in this instance, and I regret that I have to take this position, regret the short notice to counsel for the defendant, but I feel for the best interests of the Government in view of the circumstances, I would like and request this matter be continued for some fourteen days.

The Court: Well, what assurance do you have Mr. Mammel is going to be in condition to go forward on the 20th?

Mr. Cunningham: I have no particular assurance. I do know these things have happened to him before
7 and they don't last too long. This Mr. Mammel is a hard worker. He works long hours, and in view of his age these things do happen occasionally, but they do not extend over a long period of time, and he recoups himself, and he indicates that he feels that he will be able to go forward at that time.

The Court: All right.

Mr. O'Brien: If the Court please, I regret the illness of Mr. Mammel, and I understand personally why counsel would want to make this motion, but I believe that the question which he has presented here is what is in the general interest of the parties on the showing made and not what the Government thinks in its best interests in presenting the case. My people now, as before, are interested in obtaining a speedy trial of the case, and for the record I would like to assemble a few of the things at this point which seems to me bear on that subject.

First, I ask that the Court take judicial notice of the affidavit which Mr. Leone, the United States Attorney filed in the cause here December 3rd, and also that the Court take judicial notice of the official transcript of that proceeding of December 3rd of which I have here my copy, and I am not sure as a practical matter whether
8 the original is here or at Chicago. If it is not here and if it should be of any pertinency to the Court, my copy is available.

Second, I ask the Court to take judicial notice of the defendants' motion to dismiss this action because of the Government's delay of the trial which motion was filed by us December 3rd at Duluth, and for the Court's convenience I do have an extra copy of that, since it was printed. I ask that there be read and copied into the record and returned to me by the reporter, my copy of a letter of March 31, 1953 from Myles J. Lane, United States

Attorney for the Seventh District of New York, as the original of which is said to have been sent as is directed, to your Honor. This is Mr. Leone's letter concerning the unavailability of the partnership records.

"GJL ast
115164
AIR MAIL March 31, 1953.

Honorable Gunnar H. Nordbye
United States Court House
Minneapolis, Minnesota

Re: United States v. Shotwell Manufacturing Company, et al
Northern District of Illinois

Honorable Sir:

"Reference is made to your Honor's orders dated December 26, 1952, and January 29, 1953, in the above
9 entitled matter, and a subpoena duces tecum served upon me by the defendants on March 11, 1953 pursuant to said orders.

"On March 27, 1953 the Honorable Henry W. Goddard filed an opinion in this district in the case of United States vs. William Giglio et al, C 139-206 et seq. His Honor granted certain motions made by the defendants to dismiss the indictments pending against them on the grounds that they were deprived of rights guaranteed to them under the 5th Amendment to the Constitution of the United States. Judge Goddard further ordered that '• • • The Government is directed to return to the respective defendants the partnership and personal records produced by them in response to the subpoenaes.' In view of said order I shall be unable to comply with that portion of the subpoena which demands the production of records '• • • (including partnership books, papers, documents or objects, however obtained from William Giglio, one of the partners thereof,) • • •'.

"I have apprised Judge Goddard in the presence of respective counsels for the various defendants in the Giglio case of your Honor's order. The defendants have assumed the position that they do not wish to permit the production by me of any of those records, but rather they desire compliance with Judge

Goddard's order. As to the balance of the material demanded in the subpoena, I shall produce them on the return date of the subpoena, April 6, 1953.

"I am submitting the above information so that your Honor may apprise me of any thoughts as to how I might better cooperate with the conflicting orders.

Respectfully,

Myles J. Lane,
United States Attorney.

cc: Vincent O'Brien, Esq.,
105 So. LaSalle Street
Chicago 3, Illinois

H. Brian Holland, Esq.
Assistant Attorney General
Tax Division
Department of Justice
Washington 25, D. C.

Arthur Cunningham, Esq.
Special Asst. to the Attorney General
C/o United States Attorney,
Northern District of Illinois
Chicago, Ill."

I am not sure Mr. Cunningham saw that but there is a copy to Mr. Holland.

Mr. Cunningham: I received a copy of it.

Mr. O'Brien: And I call the Court's attention to the order in this case entered over the defendants' objections denying their motion to dismiss the cause because of the delay and continuing the trial from December 9, 1952 to April 6, 1953. I have a photostatic copy of Judge Goddard's opinion dismissing the Eastern case and ordering return of the papers as stated in Mr. Leone's letter, but in—

The Court: Not Mr. Leone's letter?

Mr. O'Brien: I am sorry, Mr. Myles J. Lane's, yes, sir, but in view of that letter, since it was my only photostat, I am keeping that, Your Honor. I don't think the reasons are important, it is both the Judge's opinion and his order.

Now, as to the third ground of the motion, it is somewhat out of order, but I would like to say for the record

that my motion to take the deposition of the witness Kurtz, because of his inability, due to illness, to appear in response to the subpoena which we served on him is withdrawn as against any continuance, and since the order is entered or subject to date, as I understand it, if that is the case, then I would abandon that deposition as against a continuance, although I do say to Your Honor that we arranged without any fanfare to send that matter to a firm at the place in Florida, whatever it is, Miami, perhaps I said that in the motion to you, and it wouldn't require the presence of any of the lawyers here of record or in our office. It is simply the lawyers down there who could take that testimony, and I should think that the
12 Attorney General's office could have managed to make provision to cover that. The time is short. I originally drafted the motion for April 3rd, but I couldn't see how we would get it back and get it down there by then. It is material and of some importance, but not of any controlling importance.

Now, the next thing I would like to view, briefly, is to discuss what seems clear to me to be the legal insufficiency of the showing made. First, of course, we do not assent to taking a matter of this importance either on affidavits or on the statements of counsel. By that, I mean nothing more than the legal point, that under the Supreme Court decisions, the Glasser case, I do not have it now in mind, it has been cited to Your Honor before in this cause, and under the practice in our Circuit, such affidavits are not the equivalent of evidence in the absencec of assent.

Second, the affidavit of averment that Mr. Mammel suffered a complete physical and mental breakdown is a conclusion unsupported by any sufficient averment of facts and unsupported by the certificate of a licensed doctor of medicine. The same is true of the averment of relapse, only more so because that is a weaker averment and Mr. Mammel's present confinement to his home. The af-
13 fidavit, and I think this is of substance too, both the affidavit and counsel's statement fails to show to the Court that there were not other agents who worked with Mr. Mammel in all of the essential and pertinent parts of this case of the Government's case who would be qualified to testify on the trial of the cause in his place, assuming that he should continue to be unavailable. There is no showing to the Court, and I don't think that Mr. Cunning-

ham is in a position to make a factual or a legal showing that Mr. Mammel would not be available before the time in which he expects to close the Government's case. Mr. Cunningham would have to admit that, as we know, and we know only part, that he would have to admit that they have many witnesses under subpoena and personally I just don't see in view of the cross-examination and the like, how the main Government case can be closed before somewhere between the 16th and 20th of April, of that I am morally certain, and at that rate there is no showing of that point. Now, insofar as Mr. Mammel may have interrogated or interviewed prospective witnesses in the case, any testimony on his part concerning that would manifestly be hearsay, and all those witnesses are available to the processes of the Court, and it is their evidence which would be the best evidence, and the only admissible evidence.

14 Next, I should like to say that the allegation that Mr. Mammel is an indispensable witness in that his presence is necessary for the conduct of the trial is a mere conclusion and unjustified on the basis of any facts disclosed either by the affidavit or by what counsel himself has said.

Now, are there any facts stated to show why Lubben is a necessary witness except as the Court may take notice of that from the prior discussions which have been had on one phase or another, but it is not averred that, it isn't even averred by way of conclusion that he is an indispensable witness and a direct averment that Lubben was harassed, etcetera. I don't know what the newspaper article says, but I have no, nor have I any knowledge of details of the harassment, vilification and the other terms that counsel uses, and I don't see how Mr. Cunningham could have that direct knowledge.

The Court: I don't think I would be particularly concerned with the phase of the motion with reference to Lubben.

Mr. O'Brien: Very well, sir. I would like, it's short, I will finish it, Judge, because I do want to make the record too.

Now, going to the factual side of it, more directly in a more substantive way, Your Honor will recall, not

15 from affidavits or statements, but from undisputed testimony adduced before you in open court on an-

other motion that the Bureau had agents at the Shotwell plant for some four years preceding the indictments, not only out of the office of the agent in charge, that is Mr. Wright's office, but also out of the office of the special agent, that is the Intelligence Unit.

Your Honor also knows, and I remind you that the evidence further showed that since September 1952 when you first came to Chicago on the case, and when you ordered the production of the Shotwell records which in the interim we have refused to let them continue to examine, that since that time from, except and right down to the time of hearing, right down to date, as a matter of fact, those agents are there at times as many as ten and fifteen, not just Mr. Mammel.

Now, I think that both of us would agree, and it perhaps remains for the Court to find out, that this is a complex case, it is not a simple thing. It really extends counsel and lots of counsel, and lots of help, and when you get a thing that complex you can't have everything your way, you can't have every point lined up and every person lined up just at the time you want. Illustratively, back when the matter was set for December 1st, we had from about the 18th of November, the 15th at the earliest actually, to inspect all that stuff down East. We knew we couldn't do it. We knew we couldn't do it in an adequate way and said so in our papers, but we were ready to go to trial, and when we couldn't get them at all, or were delayed for some nine days in doing it, on a proper showing to Your Honor, and a very careful and complete showing without any such loose showing as this, we got nine days more, exactly equal, I think, to the time we had been deprived or kept away from the books. Now, I think a fair way to look at, or to apprise the sufficiency of the plaintiff's motion would be to assume that the Government,—I know Your Honor has said in his last order there are very few parties, but nevertheless, assume at this stage of this case the defendants were presenting this motion rather than the plaintiff, if he were, I would have to say that on the showing made, I am sure that we could not reasonably expect the Court to grant a continuance. When you consider also the prior record in the case, as I have tried to assemble it for your recollection, I am sure that you will have to say that on the face of the record as on the face of the motion itself, it ought to be denied.

Now, finally the matter of possible or probable inconvenience to the Court, it is not for me to discuss in point of fact. I don't know anything about that except that
17 we have been advised as Your Honor said, that you expect to be in Chicago on Monday, from which we are entitled to conclude that as far as the Court is concerned, it is ready to proceed with the trial, and that is of some importance since our right to a speedy trial under the cases is always subject to the condition of the Court's call. I think the Court was similarly right to go forward with this trial last December when, on December 3rd the other motion was made.

Now, I want to say again, more to the substance, that continuances have been and will be materially detrimental to defendants, and some of the reasons, those I have been able to think of between the time Mr. Cunningham told me about this and the time I saw his motion at quarter to five yesterday are these:

First, when the Government, let me jump over here, when that last continuance occurred, Judge, we had to notify all of our witnesses, and we had to do the work over again, not only of locating and serving them, but getting ourselves back to the case in the way that we then were. Since that time, and because of something that intervened which I will mention, there have been a good many people added to that list, and we have had the job of serving those additional people too, whose names
18 were revealed when we went or when we reviewed the papers which were made available for inspection, some of which were the partnership papers, having been held until March 9th.

Now, I represent to the Court as a fact in my own knowledge, that we now have more than fifteen witnesses —I mean not all material witnesses, located and served, their fees paid, transportation and arrangements made in Chicago and all of that. We have them from New York, New Jersey, Florida, Puerto Rico, Nevada, California, Texas, Illinois, Iowa, Minnesota, Indiana and Ohio, with the greatest number of the witnesses out of Chicago. It was a staggering job to find those people and to get them served and to do it. We don't have the slightest assurance that we will be able to do it again or that they will be available because many of these witnesses, Your Honor, they have no connection with us, they don't know us, they are subpoenaed and in this type of case they are reluctant

and we can't just order them back or call them back on a subpoena. We have to reserve them, and I say we do not know, and we have no way of knowing whether many of the material witnesses who are now under process will be available at that time.

The lawyers, there are three of them of record, and
19 the others who are not of record, have put aside all matters for this trial. They can't continue to earn a living if they have to do that over and over. They can't take care of their clients, and I think to go through this work again at a later date, whether it be one week or two weeks, the letdown and interruptions are an unfair burden to put upon them and also manifestly only engulfs an additional expense to their clients.

Now, I want to mention the special thing I stated and that is this. When the Government asked for the last continuance, I say that it knew or must have known that it couldn't possibly get to trial in the New York case by April 6th in the then state of the record in that case. That transcript shows, Your Honor pointed out, it was a busy district. Mr. Leone was here from that district, the case—they hadn't even filed preliminary motions in the case, and the indictment was returned only last September. I say, as based on the facts that I have served, and I am entitled to my opinion and so is the Court, that the real objective in that motion is to get the Chicago agents into New York to make exhaustive examinations and audits of records there, including the partnership records which Judge Goddard finds were wrongfully taken from Giglio so that they could attempt to use those records in our
20 case which they were not then ready to do. The records had only been turned in and great cases of them in September. Now, what did that mean to us aside from the matter of tactics? First, and this is part of the detriment, they were given a long head start on us, as soon as that was entered, and before they were free to look at those cases of records. We couldn't look at them until March 9th. They said they didn't want us to look at them because if I got them maybe I would give them to the defendants in that case, but after they told you that, Myles Lane tendered all of the records to the defendants in that case and let them come in and start to look, and not to us, but the defendant in that case, and why did he tender them after Mr. Leone's statement? Because he wanted to

be in a position to tell Judge Goddard, or whoever else was sitting, that they didn't need to have so much time to prepare for trial, because he had kindly made the records available to them. Well, regardless of all that, we didn't get them until March 9, 1953, and between that time and the present time we had to, at great expense, send auditors in there, speed up the work to be ready at large cost, which would never have been the case if we could have looked at them when we wanted to, and which we should have been permitted to do, not as far as Your Honor
21 then knew, but on the facts as they were, that is the fact.

Now, we have a situation here at hand which I think, and I express only my opinion, in view of Judge Goddard's order, I may say too that after Judge Goddard entered that order March 27th, that was last Saturday, the parties went into court, the defendants are represented by Lloyd Paul Strieker and others, Mr. Strieker objected to having those partnership records sent on to Chicago because I think that he took the position that his clients might be re-indicted inasmuch as the indictments, the six indictments, all the indictments were dismissed on the ground that defendants had been deprived of their Constitutional rights before the Judge handling the Grand Jury and before the Grand Jury, and under your rules, although the statute has run, there may be an indictment at the next succeeding term of court if there be a grand jury then sitting and if it is not brought in then there can't be, if the statute is run, as I understand it, Your Honor will know,—at any rate Mr. Strieker told Judge Goddard that he doe not want those records in Chicago and he wanted them turned back to Mr. Giglio. Mr. Leone made a different request and Judge Goddard told him that that order meant exactly what it said and that it was quite clear and that the original is, and any copies of
22 those records the Government had would be turned back to those defendants or else.

Now, the difficulty is, the tactical difficulty as Mr. Leone points out, they may not have for proper use in the Chicago case or anywhere else those partnership records on which they got that running start, and without which they would have great difficulty in proving that part of their bill of particulars which says that we got overages from that partnership. That's what it is.

The Court: Well, will they gain anything by the delay if that is the situation?

Mr. O'Brien: I think they hope to; I think they hope to find substantive evidence in lieu of that evidence, that is my opinion; indeed, my precise note is, I think that the real purpose of the motion is, that the Government is embarrassed by Judge Goddard's order, the forthwith return to Giglio of the partnership papers and wants time to find some possible substitute for those records.

The Court: What about your situation with reference to your inability to examine those papers?

Mr. O'Brien: Well, we have examined those papers starting March 9th, we examined them, and I said to Your Honor that we sent our accountants, we speeded up
23 the work and we examined them and took off such notes as we thought were material and as we could get in that short time.

The Court: Well—

Mr. O'Brien: Many, many cases we couldn't read.

The Court: That wasn't entirely clear whether or not those particular records Judge Goddard ordered to be returned to the defendants had been made available to you?

Mr. O'Brien: No.

The Court: Had they?

Mr. O'Brien: Yes, they had, because Judge, his order was not entered to March 27th.

The Court: Well, I appreciate that but I didn't know whether or not for some reason—

Mr. O'Brien: We were there promptly March 9th or 10th and spent until last weekend.

The Court: Well, in any event then, Judge Goddard's order didn't affect your right to copy and photostat all of the documents covered by my order?

Mr. O'Brien: It did from that time on, yes.

The Court: Well, I mean, I take it that up to that time you completed your examination?

Mr. O'Brien: Yes, we had completed everything
24 that there was time to look at, that is true, we were far from completing the inspection of all the records.

The Court: Well, you had the time you thought would be sufficient when we discussed that matter in Duluth.

Mr. O'Brien: Well, I don't remember what was said about it in Duluth.

The Court: In any event, you did have access of the documents from March 9th to March 27th?

Mr. O'Brien: Yes, sir.

The Court: But your contention is—

Mr. O'Brien: I may say too, Your Honor, that the partnership—I may say two other things. When all the people got there, while they had, I don't know, maybe thirty or forty cases of detailed papers of the partnership, they had two sets of general ledger sheets, one for one year and one for another year, and outside of those two sets there were no book records of that partnership and then last Tuesday in Chicago after following Judge Goddard's orders, Mr. Krane, you know, tendered to me at Chicago for inspection the original of some eighteen bundles of checks, five or six sets of worksheets, longhand sheets, some memorandum and material which I have a record at home that he did not think that we had seen with the possible exception of some three sheets.

The Court: Well, but regardless of that, you would be ready to go to trial on April 6th?

Mr. O'Brien: Yes, certainly. We are ready to go to trial, that is true. I think that covers everything, Your Honor.

The Court: When are your witnesses subpoenaed?

Mr. O'Brien: They are subpoenaed, for the most part, for the 6th and the 8th. Some of them are subpoenaed for the 13th and a few of them for the 15th. I have a schedule, I didn't think to bring it, but I think most of them are subpoenaed for the 6th, the division was made two ways, Your Honor, first, wherever we subpoenaed records, we returned the subpoena for the 6th with the thought that perhaps we could see the records sometime in advance of the commencement of the trial where it was a straight subpoena and not a duces tecum subpoena, we tried to stagger it in anticipating the Government's case would take maybe into Wednesday or Thursday or some of the next week, and the more recent subpoenas, the two I saw yesterday were for the 20th.

Mr. Cunningham: If the Court please, I would like to say this in reply. The inference drawn by Mr. O'Brien as to bad faith on the part of the Government both at the Duluth hearing and now, I would like to deny. I don't believe that there was any bad faith on Mr. Leone's part, and I know there was no bad faith on my part insofar as the continuance at Duluth was con-

cerned. He expressed, at least I know I did, I expressed to the Court truthfully and honestly what the reasons for our concurring in Mr. Leone's request for a continuance, and it was for none of the purposes indicated by counsel.

Now, at this hearing there is an implication, maybe a little more than an implication, that there is bad faith on my part or now at this time insofar as those records are concerned, that Judge Goddard returned to the defendant in that case, I say to Your Honor now, there is no bad faith and there is no such intention in my mind, not even thought of, Your Honor. My reasons are the reasons I have set forth in the affidavit and the reasons I have stated to Your Honor. It is because of the illness of a man I think is absolutely indispensable to the trial of this case. I will agree there were a number of revenue agents that worked on this case, but all those revenue agents so far as I know, every one, and I am almost positive of this, every one of those revenue agents worked at the directions of Mr. Mammel. They were under his supersion, and the results of their efforts were directed to him.

I believe as a matter of evidence, and I apologize for
27 making this suggestion, that Mr. Mammel is the only person who could testify as to the results of all their efforts which stem from all these places to him, that he alone, that perhaps this agent might testify as to one circumstance or another but the over-all, only he can testify and interpret what I believe to be necessary interpretation, and then in this case, so I respectfully ask the Court, that this brief time be allowed in order that he may have an opportunity to fully recover and be in court; and I might say not only do I feel that he must be a witness, but I also feel that he must be present in the court room throughout the conduct of the case. I feel more so now than before this hearing started in view of the statements made by Mr. O'Brien relative to the extent of the testimony they desire to introduce and the number of people and the accounts, I feel more than ever that he is indispensable to us, and he is indispensable in a good mental frame and physical frame of mind.

Now, the Government has had a great number of people work on this case for an extended period of time at a great expense to the Government in preparation. I would hate to see that lost by reason of the failure of Mr.

Mammel at this time who, I feel must be present during, and testify, but also very important that he be present during the conduct of this case.

28 The Court: What have you to say about Mr. O'Brien's position with reference to the prejudice as the result of having already subpoenaed the witnesses and staggering their appearance to coincide with the original plan of the trial starting on April 6th?

Mr. Cunningham: Well, if the Court please, the witnesses could be notified, as the Government must necessarily notify the witnesses, by telegram, it may be a witness or two from a distant point that would have to start earlier, but in view of the fact that the Government's case starts on the 6th, I don't know how in any event the defense witnesses would be necessary on the 6th. I have advised Mr. O'Brien in the past that I felt the Government's case would take at a minimum five days, trial days. I feel although it is possible it may be shorter, but I don't see how it could be.

Mr. O'Brien: That was without cross, I gathered?

Mr. Cunningham: That is direct, but cross-examination would still extend that time further I think. I regret the inconvenience, but I hate to feel that the structure that has been built by many hours of labor, by many people, would be impaired, and I feel that these two weeks' delay, and I again say to Your Honor there is

29 no bad faith on my part, it is not for the purposes of examining any records. I have no such thought in mind. The only thought I have in mind was the necessity of this man at trial and what I have said in that affidavit is true, Your Honor, and there is no ulterior motive on my part.

The Court: Well, you have asked for a two weeks' continuance, supposing Mr. Mammel isn't ready on the 20th?

Mr. Cunningham: If the Court please, I will just have to take that chance, and Mr. O'Brien further suggested we had no assurance he would be there throughout the trial, that is another chance that the Government would have to bear.

The Court: Well, what do you mean when you say you will have to take that chance?

Mr. Cunningham: Well, I feel that he will be available.

The Court: Well, suppose he isn't, what then?

Mr. Cunningham: Well, I would rather not answer that question, what I might have to do or think about the case at that time, Your Honor, if you don't object to my not saying.

The Court: Well, you see, you have come in here without any medical foundation for Mr. Mammel's health, and you say that's not done because he belongs to the Christian Science faith and is not attended by a doctor, but on the other hand I suppose even a Christian Scientist wouldn't object to having a doctor to examine him if it wasn't for the purpose of treatment, isn't that right?

Mr. Cunningham: I can't answer that question as to their faith. I understand their treatment and care that they receive, and I just learned this, is from persons known as practitioners and who, as I understand the matter, have a discussion and thought, and that is the type of treatment that is carried on. It is I guess, I don't know of any further, I am not too sure of the usual treatment in that type of thing, but as I understand it it is a thought proposition and these individuals counsel with you and discuss with you your feelings and in that way hope to aid you in your recovery. I am neither condemning or accepting, but I am just relating the best information I have concerning that condition.

The Court: Well, if Mr. Mammel continues to be ill, have you anyone to step in his place and take over this so-called technical testimony that you intend to have him offer?

Mr. Cunningham: The only thing I could do in that instance, Your Honor, would be to have somebody train in the meanwhile to take over that position.

The Court: Is it fair to ask you what you intend to produce, is it fair to ask you as to what you intend to have Mr. Mammel testify, is he going to attempt to express some opinion from the assembled evidence insofar as it may be in the province of a certified public accountant to express an opinion?

Mr. Cunningham: That is correct, Your Honor, as an expert, I expect to have to be able to use him as an expert and as a person who is familiar with the facts, also to the whole examination of books and records that only he at this moment is fully cognizant of the whole, everything funneled into him as an individual.

Mr. O'Brien: Excuse me, I shouldn't intrude, but the statute that you have here is based on the old Shop Book Rule, is applicable both to criminal and civil cases so that anybody who looked at books, records kept and adduced subject to verification items based on that, those would be admissible without signature by the man who examined them and if not, then your statutes—I mean, you have statute records regularly kept in the Court's business.

The Court: I don't believe that that was what Mr. Mammel was going to cover, as I understand it.

Mr. O'Brien: Once those are in, any competent
32 accountant—

The Court: I see what you mean. I suppose that Mr. Cunningham's problem is to have a competent accountant trained between now and the time of trial?

Mr. Cunningham: Mr. Mammel, if Your Honor please, is in that position now. No other person is and that would take time in view of the complexities of this matter, for somebody else to get in the same equal position.

The Court: Well, I don't think that there is any bad faith on the part of the Government in making this motion. I might say to Mr. O'Brien, I don't know whether he knows it or not, but Mr. Leone called me up on March 7th or 8th and wanted to came out here and make a motion for an extension of time in the order which I have made, and which required the production of these documents on March 9th.

Mr. O'Brien: Yes, I did know that.

The Court: He told me over the phone there might be some conflict between my order and some order made by a New York Judge, and I asked him whether or not the order had been made by a New York Judge and he said no. Well, I said then as far as that is concerned, I don't know of any reason why you shouldn't obey the subpoena. I am not interested in having you come out
33 and make a motion for any further time in view of the specific understanding that was reflected in the record when the argument was made in Duluth.

Mr. O'Brien: Now, Judge, excuse me, I have a message from Mr. Kirby which says this, that Mr. Mammel worked all day yesterday and was observed by Lynch's brother,

both of whom are working on the books. I don't know what it means.

Mr. Cunningham: That is incorrect, Your Honor. He did come to the office and did find he couldn't go forward. In view of the eminence of this case, he felt that he had to be present. He is a man ordinarily of great vigor and desire to go ahead, and he is so concerned, but he did come down to the office and had to go home and was home. I think he left, I think he got to town by 9 o'clock and had to leave by 10. He couldn't take it. He is just in such a state he couldn't, and it was contrary, as I stated in my affidavit, contrary to instructions that he had received about leaving, but there is certainly Government witnesses present for interview yesterday, that he felt he just had to be there and he just,—he just couldn't make it and couldn't go on.

The Court: Well, Mr. Cunningham, it seems to me that if I am going to grant a continuance, that we should
34 have an understanding that regardless of Mr. Mammel's health that this trial should go forward to the date that I continue it to.

Mr. Cunningham: That is correct, Your Honor. It will go forward.

The Court: Obviously we just can't carry on with these continuances. The defendant is entitled to a speedy trial and while I don't believe that the continuance from December to April prejudiced the defendant, because I don't believe that the defendant was in the position, in view of the tremendous amount of work that had to be done, to be ready for trial on December 9th, and I don't believe that I did the defendant any wrong, so to speak, when I continued the matter until April. There may be a difference of opinion about it, I am merely expressing my opinion.

Mr. O'Brien: Let me correct you on the record, please, there aren't any records we got as a result of your order with relation to the proprietorship or general conventions and that's all we do get until March 9th. There weren't any of those which we didn't already have.

The Court: You never told me that.

Mr. O'Brien: I am stating prejudice in it—

The Court: You never let me believe—you let me believe that the examination of the documents in New
35 York were a matter of such utmost importance to your defense that you couldn't safely go to trial.

Mr. O'Brien: No. I--

The Court: Oh, yes.

Mr. O'Brien: I said that I needed to check the original records for cross-examination, that we wouldn't have them ready until that time, until the close of their case.

The Court: Well, I had a very clear impression and a very firm undertsanding.

Mr. O'Brien: The partnership records are the things that we should have had.

The Court: I don't know you differentiated between various records, but certainly you have indicated to me that there would be a manifest injustice if I didn't permit you to examine the New York records.

Mr. O'Brien: That is true.

The Court: Well, I am going to continue this matter until April 20th, and in accordance with the Government's request, but I think that the understanding must be, Mr. Cunningham, that the Government must be prepared to go forward on that date regardless of Mr. Mammel's health.

Mr. Cunningham: The Government will.

The Court: And an order of continuance will be
36 made with that understanding.

Mr. Cunningham: Very well, Your Honor.

The Court: Of course, the defendant is entitled to an exception to the Court's ruling and the record will so reflect.

I might say in passing that while that doesn't particularly concern the parties, but personally I am needed in my own District by reason of the tremendous amount of work that there is, notwithstanding that I would have been ready on the 6th if the parties were ready, but in view of the application for continuance, I will have enough work so that I am not entirely too unhappy about the motion, but be that as it may, that doesn't pertain to the defendants' rights.

Mr. O'Brien: No, I certainly am sure it does not, Your Honor.

The Court: As I stated before, I appreciate very much Mr. O'Brien's willingness to come here on such short notice and to avoid a trip on my part to Chicago for this purpose.

Mr. O'Brien: The only way I can rationalize it now is we are glad we don't have to work right into Easter. I feel a little guilty, I haven't had a chance to be home.

Mr. Cunningham: I apologize for the short notice,
37 I was hopeful that we could go forward, and I waited until the time I couldn't wait any further.

The Court: Thank you, gentlemen.

I hereby certify the foregoing is a true and complete transcript of the proceedings in the above matter.

Earl G. Anderson,
Official Reporter.

262 And, to wit, on the 3rd day of April, 1953, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

263

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER

The above-entitled cause came before the Court on April 3, 1953, on plaintiff's motion for a continuance.

Mr. Arthur B. Cunningham, Special Assistant to the Attorney General, Washington, D. C., appeared in behalf of the United States of America in support of said motion;

and

Mr. Vincent O'Brien, of Chicago, Illinois, appeared in behalf of the defendants in opposition thereto.

Upon good cause being shown,

It Is Ordered: That said motion for continuance is hereby granted and the trial of the above-entitled cause is continued from Monday, April 6, 1953, to Monday, April 20, 1953, at two o'clock P.M., at the United States Court House, Chicago, Illinois.

Dated this 3rd day of April, 1953.

Enter:
Gunnar H. Nordbye
United States District Judge
Acting under Assignment to the
Northern District of Illinois

264 And afterwards on, to wit, the 20th day of April, 1953 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion And Affidavit Of Arthur B. Cunningham With Exhibits A and B Attached Thereto, in words and figures following, to wit:

265

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION.

Now comes the plaintiff, by its attorneys, and moves that the trial of the above entitled cause, which is now set for Monday, April 20, 1953, be continued and be reset for trial on a day to be fixed by the Court.

In support of this Motion the plaintiff submits the attached affidavit of Arthur B. Cunningham and Exhibits A and B attached to said affidavit.

The United States of America,
Plaintiff
By Arthur B. Cunningham
Its Attorney

266

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

State of Illinois }
County of Cook } ss.

AFFIDAVIT

Arthur B. Cunningham, being first duly sworn, says that he is a Special Assistant to the Attorney General at Washington, D. C.; and as such Special Assistant, and as a part of his official duties, he has been assigned the trial of the above named case.

That the defendant, The Shotwell Manufacturing Company, was during the calendar years 1945 and 1946 engaged in the manufacture and sale of candy, and in 1946 engaged in the sale of corn syrup.

That during the calendar years 1945 and 1946 David G. Lubben was a principal of the Eatsum Food Product Company, a sole proprietorship and a partnership, and also was a principal of General Confections, Inc. and Reserve Trading Company, and as such principal purchased large quantities of candy and certain amounts of corn syrup from the defendant corporation.

That in order to effect the aforementioned purchases the said David G. Lubben, as such principal, in accordance with an oral agreement entered into by him with the 267 defendants, was required and did pay to the defendants large sums of money in excess of the invoice price of these purchases.

It is further averred that David G. Lubben, as such principal, in accordance with an oral agreement entered into by him with the defendants, made purchases of candy for which purchases he received no invoices from the defendant corporation and that for said purchases he was required to and did make currency payments to the defendants based on regular invoice amounts plus over-invoice premium amounts.

It is further averred that substantially all of the over-invoice premium payments together with payments for uninvoiced purchases were personally made by David G. Lubben to the defendants in currency and such payments were made by him at the request of the defendants in a manner so as to conceal the true nature of these transactions; that in 1945 all of the over-invoice premium currency payments, totalling approximately $177,000.00, were paid to the defendants personally by David G. Lubben; that in 1946 the over-invoice currency premium payments and the currency payments on uninvoiced purchases totalled approximately $300,000.00 and of this sum David G. Lubben personally paid to the defendants approximately 83 per cent thereof.

The affiant further says that during the calendar years 1945 and 1946 and subsequent thereto the defendants had conversations with and made statements to David G. Lubben and to no other person relative to said currency-premium payments which are material to the issues in this case.

The affiant further says that none of the over-invoice payments or the payments for the uninvoiced sales received by the defendants from David G. Lubben were re-

corded on the books or records of the defendant corporation nor reported in its income tax returns for the calendar years 1945 and 1946.

268 The affiant further says that on April 8, 1953 he was telegraphically advised (Exhibit A) that said David G. Lubben was confined to a hospital in Puerto Rico; that subsequent thereto, the affiant was advised by Dr. Edwardo Montilla, Santurce, Puerto Rico, by letter dated April 8, 1952 (Exhibit B) which letter was received by the affiant on April 13, 1953, that David G. Lubben was hospitalized at the Presbyterian Hospital, San Juan, Puerto Rico; that he was suffering from asthmatic bronchitis and pneumonitis and was running a high temperature; that David Lubben would not be physically able to travel for a period of six to eight weeks if he makes a complete recovery from his pneumonitis and asthma.

The affiant further says that on April 13, 1953 he was telephonically advised from San Juan, Puerto Rico, by Samuel Davidson, attorney for David G. Lubben, that Mr. Lubben was still hospitalized and had suffered a relapse.

The affiant further says that the testimony of David G. Lubben is vital to the plaintiff in the trial of this case.

In view of the above, the plaintiff has filed its motion for a continuance of this cause.

In view of the above, the plaintiff has filed its motion for a continuance of this cause.

Arthur B. Cunningham

Subscribed And Sworn to before me this 15th day of April, A. D. 1953.
Frank J. Gager, Jr.
Notary Public
(Seal)

269 EXHIBIT "A"

Western Union (46)
1953 Apr.
8 PM 12:50

CDU 153 19 PD INTL FR RUSH—CD SAN JUAN PR
VIA ALLAMERICA 8 234P
MM RUSH—
AX

Sam Krane U. S. Attorneys Office
Court House Chgo—

Lubben in hospital Doctor Montilla air letter follows—
Edwin Dane Bookman—
Lubben.

270 EXHIBIT "A"

Western Union (46)

1953 Apr 8 PM 12:50

CDU 153 19 PD INTL FR RUSH—CD SANJUANPR
VIA ALLAMERICA 8 234P

MM RUSH—

Sam Krane US Attorneys Office
Court House Chgo—

Lubben in hospital Doctor Montilla air letter follows—
Edwin Dane Bookman—
Lubben.

271 Western Union

LD45 QT GOVT DL PD 1953 APR 16 AM 1 35

WUX TDC Great Lakes Ill. 110A APR 16 1953

Special Asst. Atty. Genl. Arthur Cunningham

AX U.S. Fed. Ct. House. Post Office Bldg Chgo

Arrived San Juan 7:00 A.M. April 14th. Visited Lubben several times during day Presbyterian Hospital wherein he has been confined for week. Condition not critical but serious according to Dr. Eduardo Montilla a leading physician in San Juan whose diagnosis and prognosis is expected to be completed on April 16th after X-ray and consultation. Lubbens condition reported further aggravated by method of service of defendants duces tecum subpoena on April 13th by U. S. Deputy Marshal Nepomuce Mas who was accompanied by an individual who refused to identify himself to Lubben Individual questioned by undersigned and his statements were contradictory with those of deputy Mas concerning purpose of the Lubben visit Indication possible attempted witness tampering. Individual when requested to appear before Assistant Usda Pascual Rivera, San Juan, identified himself as Dale Tanner, former F. B. I. Agent in the employ of the defense but not making it known to us Deputy Marshal Mas to whom Tanner stated he had /mat/ business with Lubben now admittedly a hoax. Assistant Usda Rivera asked Tanner the nature of his business with Lubben and Tan-

ner replied that he would prefer not to state purpose but that he would admit it was being conducted on behalf
272 of the defense. After Tanner left conference the following West Indian telegram was presented to the undersigned by Asst. Usda Rivera. Telegram dated April 10th to Thomas I. Nado, Fiddler /Deposition Lawyers/, San Juan our information is Bookman is and has been in Puerto Rico. Please quietly contact Dale H. Tanner Phone One Five Sir Also Sole Motor Corporation Rio Piedras who can assist in locating him—O'Brien. Tanner denied having any business with either Lubben or Bookman whom he admittedly did not know. Please advise undersigned care of Assistant Usda Rivera Post Office Building San Juan what further action, if any, should be taken. Teletype following on 16th relating to Dr. Montillas prognosis concerning Lubbens ability to travel to Chicago

Special Agent James J. Twohig Intelligence Unit TRSY
Dept. San Juan
160339

273 Western Union Telegram
Received Apr 16, 1953
@ 9:15 A.M.
A. B. Cunningham

274 EXHIBIT "B"

Dr. Eduardo Montilla
Calle Krug 75
Terrasa del Parque
Santurce, Puerto Rico

April 8, 1953

Mr. Arthur Cunningham
Dep. Attorney General U.S.A.
U. S. District Attorney's Office
Chicago, Ill.

Dear Mr. Cunningham:

Mr. David Lubben of 50 Paseo Covandonga, San Juan, Puerto Rico, is one of my patients, and he has been requested to appear before Court on April 20, 1953.

I wish to report that Mr. Lubben has been suffering from a very severe attack of asthmatic bronchitis and pneumonitis for the past 3 days, his condition having become worse so that today I have hospitalized him at Pres-

byterian Hospital, San Juan, P. R. with a high temperature.

At Mr. Lubben's request, I am respectfully requesting that he be excused from appearing before Court on April 20th as he will not be physically able to travel for the next 6 to 8 weeks, if he makes a complete recovery from his pneumonitis and asthma.

If you require any additional information I will be glad to fu.. ish it, or you may request it directly from the Medical Director, Presbyterian Hospital, San Juan, P. R., where Mr. Lubben is hospitalized at present.

Sincerely yours,
Eduardo Montilla, M. D.
Eduardo Montilla, M. D.

EM: sam

(Special Delivery Air Mail Envelope for Above Attached but not Copied)

275 And afterwards on, to wit, the 1st day of June, 1953, there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On April 17, 1953, at Minneapolis, Minnesota, Before The Honorable Gunnar H. Nordbye, Judge in words and figures following, to wit:

1

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 Cr. 143) • •

The above entitled matter came on for hearing before the Honorable Gunnar H. Nordbye, a Judge of the above court, in the United States Court House, Minneapolis, Minnesota, at 9:00 A. M. until 10:00 A. M. and resumed again at 2:45 P. M. on April 17, 1953. The following is the 9:00 A. M. session.

Appearances:

Arthur B. Cunningham, Assistant United States Attorney, Chicago, Illinois, Attorney for Plaintiff.

Vincent O'Brien, Esq., and
William T. Kirby, Esq.,
Chicago, Illinois, Attorneys for Defendants.

2 The Court: Well, gentlemen, I assume you are here with reference to the United States vs. Shotwell Manufacturing Company, et al., and I am in receipt of a certain motion made by the United States for a resetting of the above matter, and an affidavit by Mr. Cunningham, a copy of a telegram and Doctor's certificate by Mr. Cunningham, mailed to me; and I assume a copy of that has been made available to Mr. O'Brien?

Mr. O'Brien: Yes, sir.

Mr. Cunningham: That is correct, Your Honor.

The Court: You may proceed.

Mr. Cunningham: If the Court please, with reference to this motion for a continuance, I would like to state first of all that the wire attached to my motion was received by the office a week ago Wednesday, that is Exhibit A attached to the motion. As indicated by the wire, there was not much information contained therein, and their wire stated that it would be followed by a letter from this doctor. Now, that letter setting forth the condition of Mr. Lubben is dated April 8th. I did not receive that letter, Your Honor, until Monday, April 13th. The reason I didn't receive it until that time is because of the deposition that was taken in Miami on Friday, the deposition of Sidney Kurtz, and I wasn't able to get back to the office until on Monday. As soon as I had an opportunity
3 to find out about the contents of the letter and the letter stating what Mr. Lubben's physical condition was, I started immediately to make arrangements to have a special agent of the Treasury Department proceed to Puerto Rica for special supplemental investigation. It took all of the day of April 13th to get those negotiations under way and get the authority for him to proceed to determine, assist in determining the condition of Mr. Lubben. The agent that was designated to proceed to Puerto Rico is special agent James Touey of the Intelligence Division of the Bureau of Internal Revenue. He did not leave until almost midnight on Monday.

Now, with respect to the motion, I don't desire to read it in its entirety, I would like to point to certain paragraphs in the motion.

The third paragraph, that during the calendar years

1945 and 1946, David G. Lubben was a principal of the Eatsome Food Products Company, a sole proprietorship and a partnership, and also a principal of General Confections, Incorporated, and Reserve Trading Company; and as such principal purchased large quantities of candy and certain amounts of corn syrup from the defendant corporation. During the period 1945 up until June 1st, the operation of the Eatsome Food Products Company was that of a sole proprietorship in which David Lubben was the owner. Thereafter, through the year 1945 up until March 8, 1946, the Eatsome Food Products Company was a partnership, the partnership consisting of two general partners, one David Lubben and the other William Giglio. There were some limited partners, but they were the two general partners. That partnership although maybe not dissolved, but at least it was in part dissolved by Lubben's withdrawal from that organization. The partnership then continued with William Giglio as the principal owner until its liquidation sometime in the fall of 1946. At the time of the withdrawal of Lubben from that partnership, he organized a corporation known as the General Confections Corporation. He was a principal, or perhaps the sole stockholder in that venture. The Reserve Trading Company was a wholly owned subsidiary, as I understand it, of the General Confections, Incorporated. I might state to the Court at this time, I should advise the court, that yesterday an attorney of William Giglio called at the office in Chicago and stated that he intended to file a motion to quash the service of the summons of one William Giglio and asked that that matter be heard today. I advised him that I would be present here in this Court and that I would not be available for hearing of that motion today. He stated in advance that the purpose of that motion was to quash a subpoena based on William Giglio's constitutional rights and not to testify to incriminate himself.

Now, I am giving the Court this background in order to show the essential necessity of David Lubben's presence in the trial of this case. He was the sole owner, sole proprietorship, of course, apparently, and will be the only witness available so far as the partnership venture is concerned. He is the sole owner of the General Confections, Incorporated, and he has full knowledge of transactions with respect to the Reserve Trading Corporation.

Now, the evidence in this case, and I might state to the Court, and I am going to be quite frank in what the evidence in this case is going to be to the extent of advising defense counsel, because I feel the necessity of this witness is such that I must go that far in explaining to the Court the absolute essential necessity of the presence of the witness Lubben.

Lubben, during the calendar years of 1945 and 1946, Lubben, through his companies and his various entities, purchased large quantities of candy from the Shotwell Manufacturing Company. In addition to these purchases,

6 Lubben entered into an agreement with the defendants, an oral agreement with the defendants in this case, that in addition to paying the invoice price of the candy he purchased, he would and did pay an additional over-invoice price. Now, Lubben, nobody, no one can testify other than Lubben to that oral agreement that was entered into by him with the defendants in this case. In the event it was necessary for us to proceed with the trial, there would be no person available to the Government to testify as to what that contractual arrangement was between Mr. Lubben and these defendants, it would be absolutely lost to the Government.

In addition to the invoiced amounts which Lubben was required or did agree and did pay this over invoice premium amount, a further agreement was entered into by Lubben, an oral agreement, if the Court please, by which agreement certain materials would be shipped and sold to these various ventures of Lubben whereby the entire amount of the regular invoice prices, and the overages was paid for by Lubben in cash. These are what we have termed as unbilled shipments. Now, only Lubben, Lubben alone can testify relative to the payment of the amount of those unbilled shipments.

Now, in 1945, all of the over invoice amounts were paid in currency by Lubben alone, no one else handled any of

7 the funds. He actually, physically, delivered the funds, the evidence will disclose in this case.

In 1946, substantially all of the $300,000.00 that the Government says was paid over to the defendants in this case was physically handled by Lubben and nobody else, only 17 per cent, approximately 17 per cent of the amount of money that was delivered on over invoice amounts on unbilled shipments were delivered by other persons and

those other persons, Your Honor, who delivered that currency, delivered it at the direction of Lubben and were funds supplied by Lubben. So, even insofar as those items are concerned, it was necessary, his testimony is necessary, to make a complete picture of these transactions.

Now, certain records were maintained by Lubben of his payments. Those records can be in most part, not entirely, but most part testified to by others, but that testimony standing alone without Lubben's testimony will practically be meaningless to the Court and to the jury. So, even with those records, and the testimony of those other persons, his testimony is essential and is required to the Government in this case.

In addition to the matter of the records, I believe it was subsequent to the years involved, certain documentary evidence of Lubben was delivered over under an
8 agreement, delivered over to the defendants, documentary evidence of these payments. No one except Lubben, so far as I know, can testify as to the delivery of these documents to these defendants. It may be possible that one other person has some knowledge, and I am trying to find that out now, but at this moment I have no information that anyone else has knowledge of the delivery of these documents that were evidentiary of payments, only Lubben can testify as to that delivery so far as I know.

Furthermore, during the years involved and subsequent to the years involved, certain admissions were made by these defendants to Lubben and to Lubben alone, that no one else can testify to. In addition to that, it is my opinion that certain extra-judicial admissions made by these defendants may perhaps not be admissible if standing alone, and in order to corroborate those extra judicial admissions, Lubben's testimony is again necessary.

Now, with respect to these payments, I don't like to state where the payments were made. I don't like to go into too much detail about them, but I will, if the Court desires to hear, but these payments made by Lubben were made at strange and unusual places and under strange and unusual circumstances. They were made in a
9 manner and at a place designed to conceal the true nature of the transactions. Nobody was present during those times except Lubben and these defendants, so the very nature of that proof, and the manner and the

circumstances surrounding the delivery of this currency, is only known and can be testified to by Lubben. There was some small amounts of money, roughly around, or maybe in approximation of $40,000.00, was delivered in the presence of some of the employees of the Shotwell Manufacturing Company, but that amount is extremely small in comparison with the total amount of money that the Government says was delivered to these defendants. The amount in 1945 being approximately $177,000.00, and the amount in 1946 being approximately $300,000.00. So, it was a very infinitesimal or very small amount of the total delivered in the presence of any other persons, but the great portion of the funds were delivered by Lubben to these defendants under these unusual circumstances, and I might say, in the meeting, no other persons were present, and designedly done in that matter.

Furthermore, it will be necessary for the Government in this case to produce and introduce evidence, certain secondary evidence, and without Lubben to testify as to what happened to the primary evidence, it is doubtful if this secondary evidence will be available to the Government.

During our last hearing, I regret, Your Honor, that I must come to you in such a short space of time for this continuance, but I feel that it is imperative that I do, imperative that I appear here for and on behalf of the Government for this continuance in view of the very nature of Lubben's testimony. At the last hearing here, we prayed to Your Honor for a two-weeks' continuance. Defense counsel mentioned the matter of expense, expense to the defendants with respect to these continuances. It is expensive. I admit that there is an expense, but I likewise realize that there has been a terrific expense to the Government in the preparation of this case, there has been thousands and thousands of man hours put into the preparation of this case, and it has meant thousands and thousands of dollars being expended by the Government in preparation. It is my opinion, Your Honor, that Mr. Lubben is vitally, essentially necessary for the Government to sustain this case, and if we proceed to trial Monday in his absence, I believe that we would be placed in extreme jeopardy, extreme jeopardy for the Government's case, and I might say this, Your Honor, and I don't suppose I am telling defendants a thing, facts that they don't know, but without Lubben's testimony, the evidence insofar as one of these defendants is concerned, is

practically non-existent. So, I feel that in the interests of justice, that we employ and request this Court to grant this continuance.

Now, last Wednesday afternoon I had a conference with Mr. O'Brien and discussed this matter of the continuance, and at that time I said to him that I had been seriously considering this case to proceed in the absence of Lubben, because that is a possible eventuality at some time, to consider that possibility, and I told him it was necessary for me to plan that possibility. At that time I did not know what Lubben's condition was. I did not at that time tell Mr. O'Brien the extreme seriousness of our position if it was necessary for us to proceed. I have this in mind, also, I have the Court's interest. I have stated to the Court that under normal circumstances, with a reasonable amount of cross-examination, this case, it would take the Government at least five days to present its case, and discussions with Mr. O'Brien, he advises me that this case would take from six to eight weeks to try. Now, it seems to me that it would be an extreme waste of both, I am quite sure it would be an extreme waste of the Court's time and the jury's time and everybody's time if we
12 would be required to proceed to trial on Monday.

Now, I did receive a communication after the filing of this motion from agent Touey who is still in Puerto Rico and I would like to read the telegram. The telegram is dated 1 A. M., April 16th, and was received yesterday morning by me about 9:15. It is directed to me, Special Assistant Attorney General Arthur Cunningham.

(Mr. Cunningham reads the telegram to the Court.)

Mr. Cunningham: Now, I have not received the telegram. The examination, the X-ray examinations were to be made yesterday. I advised the Chicago office of the United States Attorney to forward to me immediately here and reports that they received, but the X-ray examinations were to be made at that time, or, that is yesterday, and I haven't received any report.

(Telegram handed to the Court.)

Mr. Cunningham: So I ask the Court, I have pointed out, I believe, all of the legal necessity of this man Lubben's testimony. I feel that the Government's case will practically be for naught in the absence of his testi-
13 mony and therefore, I implore the Court, I request the Court, I pray the Court to grant this continuance.

The Court: I wonder if we might recess for just a minute. I think counsel are here to present some formal findings and possibly there are no objections for the proceedings that are to be heard.

(Recess taken.)

The Court: You may proceed, Mr. O'Brien.

Mr. Cunningham: If the Court please, during this brief interlude here, I received a call from Chicago and they have received there a telegram from the doctor, and as I recall the telegram, it is to the effect that Lubben is showing signs of improvement and it may be possible for him to travel within a week or ten days, but he has shown signs of improvement. I might also say to the Court, and I do have the approval of Mr. O'Brien to mention this, that last Wednesday at the conference that we held, in addition to discussing this matter, we also discussed other negotiations with respect to this case and I believe Mr. O'Brien will mention those facts in his statement to the Court.

Mr. Kirby: Your Honor, we would like to get certain factual material in the record and to be as accurate about it as possible, we think that Mr. Cunningham knows more about it than anybody else, and we would like to have him put in the record under oath some of these matters, it will just take a few minutes, that we want to ask him about; and so if we could call him now—

Mr. Cunningham: You want me to testify?

Mr. Kirby: Just for a few things, Mr. Cunningham.

Whereupon,

ARTHUR B. CUNNINGHAM, a witness, being the Special Assistant United States Attorney, being first duly sworn, was examined and testified as follows:

Examination by Mr. Kirby.

Q. Your name is?

A. Arthur B. Cunningham.

Q. And Mr. Cunningham, when did Mr. Lubben come to the United States from Puerto Rico in March of this year, do you know about?

A. To the best of my information, and I have been advised of this fact, it was shortly before the New Jersey trial, and to my best recollection that was within, some place between, his arrival here, some place between, oh, I

would guess—it was before the trial. I am not too sure of the trial dates.

15 Q. It was nearly March?

A. Early March I think. I would say some place between the 5th and the 12th, although I am not too sure.

Q. And when he came to New York, he then went and was in attendance on a trial at Hackensack, New Jersey?

A. I have been so informed.

Q. And this agent Touey that we have talked about this morning was in attendance upon that trial, too?

A. That's right; yes, sir, that is correct.

Q. However, it was a State Court proceeding?

A. That is correct.

Q. And the trial continued to be on April 1, isn't that true?

A. I believe that is true, a day or two beyond April 1 that trial continued.

Q. And the prior continuance here was granted at a hearing held on April 3rd, a Friday?

A. Well, I suppose that's correct.

Q. It is, Friday the 3rd was the date.

A. It was just two weeks ago today I believe.

Q. Yes.

A. Yes.

Q. And now, agent Touey being with Mr. Lubben during the course of that trial was where that Mr. Lubben went back to Puerto Rico on April 1st?

16 A. Mr. Lubben went back the night of April 1st.

Q. Yes, and—

A. Back to Puerto Rico the night of April 1st.

Q. In your remarks to the Court the last time, you said with respect to Mr. Lubben, he doesn't feel like he could go forward without some time in this case, you recall that, that you said that?

A. I think that's true.

Q. Am I correct in believing that in the corridor in rather an angry scene, Mr. Lubben told Mr. Touey that he would not come to Chicago until he had been given more time to prepare for the Chicago case, and that's substantially what you were told?

A. I have been advised that he was in such a nervous state.

Q. Yes.

A. And such a—he had been so attacked and vilified

during the course of that trial, that he had been informed that when he first came to New Jersey—

Q. I am really limiting my question.

A. I would like to give you the whole story though.

Q. Of course, the whole story about Lubben if you want to open it up is quite a gory one, really—

A. Can I move that be stricken, Your Honor?

Q. All right, all right.

17 A. As counsel for myself.

Q. Yes, indeed, I agree, you are perfectly right.

The Court: Go forward.

By Mr. Kirby:

Q. Yes. I would like to. But, were you advised on or about April 1st that he had gone back to Puerto Rico and that he refused to come to Chicago?

A. Now, what I was advised, that's what I started to tell you before you stopped me. I tell you what I was advised was this. When he was first summoned to appear and asked to appear at that trial in New Jersey he was advised he would be there a matter of a few days at the most, whereas, the trial and his attendance there lasted a portion of the several—almost three weeks; that on the day that he left, he was in this nervous condition because of his experiences throughout that trial, especially on cross-examination, and he had been away from his business, and there was nobody to take care of it except this man, I believe his name is Bookman or, again, I don't know which it is, but that he was—no one was there except him, it was necessary for him to go back, and that he was going back, and I can't recall whether he told me or he told agent Kain that he was going back.

Q. And he did go back?

A. And he did go back.

Q. And he went back under his own power?

18 A. As far as I know, yes.

Q. And he has been in Puerto Rico ever since?

A. As far as I know, yes.

Q. Now, this day when you said he was going back and he did go back, that was on a Wednesday night?

A. April 1st.

Q. April 1st was a Wednesday?

A. April 1st was on Wednesday, yes.

Q. The next day you served upon the defense your motion for a continuance in this case?

A. He was what?

Q. And the next day, Thursday, you served upon the attorneys for the defendants your motion for continuance in this case?

A. That is correct.

Q. That was on Thursday?

A. That's right.

Q. Now, he went back to Puerto Rico, and am I correct in understanding you this morning, that the first time that agent Touey went to Puerto Rico was on the 13th?

A. On Monday, midnight Monday of this week he took a plane out of New York.

Q. Yes?

A. That's correct.

Q. Now, prior to Touey going there, you had had a wire on the 8th that Mr. Lubben had gone to a hospital?

A. That is correct.

Q. And this Dr. Montiela had sent a letter on the 8th which you have attached as an exhibit to your motion?

A. That's correct.

Q. And then on the 8th, was the first date that you had this advice about Lubben's illness?

A. That's correct.

Q. And the letter?

A. Except his statements with respect to his condition at the conclusion of the trial in New Jersey, I had no information as to the extent of his condition or that he was hospitalized until the 8th.

Q. No, up until then, he had said he was going back and he did go back?

A. He said all those other things, not only that he was going back and did go back, but he mentioned his condition and also mentioned what he had been through in the course of that trial in New Jersey.

Q. And had he in the intervening week before he went into the hospital communicated with any of your people?

A. Yes, I wish I had all my notes with me, but I don't have. I have about everything except the pencilled notations I make of telephone calls.

Q. Yes, sir?

20 A. I did talk to him on the telephone and told him that the date of trial was the 20th and he explained to me what had happened to him and what had happened to his business with respect to attachments having been issued and levied on his automobile, his stock in his corporation was attached, his business—

Q. Well, he had many difficulties?

A. Many difficulties, and when he talked on the telephone, I would like to tell this fully, he sounded like a fellow who was extremely shocked by all that had happened to him in his absence and was happening to him, and I told him then that he would have to be here on the 20th. I further told him and elicited a promise from him that he would be here on the 17th of April, and he told me then that he would make every possible effort to be here on the 17th, and my purpose in having him here, of course, was to discuss this case with him. I have seen the man once for a few hours, and I haven't had an opportunity to discuss in minute detail all of the testimony that I expect this man to testify to, and he promised me then that he would try to be here by the 17th of April.

Q. On the 13th—

A. Now, I don't recall, Mr. Kirby, the date of that call, but it was before he was hospitalized.

Q. Yes. Now, on the 13th of April, a lawyer by

21 the name of Davidson phoned from Puerto Rico?

A. That is correct.

Q. Samuel Davidson?

A. That is correct.

Q. Samuel Davidson has been for some years an attorney for Lubben?

A. That is correct.

Q. Lives in New Jersey?

A. That is correct.

Q. He had gone down to Puerto Rico and was there with Lubben?

A. I would like to tell that whole story if I might.

Mr. Kirby: Well, if the Court please—

The Witness: I will withdraw.

Mr. Kirby: I dont' know how long we should go into this.

The Court: I can't give you any longer than 10 o'clock. I have a jury going to report at 10 and then we will have to adjourn until sometime this afternoon.

Mr. Kirby: I am about through with the questioning. Should I continue for a couple of minutes to finish them?

The Court: Yes.

Mr. Kirby: Thank you, Judge.

22 By Mr. Kirby:

Q. Now, with respect to this wire, I notice here that this man Tanner that is mentioned, it is your understanding of course that Tanner was in the company of the United States Marshal when he visited Lubben, isn't that right?

A. That's correct.

Q. Is your understanding further that the process that was in the possession of the Marshal related to his production of a copy of his income tax reports?

A. I have been advised of that by Mr. O'Brien.

Q. Yes. We have had some discussion even with the Court on that subject, so this fellow Tanner went there in the company of the United States Marshal?

A. That is my understanding. Now, who was—

Q. Now, this wire that the District Attorney had which was to Thomas I. Nado, you know Mr. Nado was a lawyer, do you?

A. Mr. O'Brien advised me of that during this interlude here.

Q. Have we also advised you he is a lawyer in the biggest and one of the most outstanding law firms?

A. That's correct.

Q. As far as your use of the wire was concerned, none of these people are guilty of any impropriety that you know of?

23 A. Nothing but this suspicion as is indicated, as I stated.

Q. You know the matter was discussed by the United States District Attorney down there with these people?

A. All I know about the discussion is what is contained in the wire.

Q. Yes. So that you have no personal objection to that subpoena, do you?

A. Oh, no, not at all.

Q. This fellow Bookman, that's involved in the wire, you know that he has been served with a subpoena by the defense to appear?

A. I have been advised that he has been.

Q. And you know that he was at least a participant in some of the business ventures with Lubben?

A. Insofar as related to this case I know of none.

Q. You know he was a fellow that brought in General Confections?

A. Yes, that has no materiality in this case, that's my opinion.

Q. Is it conceivable that we had a reason for serving a subpoena on a material witness is one reason for serving the subpoena?

A. I question the materiality of your subpoena on Mr. Bookman, the question of the necessity of it.

24 Q. The man, however, has been an associate of Mr. Lubben's for some years?

A. I don't know that.

Q. Yes. Now, you have had reports on Mr. Lubben and the condition of his health, have you, at other times than just now?

A. Yes, and that was the same, Davidson, going back to that call.

Q. Yes?

A. Samuel Davidson told me at that time that he was hospitalized, and still hospitalized on that date, I mentioned in my motion.

Q. Had he had a relapse?

A. And that by reason of the service of this that he had had a relapse, service of this subpoena, I told Samuel Davidson at that time that if Mr. Lubben did not appear I had no choice but to have or request the Court to issue a capias for his appearance here.

Q. You are satisfied that he could be made to travel by a capias?

A. I think it would be inhuman to, knowing what I do know to request the capias.

A. I think it would be inhuman to, knowing what I do know to request the capias.

Q. Just two final questions about Mr. Mammel, for the record. Is it correct that Mr. Mammel worked on the Thursday prior to the Friday that you were up

25 here for the continuance last time?

A. Yes, he—

Q. And is it—

A. Let me answer. He came in, he came into the office for an hour or so but had to go home and return to his home, and he did not return as far as I know until the Wednesday of the following week, and at that

time he came in for a half day, and I think he came in for a couple of half days and has been coming in full days since that time.

Q. One of the counsel in the case observed him working up until as late as 4 o'clock on the Monday following the continuance, is that contrary to the information you have?

A. That's contrary to my knowledge, on what date?

Q. Working from the Wednesday following the continuance?

A. No, no. Let me get the dates straight. He appeared on the Thursday prior, which will be April 2nd, for an hour or so, but couldn't go on and returned to his home, and I think it was a half day or part of a day of the following Wednesday, whatever date that would be that he first appeared and then for several days he put in a few hours and then after those several days, I am not too sure of the dates, Your Honor, why he has been working a full day.

Q. I don't mean to foreclose you from any other answers you would like to put in the record. I have no further questions.

26 A. Thank you.

The Court: Gentlemen, I suppose it will take some time more than the eight or nine minutes we have, and I think I will ask you gentlemen to come back at 2:30 this afternoon. I might say 2 o'clock, but I am afraid I will not be through, so unless you have some specific reservations for going back—

Mr. O'Brien: I think we better come back, Judge, it is very difficult to get out of here today and we have found that we have nothing definite.

The Court: Well, I think we better come back at 2:30.

(Recess taken at 9:58 A.M. until 2:30 P.M.)

1

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 Cr. 143) • •

The above entitled matter came on for hearing before the Honorable Gunnar H. Nordbye, a Judge of the above court, in the United States Court House, Minneapolis,

Minnesota, at 9:00 A. M. until 10 A. M. and resumed again at 2:45 P. M. on April 17, 1953. The following is the 2:45 P. M. session.

Appearances:

Arthur B. Cunningham, Assistant United States Attorney, Chicago Illinois, Attorney for Plaintiff.

Vincent O'Brien, Esq., and William T. Kirby, Esq., Chicago, Illinois, Attorneys for Defendants.

2 Mr. Kirby: This will be a short summary of the facts as we understand them relating to why, or what the record shows as to why Mr. Lubben is not available, according to the facts, as a witness; and I am going to take it chronologically.

From March 10, approximately, to April 1, Lubben was in New York and Hackensack, New Jersey as a witness in a state trial. Agent Touey was in attendance with him throughout. And, now then, we come to the days April 1 and 2. Lubben said on Wednesday April 1 he was not coming out to Chicago and he was going back to Puerto Rico, and that is precisely what he did that night, to attend to his business affairs. The next day, April 2, which was a Thursday, a motion for a continuance was filed. Mammel, the second man mentioned in that motion worked at least part of that day. A continuance was granted on Friday April 3. Mammel went back to work, we say Monday, Mr. Cunningham believes on Wednesday.

Now, we come to April 5 which is a Sunday. According to Dr. Montiela's letter, Lubben became sick. Now, Mr. Cunningham, on a date which I believe must have been between April 5 and April 8, Mr. Cunningham talked to Lubben on the phone and Lubben told Mr. Cunningham of how his business had been neglected while he was away and Eddy Dane was taking care of it; and he said his car had been attached and other diffi-
3 culties had inured to his business, but there was no mention of illness, no mention of sickness, and Lubben promised that he would be in Chicago on the 17th ready for trial, which would be today.

Now, by Wednesday April, on Wednesday, Lubben went into a hospital and had this Eddy Dane send a wire

to Mr. Cunningham. On that same day, April 8, Dr. Montiela wrote a letter saying it would be six to eight weeks before Lubben could travel. Then, we come to April 13, which is this Monday. Lubben's lawyer, Davidson, from New Jersey, called from Puerto Rico and said to Mr. Cunningham that the United States Marshal and a man named Tanner had served subpoena's on behalf of the defense in this case, and those subpoena's, we have advised Your Honor, called for certain income tax reports of Mr. Lubben; and Lubben's lawyer, Davidson, told Cunningham that Mr. Lubben, because of the service of that subpoena had had a relapse. Mr. Tanner, a former F.B.I. man, as Mr. Touey states in his wire, has advised us he was in the hospital with the Marshal so he might observe his condition, and did, and advised us that at that time Lubben said he was never going to come to Chicago.

The Court: Where does that appear? Where does that appear by way of any showing here?

Mr. Kirby: It does not. No, sir. Mr. Cunningham, that very night, that Monday night of this week, sent Touey down to Puerto Rico to see what the condition was, or, as Mr. Cunningham expressed it, to see whether Mr. Lubben was malingering.

April 15, which is this Wednesday, the motion for continuance was given to Mr. O'Brien. On April 15, as I understand it, there had been no new word with respect to Mr. Lubben's condition other than the Dr. Montiela letter, because the Touey wire didn't arrive until yesterday morning.

That brings us to yesterday, which was the 16th, and the Touey wire you have which indicates that Touey's opinion is that Lubben's condition had been aggravated by the service of the subpoena which I have already mentioned.

Mr. Touey talks of this Tanner, the former F.B.I. man, and he talks of a lawyer that Mr. O'Brien had wired, and a wire which Mr. Touey had apparently intercepted. It wasn't addressed to him, but in any event it is there, but that wire, incidentally, we knew nothing of until this morning when it was read.

That brings us to today, and we have another word from Mr. Cunningham that he has heard from his people and that there is further word from Puerto Rico which

is that Mr. Lubben is better and that he can travel up here within six, within a week or ten days, as I understand it. That causes me to refer back to the Dr.
5 Montiela letter which says he is so sick he cannot travel for six to eight weeks, and I make the observation that that prognosis is so completely wrong based on the word that we have this morning that it does justify an inference that the prognosis was wrong in order to assist Mr. Lubben in a design to avoid coming to Chicago to testify. We do not have an affidavit from Mr. Tanner as to what took place and Mr. Lubben's remarks about refusing to come to Chicago, and that is not before Your Honor, but like in the rush of these, the events we have each had to report such matters as have been reported to us, confessing the informality of them.

Now, I reviewed that simply to make a quick summary of the dates from March 10 to April 1 or 2. Then he said he was going to go and he would not come out here, and he did, and he has stuck there since.

We do not believe that the medical showing would be adequate to justify a finding that this witness is unavailable for the trial, and there is much that makes us highly critical of this witness' attitude in himself determining when he will come, and the day after he made his declaration. Once before we faced a motion for a continuance, and now that his lawyer is calling up again, we are faced again with it. And I summarized those facts because they are of grievous moment to us in making us think that if the trial were to go ahead, that this
6 witness would appear.

Mr. O'Brien: May it please the Court. I don't think I want to take any time to speak on the fact part which you have heard and know as well as I. I do want to express, in addition what has been said, a belief, after reading the doctor's letter, that the maladies described are patently not of a serious nature, but are trifling and are such as are known to respond readily to available treatment, that is to say, an asthmatic condition or a so-called pneumonitus, either or both will respond either to sulfa, penicillin or crysticillin administrations and respond quickly.

In any event, on the last report which I heard this morning, the witness would be available within a week, a week or ten days.

Now, I want to call these additional points to the Court's attention. First, the government has had literally years to confer with this witness, and on the record already before you, without having reached the point of trial, I think you, yourself, must have seen that he is in or his name does occur in nearly every motion and paper that there has been in the case, and it's been there ever since 1948 and particularly since March of 1952 when the Indictment was returned in this case. Even Mr. Cunningham, let alone the other government representatives, but even Mr. Cunningham has had
7 more than a year since the return of the Indictment to talk with this man; but on his own statement, he has never spent more than an hour or two with him.

Some reference is made, and I may be a little out of order at this point, that is in the continuity that I wish to present this in, but I recall some statement being made of the expense to which the government has been put, or the expense which it has incurred in the case. That undoubtedly is true, but I do think that there never has been a time in the case on the record before you in so far as mere money is concerned at which the government, had it presented a bill, could not have had the tax, and I have always personally felt that this never was a case for a criminal prosecution, a face which I will come to later, but more on the subject of the past opportunities to preserve Mr. Lubben's testimony.

Early in the case, as Your Honor knows, I filed a motion supported by affidavit to take depositions of various witnesses including Mr. Lubben, any of whom, I thought, due to the peculiar nature of the case, might be unavailable at the trial. I said so. I got the order. I took the depositions on Notice, and while the depositions of other witnesses of importance were returned to the clerk from New York, notably, certainly, the most important deposition, was the deposition of Mr. Lubben taken at Puerto Rico, San Juan, where Mr. Ryan,
8 or rather Mr. Gorman from Mr. Ryan's office, Messrs. Crane and Touey also attended; I went into the matter very thoroughly. I brought out, in perhaps more detail than you would ever normally do or see it at a trial, what the books and records of these companies consisted of, how they were kept, what the pattern was, what memoranda were made, and how and when, about

the alleged overceiling receipts or payments; all of that is in the deposition. It was full opportunity to the government to bring out whatever it wanted from the same witness, and it did exercise its right and bring out facts in which it was interested. It did not chose, although it had known the facts for years, to illicit evidence on any of the things which Mr. Cunningham talked about today, and those depositions are returned in the file.

I believe that it's apparent that the situation in this case in that respect is precisely that which is contemplated by the provisions ofr a de bene esse deposition, which is the only kind, as your Honor knows, which may be taken under the criminal, as distinguished from the civil rules of porcedure, one which may be used if the witness is absent and which may not be used say for impeachment if the witness is present. Now, that is something not to be lightly passed over, because we both know of cases even of a criminal nature in which a contention was made that there was no opportunity to be confronted with the witness, or to cross examine a witness whose deposition, by reason of his unavailability at the trial, was sought to be used, and yet the upper courts have said that the opportunity afforded at that time, the confrontation of the witness at that time satisfied all of the constitutional requirements.

Next, and as an independent point, I wish to suggest that Mr. Cunningham does not now contend, and that it wasn't his contention at the time of the last continuance, as shown by the papers and the transcript, that Mr. Lubben is an indispensable witness, namely, that the trial cannot go forward without his testimony, as distinguished, if you please, in those papers, the moving papers and the transcript, as well, at the last hearing from Mr. Mammel who was represented to the Court for the reasons then assigned, as being an indispensable witness. At that time, I think it is fair to say that for no reason then shown, moved the court to have me devote any of my remarks to that part which then concerned Mr. Lubben. Mr. Mammel was the indispensable witness. Now, admitted, concededly the case here can go forward without Mr. Lubben, whereas it was represented that it could not go forward iwthout Mr. Mammel, it is today stated to you that the government's case could not be so completely presented without Mr. Lubben. I think, Your Honor, on the basis of the information

before you, to give the most favorable interpretation on behalf of the plaintiff, that there is nothing that would reasonably justify the factual conclusion that Mr. Lubben cannot be here within a week or within the 10 days, ready to testify in this case if it goes forward Monday and during the government's case in chief. If it be that his appearance on the stand is somewhat out of the order which Mr. Cunningham would prefer, then that is unfortunate, but it is not a consideration of importance to justify the granting of this motion.

Now, there are other things, some of which, other than those which Mr. Cunningham alluded to, available to him in the proof of his case, in the establishment of his case as he sees it, without the presence of Mr. Lubben. Miss Feldman, who was the bookkeeper of the company, and whose deposition was also taken, is a witness subpoenaed by the government and has far more familiarity with the books and records than Mr. Lubben, according to what Mr. Lubben professed, expressly professed upon the deposition, and according to what her deposition as returned shows. I believe again that it is fair to say that her familiarity in that respect is so extensive in, that Mr. Cunningham will undoubtedly have her on
11 the stand in his case in chief for at least a day on the books of those companies, and her activities extended over the whole area.

I interrupt myself, Your Honor, I feel guilty of talking at this length. I know you have charged that Jury, you must be tired. What I have to say is limited. I will try to move on with it.

In addition to Miss Feldman, there is the outside accountant who kept the books of Lubben's companies. He is a subpoenaed witness, both will be available. And I have no doubt that the Court will recall that all of the papers and records and communications which the defendants turned over at and following he time of their alleged disclosure were not suppressed but are available for use, for whatever use, they continued to be so available to the company.

Now, what I have said covers considerations which would seem peculiarly pertinent if this were a matter of only first impression, but the motion here is not quite that and can't be that on the record which was made. I wish to refer briefly to four parts of that record, and I

am speaking of the transcript which the Reporter handed me this morning having to do with the hearing of April 3. At page 14 of this transcript, Your Honor stated:

"I don't think I would be particularly concerned
12 with the phase of the motion with reference to Lubben."

That's when I started to address myself to that in the situation as it then was.

Going to page 29, your Honor said:

"Well, you have asked for a two weeks' continuance, supposing Mr. Mammel isn't ready on the 20th?

"Mr. Cunningham: If the Court please, I will just have to take that chance, and Mr. O'Brien further suggested we had no assurance he would be there throughout the trial, that is another chance that the Government would have to bear.

"The Court: Well, what do you mean when you say you will have to take that chance?

"Mr. Cunningham: Well, I feel that he will be available.

"The Court: Well, suppose he isn't, what then?

"Mr. Cunningham: Well, I would rather not answer that question, what I might have to do or think about the case at that time, Your Honor, if you don't object to my not saying."

And then at page 33:

"The Court: Well, Mr. Cunningham, it seems to me that if I am going to grant a continuance, that we should have an understanding that regardless of Mr. Mammel's health that this trial should go forward to the date that I continue it to.

13 "Mr. Cunningham: That is correct, Your Honor, it will go forward.

"The Court. Obviously we just can't carry on with these continuances. The defendant is entitled to a speedy trial and while I don't believe that the continuance from December to April prejudiced the defendant, because I don't believe that the defendant was in the position, in view of the tremendous amount of work that had to be done, to be ready for trial on December 9th, and I don't believe that I did the defendant any wrong, so to speak, when I continued the matter until April. There may be a difference

of opinion about it, I am merely expressing my opinion."

And finally, on page 35:

"The Court: Well, I am going to continue this matter until April 20th, and in accordance with the Government's request, but I think that the understanding must be, Mr. Cunningham, that the Government must be prepared to go forward on that date regardless of Mr. Mammel's health.

"Mr. Cunningham: The Government will."

Now, I think with me, Your Honor, on that record, it is as simple as this. If the showing here today had to do with some relapse on Mr. Mammel's part, on the part of a witness described as indispensable, I don't think on the record made, there would be justification for the
14 motion, and surely, the absence or temporary absence for a week, of a witness who is not described as indispensable, who is merely described as important, could not have any more, and shouldn't have as great effect.

Finally, we have attempted to preserve our record and to insist before the court on a right to a speedy trial. There is truth in what the Court said about the tremendous job on the records, but we have done the best we can with it. We have not sought a continuance on anything had to do with our fault. The most we ever got was the one from the 1st until the 9th for reasons then assigned in December. The government has had, or by its treatment of the Court's orders, has so far had three continuances, the first two of which were for that reason and the last was the one which occurred on April 3, and now they are here with a request for a fourth, and I don't know of any reason, if the past record is not to have anything to do with it, why those requests couldn't be resumed at infinitum for whatever reasons might seem in themselves to be sound.

Now, finally, Mr. Cunningham spoke of his conversation with me the night before last when I was in his office, and of the possibility that I would acquiesce in the motion or was considering acquiescing in the motion. I am unable to state at this time, I am precluded by considerations of fact which we though about, from stating in detail
15 the nature or precise nature of our discussions, but this much I can say to Your Honor. First, that late last year and early this year, Mr. Kirby and I did have discussions in Washington with heads of the Department

of Justice, and on one occasion with them and Mr. Cunningham as well, looking to the disposition of the case, all of those discussions were in the open and solely on the merits, and then, they were in not, in no way resumed until shortly after Mr. Cunningham had come to Chicago to prepare for the trial of this case which I suppose was approximately a month ago; and I then alone talked to Mr. Cunningham. There was nothing that ensued from that discussion and the matter was dropped, and we proceeded with the preparation for trial.

On April 8, the day that Mr. Lubben's illness was, or the fact of that was communicated and made known, there was some reopening of those discussions, and on Wednesday, or, I may say I didn't know anything at that time about Lubben's situation in the hospital, but I went to Mr. Cunningham on Wednesday and asked him if what I heard was correct about the further discussion, and we talked about it, and we were conferring with this motion was handed to me along at four 4:30 in the afternoon.

Now, as far as the motion for continuance is con-
16 cerned, Your Honor, I think you will realize that I would have rejected it out of hand, but in view of the possible effect on the discussion, I felt a duty to discuss the matter with the other counsel and with the defendants in the case which I did that very night, and the next day, or yesterday morning, with their unanimous consent, I advised Mr. Cunningham that we would oppose this motion for continuance.

I don't have any more to say on the motion at hand. There were two or three collateral questions in the past that are unanswered which I would like to ask Your Honor about, but, if you have time when we finish with this. Thank you.

Mr. Cunningham: If the Court please, very briefly, with respect to the matter of sending Mr. Touey to Puerto Rico, I did, after receiving the information that I received, the wire and the letter, immediately took all steps necessary to have Mr. Touey go to Puerto Rico to find out the facts. I didn't have and representative there that I could inquire or check into the facts, and I acted with all the despatch that was at my hand. Thereafter, I stated, Mr. Touey did not leave until Monday night. I heard nothing from him all day Tuesday. I heard nothing from him thru noon on Wednesday. I realized that

I had to take some action promptly. It's my under-
17 standing of the cases with respect to the matter of continuances, when the information is called to your attention, you must act promptly I thought I waited a reasonable time before I talked this matter over with Mr. O'Brien, and then I called Your Honor relative to it, and I felt perhaps that I would hear any moment that he would be available, but I felt in view of the timely necessity, and that I should act with despatch, that I should file the motion, and that was on Wednesday that I talked to Mr. O'Brien and also called your Honor.

Now, I knew nothing about asthmatic bronchitis or pneumonitus, I don't know what they are. I know if it's bronchitis, it can be rather severe. I don't know if pneumonitus means pneumonia or what it means, but we did find out from Touey yesterday morning that he was hospitalized, still hospitalized. I think defense counsel realized that he was hospitalized. Their own representative advised them, or visited him in the hospital and talked to him there with the deputy marshal.

I stated previously that I talked to this man for two hours. My only contact with him was that of the contact before the Grand Jury. I never talked to him privately. He appeared, I presented this case to the Grand Jury and that's the only time I have ever talked to him. I
18 never talked to him before the Grand Jury session, or I haven't talked to him since. Other agents and representatives of the government have talked to him, but I have had no opportunity to see him or talk to him.

Now, relative to those depositions, Mr. Gorman of the United States Attorney's office was assigned those depositions. During the time that those depositions were being taken, I was in the midst of a trial of a case and had no opportunity to attend those depositions, but I want to tell Your Honor that at no time has Mr. Lubben indicated that he would not be present for the trial of this case, but at all times, up until the time I talked to him on the telephone, indicated that he would be in Chicago on the 17th.

Now, with reference to the matter of my allegation as to his indispensability, I don't believe under the cases that such an allegation is necessary. I think, frankly, the only thing necessary that I present to the Court is a

factual situation, and if the witness' testimony is material and not cumulative, the Court has a discretion to continue the case, and I humbly ask the Court to extend that discretion in this instance until we do have an opportunity to present this case so that full justice may be done; and in his absence, if he does not appear, full justice will not be done.

Now, with respect to Miss Feldman, it is true, as
19 Mr. O'Brien stated, she is more familiar with the books and records of that concern, of those various ventures than Mr. Lubben, but her information relative to that is limited to the books. All she knows is what the records show. The matter of delivery of currency is solely that of Lubben, as I expressed before, all in 1945 and all but 17 percent of it in 1946, and of that 17 percent, as I stated before, the funds were supplied to the messengers that carried the money, were supplied by Lubben.

Now, I did state to Your Honor that we would be prepared to go forward on Monday whether or not Mr. Mammel recovered or not. I felt in that instance that perhaps some other agent could prepare himself in the event Mr. Mammel was not available. The statements I made, those were relative to Mammel's condition. At that time, Mr. Lubben was not hospitalized nor did I have any such information as to his illness or the extent of his illness. So the things I stated then could not have been conditioned upon a situation that I had no knowledge about.

So I urgently request this Court, in the interests of Justice, that a continuance be granted.

One thing more, Your Honor, whereas Mammel could have been replaced, there is no replacement for the information, for the testimony of Lubben, nobody can replace him. He alone has that knowledge. That was not true as to Mammel.

20 Mr. O'Brien: May I ask one question?

Mr. Cunningham: Surely.

Mr. O'Brien: Isn't it a fact that before the Grand Jury and otherwise, people from the Shotwell Company who are not defendants here, testified to the receipts of money?

Mr. Cunningham: Well, Mr. O'Brien is asking me to state a thing I am not permitted to state. I would like to state it.

Mr. O'Brien: Let's leave the Grand Jury out of it. The statements on your interview with your agents, I am quite sure, so that those people had to do with the handing of money received from Mr. Lubben, and in addition, the Court must understand that that the books which we are talking about are not books that are devoid of these things, but Lubben's books have numerous memoranda and papers referring to those alleged payments.

Mr. Cunningham: May I—Excuse me, if the Court please.

The Court: All right.

Mr. Cunningham: May I, in answer to that question, not with reference to any Grand Jury proceedings, I believe I stated when I was first—my first talks on the matter of this motion this morning, that there were employees of Shotwell who had knowledge of the re-
21 ceipts of funds, but that was in the, my best recollection, in an amount not in excess of around $40,000 of a total here of $177,000 in one year and $300,000 in another year.

The Court: Well, what suggestions are you now making to the Court, Mr. Cunningham, with reference to the continuance; to any certain date, or for any certain time, or what is the position of the government?

Mr. Cunningham: Well, at the time, Your Honor, that I filed the motion, the only thing that I had to go on was a communication from the doctor. As I said, I waited as long as I thought I should for Mr. Touey. So in my motion, I left that matter up to the Court as a time to be fixed. I didn't know what to say about the date. I didn't know much about the condition of Lubben except what I heard by this wire and this letter, so I felt at that time I could not state anything as to a date.

Now, I have been advised that he can move, per if his condition shows improvement as it has shown improvement in the last 36 hours, that he can possibly be in a position to travel within a week or ten days, and my advice further, I forgot to mention it to the Court this morning, was that if he would have somebody assist him in moving, so he must not be, he will not, apparently, according to that, all I can go on, Your Honor, is what I have been advised, he apparently needs some assist-
22 ance in moving in a week or 10 days because he will need someone to travel with him, according to information I have received.

So, I am somewhat at a loss to mention a date.

Mr. O'Brien: Well, Judge, may I say that the records in the Clerk's office show that the government has more than 40 witnesses subpoenaed and that it scarcely is conceivable that their cases in chief could be put in in less than two weeks, including the time for cross-examination.

Mr. Cunningham: If the Court is interested, I can tell the Court how many witnesses are anticipated being called in chief. The government is planning to call in chief 19 witnesses. All the other witnesses, and I think there is a lot more than that, Mr. O'Brien that we have subpoenaed, are rebuttal witnesses; and all of these are rather brief with the exception of Lubben and Miss Feldman, and perhaps another bookkeeper. With the exception of Lubben, Miss Feldman, another bookkeeper and Mr. Mammel, all other witnesses will be rather brief.

The Court: Well, if I am going to consider a continuance, what is going to guide the Court as to a date of continuance? What suggestions do you have?

Mr. Cunningham: Would it be possible to discuss that matter, if Mr. O'Brien consents, off the record right here with you rather than with respect to this motion?

23 The Court: Well, I haven't any objection if Mr. O'Brien hasn't any objection. I don't know to what extent he thinks everything should be included in the record.

Mr. O'Brien: Why, I don't know what Mr. Cunningham has in mind. If he thinks it should go off, that's all right.

The Court: Off the record.

(Discussion off the record.)

(A recess was taken.)

Mr. Cunningham: If the Court please, in answer to the Court's question, it would be my suggestion that the day be fixed either the 18th or the 25th of May, that's to suit the convenience of the Court.

Mr. O'Brien: If the Court please, of course, the only position that I can see under the circumstances, we in good faith and all sincerity oppose the motion for a continuance. We don't know what the Court's ruling is in spite of the questions. The questions mean nothing

to us. In that connection, we would like to have the Court's ruling on the question of whether there is or is not to be any continuance.

The Court: Well, I will answer that, indeed. My view is that I should grant a continuance. Now, that's why I asked Mr. Cunningham as to what suggestion he
24 had as to the date to which the matter should be continued. I didn't know whether he had in mind a few days or a week or ten days or what, and I hadn't given the matter sufficient thought to indicate in my own mind just what I would do in light of his suggestion.

Mr. O'Brien: Then may I make a suggestion?

The Court: Yes.

Mr. O'Brien: As I say, the mere fact that a Court asks a question does not necessarily indicate to me what the ruling would be, and so I wanted Your Honor to rule before I presented my suggestion.

We have been with the case a long time off and on to the virtual abandonment of all other matters. I suppose that on the basis of the showing made here, if the Court complied with that, regarded that alone, there would be no basis for a longer continuance than 10 days, but 10 days brings us into the early part of May and into a new jury at Chicago. Mr. Cunningham says that it does not permit time for the preparation of some extraneous things that he wants to do and things in which we may or may not have an interest. Now, since that is true, if you took it on for a further time or that could be done or considered, it would bring us into the middle of May with a jury that already has been there for sometime and is tired and which would be held for the length of this trial. I don't think that the trial itself when
25 it is streamlined down should take more than four to five weeks, but I do really think that it will take that time. Now, I suggest that rather than come up at too early a date in May or too late a date in May, considering the way of the jury service there, that it would be better to have it the first Monday of June, whatever that date may be. It would be the 1st of June. It might take the matter a week or so into what is our summer adjournment period, but that isn't too bad, if the Court can stand it.

The Court: I think I would rather go to September.

Mr. O'Brien: Well, Your Honor, if you would, I can

only say this, that I don't want my personal situation to effect it at all, but I have been hoping that we would get through and that I could get some rest in the latter part of May or June which I need. I haven't been, or I have been away for about a year and a half, and I have been working hard. It it would go, if it's early in June and into the summer as against September, there is very little choice on our part, I suppose September would be just as good.

The Court: What do you think, Mr. Cunningham:

Mr. Cunningham: Well, if your Honor please,
26 June 1 would suit as far as I am concerned.

The Court: What do you mean by that?

Mr. Cunningham: Well, I have no commitments at all for the summer or September and nothing set down that I know of.

The Court: You see, the difficulty is, if we run into June, we run into the heat of the summer, and I am rather loath to take it upon myself an assignment at the time in view of my other commitments, and unless it was going to be so prejudicial to the government or defendants by reason of a longer delay, I think I would rather start in the early part of September.

Mr. Cunningham: Certainly satisfactory with the government.

The Court: What do you think, Mr. O'Brien?

Mr. O'Brien: I think I have already said that that is equally satisfactory to us.

The Court: Well, supposing we leave it this way, that I will give it some further thought. I don't suppose you now have in mind, if we go in to a long continuance if you are going to keep these subpoenaes in effect?

Mr. Cunningham: I was thinking of that.

Mr. O'Brien: We would almost have to or we would surely be prejudiced, I am afraid of it, seriously so,
27 and that is why I was going to ask you if you could fix a date now and we could go back and telephone and we have to send out wires, those people will be on the way to Chicago, a great many of them for Monday, and they would be at their offices, it's late now, but be some at home and some at their offices, that's the best we can do. It doesn't mean, if I am correct, that they can't go where they will so long as they are available.

The Court: What time does the jury report in September, what will be the situation?

Mr. O'Brien: There will be one the first Monday in September, Judge, or Labor Day, well, it would undoubtedly be after.

The Court: Tuesday, the 8th of September.

Mr. Cunningham: Yes.

TThe Court: What do you think about that date?

Mr. Cunningham: That day is satisfactory with the government?

The Court: How about that day, if we got to go over? I understand you are not contending this, objections have already been noted, we are merely trying to arrange a date that will be at least as convenient as some other date, and whatever statements you make now, doesn't in any way constitute a waiver of your objections.

28 Mr. O'Brien: So I understand, Judge. September 8 is all right.

The Court: Well, I think I prefer the 8th of September, gentlemen, and it may be in light of Mr. Lubben's situation down there that if we continue it for two or three weeks you may have the same thing by reason of some claim of disability.

Mr. Cunningham: It's possible, I don't anticipate it. I hope note.

The Court: The only other suggestion I might have would be if we could continue it until the early part of May. I don't know how that would work out.

Mr. Cunningham: Mr. O'Brien stated certain other considerations that take time that I don't believe—

The Court: Well, then, I think—This isn't for the record.

(Discussion off the record and the hearing came to a close.)

276 And, to wit, on the 17th day of April, 1953, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

277

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

ORDER

The above-entitled cause came before the Court on April 17, 1953, on plaintiff's motion for a continuance.

Mr. Arthur B. Cunningham, Special Assistant to the Attorney General, Washington, D. C., appeared in behalf of the United States of America in support of said motion;

and

Mr. Vincent O'Brien and Mr. William T. Kirby, of Chicago, Illinois, appeared in behalf of the defendants in opposition thereto.

Upon good cause being shown,

It Is Ordered: That said motion for continuance is hereby granted and the trial of the above-entitled cause is continued from Monday, April 20, 1953, at two o'clock P.M., to Tuesday, September 8, at two o'clock P.M., at the United States Court House, Chicago, Illinois.

Dated this 17th day of April, 1953.

Enter:

Gunnar H. Nordbye
United States District Judge
Acting under Assignment to the
Northern District of Illinois

278 And afterwards, to wit, on the 14th day of June, 1953, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

279

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER

The Clerk of Court has informed this Court that the Northern District of Illinois does not convene its regular fall term until September 14, 1953, at which date the jury will be in attendance. In view thereof,

It Is Ordered: That the above-entitled cause be reset from September 8, 1953, to September 14, 1953, at ten o'clock A.M.

Dated this 14th day of July, 1953.

Enter:
Gunnar H. Nordbye
United States District Judge
Acting under Assignment to the
Northern District of Illinois

280 And afterwards on, to wit, the 28th day of July, 1953 came the Defendants by their respective attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

281

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION

The defendants, by their respective attorneys, ask leave of Court to file instanter their additional motion in the nature of a special plea in bar to dismiss the indictment, and for a rule upon the plaintiff herein to answer or otherwise plead to said motion within a short day to be fixed by the Court.

The Shotwell Manufacturing Company
a corporation, and Frank J. Huebner,
By Vincent O'Brien
Their Attorney

Byron A. Cain,
By Thomas C. McConnell
His Attorney

Harold E. Sullivan,
By William T. Kirby
His Attorney

282 And on the same day, to wit, the 28th day of July, 1953 came the Defendants by their respective attorneys and filed in the Clerk's office of said Court their certain Additional Motion In The Nature Of A Special Plea In Bar To Dismiss The Indictment in words and figures following, to wit:

283

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ADDITIONAL MOTION OF THE DEFENDANTS IN THE NATURE OF A SPECIAL PLEA IN BAR TO DISMISS THE INDICTMENT

The defendants, The Shotwell Manufacturing Company, a corporation, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner, by their respective attorneys, leave of Court having first been had and obtained, file this their additional motion in the nature of a special plea in bar to dismiss the indictment herein and each count thereof for the following reasons:

1. That Section 3761 of the Internal Revenue Code, 26 U.S.C., grants to the Secretary of the Treasury and the Commissioner of Internal Revenue of the United States the power and authority to grant immunity from prosecution to those guilty of violations of the said Internal Revenue Code.

2. That pursuant to the authority so vested in them by the said Section 3761, the said Secretary and the said Commissioner made, or caused to be made, between the 28th day of May, 1945, and the 14th day of May, 1947, various public statements and announcements in which they promised immunity from prosecution under the In-

ternal Revenue Code to any taxpayer who came forward and made a voluntary disclosure of omissions or mis-
284 statements in his (or its) income tax returns, provided that such disclosure be made prior to the initiation of an investigation of such returns by the Bureau of Internal Revenue.

3. In the month of January, 1948, the defendants, pursuant to and in reliance on the aforementioned statements and announcements of the said Secretary and the said Commissioner came forward and made a voluntary disclosure of omissions or misstatements in respect of the returns of the corporate defendant for the years 1945 and 1946 to a responsible official of the Bureau of Internal Revenue, and that, thereafter, they gave the Bureau of Internal Revenue all of the information required by said statements and announcements in order to permit the assessment of an additional tax in accordance with the then existing rulings of the said Commissioner.

4. That the said disclosure by the defendants herein was made prior to the initiation of any investigation by the said Bureau of the returns of the corporate defendant for the years 1945 and 1946.

5. That subsequent to the aforementioned disclosure the defendants herein cooperated with agents and officials of the said Bureau to the end that the amount of the tax, penalties and interest, if any, due from the corporate defendant for the years 1945 and 1946 might be determined, and that they frequently expressed a willingness and ability, and were at all times willing and able, to pay promptly any and all taxes, penalties and interest which might be assessed by the said Commissioner against the said corporate defendant in respect of its income for the years 1945 and 1946 in accordance with the said rulings of the said Commissioner.

6. That by virtue of the foregoing the defendants nerein and each of them have been granted a full pardon
285 and amnesty for any and all offenses under, and are therefore immune from prosecution under, the Internal Revenue Code of the United States for any offense connected with, or arising out of, the tax returns of the corporate defendant for the years 1945 and 1946, and therefore plaintiff is barred from maintaining its alleged action against them and the indictment in this case must be dismissed.

The Shotwell Manufacturing Company,
a corporation, and Frank J. Huebner,
By Vincent O'Brien
Their Attorney

Byron A. Cain,
By Thomas C. McConnell
His Attorney

Harold E. Sullivan,
By William T. Kirby,
His Attorney

286 And afterwards on, to wit, the 14th day of September, 1953 there was filed in the Clerk's office of said Court a certain Letter, Dated March 30, 1953, Addressed To Honorable Gunnar H. Nordbye, United States Court House, Minneapolis, Minnesota, Signed By Vincent O'Brien, in words and figures following, to wit:

287 Defrees, Fiske, O'Brien & Thomson
March 30, 1953

Honorable Gunnar H. Nordbye
United States Court House
Minneapolis, Minnesota

In re: United States of America v. The Shotwell Manufacturing Co., et al.
52 CR 143

Dear Judge Nordbye:

As you would know, we still have some loose ends for the trial, and I am endeavoring to cover them by this letter:

1. We should like to take the depositions of a witness Kurtz, who is at Miami Beach and is incapacitated by illness from appearing in response to subpoena. I am enclosing an appropriate motion and order showing the facts as I understand them and showing the materiality of his testimony.

2. As to the matter of computations and the separate category of reconstructions which you discussed with us at the conclusion of the proceedings in Duluth, a recent talk with Mr. Cunningham indicated to us that nothing specific is available at this time that Mr. Cunningham plans to offer in evidence in documentary form, so that

he has not had occasion to notify me as was directed at the Duluth hearing.

3. At the conclusion of the hearing on the motion to suppress you indicated that we might have findings and conclusions of law if we wished. I don't think of any that we desire at this time except your legal conclusions as to what constitutes a sufficient and timely disclosure.

4. We are not informed as to your practice under Rule 24 (a) and (b), having to do with the examination of jurors and with the number of peremptory challenges.
288 There is no universal practice in our District. All methods permitted by the Rule are employed. It would be middle ground practice to permit us to supplement your questioning with oral questions propounded directly to the jurors. On the other hand, if all of the questions were to proceed from the Court, then we would have the burden of supplying you with written questions to enable you to supplement, within your discretion, anything that had not been covered. This is a mechanical chore we would like to avoid if possible.

On peremptory challenges where there are multiple defendants there is some liberality of individual judges on increasing the ten provided for in the Rule. I think that in a case of this character it would be reasonable to afford the defendants twenty, the additional ones to be used jointly or individually as they see fit.

5. As you know, we presented to Judge Barnes a motion to dismiss, part of which consisted of a plea in bar predicated on immunity as a defense growing out of the disclosure on the theory of compromise and estoppel. As you also know, the Government's demurrer was sustained pursuant to an oral opinion rendered by Judge Barnes. Although Judge Barnes' order is, of course, interlocutory, we are not asking you to pass upon it again, although you have the power to and can do so if you wish.

We do, however, now ask leave to file the enclosed motion to dismiss, predicated on pardon and amnesty, which is in the nature of a special plea in bar. That you may grant leave at this time is established by Rule 12; that you should grant leave at this time is shown by United States *v.* Wilson, 7 Pet. 150, 161-162 (U.S. 1833). If the Government traverses, the proper procedure would be to have the plea tried to the jury prior to the introduction of any evidence on the general issue. Heike v. United

States, 217 U. S. 423 (1910); Commonwealth *v.* Merrill, 90 Mass. 545, 546-547 (1864); 4 Blackstone, Commentaries, 335. If such issue is determined adversely to the defendants, the judgment would be respondeas ouster. 4
289 Blackstone, Commentaries, 335; Chitty, Criminal Law, 470; 3 Holdsworth, History of English Law, 614; Heike *v.* United States, 217 U. S. 423 (1910).

If the Government chooses to demur, we are prepared to argue the question of law at your convenience.

Respectfully yours,
(Sgd) Vincent O'Brien
Vincent O'Brien

VOB:GM
Enclosures
CC: Mr. Otto eKrner, Jr.

290 And to wit, on the 28th day of July, 1953 being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry, to wit:

291

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER

The defendants presented a motion to this Court on March 31, 1953, in which they asked leave to file instanter their additional motion in the nature of a special plea in bar to dismiss the indictment. The alleged bar is predicated upon the contention that the defendants, and each of them, have been granted a full pardon and amnesty arising out of any offense connected with the tax returns of the corporate defendants for the years 1945 and 1946.

The same grounds set forth in this additional motion as the basis for the special plea in bar were presented to Judge Barnes on a motion to dismiss the indictment, which motion he denied on June 23, 1952. On June 24, 1952, defendants were arraigned and each defendant entered a plea of not guilty. Thereafter, defendants presented to this

Court a motion to suppress certain evidence, and the basis for that motion was substantially the same grounds as those urged upon Judge Barnes on the motion to dismiss the indictment. After a full presentation of evidence by both parties, this Court denied the motion to suppress on November 21, 1952.

292 The cause was first set down for trial on December 1, 1952, and then, on the defendants' request, was continued until December 8, 1952. The trial date was continued at the Government's request from December 8, 1952, to April 6, 1953, and later, at the Government's request, from April 6, 1953, to April 20, 1953, and again, at the Government's request, from April 20, 1953, to September 8, 1953.

This additional motion to dismiss may be filed, but it must be denied. In that the parties have set forth their views in their correspondence to the Court, I see no necessity for any further hearing. First, it may be observed that the filing of this motion is not timely, and secondly the issues which defendants now desire to present in support of their motion have already been presented to the Court on two separate motions as indicated above and ruled upon adversely to the contentions of the defendants. The fact that the defendants now style their special plea in bar as one of pardon and amnesty does not enable them to present for rehearing the same issues as were presented to Judge Barnes. And in passing it may be noted that the defendants have taken the position before the Court that the issues presented on their motion to dismiss before Judge Barnes and the undersigned were for the Court alone without a jury. Rule 12, Federal Rules of Criminal Procedure, does not recognize any special plea in bar such as defendants now seek to present. It is the Court's view that the defendants have exhausted their rights on the grounds presented before the trial court, first, in moving to dismiss the indictment on the grounds urged before Judge Barnes, and secondly, on the motion to suppress the evidence before this Court. In any event, it would seem that the plea of pardon and amnesty is a matter for the executive or legislative department to consider and is not granted to any

293 officials of the Internal Revenue Department by Title 26, U.S.C.A., § 3671, as defendants contend. The authority to compromise as granted in that statute is not a grant of amnesty.

It follows, therefore, that defendants' motion to dismiss the indictment must be, and the same hereby is, in all things denied. It is so ordered.

An exception is allowed.

Dated this 28th day of July, 1953.

Enter:

Gunnar H. Nordbye
United States District Judge
Acting under Assignment to the
Northern District of Illinois

294 And afterwards on, to wit, the 14th day of September, 1953 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion To Amend And Supplement Paragraph 4 Of Their Motion To Dismiss The Indictment Heretofore Filed, With Affidavit Of Vincent O'Brien and Exhibits D and E Attached Thereto, in words and figures following, to wit:

295

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION OF THE DEFENDANTS TO AMEND AND SUPPLEMENT PARAGRAPH 4 OF THEIR MOTION TO DISMISS THE INDICTMENT HERETOFORE FILED.

The defendants by their attorneys ask leave of Court to amend and supplement their motion to dismiss the indictment heretofore filed herein as follows:

1. After paragraph numbered 4 of said motion, insert the following:

> "Since the filing of the motion to dismiss in the above-entitled cause, there was filed in another cause thereafter instituted in the same Court, entitled "United States of America vs. Sam Achilli", and there numbered 53 CR 154, a motion to dismiss supported by two affidavits of Joseph A. Struett, certified copies of which said motion and affidavits are hereto attached as Exhibits D and E, respectively, and by

reference made a part hereof. As will more fully appear from said affidavits, the said Joseph A. Struett was Regional Counsel for Region 11 of the Penal Division of the Bureau of Internal Revenue from June, 1946 until November 27, 1951. Said Regior 11 includes the Northern District of Illinois. The said affidavits for the most part have to do with the procedures and standards or lack of standards obtaining from time to time in the Bureau of Internal Revenue in respect of the determination as to which tax cases should be referred to the Department of Justice for prosecution, and said Exhibits D and E are submitted in partial support of paragraph 4 of said original motion to dismiss the indictment, but without prejudice to the right of the defendants to a hearing upon said motion on oral evidence to be adduced in open court.

296 "In further support of paragraph 4 of said motion to dismiss as amended and supplemented, the defendants submit the affidavit of Vincent O'Brien, attached hereto."

Defendants also move that the trial judge reconsider the interlocutory order heretofore entered herein sustaining the demurrer of the plaintiff in so far as said order applies to paagraph 4 of said motion to dismiss, and that in so doing, the Court pass upon the legal sufficiency of said paragraph 4 as so amended and supplemented.

The Shotwell Manufacturing Company,
a corporation,
By Thomas D. McConnell
Its Attorney

Byron A. Cain and Frank J. Huebner,
By Vincent O'Brien
Their Attorney

Harold E. Sullivan,
By William T. Kirby
His Attorney

297

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

State of Illinois }
County of Cook } ss.

AFFIDAVIT

Vincent O'Brien, being first duly sworn on oath deposes and says that he is attorney of record for certain of said defendants, and that he makes this affidavit on behalf of all of the defendants in support of their foregoing motion.

Affiant further avers that at the time the original motion to dismiss the indictment was interposed, there was unavailable to them, or to their counsel, for the purpose of the supporting affidavit, information such as is contained in Exhibits D and E to the foregoing motion, but that prior to the filing of said motion to dismiss, affiant, without avail, requested the said Joseph A. Struett to make an affidavit in support of the defendants' motion as to the subject matter of part 4 thereof. Mr. Struett said that he was unwilling to make an affidavit, but that if he were subpoenaed at any hearing which might be had, he would testify in open court. As more fully appears from the record in this cause, the said motion never reached the hearing therein requested and there was, therefore, no evidence adduced in open court because the plaintiff's

298 demurrer to said motion was sustained.

Affiant further avers that there are now and were at all times in question in this suit, many companies engaged in the manufacture and sale of candies in and about Chicago, Illinois and within the Northern District of Illinois, and also many other companies which manufactured for sale and consumption commodities in which corn products are indispensable. Affiant is informed and believes, and therefore represents the fact to be, that substantially all of said companies were compelled to, and did during all or part of the times in question in this suit, procure materials in short supply, including corn products, through the Black Market, and to that end, were required to procure premium receipts for their goods over and above the

ceiling prices then in effect, which were not reflected upon the books of most of said companies—all of which affiant avers was at all times in question in this suit well known to the plaintiff. Affiant is further informed and believes, and therefore represents the fact to be, that notwithstanding the premises, and notwithstanding the failure of such companies to make sufficient and timely disclosures, such cases were withheld from criminal prosecution and civil settlements were effected, and that with the exception of one small company which also dealt with the said Lubben and his companies, no candy company in the Northern District of Illinois has been indicted for alleged evasion of income taxes for the years 1945 or 1946 other than the defendant corporation in this case.

Vincent O'Brien

Subscribed and sworn to before
me this 12th day of September,
1953.

Alexander Newman
(Seal) Notary Public

299 EXHIBIT D

In The
UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division

• • (Caption—No. 53 CR 154) • •

MOTION TO DISMISS AND ALTERNATIVE MOTIONS.

AFFIDAVIT IN SUPPORT THEREOF.
BRIEF IN SUPPORT THEREOF.

Joseph A. Struett,
Attorney for Sam Achilli,
105 West Madison Street,
Chicago 3, Illinois,
FRanklin 2-0665.

300

In The
UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division

* * (Caption—No. 53 CR 154) * *

MOTIONS OF DEFENDANT TO DISMISS INDICTMENT, OR IN THE ALTERNATIVE, TO ORDER A BILL OF PARTICULARS, SUPPRESS EVIDENCE AND FURNISH CERTAIN INFORMATION AS TO INTERVIEWS OF CUSTOMERS OF HIGHLAND MOTOR SALES.

Now comes Sam Achilli, the defendant herein, by his attorney, Joseph A. Struett, and makes the following motions:

1. Moves that the indictment and each count thereof be dismissed, on the grounds (a) that the statute on which said indictment and each of said counts is founded, namely, Section 145(b) of the Internal Revenue Code, when read together with Section 3761(a) of the Internal Revenue Code and other statutes which are in pari materia therewith, amounts to an unconstitutional delegation of
301 authority to the executive branch, in violation of Article I, Section 1 of the Constitution of the United States manifesting the doctrine of separation of powers, and in violation of the due process clause of the Fifth Amendment of said Constitution; and (b) that the executive branch has employed unconstitutional practices and procedures in the enforcement of said Section 145(b), as applied to the defendant herein, resulting in his indictment herein, in violation of the due process clause of the Fifth Amendment of said Constitution.

In the alternative,

2. Moves, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, that the Court direct the United States Attorney to file a bill of particulars as to each separate count of the indictment herein to make full and specific the charge therein, such bill of particulars to identify, list, explain and make clear the following matters with at least as much information and details as are commonly found in a Revenue Agent's report accompanying a notice

to a taxpayer of a proposed deficiency assessment of federal income taxes viz:

a. The extent, if any, that any alleged understatement of net income of the defendant was caused by items of alleged unreported gross income of the defendant, listing each such item by date and amount, describing the transaction out of which each such item arose, and furnishing the name and address of the person, firm or corporation who or which was the source of such item of unreported gross income of the defendant;

b. The extent, if any, that any alleged understatement of net income of the defendant was caused by items of alleged unallowable deductions of the defendant, listing each such item by date and amount and describing the nature of each such item;

302 c. The adjustments of defendant's reported income and deductions, and the computations of federal income taxes, by means of which the figures set forth in each count of the indictment were arrived at, purporting to show the true and correct amount of federal income taxes due from defendant with respect to each taxable period covered in the indictment; and

d. The sources of the government's data as to the matters set forth in subparagraphs a to c, inclusive, above, both documentary and oral, to the extent not privileged by law, including, without limiting the generality of the foregoing, a detailed specification of the information, both documentary and oral, concerning defendant's transactions and affairs involved directly or indirectly in the indictment herein, obtained by the government from Earl H. Gromer, defendant's attorney.

e. That the government file the net worth statement and compilations thereof on which it intends to rely at the trial—and further that it also file a detailed statement of its evaluations, and how they were arrived at of all properties of the defendant Sam Achilli which may be included in said net worth statement.

3. Moves that this Court suppress all evidence, whether documentary, oral or otherwise, obtained by the government directly or indirectly from Earl H. Gromer concerning defendant's transactions and affairs involved di-

rectly or indirectly in the indictment herein, on the ground that such evidence stemmed and was derived from confidential information obtained by Earl H. Gromer in his capacity at attorney for the defendant herein and that defendant did not and does not waive the privilege of confidential communication inherent in and surrounding said attorney-client relationship.

4. Moves that this Court direct the United States Attorney to furnish a list of the names and addresses of all
303 customers of Highland Motor Sales who were interviewed by Revenue Agents or Special Agents in connection with the investigation of the instant case, and a copy of each written statement made by any such customer at the behest of said Agents and a copy of each memorandum of any such interview made by said Agents, pertaining to transactions involved in the instant case, including, without limiting the generality of the foregoing, any such statement or memorandum relating that a customer paid or may have paid money to Earl H. Gromer or that said Earl H. Gromer was present when money was allegedly paid by a customer to defendant or anyone else in connection with the business of Highland Motor Sales, or relating to any fact that said Earl H. Gromer participated in any manner in any transactions of Highland Motor Sales which were not fully and accurately reflected on the books of account thereof for each and all of the prosecution years.

In support of the above motions there is hereto attached and made a part hereof by reference the affidavit of Joseph A. Struett and a Brief of the Law.

.....

Joseph A. Struett,
Attorney for Defendant.

304 AFFIDAVIT OF JOSEPH A. STRUETT

305 State of Illinois, }
County of Cook. } ss.

AFFIDAVIT OF JOSEPH A. STRUETT.

MOTION TO DISMISS.

Introduction.

Joseph A. Struett, being first duly sworn, on oath deposes and says:

He is the attorney for the defendant, Sam Achilli. He has knowledge of the facts, other than facts furnished him by others and as to those facts he believes them to be true. This affidavit is made in support of the defendant's Motion to Dismiss the above indictment and for alternative relief. Deponent's experience and knowledge of the facts herein are amply sufficient to qualify him as an expert on the subject matter hereof and to express the opinions contained herein as such.

For five years, from June, 1946 until November 27, 1951, when he resigned, Deponent was Regional Counsel for Region II of the Penal Division of the Bureau of Internal Revenue (hereinafter sometimes referred to as the "Bureau"). As such Regional Counsel, he was required to make the quasi judicial determination as to which of those cases recommended for prosecution by a Special Agent should be, or not be, referred by the Bureau to Justice. He at no time, while so employed by the Bureau, had any official connection with this case since it was then under investigation. Under Bureau regulations, his right and authority to represent Mr. Achilli had to be cleared through and approved by the Bureau, which has been done.

306 Deponent dealt with the Bureau over a period of years, prior to assuming his position within the Bureau in 1946, and knew the Bureau's general policies and its general method of operation. His discussion of the problems which confronted him in his official capacity as Regional Counsel are confined to facts known to persons dealing with the Bureau; facts now a matter of public knowledge; facts supported by public documents issued by the Bureau; and facts which appear in the public documents in which are recorded the many investigations of the Bureau conducted during the last several years by various committees of the Congress.

A number of his statements made by Deponent are supported by testimony of Treasury and Bureau officials and others in hearings conducted by the Sub-committee of the Ways and Means Committee of the House of Representatives (hereinafter referred to as the "Sub-committee") beginning on January 22, 1952 when this Sub-committee had under consideration the proposed Plan of Reorganization of the Bureau. These proceedings are bound together under a heading entitled, "Proposals for Strengthening Tax

Administration." Reference to this public document will be made as follows: (Sub-committee .....)

Upon the recommendation of the Bureau, the defendant, Sam Achilli, of Elgin, Illinois, an automobile dealer in the Chicago area, operating the Highland Motor Sales of Elgin, Illinois, was indicted for attempting to defeat and evade his Income Tax for the years 1946, 1947 and 1948 (I. R. C. Sec. 145(b)). At a conference held in the office of the Bureau's Enforcement Counsel on July 23, 1952, Deponent was advised that the alleged fraudulent unreported income was due solely to alleged side payments received by Mr. Achilli in connection with the sale of automobiles by this agency. His lawyer, Mr. Earl H. Gromer, was
307 a full and active partner in this agency during the years 1945 to 1950, inclusive. Mr. Gromer was not recommended for prosecution by the Bureau!

BASIS OF MOTION TO DISMISS.

The Motion to Dismiss the indictment is based legally upon an unconstitutional delegation of legislative authority to the executive branch of the government and a denial of Due Process of Law, as the term is used in the Fifth Amendment of our Federal Constitution. It is based factually on:

(1) The chaotic conditions which have existed in the Bureau for the past several years, and the Bureau's irresponsible, unfair and illegal edicts and directives during that period as to the handling of all criminal Income Tax cases, as a result of which prosecution was recommended by the Bureau and all these cases, including the case of Mr. Achilli, were promiscuously loaded into Justice, cleared for prosecution and indicted, without any semblance of fairness, uniformity, consistency or equality in the treatment of taxpayers, and without any definite, ascertainable standards, tests or guide posts from which the Bureau could legally determine what taxpayers should, or should not, be properly and legally recommended for prosecution; all despite the fact that the Bureau was every day settling equally or even more flagrant cases of other taxpayers without recommending prosecution;

(2) the arbitrary, capricious and illegal classification by the Bureau of certain citizens and taxpayers,

including Mr. Achilli, as "Racketeers", and of their Income Tax cases as Racketeer cases, and the arbitrary, capricious and illegal directives of the Bureau that cases so classified should be given "Special Treatment" in determining whether or not they should be cleared for prosecution by the Bureau, as a consequence of which cases so classified as did not receive the equal consideration or treatment from prosecu-
308 tion standpoint as did the cases of other taxpayers, and were cleared more readily into Justice. As a matter of fact, once the case of any taxpayer was classified as a Racketeer case, and a Special Agent recommended prosecution, its clearance to Justice for prosecution was practically automatic;

(3) the indefensible, discriminatory, unfair, unreasonable, arbitrary, capricious and utter lack of uniformity and equality of treatment by the Bureau in the singling out and recommending for prosecution, and the subsequent indictments fathered by such recommendations, of the cases of a negligible few automobile dealers of the Chicago area, and particularly the defendant, Mr. Achilli, after and despite the fact that the Bureau had civilly settled, without recommending prosecution, the cases of innumerable (approximately two hundred or even many more) other automobile dealers of the Chicago area, in similar circumstances, whose cases involved identical or similar facts and were equally or more flagrant.

The term "settled" is used in its broadest sense in this Affidavit; namely, the closing out by the Bureau, without recommending prosecution, cases of taxpayers upon the payment of the taxes, negligence penalties, and/or fraud penalties, although the Bureau had evidence of fraudulent unreported taxable income. Taxpayers falling within this category are referred to and described herein as "Tax Evaders."

SANCTIONS AVAILABLE TO BUREAU DEALING WITH TAX EVADERS.

To aid the Bureau in its administration, enforcement and collection of taxes, and particularly Income Taxes, the Congress has enacted many alternative and cumulative prerogatives, sanctions and remedies, including civil and

criminal penalties, available to and to be used by the Bureau in dealing with taxpayers against whom the
309 Bureau has uncovered sufficient evidence to establish that they have willfully evaded their taxes. The use of one or more of these sanctions does not exclude or require the use or non-use of another. The Bureau may settle the case of a tax evader or it may recommend that case for prosecution. Prosecution does not bar the collection of the civil penalties. The Bureau may, but is not required to, recommend prosecution of a tax evader. The use or non-use of all or some of these sanctions is closely tied-up, interwoven with, and a part of the proper disposition of a particular case in the interest of the Revenue.

(a) Civil Penalties.

Among the civil penalties are the five percent negligence penalty, twenty-five percent delinquency penalty, and the fifty percent fraud penalty. In addition, there is a provision for six percent interest on any deficiency. It is not uncommon for the civil penalties and interest, when applied to cases of tax evaders, to far exceed the additional taxes due. These civil penalties are most severe; at times they are overwhelming. Under the present high tax rates they may well not only constitute sufficient punishment, but excessive punishment for the offense committed. They can greatly exceed the amount of the fraudulent unreported income; and they may well take away every dollar the tax evader has. They survive the tax evader's discharge in bankruptcy; in truth, they even follow his heirs after he is in his grave.*

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* The overwhelming severity of these civil penalties, plus interest, when applied to cases of tax evaders, is lucidly summarized by Mr. Balter in his recent book, Fraud Under Federal Tax Law (Second Edition), at page 256 as follows:

"The fact that the normal reaction is to fear the criminal charge more than the civil penalty, should not lull the taxpayer who has successfully warded off a possible criminal action against him into a false sense of security. Whether there is a criminal charge or not, if fraud is an issue, the civil penalties may be overwhelming."

"We have already pointed out the inexorable effectiveness of applying the fraud penalty to the entire deficiency, even if only a small portion of it is tainted with fraud.

"The addition of interest may by itself be an extremely burdensome item. For example, if the fraud is asserted in 1950 for the tax year 1944, the interest at 6 per cent for six years on the deficiency alone would total 36 per cent, no mean item.

310 From the standpoint of legal theory, these civil penalties are not construed as punishment, but as remedial in nature to reimburse the heavy expenses of the investigation and the loss resulting from the tax evader's fraud Helvering *v.* Mitchell (1938), 303 U. S. 391, 82 L. ed. 917. Practically and realistically, however, these civil penalties, at our present high tax rates, in cases of most tax evaders certainly constitute ample, or even excessive punshment and far exceed the cost of the investigation. They should be considered by the Bureau before prosecution is recommended (Sub-committee 203, 242).

(b) Criminal Penalties. Power of Bureau to Compromise Criminal Penalties.

Among the ten criminal penalties is Section 145b. Every taxpayer fraudulently omitting income obviously commits a Federal crime. There is a broad general rule, laid down by Statute Title 28 U. S. C. Section 507, that every Federal official charged with the duty of the enforcement of our Federal laws must prosecute "all offenses against the United States." He cannot compromise criminal liability without compounding a felony. A striking exception to this rule is the particular crime of attempted evasion of Income Taxes and/or other penal provision under the
311 Revenue Laws (Sub-committee 175) Thus, we have the unique Statute, Section 3761 of the Internal Revenue Code, giving the Secretary of the Treasury the authority to settle and compromise not only the civil aspects of a case, but likewise the criminal aspects. Once a case is referred to Justice by the Bureau with a recommendation of prosecution, Justice assumes jurisdiction of that case. The Attorney General then has plenary power to compromise and settle both the civil and criminal aspects of the case under the same Statute. This Statute of itself indicates that the Congress intended that many

(Footnote Continued)

"And as we have seen, the civil penalties may be cumulated with the not uncommon result that if there is fraud and also a failure to file for the same year, a 75 per cent penalty would be added to the deficiency.

"If we add to these factors already discussed these further objects for concern, namely, that there is no statute of limitations operating against the Treasury, that the tax deficiency as well as the fraud penalties will survive a discharge in bankruptcy; and that even the death of the taxpayer would not stay the Treasury from proceeding against the estate to collect the taxes and penalties, then we can clearly understand how severely the civil penalties operate." * * *

cases of tax evaders should be settled and compromised without criminal prosecution—that not all tax evaders should be prosecuted (Sub-committee 263). This Statute is seldom used by the Bureau at the present time, since the executive branch has surrounded its use with technicalities resulting in much delay. From a practical standpoint, however, when the Bureau closes out, as it does every day, most of the cases of tax evaders upon the payment of taxes and certain civil penalties without recommending prosecution, it amounts to an informal use of the statutory license not to prosecute.

THE CASES OF MOST TAX EVADERS ARE SETTLED BY THE BUREAU WITHOUT RECOMMENDING PROSECUTION IN THE INTEREST OF THE REVENUE.

The then Secretary of the Treasury, in a press release dated May 25, 1947, openly admitted that "most fraud cases are settled upon payment of the tax plus interest and civil penalties." He urged all tax evaders to take advantage of the Bureau's then Voluntary Disclosure Policy. That is, to come in, disclose and pay. As a matter of persuasion, he stated "the number of prosecutions also has been rising" (Sub-committee 151). This statement of the then Secretary of the Treasury reflects the real
312 purpose of criminal prosecutions, namely to help collect the money, not to punish.

The function of the Bureau is to collect the Revenue and not prosecute tax evaders except for that very purpose. Prosecution of tax evaders costs all taxpayers money, besides delaying and often endangering the collection of the civil liabilities.* As a matter of fact, sometimes such prosecutions so delay civil settlements as to cause a loss of the civil liability. "The time and effort spent in sending a crook to jail often costs more than the revenue we obtain from him." (Statement of New Commissioner, May 8, 1953 issue U. S. News). Settlement with tax evaders and collection of their taxes, in-

* Under Bureau procedure, once prosecution is contemplated, the civil aspects of a case cannot be considered until the criminal aspects of the case are disposed of. This may mean a delay of from 2 to 5 years and even longer before the government collects the taxes and penalties in cases recommended for prosecution or prosecuted.

terest and penalties, not only save all taxpayers the costs of prosecution, but also results in the prompt collection of the Revenue. As everyone knows, the disposition of all tax cases, including the cases of tax evaders, is a matter of negotiation between the Bureau and its officials and the taxpayer and his representatives. The interests of the Revenue are paramount from the standpoint of the Bureau.

Many reasons for settling without prosecution were developed before the Sub-committee by representatives of the American Bar Association, members of the Sub-committee, representatives of Justice, and representatives of the Treasury Department as appears in part by the following:

> "Our systems of law enforcement and judicial process could not stand the strain (of prosecuting all tax evaders) so there must be some effort to distinguish among various graduations of tax falsifications." (Sub-committee 227); "It (criminal prosecutions re-
> 313 commended in every possible case) would have worse effects upon our fiscal system than would your meeting the problem squarely and adopting the policy that all taxpayers know will be applied with uniform force." (Sub-committee 97); "The object of the law is to collect taxes, I think you can have too many prosecutions." (Sub-committee 203); "We all know what happened in the old prohibition days; it got so that juries wouldn't convict," (Sub committee 213) and "If every case were to go through this whole process, to go to the Department of Justice, would be a terrific delay in the determination of civil penalties and the collection of civil penalties * * *," "* * * I think (this) would result to a detriment of the tax system" (Sub-committee 166).

These same reasons emphasize that a Bureau employee who settles the case of a tax evader is not dishonest or failing in his duty. This same employee may well be conscientiously, courageously, competently and honestly performing his duty to a greater degree in the interest of the Revenue than some other Bureau employee who might be inclined to or does recommend prosecution of that very case or a similar case.

The new Commissioner of Internal Revenue recognized the true situation, namely, that cases had to be settled

and settled promptly, as manifested by his interview in the U. S. News & World Report of May 8, 1953:

> • • • A. • • • I think we have considerably restored or started morale on the way back. • • • (Emphasis supplied.)
>
> • • • A. • • • "What we're after is to get the cases settled. We want to stop this pile-up along the line."
>
> "Q. Is there much of a jam now?"
>
> "A. It is pretty bad. It is so bad, in fact, that I am told that Tax Court cases may not get tried for two or three years.
>
> "But we are making headway on this. I've given
314 instructions that there must be more concentrated effort to settle."
>
> "Q. Wouldn't you get more revenue that way?"
>
> "A. We get the revenue and get the case out of our way and simplify the thing all along the line. I haven't said that we have to settle a case just to settle it, but I said to these fellows:
>
> "Here, forget about all this business of being scared to death of investigations. Go on and make your decisions. You have the authority to make them. Make every decision you can make within the scope of your authority, and be satisfied that if it is an honest decision you will be defended in it." • • •

HOW AND WHERE MOST CASES OF TAX EVADERS ARE SETTLED.

The investigation of a tax evader is usually commenced by the Revenue Agent. The old Revenue Agent in Charge had the real responsibility for bringing in the revenue. A Revenue Agent has to examine returns and reach decisions quickly and collect the money even from tax evaders. He is hesitant to call in the Intelligence Unit because of the delay which inevitably ensues. There were certain Revenue Agents in Charge who rarely called in the Intelligence Unit and others called them in sparingly. Revenue Agents are not interested in prosecutions except where particular cases have genuine moral turpitude and real enforcement value. They are interested in the rare cases where prosecution rightfully attracts publicity, thereby inducing other taxpayers to comply with the revenue laws and voluntarily come in and pay their taxes and

penalties and do it quickly. The present jam throughout the Bureau is in no small way due to a practice in existence during the last several years that a Revenue Agent as such cannot assert a fraud penalty without calling in the Intelligence Unit. This has cost taxpayers millions of dollars.

315 The Revenue Agent may, and in some instances should, call in the Intelligence Unit (Special Agents). Once the Intelligence Unit is called in, it assumes jurisdiction of the case, and a Special Agent proceeds with the investigation, working with the Revenue Agent. The Special Agent, having concluded his investigation, has two alternatives: (1) He can settle, if possible, the case of the tax evader for the taxes determined by the Revenue Agent and the fraud penalties, or, if unsuccessful in settling the case, he can attach the fraud penalties and move the case forward for civil disposition; and (2) he can recommend criminal prosecution of the taxpayer. The Intelligence Unit referred but 24% of their cases to the Penal Division for prosecution for the period from July 1, 1946 to June 30, 1951 (Sub-committee 114). But 60% of these were cleared by the Penal Division to Justice. If a Special Agent recommends prosecution, he, of course, also attaches the fraud penalties to the additional civil taxes. Thus, under Bureau regulations, the quasi judicial recommendation of prosecution of a particular tax evader is made by the Special Agent, the very person who conducted the investigation. If the Special Agent as such recommends prosecution, and it is approved by his superiors, the case goes to the Enforcement Counsel of the Bureau for legal review. He, in turn, has two alternatives: (1) To refer the case to Justice for prosecution; and (2) to send the case back to the Revenue Agent for disposition of the civil liability. Once he determines to refer the case to Justice, he, on behalf of the Bureau, sends the case to Justice with the recommendation of the Special Agent that the tax evader be prosecuted.

316 THE BUREAU ALONE DETERMINES WHAT TAX EVADERS SHALL BE RECOMMENDED FOR PROSECUTION AND ONLY THOSE SO RECOMMENDED MAY BE PROSECUTED.

Unless the Bureau recommends prosecution, the Department of Justice obtains no jurisdiction over a tax

evasion case. Thus, the Bureau is in a position to stifle a prosecution in the inception, merely by settling the case.

Justice assumes jurisdiction of the case only after referral for prosecution (Sub-committee 171).

The Revenue Agent can and does settle a great number of such cases without calling in the Special Agent. If he does, there is no chance for the Special Agent to recommend prosecution (Sub-committee 107). The Special Agent can and does settle many of such cases without recommending prosecution, and if he does, there is no recommended prosecution. If either the Revenue Agent or the Special Agent settles these cases, they never reach the Enforcement Counsel's office (Sub-committee 104-105). It goes without saying that the Enforcement Counsel cannot refer to Justice cases which never reach his office, nor can Justice prosecute cases it never receives.

The end result of this multi-level sieve for settling fraud cases is to work a gross inequity upon those singled out for prosecution.

To illustrate: Suppose there are ten tax evader automobile dealers in a city whose cases are all equally flagrant. All are under investigation by Revenue Agents. The Revenue Agents may settle five of these cases without even calling in the Special Agent. The Special Agent having been called in settles four of the remaining five and forwards one to the Enforcement Counsel who refers that case to Justice. Justice gets and can get only the one case, though there were nine other cases settled by the Bureau which were equally flagrant. Thus, the lack of
317 equality of treatment and the denial of due process is involved only in the one case which is singled out and recommended for prosecution, and that lack of equality of treatment and lack of due process occurs administratively in the Bureau.

THE PROBLEM IS WHAT CASES AND WHAT TAX EVADERS SHALL BE RECOMMENDED FOR PROSECUTION BY THE BUREAU AND WHY?

Bearing in mind the facts heretofore developed, and particularly the fact that every day in the Bureau someone administratively, rightfully and properly settles most cases of tax evaders without recommending prosecution, and that some one else in the Bureau administratively

determines that some cases of other tax evaders under like or similar facts shall be recommended for prosecution, we reach the crux of this Motion to Dismiss for Lack of Due Process. What cases of what tax evaders are to be recommended by the Bureau for prosecution and why? Are there determining factors, tests, guide posts or discernible standards which the Bureau and its officials are duty bound to apply before they can legally recommend to Justice that the case of a particular taxpayer, with equality to all like taxpayers, involving fraudulent unreported income, be prosecuted? If so, what are they? Or is the Bureau and its officials, without stated and known standards, free to administratively recommend the prosecution of any such taxpayer? If the Bureau and its administrative officials have this latter virtually unregulated power to make such determination, then such administrative officials are obviously making the law. If such administrative officials have such a power, and if they have evidence establishing fraudulent unreported income of any taxpayer, they can single out and seize upon the case of any such taxpayer whom they desire to recommend for prosecution, or they can refuse to prose-
318 cute a taxpayer whose case is similar, without a semblance of fairness, equity, uniformity or equality of treatment of all taxpayers. Such administrative officials have it within their unregulated power to administratively settle the case of one tax evader (thereby for such tax evader avoiding prosecution), and then simultaneously recommending for prosecution the case of another tax evader (thereby for such tax evader burdening him with the ignominy of such prosecution), whose case is no more flagrant than that of the tax evader whose case is settled. That some Bureau officials believe that they have this unbridled, unshackled power is best emphasized by a conference this Deponent had with one of the top Bureau officials of the Chicago office, who was charged with the solemn duty of determining whether or not the case of a certain automobile dealer should be settled or recommended for prosecution. He advised this Deponent that the Bureau had determined to recommend prosecution. When this Deponent called his attention to the fact that the Chicago office of the Bureau had settled (hence failed to prosecute) far more flagrant cases of

many other violating automobile dealers, this official's reply in substance was that while there was no question about this latter fact, "We have determined that this case should go forward for prosecution, we call them as we see them." If such lack of uniformity of consideration and action, irrational and unfair attitude, and display of arbitrary power of such officials having such virtually unregulated power is to be tolerated and receive legal sanction, then we have a government of men and not of law, whereunder all citizens and taxpayers in like situations can be and are subject to the arbitrary abuse and misuse of bureaucratic administrative power without remedy of law. What is the correct answer? The Bureau has struggled with this question for years in an attempt to arrive at a fair solution.

319 Deponent, as Regional Counsel, received the recommendations for prosecution of innumerable Special Agents, approved by their superiors, Special Agents in Charge, covering an area of sixteen states. As stated, it was the duty of this Deponent to make the quasi judicial determination as to what cases, so received, should be forwarded to Justice for prosecution, and what cases should be returned to the Revenue Agent's office for civil settlement. Hundreds of such cases of every conceivable nature, involving fraudulent unreported income, were presented to and passed upon by this Deponent. Most of such cases were given the personal attention of this Deponent to a greater or lesser degree. He, too, was faced with the problem raised in the last paragraph. The manner in which and how and under what circumstances the problem was solved is most pertinent here.

THE BUREAU'S PRACTICES AND PROCEDURES IN EFFECT IN 1946.

Deponent on assuming his duties as Regional Counsel in June of 1946, believed that the Bureau's then overall problems, the history and purpose of these income tax prosecutions and the basic conceptions applicable to all of Federal prosecutions, as fully developed in Appendix A, were to be a part and parcel of his evaluation of a criminal income tax fraud case, and in making his determination of which cases should be forwarded to Justice for prosecution. On this objective basis, these cases had

to be most carefully reviewed and screened before they were cleared for prosecution so that: they would be representative substantial cases of willful, flagrant, defiant violators; they could and would be absorbed and processed promptly by Justice and the courts; when they reached the courts they could and would be promptly tried with well-merited publicity; and if their prosecution was
320 successful, substantial penitentiary sentences could be rightfully imposed, not probations. On this same basis, other cases, lacking these essential elements, were to be closed out upon payment of tax and penalties, since these cases merely clogged all dockets everywhere, in the Bureau, Justice and the courts, thereby delaying (delay is often the best defense) and preventing the processing of substantial cases as aforesaid and likewise delaying the collection of the revenue. To illustrate, the clearing for prosecution and the prompt prosecution in the State of Illinois of two clear-cut substantially flagrant cases of defiant tax evaders with much publicity followed by substantial penitentiary sentences has far more benefit from an enforcement standpoint, and from cost to taxpayers, than does the clearing for and prosecution of 10 cases of 10 tax evaders and saves all taxpayers much money. If all 10 cases are cleared they just tend to clog the dockets in Justice and in the courts. They cannot be promptly tried. If disposed of promptly they are usually followed by probation. Lawyers ordinarily do not plead clients guilty if they believe they will be incarcerated. If they are not disposed of promptly they just lay pending, further clogging the dockets of the courts and steadily losing all enforcement and prosecution value. While cases are in this state, the collection of the revenue is inordinately delayed at the expense of all taxpayers.

Deponent discovered that there were no Bureau regulations nor any explicit standards of the Bureau for selecting income tax cases for penal treatment. There was, in effect, only a Bureau policy which had been conceived in 1919 by confidential memorandum and restated by confidential memorandum in 1934. This policy had been held within the archives of the Bureau for a period of 26 years, until it was publicly released in 1945. This policy was that the Bureau would recommend the prosecution of a case "solely on the basis of whether the evidence is sufficient to afford reasonable grounds for the belief

321 that a conviction can be secured" (Sub-committee 139). This was actually only a directive to analyze the evidence (gathered by the Special Agent) to see whether or not he had correctly determined that this evidence was sufficient to sustain a conviction. If it was, the approval of the Special Agent's recommendation would be, for all practical purposes, automatic, and the case of that taxpayer would be forwarded to Justice for prosecution in accordance with the Bureau's "Policy." If sufficient, it was at first assumed that the Special Agent had properly and legally recommended prosecution, and that it was proper and legal for Deponent to refer that case to Justice. Under the then Bureau policy, Deponent furnished taxpayers and their representatives as little information as possible. He did not dare disclose the Government's evidence. If the taxpayer could not establish that he had not cheated on his taxes, the case was on its way to Justice. The operation was on a mass production basis. The tests, guide posts and standards in determining whether or not a particular case should be referred to Justice were one and the same, "the sufficiency of the evidence to convict." The basic concepts of all Federal criminal prosecutions were ignored. Thus, operating under this policy, Deponent at the outset loaded into Justice, without the semblance of uniformity, consistency or equality of treatment, practically most cases recommended for prosecution by a Special Agent where there was sufficient evidence of fraudulent unreported income. Deponent's legal treatment of these cases, as Deponent gradually comprehended, was nothing more nor less that the rubber stamping of the Special Agent's recommendation.

PROBLEMS WHICH AROSE IN 1946 TO 1949 AS A RESULT OF THE BUREAU'S 1919 POLICY.

Problems arose and continued to arise in the Bureau concerning the handling of these cases by the Bureau under its "Policy", and the character of the cases the 322 Bureau had forwarded to Justice for prosecution pursuant to that "Policy." They could not be and were not solved by that "Policy", since that "Policy" was directly responsible. Some of them arose almost immediately. Others did not arise until much later. They were all interwoven and overlapped.

Deponent and the Bureau rather quickly and progressively began to appreciate that they were clearing for prosecution small, inconsequential cases of no enforcement value, despite the fact that similar cases of other taxpayers were being settled every day by the Bureau. Cases were being cleared for prosecution where the recommended prosecution might well have been the result of antagonism between the taxpayer and the investigator, and/or the failure of the taxpayer to agree to pay the taxes and penalties demanded. Just a year ago one of the Judges of this court was confronted with this very problem and dismissed the case. Co-operation cases were being cleared for prosecution.* Voluntary Disclosure cases were forwarded for prosecution.**

323 Justice was hesitant to prosecute cases involving only one year of unreported income since there was no pattern of fraud. There was no uniformity of treatment of taxpayers. More cases were forwarded for prosecution from the little State of Maryland than from the entire State of New York.*** Deponent on information

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* Co-operation cases, as the term is used here, are cases where the Agents, after the investigation has commenced, seek the co-operation of the taxpayer, his accountant or his lawyer, and they furnish evidence, which evidence so furnished is the basis of the recommended prosecution. These cases and their prosecution present a real problem from the standpoint of the Bureau and, of course, from the standpoint of the taxpayer. Because of the lack of personnel to work cases, investigating agents must request and seek the co-operation of taxpayers in the early stages of the investigation and the taxpayer cooperates and furnishes evidence. Often the recommended prosecution against a particular taxpayer is based solely upon the evidence so furnished. If this matter became generally known, this co-operation would not and should not be forthcoming. Hence, the entire administrative collection procedure of the Bureau would be disrupted. From a prosecution standpoint, these cases present a legal question of whether or not this evidence was "voluntarily furnished." If not, it may well be subject to a Motion to Suppress. In addition, they present the question of fairness as to the taxpayer and the question of overreaching by the Bureau. The Bureau, without recommending prosecution, settled many of these cases on an individual basis (Sub-committee 163). This meant that one tax evader who co-operated was prosecuted, while another tax evader who co-operated settled his case. It is Deponent's understanding that the Bureau officials in 1950 assured the Subcommittee that these co-operation cases were not being prosecuted.

** Criticisms of the Bureau's handling of these Voluntary Disclosure cases became so widespread that the Congress in 1950 threatened to legislate on this subject.

*** The Bureau even had different prosecution policies in different states (Sub-committee 169-170).

and belief states that there were some States where there had never been an Income Tax prosecution. Were or are the taxpayers in those states more or less honest than taxpayers in states where prosecutions occurred? The Bureau was recommending for prosecution the case of one tax evader and closing out the case of another tax evader, which cases were equally flagrant, even if they were neighbors or lived in the same community or in another state. As cases prosecuted reached the Courts, there was a vastly increasing number of probations granted. Courts which had previously imposed substantial penitentiary sentences in Income Tax cases were granting probation. This is emphasized by the records of these cases in this District. Grand Juries refused to indict. These probations emphasized that something was wrong with the type of cases the Bureau was clearing for prosecution. Many such cases had no enforcement value since probations did not benefit enforcement, and the Bureau, at the expense of all taxpayers, was merely delaying the collection of the Revenue. Justice, with a more liberal conference procedure, thereupon began making an overall evaluation of these cases and returning a number of them to the Bureau. The Bureau, as a result of its 1919 "Policy", was right back where the Government was when it was attempting to enforce the prohibition law. This analogy was made before the Sub-committee (Sub-committee 213, 242). "We cannot * * * run the risk of having income tax enforcement cheapened in the way prohibition enforcement ultimately was" (Sub-committee 242).

324 The facts and problems above related are not state secrets. They are known to everyone in and out of the Bureau familiar with the general situation, and particularly to tax practitioners. They appeared in one form or another in the many Congressional investigations of the Bureau. As stated, these problems were closely related, overlapped and did not occur all at one time. Some would be solved, then others more serious would arise. They became progressively worse. They were given consideration by everyone in the Bureau having any responsibility in dealing with them, and they were given consideration by those who dealt with the Bureau. They were also, in some instances, given consideration by the Congress through its Sub-committees. As a result

of the Bureau's "Policy", the Bureau was in trouble with Justice, the public, the American Bar Association, lawyers, accountants, taxpayers, and the Congress. Repercussions began early and became increasingly more serious. As early as September, 1947, the Committee on Bureau Practice and Procedure of the Tax Section of the American Bar Association filed a report in which it complained of the way these tax cases were handled by the Penal Division. This report not only dealt with certain problems which had already arisen, but, in addition, correctly forewarned against certain problems to arise in the future. In this report, the Penal Division was accused of rubber stamping the recommendations of Special Agents, its conference procedure was condemned, and it was warned against flooding the courts with these tax fraud cases.

This report of the Bar committee went much further and commented on many of the very matters which this Deponent has heretofore discussed, and emphasized some of the basic conceptions which Deponent regarded as essential to a proper administration of the office of Regional Counsel. This report stated that "the threat of fraud
325 should not be used as a club to collect tax which was not due." This report referred to the "tremendously high rates of recent years", and that citizens who had previously been honest "should be given an opportunity of discussing their case with decision making officials of the Penal Division." This obviously meant a weighing of the overall equities before forwarding a case for prosecution. Merely because some Special Agent had correctly determined fraudulent unreported income did not necessarily warrant criminal prosecution. This report mentioned the unjustifiable practice of indicting citizens as their "character (was) ruined" and then the dropping of the case without trial. This report stated further in part:

> • • • "The purpose of the Bureau is to collect Revenue and not to fill jails. Of course, properly publicised convictions for tax fraud have a healthful and immediate effect by (1) encouraging voluntary disclosure of tax frauds which otherwise would not be discovered, and (2) keeping taxpayers in line who otherwise might file fraudulent returns.

"If such a system is not followed, the elaborate decentralization of the Penal Division may bring an almost overwhelming flood of tax fraud cases on the courts." • • •

THE EVOLUTION OF A SOUND PROSECUTION POLICY.

The Bureau and all the parties heretofore mentioned, at least by the Fall of 1949, recognized that the Bureau's prosecution "Policy" was no policy at all; that the Bureau had to have a sound prosecution policy, or at least it had to do something about these problems. It had to liberalize its conference procedure; sharpen and up-grade its cases so that the cases forwarded to Justice would have real enforcement value; evaluate the cases on an overall equitable basis, keeping in mind the substantial civil penalties; eliminate certain types of cases; and
326 treat taxpayers on a basis of fairness, consistency and equality. Once everyone recognized this situation, the Bureau's 1919 "Policy" was dead; the basic conceptions of all Federal prosecutions emerged and triumphed; the Special Agent's recommendation meant nothing; and a sound prosecution policy for the Bureau was apparent which policy was substantially as follows:

The Bureau, of necessity, had to confine its recommended prosecutions to substantial, flagrant, clear cut, key cases against defiant taxpayers so that if convictions were obtained, they would be followed by incarcerations, thus giving these cases real enforcement value. Others were to be settled.

There are plenty of cases with real enforcement value which can and should be made and recommended for prosecution under and within the sound prosecution policy above mentioned if the Special Agents will only go out and make them. This latter fact is emphasized by the innumerable cases coming well within the above sound prosecution policy which have been successfully prosecuted in the courts of this District. These sound prosecution cases were not made by Special Agents running to taxpayers and seeking their co-operation and having them furnish evidence or seizing upon the evidence furnished by taxpayers to Revenue Agents and using that evidence,

even if voluntarily furnished, as a basis for recommending prosecution.

Deponent, as Regional Counsel, finally, with full knowledge of his superiors and the Bureau, put this sound prosecution policy into effect. It was not done at one certain time, but it was achieved over a period of years, in part before the year 1949, and in part after. It certainly was rather well crystallized before the end of 1949. It was accomplished only as a result of much co-operation from his superiors, Special Agents in Charge, and members of his staff, after struggling with the difficult 327 problems above mentioned, and many more. It was only when this sound prosecution policy was recognized and applied that the Bureau and Deponent, as Regional Counsel, had some discernible standards, guide posts and tests, which enabled the Bureau to, at least, have some semblance of a legal basis to determine what cases of what tax evaders should be forwarded for prosecution and why. It was only thus that the Bureau at least made an effort to establish consistency, fairness and equality of treatment in the handling of these cases, the basis of Due Process.

THE INVESTIGATIONS.

In 1950 the Congress designated a special committee to investigate Organized Crime in Interstate Commerce (hereinafter for convenience called the Crime Committee). Once organized, this Crime Committee demanded and received from the Bureau the returns of certain citizens and taxpayers whom they or someone else designated as racketeers or hoodlums. Under date of February 28, 1951, this Crime Committee issued its Interim Report in which it questioned whether the Bureau had been making "a real effort"* to check on the income tax returns of known gamblers and racketeers.

* The Bureau had always devoted part of its time and manpower to this very task. In fact, during the period from 1947 to 1951 approximately 10% of the cases investigated by the Intelligence Unit were cases of gamblers and racketeers. The Bureau did not have the manpower, nor did the Bureau squander the taxpayers' money, to engage on witch hunts against panderers, prostitutes, bookies, race horse touts, etc. In addition, 278 of such cases had been recommended for prosecution (Statement of the then Commissioner of Internal Revenue to the Sub-committee on March 20, 1951, Taxes—The Tax magazine May 1951, page 350).

This was only the first of an increasing number of exposés and investigations, by Congress, grand juries and newspapers, bringing the Bureau and its employees under attack.

Seemingly there was no one at top administrative
328 levels able to deal with these unfortunate situations which had developed and who could present the true case of the Bureau and its many complicated problems to the people and the Congress—no one who could forthrightly go before the Congress and explain in detail why most fraud cases of tax evaders were settled in the interest of the Bureau. No top Bureau official came forward to stand up and protect the thousands of honest employees who were doing their job and doing it well. More words of praise were given these honest employees for their accomplishments by representatives of the American Bar Association than were given them by their superiors.

The Purification Program-Chaos.

There were demands from the public, and demands from part of the press, and demands from certain members of the Congress that more racketeers be prosecuted, that more tax evaders be prosecuted, and that the developing unfortunate situations within the Bureau be rectified. To meet these demands the Bureau, already burdened with its own difficult problems, had to undertake a program to satisfy these demands. This program is herein described as a "Purification Program". It was under way by March and has continued up until the present time. In the Summer of 1951, Mr. Dunlap, a new Commissioner of the Bureau, was appointed and among his many duties was the additional burden of this purification program. It consisted of the prosecution of more tax evaders, a drive against racketeers, and a general inquisition against all Bureau employees, honest and dishonest. The net result of this purification program was that tax evaders were promiscuously recommended for prosecution; the entire administrative and collection ma-
chinery of the Bureau was disrupted; the money was
329 not coming in; the morale of the Bureau employees as a whole was wrecked and there was chaos and confusion throughout the Bureau—a real mess—all at the expense of the Bureau and all taxpayers.

(a) The Prosecution of More Tax Evaders.

By April or May, 1951, it was apparent that the Bureau intended to load into Justice for prosecution, practically every case of every taxpayer recommended for prosecution by a Special Agent if there was sufficient evidence to convict. The heat was on, the Bureau's previous prosecution policy was at an end—it was cast to the four winds—and the Bureau's 1919 policy was resurrected. These cases were pushed through the Bureau and Justice like a streak of lightning, and those marked with a big red "R" like a streak of greased lightning. Deponent states, without equivocation, that that has been the continuous situation in the Bureau from at least May of 1951 up to and including the present time. The basic concepts of all Federal prosecutions have been continuously ignored and there has not been, and is not, the semblance of consistency, fairness and equality of treatment by the Bureau in the loading of these cases into Justice and their clearance by Justice for prosecution. No one, whether it be a Grand Jury, a Congressional Committee, a newspaper, or the man on the street was again going to have any opportunity to accuse any one in the Bureau, and for that matter in Justice, of closing out any case of any taxpayer where the Special Agent had recommended prosecution and had developed sufficient evidence to support that recommendation.

(b) The Drive Against Racketeers.

In April or May of 1951, the Bureau started a drive against racketeers. The Bureau had joined the National crusade against organized crime—it was going to in-
330 vestigate all racketeers. As Deponent understands, the term "Racketeer" was generally used to designate some individual who may have sometime violated some state law (extortion, abortion, prostitution, racing, liquor, gambling, etc.). The Bureau first had to accumulate these racketeers. As early as March of 1951, a racketeer list was in the process of preparation. Every investigative agency of the Bureau, which was supposed to be out examining returns and bringing in the money, was working on the preparation of this list. Names were secured from every source possible and a master list of 30,000 racketeers was prepared. If the agents had no definite legal evidence, and they seldom did, to establish that a citizen

or taxpayer was a racketeer, they placed him on that list on the basis of rumors. If a citizen and taxpayer had been arrested for gambling, even though he was discharged, he found his way on that list. If a citizen and taxpayer had been associated with a racketeer, or a person whom an investigating agent believed was a racketeer, no matter how legitimate that association was, he, too, found himself on that list. Even if a citizen and taxpayer had been associated with a racketeer years before and the racketeer had died, that citizen and taxpayer found his way on this racketeer list. Special squads, known as "Racket Squads" were set up in various parts of the Bureau under so-called "Specialists" in the handling of the investigations of racketeers. From this list as aforesaid, the agents began their investigations, which of necessity were most cursory, and the cases were loaded into the office of the various Regional Counsel with a recommendation for prosecution. They were to be referred to Justice —and promptly.

All these so-called racketeer cases had a big red "R" stamped on their files and they were to be expedited. While the responsibility was ostensibly placed on the Regional Counsel to determine whether or not the rack-
331 eteer classification was justified, if he removed an "R" stamping, someone in Washington would put it right back on.

Mr. Schwartz, assistant head of the Penal Division of the Bureau, in the Fall of 1951, fully developed the consideration given and to be given by the Bureau to these cases with a big red "R", after pointing out that any such citizen or taxpayer was, of course, affected by how his case was handled in the Bureau, Mr. Schwartz testified in some detail that the Bureau had outlined by various directives a "Special" procedure for the handling of these so-called racketeer cases. The Bureau had adopted a "rule of thumb" to be applied so that a case of a racketeer should be forwarded for prosecution if there was evidence of a "prima facie" case,—hence the Bureau just listened to matters of defense and moved the case on,—whereas other cases (honest tax evaders) would be forwarded for prosecution by the Bureau to Justice only if the Bureau was convinced of the taxpayers' guilt and that a conviction was reasonably certain. To avoid any confusion on the part of the committee, Mr. Schwartz emphasized that

the cases of racketeers—those marked with a big red "R" —could be forwarded more readily since "Special Tests" were applied to these cases. If there was any evidence, no matter how flimsy, they were on their way to Justice.

So that there could be no question concerning the Bureau's two separate and distinct standards used as aforesaid, Mr. Schwartz again covered the situation when he appeared before this same Sub-committee on January 23, 1952. Here he stated:

> "In our recent drive on racketeers, I think it has become generally known through testimony before this committee and elsewhere that a case of a criminal racketeer is moving forward on the basis of a prima facie case. In that case, if we put them in court, the jury knows what to do with them." (Sub-committee 117.)

332 By this action the Bureau classified its thinking on the subject. Having determined, even if it be by rumors only, that a certain citizen and taxpayer was a "racketeer", it now determined that this citizen was a "criminal racketeer". Mr. Schwartz might just as well have said that the Bureau, to aid the State Government, under the guise of income tax prosecutions, intended to prosecute a man for being in the policy racket. They were sure that they could convict him on his past record even if it had nothing to do with income taxes.

Mr. Achilli's case received this special "R" treatment, meaning little or no consideration, from the Bureau. His case had a large red "R" on it. When Deponent first inquired as to why this case had been classified as a racketeer case there was some mention of a poker game. Later it was mentioned that Mr. Achilli had been arrested on a gambling charge—from which he was discharged. At the conference, if it could be called a conference, which Deponent had at the office of the Enforcement Counsel, he was advised, in substance, that the case against Mr. Achilli was a net worth case corroborated by specific items of omitted income, the source of which was his automobile agency—namely, side payments on cars, and that source only. Having been given this information as aforesaid, Deponent requested and demanded of the Enforcement Counsel, the Chief Counsel of the Bureau, and the then Commissioner of the Bureau, Mr. Dunlap, that this racketeer classification be removed from the case of Mr. Achilli

but his requests and demands were ignored. Since then Deponent understands that the Bureau is contending that they have some evidence which it has refused to disclose, to the effect that Mr. Achilli had unreported income from gambling.

Mr. Achilli's case was forwarded for prosecution because the Bureau applied the prima facie standard against
333 him. His partner, Mr. Gromer, was not subjected to prosecution, apparently because the Bureau did not apply the "R" stamping procedure to him. Yet, they were both partners in the same automobile agency over a period of five years including the prosecution years and governed by the same set of facts.

(c) The General Inquisition Against All Bureau Employees—Honest and Dishonest.

The Bureau, by the Fall of 1951, pursuant to popular demand began its own inquisition of all its employees. There were now two classes of citizens and taxpayers who were given "special treatment" under the purification program: (1) The racketeers and (2) the honest employees of the Bureau. It commenced with some directives that the tax returns of all Bureau employees should be singled out and subjected to "special audit". Instead of collecting money from all tax evaders and all tax avoiders in the interest of the Revenue, the Bureau directed its investigations against the tax returns of honest Bureau employees. Think of the money this cost all taxpayers!

Then came the questionnaire. "All supervisory employees and all other employees dealing with the public or handling government funds—some 31,000 in all—have been required to execute and file with the Bureau a statement which would reflect their income and net worth. This will be a continuing program." (Sub-committee 8.) This statement was made by the then Secretary of the Treasury and applied only to Bureau employees. They, of all Government employees, were singled out for "special treatment", being required to file these questionnaires. Honest government employees are not required to prove their innocence and dishonest employees should not be required to furnish evidence of their guilt even if they work
334 for the Bureau. This is America and not Russia. Deponent refused to sign and submit this questionnaire. The racketeers weren't even required to do this. These

investigations, the widespread unfavorable publicity, and the general inquisition as aforesaid, all taken together wrecked the morale of the Bureau employees.

It did much more, it wrecked the administrative procedures of the Bureau, all geared to bring in the money. Everyone in the Bureau was afraid to close out a case, civil or criminal, for fear that he would be criticized and no one above him would stand up and protect his action. No one wanted to assume the responsibilities which he was required to assume. Everyone in and out of the Bureau knew this fact. They further knew that everybody was checking everybody else, and everybody was reviewing the work of everybody else. The whole situation is summed up in a statement which Mr. Arent, the former Chairman of the Committee on Procedure in Fraud ases of the Section of Taxation of the American Bar Association, made to the Sub-committee in February of 1952, as follows:

> "Because of the mistakes and transgressions of a small minority of our public officials, we find an increasing timidity among honest and able public officials with respect to assuming responsibility for difficult decisions. This could lead to a bureaucratic paraly is which would seriously harm the effectiveness of our Government and grossly injure all of us who have to deal with our Government—whether as taxpayers, as businessmen, or as servicemen. The abandonment by the Treasury of its voluntary disclosure policy, and perhaps, too, of its recognition of health as an element of decision in the processing of a tax-fraud case, is not the constructive or courageous way out. The Bureau should be encouraged to grapple with its difficult
335 problems and not to run from them." (Sub-committee 243.)

The increasing timidity of Bureau employees to assume their responsibilities and this bureaucratic paralysis had been accomplished before Mr. Arent's statement. It still exists in the Bureau. The existence of the low morale of the Bureau employees and their hesitancy to promptly and properly discharge their duties and make decisions required, even at the present time, is emphasized by the statement of the new Commissioner which appeared in U. S. News of May 8, 1953, part of which has heretofore been quoted.

The Bureau in 1951 quickly "solved" most of these

problems by the following means: Once a Special Agent recommended prosecution—and those above him agreed, (on what basis does not appear, but they always agreed)—"they then shot it right straight into the Department of Justice" (Sub-committee 51). This entire failure and refusal of Bureau employees to assume their responsibilities vitally affects the question of Due Process in this case, since once a Special Agent has recommended prosecution and there is evidence to sustain that recommendation, everyone in the Bureau above him will not apply the basic conceptions applicable to all Federal prosecutions but will rubber stamp that recommendation. For practical purposes, there is no review whatsoever in the Bureau of that recommendation. Considering what the honest, competent Bureau employees went through in the last several years one cannot blame them too much for not assuming and doing their duty.

336 DEPONENT'S RESIGNATION AS REGIONAL COUNSEL.

Deponent, as Regional Counsel, strenuously opposed, each and all parts of this purification program as it was developed and conducted. When unsuccessful in his efforts, Deponent resigned as Regional Counsel on November 27, 1951. Portions of his letter of resignation dealing with each of these situations are pertinent here and attached hereto as Appendix B.

THE PLAN OF REORGANIZATION.

The Bureau, faced with all the difficulties above mentioned, brought forth in January of 1952, its plan of reorganization which contemplated sweeping changes in the entire Bureau procedure for the handling of all matters in the Bureau including the handling of income tax fraud cases. This plan may well be "structurally and functionally" sound. However, when it was brought forth and applied to the chaotic conditions which then existed in the Bureau, it only created more chaos and more confusion. Nobody under the plan knew who did what, many thoroughly competent individuals were given high titles with mere ministerial duties. Questions of policy were often left to inexperienced or incompetent employees, or subordinates. It was in this atmosphere of chaos and confu-

sion that the case of Mr. Achilli was "expeditiously processed" as an "R" case by the Enforcement Counsel and "shot" right straight to Justice.

THE RESULTS OF THIS NEW POLICY OF FEAR IS APPARENT FROM THE STATISTICS.

Prior to 1930, there were few income tax cases prosecuted. The report of the Commissioner for the year 1931 stated, in part, "the Penal provisions of the law, of
337 course are incidental to the general purpose of raising revenue * * *" (page 50). Deponent has examined all of the Commissioner's reports for the years 1930 to 1940, attempting to determine the number of cases forwarded by the Bureau to Justice with a recommendation of prosecution with little success. Seemingly the number referred was between 50 and 75, but as reflected by these reports, this number included not only income tax cases but miscellaneous tax cases. During the period from 1941 to 1946, the Bureau forwarded to Justice between 80 and 100 cases, approximately 60% of which were forwarded for prosecution. In 1942 there were 75 cases referred, in 1943 there were 94 cases referred, and in 1944 there were 77 cases referred. Of this number approximately 60% were prosecuted (Sub-committee 175, 203). The last figures are the figures of Justice and they do not conform with the figures of the Bureau since, most generally, the Bureau counts their cases by the number of individuals involved and even related cases, whereas Justice counts their cases on the basis of the case itself. As emphasized, a Tax Drive was started in the fiscal year of 1945 to procure prosecutions in order to have tax evaders come in and make Voluntary Disclosures. The Commissioner's report for the year 1947 emphasized that in the year 1945, the Bureau referred 165 cases and convictions were had in 58, whereas in 1947, the Bureau referred 556 cases and convictions were had in 94 cases. The figures for Justice for the fiscal year 1947 show that they received 393 cases (Sub-committee 203). This indicates the different way in which the statistics on these cases were kept by the Bureau and Justice.

The number of cases and defendants referred to Justice and the number closed out without referral by the Penal Division of the Bureau appear in the Annual Fiscal Re-

ports of the Commissioner for the fiscal years 1947 to
338 1951, inclusive, the fiscal year 1947 being from July 1, 1946, to June 30, 1947, etc. This tabulation follows:

Fiscal Year	Number of Cases	Number of Defendants	Cases Closed Out
1947	556	655	
1948	867	1043	266
1949	819	907	467
1950	503	559	530
1951	515	623	526
1952	1414	1529	269

The Commissioner's Annual Report for the fiscal year 1952 also indicates that the recommendations for prosecution by Special Agents for the fiscal year 1951 (July 1, 1951 to June 30, 1952) increased 100% over the previous year. The tabulation above emphasizes that as early as the fiscal year 1949 (July 1, 1948 to June 30, 1949), the Bureau was having problems with the cases referred. Hence, there was at first a gradual tapering off. Then in the fiscal year of 1950, beginning July 1, 1949, there was a substantial reduction of the cases referred to Justice. This was when the sound prosecution policy was put into effect. In both years, the years 1950 and '51, the Bureau closed out more cases than it referred to Justice.

For the fiscal year 1951, the Bureau referred but 515 cases and closed out 526 cases. For the fiscal year 1952, beginning July 1, 1951, the Bureau, under its Purification Program, forwarded 1,414 cases and closed out but 269 cases. Of the 1,414 cases so referred by the Penal Division to Justice, 130 were so bad that the Bureau did not even recommend prosecution. It just passed the buck to Justice. There was no more manpower available to the Bureau in 1952 than there was in preceding years insofar as the review of these cases was concerned. The figures show the lack of review. These cases were not given the
semblance of any careful legal review or considera-
339 tion. This was most necessary since the Special Agents had little opportunity, under the pressure of the drive, to make a thorough examination of these cases in the first instance. Yet their recommendations were rubber-stamped right straight up the line. How bad the situation was is again reflected by the fact that in December of 1951, the Penal Division forwarded 263 cases to the Jus-

tice Department and closed out but eight. (Internal Revenue Service Monthly Activity Report, January 1952, app. page 2.)

The same situation existed in Justice. On March 29, 1952, the Justice Department revealed that 450 tax evasion cases had been approved for prosecution between November 1, 1951 and March 15, 1952, and that this was twice the number in any comparable period during the last ten years (New York Times, March 30, 1952). The reason for all this appears in the testimony of the then Attorney General before a House Judiciary Committee. In this testimony, he stated, in substance, that because of the current "investigative atmosphere, Justice has been less objective whether or not prosecution should be undertaken." He further stated, "fewer and fewer men are willing to take the responsibility for decisions on these matters with the result that more cases are going to the Grand Juries" (as quoted by Associated Press, Milwaukee Journal, March 30, 1952, page 23). All of these statistics and all of these facts emphasize but one thing—namely, that everyone in Justice, and in the Bureau, was to say the least, most hesitant to close out a case of any tax evader once a Special Agent, as such, had recommended prosecution. This situation has existed both in the Bureau and Justice since 1951. These cases have been rushed through the Bureau and Justice without any consideration of the rights of citizens and taxpayers, even if they are tax evaders, without the semblance of fairness, consistency or equality of treatment. All that is required is a belief that there is sufficient evidence to convict. If the big red "R" is on the file, then practically nothing.

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Just how vicious, irresponsible and unfair this entire matter is and how afraid everyone in the Bureau and Justice is to overrule a recommendation of a Special Agent appears from the following facts relating to one case, which was not an "R" case. A Special Agent unfairly and wrongfully recommended the prosecution of this particular taxpayer for evading his taxes for one year. The motives behind such recommendation create much speculation. This recommendation, of course, was approved by his superiors and the Enforcement Counsel. The attorney representing this particular taxpayer demonstrated, as far as humanly possible, to Justice, both orally and in writing, that this particular recommendation was, for all prac-

tical purposes, baseless in fact and in law. The attorney in Justice should have closed out the case; as seemingly any fair minded competent attorney would have done. However, in order to avoid the March 15, 1953 deadline, and unduly afraid to close out a case where the Special Agent had recommended prosecution, Justice, without even communicating with the attorney, forwarded the case to the United States Attorney for prosecution. This taxpayer was indicted on two counts. One count was under a provision of the Criminal Code where the Statute of Limitations had already run. The other count was based upon one of the catch-all criminal provisions of the Revenue Code, which count was, to say the least, most technical and of questionable, factual and legal, validity. The Special Agent and the Bureau accomplished their purpose—they got the citizen and taxpayer indicted—even if they didn't know what they were doing when they recommended prosecution. Thus, Special Agents determine the prosecution policy of the Bureau and Justice. Thus, does the Bureau and Justice persecute citizens and taxpayers.

341 THE FUNCTIONS, POWERS AND PREROGATIVES OF THE ENFORCEMENT COUNSEL UNDER THE PLAN, AND HOW THEY WERE EXERCISED IN THE CASE OF MR. ACHILLI.

Deponent first undertook the case of Mr. Achilli after it had reached the office of the Enforcement Counsel with the big red "R" on it. The office of the Enforcement Counsel was set up under the plan of reorganization and as emphasized, the "conclusion of the Enforcement Counsel will be the final determination of the Bureau on the prosecution question" (Sub-committee 77). The Enforcement Counsel was the trained, experienced legal talent who was to make the solemn final determination of the Bureau whether or not the recommendation of the Special Agent, as such, that a particular tax evader should be prosecuted should be approved and forwarded to Justice. Before the Enforcement Counsel was given this duty the Bureau had re-established its 1919 policy, had embarked on its racketeer drive and had embarked on a policy of loading into Justice practically every case where the Special Agent had recommended prosecution and had gathered sufficient evidence to justify a conviction. The

Bureau by January of 1952, at top levels wanted vigorous enforcement. The Bureau wanted to send forward every case where "we think the man is guilty" and "when we think we have a chance to convict him" (Sub-committee 122). Under this same plan of reorganization, one of the functions of those in Washington was to review the actions of the Enforcement Counsel as to cases he closed out. If he closed one out, they sent the case forward anyway. Thus the Enforcement Counsel had little if any discretion in passing on these cases other than a review of the sufficiency of the evidence. The plan of reorganization went into effect on May 1, 1952. Mr. Balter, in his book "Fraud Under Federal Tax Law," second edition 1953, released on May 25, 1953, com-
342 mented on the prerogatives of these Enforcement Counsel as follows:

> "The apparent tendency of Enforcement Attorneys in some district counsel's offices is 'to go along' with the recommendation of criminal action where there is clear evidence of a substantial under-statement of income, giving little weight to the presence of other factors in the case which may bear on the absence of criminal intent or 'willfulness'." (p. 188.)

In other words, in less than a year it has become apparent to the American Bar and Tax Practitioners that the Enforcement Counsel, as such, could not even consider questions of "intent" or "willfulness," much less the basic conceptions applicable to all Federal prosecutions, nor matters concerning consistency, fairness and equality of treatment in these prosecutions.

THE "LEGAL CONSIDERATION" GIVEN THE CASE OF MR. ACHILLI BY THE BUREAU.

Deponent knew all of the above facts before he even had a conference—if it could be called a conference—in the office of the Enforcement Counsel on the case of Mr. Achilli. Deponent as a representative of a citizen and taxpayer had been "afforded" the opportunity of a conference with a top official of the Bureau who had the final responsibility of approving the Special Agent's recommendation and sending the case to Justice, and who, holding such top position, had no discretion whatsoever. Deponent also knew that there was a great big red "R"

involved. With all these facts in mind, Deponent had the conference on July 23, 1952. For all practical purposes Deponent just wasted his own time and the money of his client in attending this "conference." Deponent then sought relief from those responsible for this situation.

343 On August 27, 1952, he wrote the then Chief of Counsel of the Bureau a letter in which he reviewed the over-all facts of Mr. Achilli's case, the unfairness of the proposed recommendation, the situation as to Mr. Gromer, what had occurred in the conference with the Enforcement Counsel, the Deponent's subsequent demand to the Enforcement Counsel that he remove the racketeer classification, the request for a full fair complete conference on the merits, and equality of treatment for his client in view of the settlement of the other 200 automobile dealer cases. A part of his letter reads:

> "I respectfully request and of necessity must demand that you forthwith remove, or cause to be removed, or recommend to be removed, this racketeer classification from the above case so that I can have a full, fair and competent conference in this case on its merits and so that the taxpayer will receive the same treatment accorded to other taxpayers by the Bureau, and particularly those 200 automobile dealers around here that have settled their cases without criminal prosecution. Further, if the Enforcement Attorney is nothing but a rubber stamp for the recommendation of a Special Agent, then I respectfully request an opportunity to discuss this case fully, frankly, and openly, once and for all, with some competent lawyer in your Department on a fair, practical, realistic basis; pre-supposing that that lawyer has sufficient knowledge, experience, authority and intestinal fortitude to close out the criminal aspects of this case, if it should be closed out consistent with directives and policies of the Bureau and precedents of both the Justice Department and the Bureau—and consistent with the treatment of other automobile dealers."
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> "All I am asking for in this case is to discuss this case with some competent lawyer in the Bureau who knows what it is all about, who has the authority to

act, who has the discretion to act and who is not
344 afraid to act. I propose to lay my cards on the table and I think the Government should do likewise before this case is 'processed to justice'."

Deponent got nowhere and was finally advised by said Chief Counsel on October 2, 1952, "Conferences on such matters are not held here." Deponent asked no favors. All Deponent requested or demanded was a legal consideration of his client's case by some lawyer in the Bureal, a removal of the "R" and equality of treatment for his client before the case was shot to Justice. Under the purification program as aforesaid he and his client received none of these.

MR. ACHILLI ALSO WAS ONE OF THE NEGLIGIBLE FEW AUTOMOBILE DEALERS OF THE CHICAGO AREA THAT RECEIVED "SPECIAL TREATMENT" FROM THE BUREAU.

The situation in the automobile industry after World War II and the method of operation of most of these automobile dealer agencies from an income tax standpoint followed a general pattern which was so widespread that it was known to everyone in and out of the Government. The one person who did not know, according to the Agents in this case, was one Earl H. Gromer, who was a full partner for a period of five years with Mr. Achilli in the Highland Motor Sales. He, Mr. Gromer, only heard rumors. Only recently, one of the representatives of the Department of Justice, in generally discussing these automobile dealer cases with this Deponent, stated, in substance, "they are all the same." This pattern is substantially as follows: It cost the dealers money to engage in the automobile business and the money had to be obtained somewhere and somehow; in substance, you had side payments in cash or by the medium of checks, usually two. If checks, one was payable to the agency
covering the ceiling or list-price for the books of the
345 agency, and the other was usually payable to cash, cashed and not recorded on the books. Sometimes you had used cars taken in trade which were not reflected on the books, or only partly reflected. Money so irregularly obtained was usually, in whole or in part, passed

on by the agency or dealer to someone to get cars so that the dealer could remain in business. This money, and to whom it went, was not ordinarily reflected on the books. If it had been, the agency would have been out of business. Deponent is not saying that all automobile dealers in the Chicago area followed this pattern in their method of operations, but numbers of them did. Some of these dealers not only gouged the public in every conceivable way, but in addition a large part of these side payments went into their own pockets. Other dealers confined their irregular activities primarily to get sufficient money to get cars so as to stay in business, and smaller amounts of these side payments, if any, went into their pockets. Of necessity many of them, to some extent or degree violated OPS regulations and the Income Tax Laws. If there was a degree of flagrancy, it was how badly they gouged the public and how much money went into their own pockets. Deplorable as the situation was, it was no different than in other industries where critical shortages existed. Many Tax Court cases reflect the general character of these operations and the general pattern of operation became apparent. In fact, this Deponent has been informed and states the fact to be, that certain automobile manufacturers had to discharge certain employees who exacted these tributes from dealers.

The Bureau in Chicago, as did the Bureau everywhere else, recognized this deplorable situation. In Chicago, a special group of Revenue Agents and Special Agents was set up to investigate and process these automobile dealer cases. Deponent does not know the exact number of 346 such cases worked by, processed and settled by this automobile squad. After Deponent resigned as Regional Counsel, he was informed from many sources in and out of the Bureau that the number of these cases so processed and settled was in excess of one thousand. Other figures approximating one thousand he heard from other lawyers, accountants and other people. A majority of these 1,000 cases, of necessity, involved alleged fraudulent unreported income in one way or another or at least a failure to correctly report gross income. In the interest of conservatism, Deponent has contended and stated and states that the Bureau in Chicago has settled approximately two hundred cases of these automobile dealers in the Chicago area without recommending prose-

cution, despite the fact that they were as flagrant or more flagrant than the case of Mr. Achilli.* The records of this Court indicate that only recently only a negligible few of these automobile dealers have been indicted, after their cases no longer had any enforcement value. The alleged irregular practices have long since ceased and the Bureau has settled most of the cases of these automobile dealers in the Chicago area without recommending prosecution. Deponent believes the number of automobile dealers so indicted is five including Mr. Achilli. They were recommended for prosecution, rushed through and indicted when the "heat" was on.

That these automobile dealer cases were being settled as aforesaid without recommending prosecution appears from an affidavit in Deponent's possession, part of which reads as follows:

"That together with one William Parrillo, since
347 deceased, this deponent represented Mr. Sam Achilli of Elgin, Illinois, in connection with his income tax troubles with the Government for the years 1946, 1947 and 1948.

"That this deponent and Mr. Parrillo also represented another automobile dealer in the Chicago area on or about the same time, and the investigations were going on at or about the same time.

"That both of these cases followed the same general pattern usually followed in auto dealer cases from the income tax standpoint, and there was little if any difference as to the over-all facts in the two cases or the character of the alleged omitted income.

"That this deponent and Mr. Parrillo settled the case of the other auto dealer with the Special Agent who handled that case, and the Special Agent in the case of Mr. Achilli recommended prosecution."

That the Agents who investigated the case of Mr. Achilli had full knowledge of the general pattern prevail-

* A mass of correspondence has passed between this Deponent and various Bureau officials, at low and top levels, concerning the impropriety of recommending for prosecution the cases of these few negligible automobile dealers including Mr. Achilli in view of the fact that over 200 other automobile dealer cases in the Chicago area were settled without prosecution, despite the fact that these cases were as flagrant or more flagrant. Never once has this conservative figure of 200 been questioned or challenged. Some correspondence to the same effect has passed between this Deponent and Justice.

ing in these automobile dealer cases appears in an affidavit in Deponent's possession, obtained under the following circumstances. Mr. Achilli complained to this Deponent about the conduct of these investigating Agents, claiming that they had not only indicated to his customers an animosity toward him, Mr. Achilli, but in addition had threatened these customers. Deponent advised Mr. Achilli that he, Deponent, would not consider such matters unless they were supported by signed letters from customers. Mr. Achilli then advised Deponent that he would get the Deponent all of the letters Deponent wanted. Mr. Achilli was not too successful. The reasons were apparent from the letters Mr. Achilli did obtain. When the customers denied having made any side payments to Mr. Achilli, the Agents threatened them with investigation of their own Returns. One of the affidavits in Deponent's possession reads in part as follows:

"I was called to the office of the Internal Revenue
348 in Elgin Tower regarding my purchase of a Plymouth from Sam Achilli. I told the agents I bought the car at dealer's cost, and they both started smiling. They said, 'Don't kid us now. You couldn't get a car at cost when all the dealers in the country are getting money under the table for them.' I told them the actual figures, and that they could believe me or not, that I was telling the truth. They called me a liar, and said. 'We don't care if you tell us the truth or not, we've got enough on Sam to "put him away."' Then I was asked, 'Did you pay your income Tax? Maybe we should check yours?'"*

These Agents acted as if they had the rights, powers, privileges and prerogatives of the courts. They should

* There are at least 100,000 automobile dealers in this country. If the statement of the Agents in this case is correct; namely, that all these dealers "are getting money under the table", then at least 50,000 of them, of necessity, failed to at least correctly report their gross income, and they could be indicted under one of the catch-all penal provisions of the Revenue Code. As far as Deponent knows, there is but one automobile dealer in the entire United States who was so indicted and indicted for that very offense alone. One automobile dealer out of 50,000 automobile dealers was seized upon for the purposes as aforesaid. It is difficult to comprehend how this constitutes "impartial" treatment. There may be more than one that received this "impartial" treatment, but Deponent knows of only one. If there are more than one, Deponent assumes the Bureau will furnish this Court with the correct number at the time of the hearing on this motion.

not even be permitted to recommend prosecution. If permitted, their recommendations should receive "full legal consideration" by their superiors to determine whether a particular recommendation was made, even in part, because the Special Agent did not like the taxpayer.

EQUAL JUSTICE UNDER LAW.

From the inception of our Country, it has been recognized that the basic principle of our system of American Jurisprudence was equality under the law. All people, citizens and taxpayers—and yes, even tax evaders and other criminals—are to be treated on a basis of equality under definite discernible standards of our law. Citizens,
taxpayers, tax evaders, and even racketeers are not to
349 be arbitrarily or capriciously dealt with or discriminated against by those charged with the solemn duty of fairly and equally administering and enforcing our laws. Nor are these persons to be subjected to the whim or caprices of enforcing officials. This solemn command is inscribed on the front of the building in Washington which is the home of our Supreme Court—the highest court of this land—in four solemn words, "Equal Justice Under Law". That the present Attorney General was fully aware of this solemn command appears from his testimony before the Judiciary Committee of the United States Senate prior to his confirmation. In testifying he assured this committee in substance that the basic philosophy for the future administration of his office was that all persons should be dealt with equally because this is a Government of laws and not men. On March 14, 1953, Justice and the Bureau issued a joint statement to the effect that they were going to conduct a vigorous and impartial drive against Tax Evaders. Thus the heads of these two Government Agencies were fully aware that even Tax Evaders had to be treated on an impartial basis—a basis of equality.

This Deponent has read the greatest part of the various proceedings before the various committees of Congress pertaining to the investigation of the Bureau. Prompting all of these investigations was the solemn command that all taxpayers—even tax evaders—be treated on a basis of equality. The committee explored the question whether or not some of these tax evader

cases were closed out because of political or personal reasons. Was there a peddling of these cases to favored lawyers? Did these favored lawyers receive considerations which some other attorney did not receive? Did some tax evaders receive special consideration while other tax evaders were discriminated against? Why were 350 200 automobile dealers permitted to settle their cases without prosecution being recommended by the Bureau while 5 automobile dealers were singled out, recommended for prosecution and indicted?

That the Congress was fully aware of this solemn command again appears from their interrogation of Mr. Dunlap before the Sub-committee. Representative Curtis had in mind the very problem presented in this case. Two taxpayers residing in the same community and "both guilty of under payments," one case handled by one employee, the other handled by another employee. "Actually, the two cases are very much alike, but the two employees approach them a little differently," "one taxpayer is quite diplomatic and he does a pretty good job, and his case is not referred to the fraud section for investigation, while the other man's case is." Representative Curtis thought "it was quite a thing from the standpoint of public confidence and morale" (Sub-committee 62). Mr. Dunlap advised the Sub-committee that that was exactly one of the problems "we are trying to solve; that is, the equal treatment and fair treatment of every taxpayer in the country." Mr. Dunlap then emphasized the merits of the Plan of Reorganization and stated, "But under this Plan, it is in the final analysis one man who reviews all of that, and he will have to insure equal treatment of the people within that district" (Sub-committee was given solemn assurances as aforesaid that all taxpayers would receive equal treatment and fair treatment.

DEPONENT'S EFFORTS TO OBTAIN FAIR AND EQUAL TREATMENT FOR THE CASE OF MR. ACHILLI WERE UNSUCCESSFUL IN THE BUREAU AND IN JUSTICE.

Deponent was employed by Mr. Achilli around May of 1952. From that time up to and including the present time he has raised this question of inequality of treat-

ment with every one at high and low levels in the
351 Bureau or in Justice who had anything to do with the expediting of this case for prosecution. He first raised it with the Enforcement Counsel. He then raised it with the then Chief of Counsel of the Bureau. He then raised it with Mr. Dunlap the then Commissioner of Internal Revenue. When this case was referred by the Enforcement Counsel to Justice Deponent demanded of the then Bureau officials that they recall this case. He then wrote the new Attorney General as to this general overall unholy situation. He raised the question with the attorney in Justice handling Mr. Achilli's case and his immediate superior. These officials advised Deponent that they didn't blame him for screaming concerning the lack of equality of treatment received by Mr. Achilli, but that that was not their concern and Deponent should do his screaming in the Bureau. When he was advised by them that they would not consider the matter of equality of treatment he again attempted to take the matter up in the Bureau. He then wrote the new Commissioner of the Bureau requesting that the case be withdrawn from Justice. He then took the matter up with the new Head of the Tax Division of the Attorney General's office. The new Head of the Tax Division advised Deponent that he realized how strongly Deponent felt on this question of lack of equality of treatment, but that Deponent was raising top policy questions which might take months to decide.

The question of inequality of treatment and the lack of Due Process in this case has been taken up by this Deponent with everyone in the Bureau or Justice having any responsibility in connection with the case of Mr. Achilli whether it was under the old administration or whether under the new and they all failed to act. The purification program was in full force and effect. The great big red "R" was on the case. The solemn command and the solemn assurances made to the com-
352 mittees and the Congress as aforesaid would seem conclusive as to the lack of fair treatment and equal treatment accorded Mr. Achilli in this case.

Deponent having generally developed the facts in the case of Mr. Achilli will now develop in more detail; the arbitrary power of a Special Agent and his lack of qualifications to make a recommendation of prosecution; the requirement for legal review of his recommendations for prosecution and the lack of said legal review; the lack of any policy or discernible standards upon which a legal review could be based; a general analysis of the above as applied to cooperation cases; the Bureau's recommendation of persons who had not paid their taxes and how all tax evaders are at the mercy of a Special Agent. All pertinent here. Bundled together, these facts, considered with the facts heretofore developed conclusively establish chaos and not due process in the handling of all these cases, including the case of Mr. Achilli by the Bureau since 1951. They establish a lack of "impartial" treatment—the lack of "equality of treatment" and a government of men and not of law.

THE SPECIAL AGENTS, AS SUCH, THEIR POWERS AND THEIR PREROGATIVES.

Who is this Special Agent? He is nothing more nor less than an investigator. Special Agents, as such, were continuously being referred to, before the Sub-committee, as highly specialized and trained investigators. Some are and some are not. Many Revenue Agents are far more competent and fair minded than many Special Agents. Most former Special Agents in Charge and
353 some Special Agents are also most fair-minded and competent. Deponent recognizes their ability in ferreting out the facts and presenting those facts on a fair basis to the tax evader but not their legal ability or right to recommend prosecution. It is not too easy for Revenue Agents and/or Special Agents to make some of these fraud cases. Many tax evaders are antagonistic, deceitful and just want to escape their obligation to their government. These tax evaders should be prosecuted. Other Special Agents haven't the semblance of a conception of what a criminal income tax case is, or what the constitutional rights of a defendant are (Sub-committee 242). They seem to believe that they are free to deal with the tax evader in any way they see fit without a semblance

of fairness or regard for the tax evader's constitutional rights. All they are interested in is to obtain the evidence, an admission from the taxpayer of his guilt and recommend prosecution. They are content to get this evidence by contact with the taxpayer, by subterfuge and a concealment of their object (U. S. v. Guerrina, U. S. District Court, Pennsylvania, Criminal #17078, May 5, 1953, CCH 53, Volume 5, Paragraph 9369). Some of their tactics have been condemned by the American Bar Asociation (Sub-committee 239). When the American Bar Association sought relief from the Bureau it got nowhere. The Bureau did not desire to alarm innocent taxpayers. Certain of these Special Agents haven't the slightest hesitancy in recommending prosecution because the taxpayer refuses to cooperate, refuses to pay the taxes and penalties they demand, or even because they don't like the taxpayer or his lawyer. The recommendations of these Special Agents are amongst those being rubber stamped and cleared through to prosecution as aforesaid.

Mr. Schwartz, assistant head of the Penal Division, admitted that these Special Agents were rarely
354 lawyers—at least while many of them had law degrees they had never practiced the profession (Sub-committee 106). He was most hesistant to admit that their antagonism ever entered into a recommendation for prosecution (Sub-committee 106) yet he had previously testified that he had attempted to reach his conclusion regardless of the recommendation of the Special Agent (Sub-committee 104). Mr. Dunlop had been far more frank and stated that the years of experience had demonstrated that personal antagonisms between agents and taxpayers often resulted in a failure to obtain settlement agreements (Sub-committee 60).

The then Secretary of the Treasury advised the Sub-committee that the Bureau was "fully aware of its responsibility in recommending prosecution of tax-evaders" (Sub-committee 77). Yet this solemn responsibility is lodged in the Special Agents, as such, and their recommendation as aforesaid is approved under the circumstances heretofore developed. A Special Agent, as such, is the Czar of the Bureau in determining what tax evader should be prosecuted or not prosecuted. He can recom-

mend the prosecution of a tax evader who throws him out of his office or a tax evader who refuses to sign an agreement to pay the taxes and penalties he demands, he can recommend the prosecution of a tax evader because he fails to cooperate, he can recommend the prosecution of a tax evader who fully cooperates and furnishes evidence on the very evidence so furnished, he can recommend for prosecution an automobile dealer tax evader on one side of the street and settle the case of another automobile dealer tax evader across the street. One Special Agent can recommend the prosecution of one automobile dealer tax evader on one side of the street and another Special Agent, as such, can investigate the case of another automobile dealer tax evader three blocks
355 down the street and settle that case, although the cases are substantially similar. All this is being done today in one form or another, and no one above that Special Agent will consider these matters. Once he makes his recommendation against the particular tax evader, no matter what prompted the recommendation, the case of that tax evader is on its way to the Grand Jury room.

Mr. Balter in his book "Fraud under Federal Tax Law," second edition 1953, stated at page 74,

> "If it was true in the past that the Special Agent held in his hands the fate of the taxpayer being investigated; it is even more true since the reorganization of the Bureau. Formerly, a recommendation of the Special Agent that criminal charges be brought was subject to a long series of reviews, which, if this involved inordinate delay, at least guaranteed that no taxpayer would be proceeded against criminally because of the whim, caprice, recklessness or ill-will of any one special agent or official, but only after the most careful weighing of his case in every light by a virtual phalanx of men trained to be fair to the Government and to the taxpayer as well."

Everyone but Mr. Schwartz knew the real basis of some of the prosecutions recommended by some of these Special Agents. When the Bureau forwarded 1414 cases in 1952 and closed out only 269 cases, it is quite apparent that it gave little consideration to this problem.

Only recently, a citizen and taxpayer had assessed against him approximately a $200,000.00 deficiency, and

a 50%, $100,000.00, fraud penalty. The Special Agents wanted $300,000.00 from this taxpayer. When the case reached the Tax Court sitting in Chicago, the case was settled by stipulation for approximately $20,000.00 with a 5% negligence penalty. Something is wrong somewhere. The Tax Court today is loaded with cases 356 involving the propriety of fraud penalties asserted by some of the Special Agents (Taxes. The Tax Magazine, February 1953, pages 110-118). Yet certain of these Special Agents are given the right to recommend the prosecution of a tax evader under the circumstances above indicated.

Appreciating the above situation and being fully aware of it, the Sub-committee of the Congress clearly, from time to time, and again and again, indicated that the members of this Committee were determined that these recommendations of these Special Agents, as such, should not be the recommendation of the Bureau. Bureau representatives circumvented this attitude of the Committee by advising the Committee that they would carefully consider the question whether or not a Special Agent, as such, should even be permitted to make such a recommendation but rather should merely make a report of the facts. In addition, the members of this Sub-committee were assured by the representatives of the Bureau that all of these cases were carefully reviewed by trained, experienced, competent legal talent.

LEGAL REVIEW OF THE PROSECUTION RECOMMENDATION OF THE SPECIAL AGENT, AS SUCH, IS REQUIRED BY BUREAU PROCEDURE.

The then Secretary of the Treasury appearing before this Sub-committee on January 22, 1952 presented a formal statement, part of which is as follows:

> "There need be no concern that the prosecution case will not receive full legal consideration. The field offices of the Penal Division are staffed with competent personnel, and the regional and district counsel in charge are especially trained in the field of criminal tax law. Through experience gained over years they are fully qualified to give the final Bureau legal review of the investigator's prosecution recommendation." (Sub-committee 77.)

357 "Final legal review for what"? The only permissible legal review under the Bureau's 1919 Policy is a review as to the sufficiency of the evidence. The Bureau having given the Special Agent, as such, the grave responsibility of quasi judicially determining that a particular taxpayer should be recommended for prosecution, of necessity must have recognized that this same Special Agent had at least sufficient qualifications to develop sufficient evidence to justify that recommendation. If the Special Agent, as such, lacked this latter qualification, then he certainly should not be given the right to recommend prosecution, a far more solemn responsibility. On these logical assumptions, if innumerable Bureau employees above this Special Agent, whether they be administrative or legal employees, confine their review of this recommendation only to the sufficiency of the evidence, then the Bureau should have no need for these extra and additional employees. They are then doing nothing but rubber stamping that recommendation. Their elimination might help balance the budget.

As emphasized by the then Secretary of the Treasury, and as provided for in the Plan, before these cases are forwarded to Justice a legal review is required in the office of the Enforcement Counsel. This legal review should be made by experienced, competent attorneys pursuant to a sound prosecution policy founded on the basic conceptions of all Federal Prosecutions and upon definite discernible standards, guide posts and tests, so as to have consistency, fairness and equality of treatment of all tax evaders in connection with the referral of these cases. This has not been done since 1951, since there is no policy nor any discernible standards.

358 THE BUREAU HAVING NO PROSECUTION POLICY, HAS NO DISCERNIBLE STANDARDS FOR A POLICY.

Deponent has fully developed that the Bureau Policy of 1919 is no prosecution of policy at all, but merely a mandate to rubber stamp the recommendation of a Special Agent, as such, that a particular tax evader should be prosecuted. The Bureau thus has no discernible standards to determine what tax evaders should be prosecuted.

The Bureau has been in constant trouble with the American Bar Association, particularly the Committee on Procedure in Fraud Cases as a result of its lack of discernible standards for legally determining what cases shall be forwarded to Justice. In February of 1950, this Committee adopted the following resolution:

> • • • "Resolved, That in the opinion of the Council of the Section of Taxation the publication of a statement by the Bureau of Internal Revenue of its basic procedures and policies in fraud cases would serve to remove widespread misunderstanding of such procedures and policies and to help the Bureau maintain uniform standards of fair treatment for taxpayers throughout its many field offices; the Council therefore recommends the publication of such a statement." • • • (Section of Taxation, 1950 report, American Bar Association, Page 96.)

In 1952, the former Chairman of the Bar Committee, appearing before the same Sub-committee of the Congress, stated:

> "• • • Our main complaint has been the unwillingness of the Bureau to state publicly the policies and procedures which govern its handling of fraud cases. Tax lawyers have wanted to know what the rules were so that they might honestly and ably represent their clients within the orbit of those rules. • • •" (Subcommittee 242.)

359 For a lawyer today to properly represent a client he must be sure that some special agents like him, or if not, turn the case over to some lawyer or accountant they do like.

This same committee of the American Bar Asociation on January 13, 1953, forwarded to the Chief Counsel of the Bureau a detailed letter severely criticizing the Bureau for its abandonment of its Voluntary Disclosure Policy. It, the abandonment, was all a question of the Bureau's inability, or refusal, to establish discernible standards, tests, and guide posts for the application of this policy. A portion of this letter is as follows:

> "• • • For the same reason, it is submitted that the tax administrators might be subject to less criticism and pressure under a voluntary disclosure policy than

> under the present rather vague one, which has so few discernible standards for determining which cases are to be prosecuted and which are not. * * *" (American Bar Association, Section of Taxation, Bulletin, March, 1953; page 25.)

The above quoted statement is most charitable to the Bureau. When they refer to the Bureau's present policy as a "rather vague one," they should have said that it has no policy. It has no policy for legal review. When they refer to the "so few discernible standards" for determining what cases should or should not be prosecuted, they should have said that the Bureau had no discernible standards. It has no discernible standards for legal review.

The utter lack of any policy and any discernible standards is again emphasized by the recent experiences of this Deponent. This Deponent represented one automobile dealer and was associate counsel representing another automobile dealer, both in the Chicago area, and both of whom have now been indicted. Each of these present defendants repeatedly asked this Deponent this question:

"Why are they going to indict me when they settled
360 with so and so (naming the party), another automobile dealer? He did so and so, which I didn't do."

There was only one answer this Deponent could and did give them. Either they didn't hire the right lawyer and/or they didn't pay the unwarranted taxes the Agents demanded of them—they didn't cooperate. Deponent after practising law in Chicago for 30 years has never before been confronted with such a vicious situation. Such situations invite charges of irresponsibility in the handling of these tax fraud cases by the Bureau, incompetency of Bureau employees, favoritism, unfairness, and yes, corruption. They destroy public confidence in the administration of the Bureau.

Citizens and taxpayers, the American Bar Association, competent lawyers and accountants all have a right to request that the Bureau should formulate and announce now, without equivocation, a sound prosecution policy founded on the basic conceptions applicable to all Federal prosecutions with definite discernible standards, guide posts and tests, so that everyone in the Bureau and everyone dealing with the Bureau will know what

cases of what tax evaders are to be recommended for prosecution and what cases of what tax evaders are to be settled and why. It is only thus that competent lawyers and accountants can deal with the Bureau relative to these cases, adequately represent their clients, properly advise their clients as to their rights, and the legal reasons for a determined action by the Bureau in a particular case. No lawyer and/or accountant should be forced to advise his client that his client may well have been recommended for prosecution because his client had hired the wrong lawyer or accountant or because he had failed to pay the taxes and penalties demanded by the Bureau.

There being no policy or discernible standards some of these cases may well be disposed of on a personal
361 basis. The Sub-committee explored the question of how certain lawyers obtained these cases and whether or not there was favoritism shown in connection with the handling of these cases. Deponent has been amazed how certain former Special Agents and Revenue Agents, once they have resigned from the Bureau, can set up an office, "Tax Consultant," and attract these income tax fraud cases to them. If there is any peddling of these income tax fraud cases from within the Bureau, it is the duty of the Bureau to stop this matter and speedily. These former Bureau employees should get their tax business just like honest, competent lawyers and accountants do. There should be no favoritism in the handling of these cases, in or out of the Bureau, and those who deal with the Bureau should deal with the Bureau on the basis of what they know and not who they know, and the Bureau should do likewise.

A special agent can settle a case because the taxpayer or his accountant co-operates if he likes the taxpayer or accountant—or, if he desires, he can forward a case where a taxpayer co-operates. Either decision is proper under present Bureau procedures since the Bureau has no policies or discernible standards as emphasized by the testimony on this subject before the Sub-committee.

CO-OPERATION CASES.

The Bureau deals fast and loose with taxpayers, their attorneys and accountants who cooperate during the course

of the investigation. The Bureau announced the abandonment of its Voluntary Disclosure Policy on December 11, 1951. The Sub-committee desired to know whether or not the Bureau, in the future, was going to recommend for prosecution these Voluntary Disclosure cases and Co-operation cases. Generally, Voluntary Disclosure cases are cases where the taxpayer comes in voluntarily before the investigation has commenced, discloses his culpability, co-
operates, furnishes evidence, and pays. Co-operation
362 cases are cases where the taxpayer, after the investi-
gation has commenced, cooperates, discloses, fur-
nishes evidence, and pays, or is willing to pay. There was much confusion before the Committee as to how these types of cases were to be treated by the Bureau in the future. Mr. Schwartz, the Assistant Head of the Penal Division, conceded that many Co-operation cases had been closed out in the past on an "individual basis", but he qualified his answer by bringing in the question of voluntary disclosure and the fact that the Government could not get its evidence except from the tax evaders (Sub-committee 163). The Government had no occasion to attempt to obtain its evidence from any other source. It obtained it through the co-operation of the tax evader. Mr. Dunlap believed that all these facts (Voluntary Disclosure or Co-operation) should be given to Justice and should be considered by it in determining whether or not Justice should prosecute; and, seemingly, if Justice so determined, the Bureau was satisfied (Sub-committee 90-92). Thus, under Mr. Dunlap's interpretation of Bureau procedure, the Bureau had no responsibility in the matter whatsoever, other than to give Justice all the facts. Yet, Mr. Dunlap, after testifying that the Bureau would give Justice all the facts, that the taxpayer had "co-operated with us 100%," was not definite whether that case would even be recommended (Sub-committee 92). Mr. Lynch, General Counsel of the Treasury Department, took a somewhat different view. He thought there was some "responsibility as an administrative agency we should assume and must assume," "the necessity of a decision as to whether or not a case will be treated on a basis of civil liability or criminal liability," and that there could be "no advance promise of immunity." (Sub-committee 166.) The following occurred before the Sub-committee:

"Mr. DeWind: Then, very clearly, it would still be
363 a factor to be taken into account by the Bureau, in deciding whether or not to send the case forward, that the taxpayer came forward voluntarily or cooperated fully and so forth.

"Mr. Lynch: Yes. It certainly is easy to conceive of a case where it would be a waste of time to send it forward with a recommendation for prosecution." (Sub-committee 95.)

Deponent, of necessity, has taken some of these quotations out of the context and from various parts of the proceedings in an attempt to determine whether the Bureau, as of January, 1952, had any policy as to the handling of these Co-operation or even Voluntary Disclosure cases in the future, and whether they were to be forwarded for prosecution or closed out pursuant to discernible standards.

Unless Deponent knew, he as a lawyer, could not properly or conscientiously advise a client to make a voluntary disclosure or to co-operate, and he, of course, could not adequately protect the interest of his client. Deponent was unsuccessful. The Bureau did not want to say yes and the Bureau did not want to say no.

"I would not want to say that automatically there never would be a prosecution, nor would I want to say that there is any commitment outstanding • • • of immunity." (Sub-committee 93.)

After analyzing all this testimony on this subject, Deponent was confused and still is confused. Representative Keogh was also confused.

"Mr. Keogh: If you have no policy with respect to declining prosecutions, why do you have a policy with respect to recommending prosecution in such cases as we were discussing?" (Sub-committee 97.)

All Bureau officials testified that the fact that a taxpayer disclosed, co-operated and furnished evidence would be given consideration by the Bureau. Many Special
364 Agents always tell this to taxpayers to obtain their co-operation. What consideration? The Bureau built up its case against the citizen and taxpayer on the basis of his co-operation and evidence furnished. The Bureau slapped on the fraud penalties on the same basis. And

then the Bureau recommended prosecution on the basis of that very co-operation and that very evidence so furnished. Why didn't the Bureau just seize the taxpayer's property and take the taxpayer out and hang him? Seemingly, the citizen and taxpayer and not the Bureau furnished the consideration. All the consideration the taxpayer received was a recommendation for prosecution! Now let us see what happens to a taxpayer when he co-operates or what happens to a lawyer or accountant who, in good faith in an effort to accommodate the Bureau, co-operates.

Recently this Deponent was called into one of these co-operation cases, which had cleared the Bureau into Justice and out to the United States Attorney. The taxpayer had paid the additional taxes, and has since paid the fraud penalties. The accountant for the taxpayer had furnished the Agent with a net worth statement. He and the Agent then computed the correct taxes, 90 day letters were issued, and arrangements made to pay the taxes. Then a Special Agent seized upon the net worth statement so furnished and recommended prosecution. Deponent asked the accountant why he had furnished this net worth statement. He advised Deponent in substance that he had always followed this procedure and he had settled his cases and that only recently he had settled a case, which he regarded as more flagrant, by following the same procedure that he did in the case where his client was recommended for prosecution. The co-operation furnished by this particular accountant in all of these cases was, of necessity, based on the belief that he could settle the case by co-operating, and he did settle all except the one mentioned. Certainly, he was induced to furnish the net
365 worth statement in the latter case by his experience with the Bureau in the past. Then the Bureau seized upon this latter case for prosecution. Even tax evaders should not be dealt with by the Government on such a catch-as-catch-can basis. Such a maladministration of our Criminal Income Tax Law is a disgrace. Deponent has discussed and attempted to discuss this particular case with top Bureau and Justice officials, and has gotten just nowhere.

Mr. Balter, in both editions* of his book, Fraud Under

* First Edition, pp. 245-249; Second Edition, Chap. VII, pp. 181-191.

Federal Tax Law, dealt with the advisability of taxpayers, lawyers and accountants co-operating with investigating agents during the course of the investigation. In his first edition he seemed inclined to favor co-operation. He emphasized the danger of not co-operating as follows:

> "There is no question but that the first effect of claiming his Constitutional privileges would be to prejudice the Government Agent against the taxpayer." (First Edition 248.)

If a taxpayer stands on his Constitutional rights and fails to co-operate, the antagonism of the Special Agent at once appears and the taxpayer may well be prosecuted. If the taxpayer does co-operate and furnish evidence, then the Special Agent is free to use that evidence as a basis for recommending prosecution. The taxpayer is damned if he does not co-operate; and may well be damned if he does.

Mr. Balter in his first edition developed that the proponents of co-operation do not believe that the antagonism engendered by a refusal to co-operate would be too serious, or the dangers of co-operation as such would be too serious since the Special Agent's recommendation would be reviewed at several higher echelons divorced from the antagonism of the Special Agent. Mr. Balter in the second edition of his book develops at some length
366 that seemingly no one at higher echelons will now review the recommendation of the Special Agent and that it may well be accepted as prima facie sound. Everyone at higher levels is hesitant to do their duty and make decisions as emphasized by the former Attorney General and the present Commissioner. The lack of competent and fair review may well endanger the rights of any taxpayer who co-operates with a Special Agent or a Revenue Agent who has the case before the Special Agent gets it. Taxpayers, lawyers and accountants who today co-operate and furnish evidence are at the mercy of a Special Agent and the Bureau.

THE BUREAU EVEN RECOMMENDS PROSECUTION BECAUSE A TAXPAYER HAS NOT PAID HIS TAXES.

Unfortunately the Bureau, like some Special Agents, believes that a tax evader should be prosecuted just be-

cause he failed to pay the taxes and penalties demanded by the Bureau. On December 11, 1951, the Bureau abandoned its Health Policy. This Policy in substance was that if a Government doctor concluded that prosecution would endanger a taxpayer's life, the criminal aspects of the case were to be closed out. Deponent has been informed and states that once having abandoned this Policy, as aforesaid, various directives were issued by the Bureau to reexamine these Health cases so closed out. Not to determine whether or not they had been properly closed out, but whether or not the taxes and penalties had been paid. If the taxes and penalties had been paid, the cases remained closed out. If they had not been paid, then prosecution was to be considered and some of these cases were recommended for prosecution, cleared for prosecution and indictments returned. This is imprisonment for debt. The Colonists threw the Tax Collectors into the sea for less.

367 TAXPAYERS RECOMMENDED FOR PROSECUTION ARE AT THE MERCY OF SPECIAL AGENTS, AS SUCH, SINCE TAXPAYERS USUALLY HAVE NO DEFENSE ON THE MERITS BEFORE A COURT OF LAW.

Certain persons before the Sub-committee expressed the opinions that since certain taxpayers had pleaded guilty they should have been and were properly recommended for prosecution. This does not follow. This fact may well, and does, magnify the lack of equality of treatment in these cases. Every Report of the Commissioner emphasized the number of successful convictions obtained. The percentage of convictions, and this percentage is the figure always used, is approximately 96 per cent. (Sub-committee 114-115.) Ninety per cent of these convictions, however, are the result of pleas of guilty or pleas of nolle contendere. (Taxes, the Tax Magazine, May 1952, 354.) Anyone having the slightest knowledge of prosecution, as such, knows that when the percentage of convictions is so high, and pleas of guilty are so high, something is wrong somewhere and the answer can be readily found. The prosecuting agencies are either seizing upon the wrong type of case, or they may be seizing upon a particular type of case where the defendant has no defense. They are shooting ducks on a pond or catching fish in a barrel, or

kicking a man that is down. These reasons are all apparent in these income tax prosecutions. The tax evader whose case is forwarded for prosecution and subsequently indicted usually must and does plead guilty, as appears from the Bureau's own figures. The indictment itself reflects on the tax evader's personal and professional standing, and may well destroy his business. His plea of guilty brands him a felon; in addition he may be incarcerated. The other tax evader whose case is similar and just as flagrant, settles his case and suffers none of these ignominies. Considering the dire consequence cast upon the one tax evader under the above circumstances, and bal-
368 ancing it against the settling of the case of the other tax evader, whose case is equally as flagrant, the lack of equality in treatment, and the lack of Due Process in the handling of these cases by the Bureau and Justice, is again emphasized and magnified by the very figures above developed. One thousand automobile dealer cases in the Chicago area were investigated by the Agents. They all follow practically the same pattern. They are all in similar circumstances. If even only 500 involved fraud, 495 were settled and five recommended for prosecution. These unfortunate five have their personal and professional standing endangered and their reputation ruined. The other 495 go free. This unfairness and lack of equality of treatment in the administration of our Revenue laws is not answered by the superficial argument that the negligible five were properly indicted since they were guilty or that they are crooks and should be in jail anyway.

ALTERNATIVE MOTIONS.

Motion for Bill of Particulars.

The right of a defendant to a Bill of Particulars, and under what circumstances, is fully developed in a brief filed in this Court in the case of U. S. v. Lawrenz, 52 Cr. 132. A further discussion of these rights would only prolong this unduly long affidavit; hence, this Court's attention is respectfully invited to the brief mentioned.

Both the Bureau and Justice have advised Deponent that the alleged case against Mr. Achilli is a net worth case. In such a net worth case the Government, of necessity, started with what it believed to be Mr. Achilli's net

worth, viz.: his assets less his liabilities as of December 31, 1945, starting point. It then determined his net worth as of December 31st for each of the succeeding prosecution years. That is, December 31, 1946, 1947 and 1948.
369 The increases in net worth so computed by the Government for each of these years over the previous year, according to the Government, exceeded the amount of reported income for that particular year. The difference between the increases in net worth for each of these years as computed by the Government and the amount of income reported by Mr. Achilli for each of these years, according to the Government, represented fraudulent unreported income by Mr. Achilli. As will hereafter be developed, the Government has used and given Deponent so many different figures concerning its computations, that no one can have any conception of how the Government arrived at its figures.

The facts in this case are most peculiar. Mr. Achilli and Mr. Gromer, as partners, operated the Highland Motor Sales for a period of approximately five years from 1945 to 1950. In addition, Mr. Gromer was Mr. Achilli's personal attorney. As such attorney, Mr. Gromer handled the legal details of many of Mr. Achilli's personal transactions involving certain of the assets which form the basis of the Government's alleged Net Worth case against Mr. Achilli. Mr. Gromer at times kept the books of this partnership; and at times supervised their keeping.

The income tax returns of the partnership, Highland Motor Sales, were prepared by Mr. Gromer and signed by him. The income tax returns of Mr. Achilli were prepared in Mr. Gromer's office. Mr. Gromer undertook to represent, and did represent, the Highland Motor Sales, Mr. Achilli and himself in the early stages of this investigation. In 1950 difficulties arose between these partners. Mr. Gromer filed a complaint to dissolve the partnership and Mr. Achilli purchased Mr. Gromer's interest for approximately One Hundred Thirty Thousand Dollars. To do so, Mr. Achilli pledged practically all his assets, in-
370 cluding his home. All of these facts were known to the Agents, and in fact were given by Deponent to the Bureau. In addition, Deponent has been advised by Mr. Achilli: that the investigating Agents requested to examine the contents of his safety deposit box; that the

Agents represented to him that if he did not permit such examination they would obtain a court order; that they did examine his safety deposit box, going through all his papers, saying they were looking for thousand dollar bills; that they even insisted that he, Mr. Achilli, break the seal on his Last Will and Testament. Thus, as of 1950, Mr. Achilli had certain definite known assets and liabilities which of necessity were known to the Government.

As of December 31, 1945 (starting point) aside from certain assets Mr. Achilli had which the Agents may not have known, and certain claimed assets of Mr. Achilli, he, Mr. Achilli, had certain other definite known assets. Deponent had his accountant take the known assets and liabilities of Mr. Achilli as of December 31, 1950 and work these known assets back to the known assets as of December 31, 1945, on a yearly basis to determine a true and correct Net Worth increase for Mr. Achilli for each of these years, 1946 to 1950, which, of course, included the prosecution years. Some of these assets were in existence at all times, some came in and out of the Net Worth determination. Deponent furnished the Enforcement Counsel's office with the known assets at the beginning of the period and the known assets at the end of the period.

At a conference held in the Enforcement Counsel's office, Deponent was advised that the Agent's computations of Net Worth increases over the prosecution years which was taxable as additional income was $36,000 for 1946, $60,000 for 1947, and $20,000 for 1948 or a total of One Hundred Sixteen Thousand Dollars ($116,000). The figures arrived at by Mr. Achilli's accountant did not
371 even approach that amount and Deponent so advised the Enforcement Counsel. It was obvious that both the Government Agents and the accountant for Mr. Achilli were both dealing with known assets and liabilities of which they both had knowledge. This large discrepancy, between the figures of the Government and defendant's figures, of necessity had to be based upon an erroneous evaluation of those known assets by one or the other. Accordingly, this Deponent suggested to the Enforcement Counsel that the Agents and Mr. Achilli's attorney sit down together, go over these assets and liabilities and arrive at a correct Net Worth statement. This request was refused. In addition, at the conference in the Enforcement Counsel's office, this Deponent was advised that

these Net Worth increases were supported by specific items of unreported income—namely, side payments and that the amount of these side payments, over the period of the prosecution years, was approximately Seventy-Five Thousand Dollars ($75,000).

Despite the fact that the Enforcement Counsel would not discuss with Deponent the basis of his figure of One Hundred Sixteen Thousand Dollars ($116,000), alleged Net Worth increases, when Deponent had his conference in Justice, Deponent was advised that the government's case was based on increases of Net Worth of only Sixty-Five Thousand Dollars ($65,000). Thus, seemingly, the Enforcement Counsel must have concluded that these Agents had made mistakes, or errors, or what not of approximately 50% of Fifty Thousand Dollars ($50,000). Deponent then explained to the representatives in Justice the above situation, and the opening and closing assets as to character and kind were checked and they were substantially similar. Deponent then asked the representatives of Justice if they could please give him the evaluation of these items. All Deponent was interested in
372 was to get at the truth. Finally, the evaluation of one asset was given. The Agent had an evaluation of approximately Ninety Thousand Dollars ($90,000) for this asset at the close of the period, and Mr. Achilli's accountants had an evaluation of Seventy Thousand Dollars ($70,000). If Mr. Achilli's accountant was right, obviously the Sixty-Five Thousand Dollars ($65,000) should have been Forty-Five Thousand Dollars ($45,000). There were several other items involved which might well have further substantially reduced this Forty-Five Thousand Dollars ($45,000). In addition, in Justice it developed that there were included in the Net Worth statements prepared by the Agents, certain alleged loans owing to Mr. Achilli. These had not been taken into consideration by Mr. Achilli's accountant. Deponent then called Mr. Achilli and was advised that Mr. Gromer had handled these particular matters and that the Agents must have gotten the information from Mr. Gromer. Deponent then went back to Justice, got the details of these loans and had them checked. Some of them, according to Mr. Achilli's accountant, should never have been in the Net Worth figures, and

some of them were erroneous if they were computed on the basis that Deponent understood from Justice they were computed. Deponent then offered to sit down with Justice and go over these figures and his request was denied. Then on this record, when the indictment was returned, it alleged unreported income of One Hundred Six Thousand Dollars ($106,000) over the 3 years in question.

The Enforcement Counsel advised Deponent that the Government was unable to make a case against Mr. Gromer. Perhaps the investigating Agents could only make a prima facie case against Mr. Achilli. Or perhaps the investigating Agents didn't want to make a case against Mr. Gromer. When Deponent had his conference in Justice, he brought up the question of these spe-
373 cific items—namely, the Seventy-Five Thousand Dollars ($75,000) of side payments. Justice informed him that the Enforcement Counsel had not charged Mr. Achilli with Seventy-Five Thousand Dollars ($75,000) of specific items. He had charged Mr. Achilli with Thirty-Seven Thousand Five Hundred Dollars ($37,500) of side payments and he had charged Mr. Gromer with Thirty-Seven Thousand Five Hundred Dollars ($37,500) of these side payments. Thus were these "R" cases legally treated by the Bureau and Justice.

The Bureau issued Ninety-Day letters in Mr. Achilli's case and that case is now in the Tax Court. Here too Mr. Achilli received "special treatment". In these Ninety Day letters he is alleged to have fraudulently failed to report additional income of $100,000 for 1946; $95,000 in 1947 and $37,000 in 1948; a grand total of $232,000. He was given no detailed information on what facts these astronomical figures were based. He was charged with failing to report income on other transactions which were handled exclusively by Mr. Gromer. The amount of additional income allegedly due from Mr. Achilli to the Government far exceeds any figures given to Deponent by either the Enforcement Counsel's office or Justice. The Bureau claims that Mr. Achilli owes approximately Two Hundred Thousand Dollars ($200,000) in taxes for the three prosecution years to which they have added the Hundred Thousand Dollars ($100,000) fraud penalty. We here again have a Three Hundred Thousand Dollar ($300,000) tax liability asserted by Special Agents. Something again is wrong somewhere.

Deponent requested the Bureau on behalf of Mr. Achilli that he be permitted to sit down and discuss the civil liability involved in this case with any competent, fair-minded Bureau official and if there was any tax due, Mr. Achilli would make every effort to straighten out the obligation, if any, with his Government. This request was ignored. Deponent has been informed that once Mr. Achilli was indicted, Mr. Gromer stated that he never had any income tax troubles, that he always paid his taxes.

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Under the above circumstances, the Government should be required to file as part of its Bill of Particulars, the Net Worth statement upon which it relies. The Government should be required to file and produce the basis of each of its evaluation of each and all of the assets set forth in that Net Worth statement. The Government should be required to set forth in detail, from what source these Agents obtained this information as to the evaluation of all of these assets. This should not be limited to the last source of information but to the first, which might well be Mr. Gromer. The Government should also furnish the additional evidence requested in the motion for the Bill of Particulars.

Motion to Suppress the Evidence.

It is Deponent's understanding that under the Rules of Criminal Procedure Deponent can make this Motion at any reasonable time prior to trial. As a result of Deponent's investigation of this case, and from conferences he had with Mr. Achilli, his accountant, the Enforcement Counsel, employees of the Bureau, and Justice, Deponent believes and so states the fact to be that much of the evidence which the Government now intends to use against Mr. Achilli, in support of its Net Worth case, was either obtained from Mr. Gromer or information as to its source was obtained from Mr. Gromer. In discussing the propriety of the use of this evidence, one of the Bureau officials took the position that the impropriety, if there was any impropriety, was that of Mr. Gromer in furnishing the evidence and the Agents were perfectly justified in obtaining evidence from any sources they could. When this matter was discussed in Justice, Justice took a slightly different view. The attorney who examined the case in Justice stated, in the presence of his superior, that much

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of this evidence received from Mr. Gromer was not received by the Agents from Mr. Gromer until after Mr. Gromer no longer represented Mr. Achilli, and after Mr. Achilli had hired a new lawyer. The relation of attorney and client had ceased, but the privilege still remained. The impropriety of the conduct of these Agents in this connection, and the right of this defendant to suppress all of this evidence was only recently emphasized in the Guerrina case, supra. Because of the length of this affidavit and since this is an Alternative Motion, this Deponent respectfully requests that if necessary he be permitted to later develop this matter in detail.

Motion That the Government Furnish the Defendant Mr. Achilli With a List of All Customers Interviewed By Investigating Agents, Together With All Statements Furnished By These Customers to These Investigating Agents.

As appears from the contents of the affidavit heretofore set forth, these investigating Agents went out and threatened these customers with the investigation of their own returns. Deponent has additional letters and affidavits from other customers to the same effect. Hence, it is most important, in the interests of Justice, to find out just why and under what circumstances each and all customers stated to the Agents that they made these side payments to Mr. Achilli. Their interrogation might well develop that these side payments were made to other people. Certainly this Deponent should not be required to wait until the trial to find out, by cross-examination, the above circumstances.

376 CONCLUSION.

Deponent has attempted to fairly, forthrightly and honestly present all the pertinent facts pertaining to this unfortunate complex situation and its far-reaching effects. It has been a difficult task and certainly not a pleasant one. Deponent has wandered far and wide in doing this, but the broad issues upon which this motion is based required just that.

As a matter of fact, the issues are so broad and their effect so far reaching, that it may well be that Deponent has overlooked certain facts which may be pertinent. If so, Deponent, of necessity, must reserve the right to sup-

plement this affidavit by furnishing these facts in a supplemental affidavit or by proof at the time of the hearing of this motion.

All of this is preliminary. The people in November of 1952 voted overwhelmingly for a change. They want a change. They want it now and they do not want a continuance of the old order. In a speech before the House of Representatives on January 9, 1953, Hon. Chauncey W. Reed said, in part:

> "Mr. Speaker, there is no more important problem facing the American people today than that of taxation. For the past 20 years taxes have been increasing at an alarming rate, until they have reached a point where they constitute a well-nigh unbearable burden on our people and a serious threat to our economy. There is imperative need of a reduction all along the line."

The American people voted for and demand a balancing of the budget and a reduction of the present confiscatory high income taxes. They also voted for and demand a complete rehabilitation and revitalization of the Justice Department and the Bureau. These agencies belong
377 to all the American people and their management, operation and control should be far above partisan politics. The responsibility for accomplishing this rehabilitation and revitalization rests upon those now in charge. This is to be accomplished, not by the errors in the past, if they were errors, but by the realization that these errors are beacons to guide the proper course for the future. The present problems of these agencies must be squarely faced now. True, employees of these agencies are hesitant to make decisions, to act and to perform their duties. They will never do this until those at top levels make prompt, sound decisions. These latter officials must determine top policy matters—not people in the field.

Only recently, the American public were told that the budget could not be balanced and taxes could not be reduced. As Deponent recalls, the reason was that the estimated collections of the government were approximately Eight Billion Dollars short. The reason for this unfortunate situation, if it exists, is largely due to the chaotic conditions existing in the Bureau. The Bureau is chasing petty gamblers and squandering taxpayers' money in doing so, instead of collecting the revenue. This racketeer

drive has disrupted the entire Bureau organization geared to collect the revenue. Deponent on information and belief states that this racketeer drive is costing the American people, at least, Five Billion Dollars. Abandonment of the Bureau's Voluntary Disclosure policy has cost the American people millions of dollars. There are many people who cheat on their taxes who would be only too happy to come in and disclose and pay up, providing they were not prosecuted. Under the Bureau's present illusory cooperation policy, no taxpayer, lawyer or accountant can safely cooperate with government agents and furnish evidence for fear that this evidence may be seized upon as a basis for prosecution by a Special Agent. If this irresponsible
378 policy continues, the Bureau will not and should not receive such cooperation. This means or should mean that every case of every tax evader must be investigated by the Bureau, independent of the taxpayer and his representative. All this, despite the fact that the Bureau has not sufficient personnel to do the job and must settle cases quickly.

The present problems of those in charge of our fiscal policies and the administration of Justice and the Bureau are just as stupendous, or more stupendous, than they have been in the past. To solve them requires men of great vision, wide experience, unquestioned ability and integrity, great stamina and real courage. They must grapple with these problems and meet them squarely. They must act and act now. The proper handling of these tax fraud cases is but one of their very many problems. In determining top policies relative to these tax fraud cases they must be both realistic and practical. They must realize that with the present high taxes, people are likely to cheat and that some people just cannot operate their business and comply with all phases of our Revenue Laws. They must be practical enough to appreciate that you cannot fill jails with tax evaders and that the primary function of the Bureau is to collect the Revenue. They must be practical enough to realize that this revenue cannot be collected without the cooperation of taxpayers, lawyers and accountants and that this cooperation will not be forthcoming if taxpayers who cooperate are to be indicted. Those burdened with these duties and responsibilities, as aforesaid, deserve the sympathy and the full support of all the American people in the tasks they face, not their criticism. If criticism is di-

rected against them or any of them it should be by way of constructive criticism, not destructive criticism. People should not criticize unless they are prepared to present a better solution.

Deponent has been asked, by one of the top officials
379 mentioned herein, what he would do about the handling of these income tax fraud cases. He would do what the American people voted for. He would have a change. He would act quickly and drastically now, tomorrow, not months hence. He would wipe the slate clean. More specifically he would: (1) Tomorrow, and not next week, end the nonsensical, irresponsible, illegal and costly racketeer drive and everything connected with it and get rid of the irresponsible box car assessments that have been made in these cases which only clog up the Bureau. (2) He would as quickly as possible, dismiss each and every income tax indictment which has been cleared since 1951 since most of these cases, if not all, were just shoved through to prosecution under the circumstances above related. If at all possible, he would get the revenue from these cases. It may well be that some of these cases were carefully reviewed and that a particular taxpayer should stand trial; however, when you wipe the slate clean the overall object controls the exception. Years are not to be spent, at great cost to all taxpayers, to determine which of these cases should go to trial and which should be dismissed. (3) He would dimiss all indictments against all tax evaders for prior years if they are still pending. These indictments of necessity have to be pending 2, 3, 4 and even 5 years. Most taxpayers have been punished sufficiently by having these indictments hanging over their heads, to say nothing of their cost. In addition if fraud can be established they have to meet the overwhelming civil liability. These indictments have lost all enforcement and prosecution value. They just clog the courts and they further delay the collection of the revenue which is necessary to balance the budget. (4) He would formulate
a sound prosecution policy for the Bureau, eliminating
380 any recommendations by Special Agents, with definite discernible standards as repeatedly urged by the American Bar Association over the last 4 years. Honest lawyers and competent accountants would know what cases are to be prosecuted and why so that they can adequately protect the rights of their clients and they wouldn't be

at the mercy of Special Agents. It may well be that before this sound prosecution policy can be legally put into effect, action of the Congress is required for the reasons set forth in the brief attached hereto. (5) He would tomorrow restore the Voluntary Disclosure policy as recommended by the American Bar Asociation. (6) He would tomorrow have a Cooperation policy. Lawyers and accountants would know that when Agents come to them and seek their cooperation and ask them to furnish evidence of their client's culpability that their client will not be prosecuted on the evidence so furnished, but that the government will be satisfied with the tax and penalties. The Bureau will give consideration for that cooperation. It will build up good will, not ill will. (7) He would call in the old Revenue Agents in Charge and the old Special Agents in Charge, whatever their new positions are under the Plan, and other top officials under the Plan, advise them to get their organizations in order, to clean up their own organizations, and to collect the Revenue. They know how to do it and they can do the job if they are only permitted to do it. He would advise all employees of the Bureau at all levels that it was their duty to act and make decisions promptly and to clean up their dockets and settle cases. This was done in 1931 and it should be done again. The Tax Court would not be three years behind very long. (8) He would, within 24 hours, abolish the un-American questionnaire and really start restoring the Bureau morale. (9) He 381 would discharge his duties and make decisions promptly and give the American people the true overall facts of this entire problem. He would then expect those under him to likewise discharge their duties and make decisions promptly and honestly. This would not require any "gold fish bowl" policy of making public every act of every employee of Justice and the Bureau. Such a policy merely means that every employee will be hesitant to do his duty: no one will close out a case where a Special Agent has recommended prosecution and these cases will not be disposed of "objectively" nor in the interests of the Revenue, viz. in the interest of all taxpayers who pay the bills. He would thus break the jam: it is not to be broken by a "gold fish bowl" policy. Such a policy will only make the present

intolerable situation worse. The American people assume that those now in power will do an honest and competent job; that is why they voted as they did. They are not concerned with the details of how that job is done; they have enough troubles of their own attempting to pay the present high income taxes. They want the job done. (10) He would wipe the slate clean and his rehabilitation and revitalization program would not be based on the errors of the past.

Prosecutions of tax evaders would be conducted on a high basis consistent with the dignity and power of the Federal government, or they would not be conducted at all. The American people want no more of the prohibition era. Deponent would give the American people a change, and it would be a real change in the interest of Revenue. It would be the change the American people voted for. It is only thus that the budget can be
382 balanced and the present high taxes reduced, and it would be started now, tomorrow—not six months hence, or two years hence.

Further, this deponent sayeth not.

.....

.....

Joseph A. Struett.

Subscribed and sworn to before me this ..... day of ....., 1953.

Notary Public.

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BRIEF IN SUPPORT OF MOTION TO DISMISS

384 BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT.

Defendant's motion to dismiss the indictment is based upon two grounds, each of which by itself requires the dismissal of the indictment:

First, Congress has made an unconstitutional delegation of authority to the executive department with reference to crimes created under the revenue laws, in violation of the doctrine of separation of powers, and in violation of the due process clause.

Second, the executive department has adopted and

employed unconstitutional procedures in the enforcement of criminal laws created in the revenue Act, in violation of the due process clause of the Fifth Amendment.

I.

CONGRESS HAS MADE AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY TO THE EXECUTIVE DEPARTMENT WITH REFERENCE TO CRIMES CREATED UNDER THE REVENUE LAWS, IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS, AND IN VIOLATION OF THE DUE PROCESS CLAUSE.

Defendant was indicted for an alleged violation of Section 145(b) of the Internal Revenue Code, which reads in pertinent part as follows:

> "* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

385 Congress has laid upon the United States attorney the duty, within his district, to prosecute for all offenses against the United States, under the direction of the Attorney General. Thus, the statute provides, insofar as material (28 U. S. C. A., Sec. 507):

> "(a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:
>
> (1) Prosecute for all offenses against the United States;
>
> * * *
>
> (4) Institute and prosecute proceedings for the collection of fines, penalties and forfeitures incurred for violation of any revenue law unless satisfied upon investigation that justice does not require such proceedings;
>
> * * *
>
> (b) The Attorney General * * * shall direct all United States attorneys * * * in the discharge of their respective duties."

From the foregoing, it may be seen that when Congress creates a law defining a crime, it is the general duty of the United States attorney, unless otherwise provided by law, to prosecute all offenses against that law. Failure to prosecute would be a dereliction of duty, amounting not only to nonfeasance in office but also to the compounding of such crime, justifying removal from office at the least. U. S. v. Brokaw (D.C., S. D. Ill., 1945), 60 F. Supp. 100, at 103.

However, with respect to offenses against the revenue laws, the law has provided otherwise. Section 3761(a) of the Revenue Code states:

> "(a) Authorization—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case
> 386 arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

No standard of any kind, manner or description whatsoever is set forth in that statute as a circumscription of the power to compromise—not even a general standard governing suits to collect fines, penalties and forfeitures under the revenue laws, as found in 28 U. S. C. A., Sec. 507(a), quoted above. Under 28 U. S. C. A., Sec. 507(a), the United States is required to institute and prosecute such suit for collection "unless satisfied upon investigation that justice does not require such proceedings." But under Section 3761(a) of the Internal Revenue Code, Congress laid down no standard at all. Thus, for aught that appears, the executive branch is given a completely free hand, with no statutory guideposts of any kind.

Sections 145(b) and 3761(a) of the Internal Revenue Code being in pari materia, they must be read together. In combination, they spell out a statutory scheme to permit the executive department to determine for itself which wilful tax evader is to be treated as a criminal and which is not, without any standard prescribed by Congress by which to pick and choose. In short, so far as the statutory scheme is concerned, one tax evader may be treated and branded as a criminal and another not—not because of

any material difference in the facts, circumstances or effects of their offenses, but merely because one has a name beginning with "A" and the other has a name beginning with "B".

It is no answer to say, as some might contend, that the executive department might adopt standards of its own.

It never did. Any standards it might impose upon
387 itself could be changed at will, and in any event, would amount to mere voluntary forbearance.

The Bureau's "Policies" or "Standards" "vary sometimes from year to year" (Sub-committee 117). Determined efforts were made in 1948 to 1950 by the Bureau to have a sound prosecution policy with discernible standards to treat even tax evaders fairly, consistently and equally. This policy in 1951, as a result of investigations and whatnot, was thrown to the four winds. Since that time the Bureau has grabbed whomever it could lay its hands on for prosecution or whom it desired to prosecute, without rhyme or reason, much less any sound legal basis.

In truth, the executive branch never has imposed upon itself a policy in this field worthy of the name. The Treasury Department has never promulgated a Regulation representing a formal and definitive policy in this regard. Indeed, the only policy it has ever professed is an informal, internal one, created in 1919, to the effect that whenever there is evidence sufficient to convict, prosecution shall occur. Yet this so-called policy has been honored in its breach, rather than by its observance, as everybody knows. Until the early 1930's, there were only a handful of tax prosecutions altogether. Since then, until recent times, the number was most small, in sharp contrast to the very large number of cases disposed of upon payment of 50% fraud penalties and therefore presumably involving sufficient evidence of fraud to convict.

Moreover, it was a matter of common knowledge that until recent times, the 1919 policy was tempered by two qualifications, *i. e.*, the so-called health policy and the so-called voluntary disclosure policy, under which, despite evidence sufficient to convict, no prosecution would occur if the tax evader was in bad health or if he cooperated with the Treasury Department and made voluntary
388 disclosure of his liability before an investigation was commenced or even thereafter.

In view of the lack of any standard imposed by Congress by which to circumscribe the actions of the executive branch in this field, it was not surprising that the executive branch came under Congressional investigation and attack in recent years. Under the lash of investigations, the Treasury Department has abandoned its deviations from its so-called 1919 policy and, as a practical matter, no one in a superior position will now interfere with the recommendation of the Special Agent, whatever his recommendation may be. In effect, therefore, there has been concentrated in the hands of the Special Agent alone virtually unlimited power to determine which tax evaders are to be treated and branded as criminals and which are not. This has been followed by a misuse and abuse of power.

Needless to say, these self-imposed, purported policies of the Treasury Department have been a far cry and a most unworthy substitute for a Congressional standard which should have been laid down in the statute itself. As might be expected, since the executive branch has been relieved of the general duty to prosecute, except as it saw fit, it has made a shambles of the law. Whim, caprice, arbitrariness, favoritism, political and personal considerations and even corruption have ruled the day, rather than the uniform, fair and impartial standards imposed by a legislative body or even by the executive branch itself.

It is clear that these unwholesome effects have stemmed entirely from the Congressional attempt to relieve the executive branch of its duty to prosecute without laying down any uniform and impartial standards for its guidance. The situation today is as though Congress had written Section 145(b) of the Internal Revenue Code in the following language:

"When the executive branch decides that wilful
389 tax evasion is a crime or to be treated as a crime, so be it; otherwise, not."

A statute so drawn amounts to nothing less than an unconstitutional delegation of legislative authority to the executive branch, in violation of the doctrine of separation of powers upon which our government was founded. As succinctly stated in

Welton v. Hamilton, 344 Ill. 82, at 87:

"Any law which vests in the discretion of adminis-

trative officers the power to determine whether the law shall or shall not be enforced with reference to individuals in the same situation, without any rules or limitations for the exercise of such discretion, is unconstitutional."

To the same effect, see:

Wichita R. & Light Co. v. Public Utilities Comm., 260 U. S. 48, at 59, 67 L. ed. 124, at 130:

"In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."

And see, generally, annotation in 79 L. ed. at page 474, *et seq.*

Not only is such a statute void as amounting to an unconstitutional delegation of legislative authority; it is also void as being in violation of the due process clause. In an eloquent opinion written in the case of

Yick Wo v. Hopkins, 118 U.S. 356, 30 L. ed. 220,

the Supreme Court cited with approval the following excerpts from Baltimore v. Radecke, 49 Md. 217 (see 30 L. ed., at 227):

"But it (the ordinance) commits to the unre-
390 strained will of a single public officer the power to notify every person who now employs a steam engine * * * to cease to do so. * * * But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. * * * In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

The only case found after extensive research, which touched upon the point here involved, is Heitsch v. Kavanagh, (C. A. 6) 200 F. (2) 179. In that case, in which an executor was suing to recover federal estate taxes, the contention was made that the power of the executive branch to compromise civil liability, as granted in Sections 3760(a) and 3761(a) of the Internal Revenue Code, amounted to an unconstitutional delegation of legislative

authority to the executive branch. However, it was stipulated and found in that case that no compromise of civil liability had been made or attempted under said statute, in view of which it was ruled the executor failed to establish that he was injured by the alleged unconstitutional features and thereby within the class of persons entitled to complain thereof. This being so, the Court of Appeals refused to rule on the constitutional question, in line with the principle that such questions are not to be decided hypothetically. (200 F. (2d) at p. 180). In the instant case, as seen, there is nothing hypothetical with respect to the constitutional questions raised. Mr. Achilli has already been seriously injured, by being indicted. Thus, he has already experienced the direct and immediate impact of this grossly deficient statute; and its grossly irresponsible and illegal application. He even got the "R" treatment!

391

II.

THE EXECUTIVE DEPARTMENT HAS ADOPTED AND EMPLOYED UNCONSTITUTIONAL PRACTICES AND PROCEDURES IN THE ENFORCEMENT OF CRIMINAL LAWS CREATED IN THE REVENUE ACT, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Taking full advantage of the wide-open door to administrative abuse left by Congress, the Treasury Department, in the last few years, has instituted a practice and procedure which is wholly arbitrary and discriminatory in its operation and effect—one which was employed against the defendant in this case, and of which he has every right to complain. The practice and procedure referred to may be called, for want of a better name, the "R" stamping practice and procedure, and operates as follows:

Whenever a Treasury agent may believe, for whatever reason, even on the basis of rank unsubstantiated hearsay, that a taxpayer may have engaged in activities contrary to state law, the agent causes that taxpayer's file to be stamped in red with he letter "R" denoting "racketeer". This is done regardless of whether the alleged activities of the taxpayer were remote or current, and regardless of whether such activities had or would have any significance under the internal revenue laws.

Once a file is stamped with an "R", the taxpayer gets short shrift, indeed. Having been thus singled out, he is on his way to indictment under one or more of the catch-all revenue laws, even on the flimsiest of evidence. All customary hearings and reviews on the merits by superiors of the Treasury agent are either dispensed with or rendered sterile and empty in the face of that red stamping. Insofar as such a taxpayer is concerned, even
392 though the hearsay as to his supposed activities was not true, and even though such activities were not germane in any way to the revenue laws; nevertheless, on the basis of rumor as to his character, he has become a vulnerable target for arbitrary action, no longer to be treated like any other taxpayer.

The irony in this evil practice and procedure is that, by way of contrast, a different taxpayer, whose misdeeds may have been actual, far more flagrant and directed four-square against the revenue laws themselves has his case treated according to another and different so-called standard, will be accorded full hearings on the merits, at every level, and probably will escape with civil fraud penalties. Even an associate or partner of the "R" taxpayer, whose tax deficiencies arise out of precisely the same set of facts, will be permitted to escape prosecution, as happened in this very case. Here, Mr. Achilli had as his partner and associate an attorney at law, who is presumed to know the law. The attorney prepared and signed the partnership returns. Yet the attorney was let off, but not Mr. Achilli, the only apparent difference being that Mr. Achilli's file was stamped with the red "R".

Manifestly, any practice or procedure of enforcement which depends, not on legal considerations, but merely upon supposed difference in the personal character of one taxpayer as compared to another, is so abhorrent to our system of government as to be in violation of fundamental law. In the language of Baltimore v. Radecke, 49 Md. 217, quoted above, and cited with approval by the Supreme Court in Yick Wo v. Hopkins, 118 U.S. 356, 30 L. ed. 320, such a practice and procedure

"hardly falls within the domain of law • • •."

It is the same evil, the mere suspicion of which, in a particular instance, led to sweeping condemnation by four of

the Justices of the Supreme Court in the recent case
393 of Rutkin v. United States, 343 U. S. 130, at 141 et seq., 96 L. ed. 833, at 841 et seq. In that case, no point was raised nor facts shown as to whether a practice or procedure was applied to Rutkin comparable to that complained of here; yet, merely viewing the case as an isolated instance, and solely from what could be deduced from the record, almost half of the court were ready to reverse the case

When the heat was on and the Bureau was subjected to the pressure of investigation, the Bureau singled out and recommended for prosecution the cases of a negligible few automobile dealers in the Chicago area (five in number), including Mr. Achilli, despite the fact that it had settled without recommending prosecution, the cases of innumerable other automobile dealers (200) of the same area, whose cases were as flagrant or more flagrant. This simple statement emphasizes the lack of fairness, consistency and equality of treatment and the lack of due process under the Fifth Amendment of our Constitution. It is just a simple matter of right or wrong. In Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, at page 227, the Court said:

> "* * * Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." * * *

Even Special Agents in times of peace do not have the privileges, rights, prerogatives and powers given the Commander-In-Chief during times of National Emergency. Harabayshi v. U. S., 320 U. S. 111, 87 L. ed. 1792. Controlling all facts and questions submitted is the basic philosophy that these prosecutions must be conducted consistent with the power and dignity of the Federal
394 Government. This basic philosophy, equally applicable to any sovereign government, was simply stated in the case of People v. Claveu, 355 Ill. 358 (189 N. E. 364). The Court said (189 N. E. 367):

> "The state is sovereign and it neither needs nor can it accept the benefit of any questionable or undue

advantage over one of its citizens. Its procedure against an accused must be kept on such an ethical plane as will be consistent with its dignity and with its power."

The "general processing" during the last several years of all of these so-called criminal Income Tax cases by the Bureau and Justice—there may be exceptions, but they are few and far between—and the subsequent promiscuous indictments of the victims capriciously seized upon, including Mr. Achilli, is repulsive to our entire system of American jurisprudence, our Constitution and its Amendments, and our American way of life. It is a flaunting of arbitrary, irresponsible, and uncontrolled power. It is a defiance of the solemn command, "Equal Justice Under Law." The indictment against Mr. Achilli should be dismissed.

Respectfully submitted,

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Attorney for Sam Achilli.

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395 APPENDIX A.

INCOME TAX PROSECUTIONS 1946-1950 AND THEIR UNDERLYING PROBLEMS, WHEN CONSIDERED (a) IN RELATION TO THE OVERALL PROBLEMS OF THE BUREAU IN 1946 AS SUCH; (b) THE HISTORY AND PURPOSE OF THESE PROSECUTIONS PRIOR TO 1946, AND (c) THE BASIC CONCEPTIONS APPLICABLE TO ALL FEDERAL PROSECUTIONS.

(a) The Problems of the Bureau As Such—1946.

As the activities of Government expanded, and taxes of every sort arose, these taxes became the problem of the Bureau. All problems of the Bureau at all times mentioned herein were centered around a man power shortage and an ever increasing work load. The problems of the Bureau became the problems of the Congress. In a report in January of 1948, the Congress emphasized

the need of sweeping improvements in the management of the Bureau in that "unnecessary, cumbersome, outmoded and wasteful practices have continued unchanged in the Bureau for decades" (Sub-committee 79). The actual fact was that as a result of the lack of personnel and the ever increasing work load, the Bureau was never able to improve its management and method of operation. Most everyone in the Bureau was doing the best they could under practically insuperable difficulties. Prior to the War, returns had been filed by not more than five million taxpayers. By the time the War had ended, this number had been increased to at least fifty million. There were also innumerable other kinds of taxes which had to receive the consideration of the Bureau. The Bureau not only had to collect these large and various taxes, but had to make a substantial effort to collect the Income Taxes from tax evaders who had made large profits during the War and had failed to report them. From a
396 man power standpoint, with all this additional burden, the Bureau after the War had practically the same number of employees available as it did before the War. A large number of these employees were new people without experience in the problems of the Bureau. Prosecutions were necessary. Special Agents had to send in cases with their recommendation of prosecution. They had to be cleared for prosecution by the Regional Counsel, and they had to get to the Courts promptly.

(b) History of Income Tax Prosecutions.

Deponent first learned of Income Tax prosecution as such as far back as 1930. Deponent was an attorney in the United States Attorney's office in Chicago for a period from 1928 to 1934. It was then and there that Income Tax prosecutions as such were pioneered. While he personally handled none of these cases, Deponent knew all the people who worked on these cases, their problems, difficulties and the time and cost required to make a substantial case against a defiant taxpayer. He was familiar with some of these cases at their inception; he knew how these cases were prepared; and he followed their prosecutions in this very Court. The records of this Court indicate that they were made by skilled, competent investigators, both Revenue Agents and Spe-

cial Agents, that they were substantial key cases against flagrant and defiant taxpayers, and that once convictions were obtained, substantial penitentiary sentences were given. These cases had enforcement value because they were conducted on a highly selected basis. Deponent contrasted this situation with the then Prohibition prosecutions which were being conducted on a wholesale basis where they descended to the prosecution of the bartender. He thus learned as far back as 1930 that a Federal Statute, particularly an unpopular one, could not be enforced by wholesale prosecutions. The Congress appreciated this fact and in an effort to enforce the Prohibition
397 Law, it enacted the Jones Law. This ended the Prohibition prosecutions.

As stated, these Income Tax prosecutions were really pioneered in this District back in 1930, and were confined to substantial flagrant cases of real enforcement value. There is another aspect to these cases. They were not confined to the prosecution of a particular tax evader as such, but were obviously intended to reach out against certain particular persons or certain particular situations which required law enforcement. A representative of the American Bar Association stated to the Sub-committee:

> "The crime of income-tax evasion is a unique one in a number of respects. For the first 20 years after the offense of filing a fraudulent income-tax return was redefined to make it a felony, the law was not so enforced generally by the Government against tax evaders, but only as a supplemental criminal sanction against persons who had committed other crimes." * * * (Sub-committee 226.)

Only recently in a case before the Supreme Court, four of the Justices were of the opinion that a particular tax evader was being prosecuted not for Income Tax evasion, but for extortion, Rutkin v. U. S., 343 U. S. 130, 96 L. ed. 833, and would have reversed.

While these prosecutions had been directed against substantial flagrant violators and particular situations requiring law enforcement, they had another far more important and real purpose. Namely, to bring in the money from other tax evaders, enforcement value. The

threat of and fear of prosecution were inducements to pay the money due from tax evaders. One has but to examine the press releases of the Bureau from 1945 to 1947 relative to Voluntary Disclosure to see the real purpose behind all of these prosecutions or threatened prosecutions (Sub-committee 140-150). They were not to prosecute tax evaders as such. They were to bring in the money. In 1945, the Treasury Department 398 announced "Treasury policy even permits the willful evader to escape prosecutions if he repents in time" (Sub-committee 143); the man who makes such a disclosure "protects himself and his family from the stigma of a felony conviction" (Sub-committee 144). Deponent has heretofore referred to the press releases of the then Secretary of the Treasury on May 25, 1947. The present Commissioner of Internal Revenue emphasizes this same purpose in his interview printed in the U. S. News of May 8, 1953. To illustrate what is meant by enforcement value: The Bureau while Deponent was Regional Counsel cleared for prosecution several cases over a period of several years in a State where there had never been an Income Tax prosecution. As each of these cases were prosecuted, they received wide publicity and their successful prosecution were followed by substantial penitentiary sentences. As a result, innumerable tax evaders from that State and surrounding area came in, filed amended returns, disclosed and paid their taxes and penalties. This history both before and after 1946 emphasizes that the purposes of prosecution or threatened prosecution of these Income Tax cases is primarily to induce other tax evaders to come in and pay up and not to indict and prosecute the particular crime of tax evasion or tax evaders as such.

(c) Basic Conceptions Applicable to all Federal Prosecutions.

Deponent knew the basic conceptions applicable to all Federal prosecutions (hereinafter sometimes for convenience referred to as "basic conceptions"), which had to be weighed and considered, as the situation demanded, before any Federal prosecution was undertaken or recommended. Some of these basic conceptions are: The character of a particular Statute and the object sought

to be obtained by a prosecution under that Statute;
399 a fair equitable evaluation of the overall facts of a particular case, not only of themselves, but in relation to similar cases of other citizens; an appreciation of the many Government enforcement problems: all law evaders cannot be prosecuted, wholesale prosecutions are not successful, the cost of prosecutions, the limitation of Government personnel, the clogged dockets everywhere and the shortage of Judges; the need of prompt prosecutions, once an indictment is obtained; the punishment which may be inflicted; the requirement that as far as humanly possible there should be fairness, consistency and equality of treatment of all citizens; and that Federal prosecutions were to be originated and conducted consistent with the dignity and power of the Federal Government. These same basic conceptions in part were developed only recently with much supporting authority by Mr. Justice Black in his dissenting opinion in the Rutkin case. They also appeared in part in the O. P. A. Manual governing O. P. A. prosecutions.*

* The standards determining such O. P. A. prosecutions and reasons therefore, basic conceptions, were set forth in an article by Mr. L. B. Schwartz entitled "Federal Criminal Jurisdiction and Prosecutors' Discretion" appearing in 13 Law and Contemporary Problems, (p. 65), as follows (p. 84):

> * * *"Administrative agencies which investigate and refer cases to the Department of Justice for prosecution have developed quite explicit standards for selecting cases for penal treatment. These standards naturally reflect those of the Justice officials who have to be persuaded to proceed with the cases. Thus the Enforcement Manual of the Office of Price Administration stated the 'general considerations' bearing on the selection of cases for criminal prosecution as follows:
>
> > OPA cannot use the criminal remedy for wide coverage of offenders, as is done in England, because it would unduly flood the Federal Courts. Instead, OPA must develop techniques and criteria for choosing a relatively small number of key cases to prosecute criminally. OPA cannot in this way punish all violators who deserve criminal penalties. No prosecution should be recommended unless the case has clear significance for enforcement beyond the administering of deserved punishment.
>
> The Manual then reminded enforcement officers of alternative non-criminal sanctions, e.g., injunctions, penalty suits—to be weighed against criminal proceedings in the light of relative possibilities of success, speed of disposition, and other considerations. Prosecution was to be limited to intentional or wanton violations, a stricter standard than required by the statutory 'willfulness.' Among wanton and intentional violators, moreover, only 'strategic,' or 'key' cases would be prosecuted. A case might be strategic because the violator was a leader in his industry or in a key position economically so that his price violations tended to cause similar violations by others."
> * * *

A FAIR AND SOUND PROSECUTION POLICY.

"The primary function of the Bureau is to collect the revenue. Prosecution under our revenue laws, and particularly our income tax law, is but an arm of enforcement. Our revenue laws are unique in that the Commissioner, with the approval of the Secretary of the Treasury, can settle both the civil and criminal aspects of an income tax violation. This is proper. We do not have sufficient personnel to prosecute all persons who cheated on their taxes. The civil penalties are substantial and ofttimes constitutes sufficient punishment, and prosecutions delay disposition of civil settlements to the detriment of the revenue. I have always felt that our income tax prosecutions should be primarily confined to substantial, flagrant, defiant tax evaders, both racketeers and honest "businessmen"; that such cases should be given wide publicity; and if convictions are obtained, the punishment should be substantial penitentiary sentences—not probations. I have always felt that we were receiving from the Special Agents in Charge many cases which should have been settled in the field by the imposition of the fraud penalties. I have also felt that, as a result, we were prosecuting a particular taxpayer despite the fact that a more flagrant taxpayer has been permitted to settle his tax case. In other words, I have always felt that we were getting too many of the little men and too few of the big men. That there must be some basis for my thoughts is emphasized by the increasing large number of probations that are granted by the courts in our income tax prosecutions. There should be few, if any, probations in our income tax case prosecutions. There must be consistency, uniformity, and equality in our tax prosecution policy. We cannot recommend the prosecution of one taxpayer whose case is no more flagrant than that of another taxpayer whose case is settled. We should have fewer and better cases. We should have quality
401 rather than quantity. In my judgment, during the last four years, we were all working toward accomplishing a prosecution policy consistent with the above

views. In my judgment, because of "investigations" and our Racketeer Drive, the prosecution policy which we have been attempting to put into effect, and which I have always advocated, has been thrown to the winds. These remarks again emphasize what I think of our racketeer drive. We get the bartender!"

THE RACKETEER DRIVE.

"Some well-meaning persons evidently think that the Federal Government is under a duty to enforce our state criminal laws, do the work of incompetent and dishonest state law officials and put all violators of our state laws in jail. For what? For violating our Federal income tax laws; hence, our racketeer drive. The whole administrative functions of the Bureau has been disrupted as a result. A master racketeer list has been prepared. Some people are on there who should never be on there. Any petty racketeer and state law violator somehow finds his name on this racketeer list or is classified as a racketeer. He is investigated and investigated promptly. Unreported income is found, or we think we found unreported income, and his case is promptly cleared for prosecution. It is given high priority and is rushed to Justice without recommendation for prosecution. We roll them along. What we, in effect, do is rubber-stamp the recommendation of some investigating agent whose investigation, of necessity, under the pressure of our drive is, in most instances, most incomplete and superficial. I have been told that we can expect three thousand, five thousand, and even nine thousand of such cases. How can our own organization handle these cases and do a lawyer-like job in handling them? What is Justice going to do with these cases? Who is going to prosecute them, and how? What are our Federal courts going to say? We will reduce our Federal judiciary to the levels of police magistrates and we will reduce our revenue laws to the low levels of the old prohibition laws. While we are investigating the racketeers and our honest employees, the real tax cheats prosper. If we are to be
402 required to enforce the state laws through the weapon of our income tax prosecution, let us do it on a high level—fewer and better cases, quality rather than quantity. Let us take time and effort to do a real job. Let us work on the big racketeer and the dishonest state officials.

—not the little fellow. Let us follow the pattern set by the late George E. Q. Johnson. Are dishonest state officials classified as racketeers? If not, why?"

THE GENERAL INQUISITION AGAINST ALL EMPLOYEES.

"The present difficulties of the Bureau, in my opinion, are the results of certain situations and the activities of certain persons. Some of these situations have been rectified. Some of the persons who have resigned or have been discharged. Some of these matters should have been taken care of long before they were. All of these matters should be cleaned up and promptly cleaned up. Unfortunately, in my opinion, these matters have been handled and are being handled in such a way as to reflect on the integrity of the Bureau as a whole and upon the many thousands of honest, competent employees, one of whom I consider myself, who were in no way responsible. The effect has been disastrous. The confidence of the public in the Bureau has been destroyed, and the morale of its honest employees is, likewise, being destroyed. Seemingly, some think the Bureau can be cleaned up only by a general inquisition directed against every employee, honest and dishonest, by way of questionnaire. An investigation of all to clean up usually results in an investigation of no one and a cover-up rather than a clean-up. There are others who think the Bureau can be cleaned up on the basis of resignations. Everytime some dishonest employee resigns this is given wide publicity as an accomplishment toward a clean-up. As a matter of fact, this sort of publicity just reflects on the Bureau as a whole and particularly its many honest, competent employees."

403 DEPONENT'S CONCEPTION OF HIS DUTIES.

"I closed out more cases than did any other Regional Counsel * * * I assume the full and complete responsibility for all cases closed out by my office. As I testified before the St. Louis Grand Jury, after signing an immunity waiver, I am willing to justify their closing out before a dozen Committees of the Congress. They were all closed out on a realistic, sound, factual, and legal basis, consistent not only with many memoranda furnished me by my superiors, but primarily with my own personal

views on what cases should be forwarded for prosecution. I run my office the way I think it should be run. That was what I was hired for. If I cannot do that, I get out!"

• • • • •

"The position I hold is trying enough in ordinary times. Under the present circumstances, I want out. I am a lawyer, I have always tried to run a law office, giving each case a lawyer-like consideration, afford every taxpayer a full and complete conference, and dispose of the case on a sound, legal, realistic, and fair basis. In my opinion, I just cannot run such an office now. I cannot be a rubber-stamp for a program which I do not believe in and which I condemn. This leaves me no alternative but to resign."

EXHIBIT E

404 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 53 CR 154) • •

SUPPLEMENTAL AFFIDAVIT OF JOSEPH A. STRUETT

IN SUPPORT OF MOTION TO DISMISS

Joseph A. Struett, being first duly sworn, on oath deposes and says:

That subsequent to the preparation and filing of his Affidavit in Support of the Motion to Dismiss the Indictment against Mr. Achilli, 53 C 154, there was brought to deponent's attention an article appearing in the Columbia Law Review for April, 1953 (pp. 476-503).

That this article was written by Charles S. Lyon, who from 1951 to January, 1953, was successively Assistant Counsel and Chief Counsel of the King Sub-committee (in the original Affidavit of deponent referred to as Subcommittee), and Assistant Attorney General of the United States in Charge of the Tax Division. That said Tax
405 Division is the division of the Attorney General's office that processes the recommendations submitted by the Bureau for prosecution of tax evaders. It is most significant that a lawyer and former high Government of-

ficial who obviously had an intimate knowledge of this entire situation should, in this article, develop facts practically identical to the basic facts upon which this Motion to Dismiss the Indictment is predicated.

My. Lyon developes at length in the article above mentioned the complexities of this entire matter, its many problems and the pitiful, nebulous and chaotic situation which has existed in the Bureau in connection with the handling of these Income Tax Fraud cases, both criminal and civil, for the last several years, from the standpoint of administrative and legal procedure and theory. In this same article, Mr. Lyon concludes that "the whole complex of existing procedures for determining what taxpayers to subject to fraud examinations is ripe for re-examination," including the fundamental question whether Special Agents should be permitted to recommend prosecution. (p. 487).

Mr. Lyon does not discuss the legal or Constitutional questions upon which the Motion of Mr. Achilli is based, but the facts he developes corroborate and supplement the general basic facts set forth in deponent's original Affidavit in Support of said Motion to Dismiss, as appears from the following.

406 1. Mr. Lyon, in substance, recognizes and states that these prosecutions are not and never have been intended to prosecute and punish tax evaders as such, but to deter others. He even assumes—a fact known to everyone—"That the primary purpose of the criminal provisions is not to visit retribution upon tax sinners, but to encourage by way of threats the greatest possible degree of compliance with the substantive provisions of the Income Tax Laws. In short, the purpose of the criminal provisions is to be found in terms of what is commonly called "deterrence" of other potential law violators." (p. 488).

2. Mr. Lyon developes that in 1951, in response to the Kefauver Committee, the Bureau deployed a large part of its personnel into the nationwide drive against racketeers, thus giving tax administration "an ultimate purpose other than revenue." (p. 477). He seeks authority for such action on a basis of administration discretion, supported by the desirability of "policing racketeers in any available fashion", and the satisfying of Congressional and public clamor, all despite "the probable loss of greater revenues collectible on audit of other taxpayers." (p. 485).

3. Mr. Lyon states that by and large the Bureau has had "comparatively little system or program for determining what matters and what persons should be made the subject of fraud investigations" after reviewing the fact that the Revenue Agent and Special Agent can
407 close out these cases. (p. 487). He should have stated, and correctly stated, that the Bureau has no system and no program. He recognizes that the Bureau, operating as aforesaid, has "exclusive jurisdiction" to investigate these cases, and "normally only those cases which it recommends for prosecution reach the Justice Department." (p. 477). Later he refers to the "self imposed" limitations of Justice as to what cases it will prosecute. (p. 490).

4. Mr. Lyon developes at some length the problem of these prosecutions from the standpoint of sentences and questions whether probations benefit tax enforcement. He states that substantial sentences are exceptional, and fifty-six percent of the tax evader criminal cases disposed of resulted in no jail sentences. (p. 479).

5. Mr. Lyon recognizes the hesitancy of public officials, because of public clamor, to close out these cases or to do their duty. He states: "The upshot of all this pressure has been to surround tax fraud cases with a blanket of sensitivity and to make tax fraud administrators much more reluctant to decline a prosecution except on the sort of clearly defined authority which seldom obtains in tax fraud cases." (p. 477). In fact, it never obtains. Having no policy with respect to declining prosecutions, it is difficult to perceive how the Bureau can have a policy with respect to recommending prosecutions. (see
408 question of Congressman Keogh original Motion p. 63).

6. Mr. Lyon also refers to the character of the legal review by the Bureau during the last several years. The Bureau, when the heat was on, to expedite these cases, at times forwarded them so rapidly to the Tax Division that in some instances there was a skimping of the Bureau's review procedures, no conferences were afforded by the Enforcement Counsel, and some cases were forwarded without "any definite recommendation that prosecution be undertaken." (p. 500).

7. Mr. Lyon, of course, refers to Cooperation cases, emphasizing the Constitutional questions involved, and the

seemingly over-reaching by the Bureau of the taxpayer to obtain evidence, which over-reaching might not be sufficient to constitute a promise of immunity. He states: "This typically takes the form of vague references to the advantages which will flow from 'cooperation'." (p. 496).

8. Mr. Lyon, throughout his article, refers to various basic conceptions applicable to all Federal prosecutions, and emphasizes that just so many of these cases can be promptly cleared for prosecution because of limited man power, court dockets, and so forth. He, of course, recognizes that if substantial sentences were given in these cases, there would be fewer pleas of guilty. (p. 488).

From the above facts, considered together with the other facts developed by Mr. Lyon, there exists an administration or mal-administration (which term is proper)
409 by the Bureau in connection with the handling of these criminal Income Tax cases, which requires administrative, Congressional and/or Judicial attention, depending upon the facts and problems presented. Mr. Lyon does not consider the legal or Constitutional questions involved, nor does he consider the question of consistency, fairness or equality of treatment of tax evaders, the basis of Due Process. All activities of the Bureau which he discusses, attempts to justify, or criticizes, are not considered from the standpoint of basic legality, but from the standpoint of what he terms Bureau administrative discretion at all levels. He states:

"It is, however, very difficult to lay down standards with any definiteness or precision for distinguishing between cases which are appropriate only for the assertion of civil fraud penalties. At the moment, in short, there is broad undefined discretion." (p. 482).

Mr. Lyon thus recognizes that the Bureau, and in turn Justice, have no legal discernible standards for penal treatment. He further states:

"It is implicit in much of the foregoing that there are substantial areas of discretion in the administration of Federal Tax Fraud Law. This is underscored by the Generality of the language of the tax evasion statute and by the blanket power given the Treasury and Justice Departments to compromise any tax matter." (p. 481).

Paraphrasing these statements, Treasury and Jus-
410 tice Department officials have a broad undefined discretion, underscored by the generality of the tax eva-

sion statute, to prosecute one automobile dealer tax evader and the blanket power under another and different statute to compromise the case of another automobile dealer tax evader, despite the equal flagrancy of their cases, and despite the fact that these two statutes relate to the same subject matter, are in pari materia, and must be read and considered together.

There is no such broad, blanket undefined discretion known to the law. Discretion does not denote arbitrary power, whims or caprices. Lord Camden considered discretion to be the law of tyrants, being casual and depending upon temper and passion. "In the best it is often times caprices; in its worst, it is every vice, folly and passion to which human nature is liable." Delano v. Market Street R.Y. Co., 124 F 2d 965, 967. The term discretion "while implying the absence of a hard-and-fast rule, should not be a word for arbitrary will or inconsiderate action." The Suria v. Morgan, 186 U.S. 1, 9 L. ed. 1027. "When envoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed to the reason and conscience of a Judge to a just result." Langnes v. Green, 282 U.S. 531, 541, 75 L. ed. 520. Chief Justice Marshall said, "Courts are mere instruments of the law and can will nothing when they are said to exercise a discretion, it is a mere legal discretion; 411 a discretion to be exercised in discerning the course prescribed by law and when that is discerned, it is the duty of the Court to follow it." Osborn v. U.S. Bank, 22 U.S. (9 Wheaton) 738, 866; 6 L. ed. 204. Discretion implies fairness, soundness and equitable disposition, consistent with sound principles of law in the interest of justice and prudence. In re: Bond's Guardianship, 295 NYS 493, 496, 251 App. Div. 651; Fessendon v. Fessendon, 165 N.E. 746, 747; 320 Ohio App. 161; U.S. v. National City Lions D.C. Cal. 7 F.D.R. 383, 397. Arbitrary discretion is nothing more or less than a government of men rather than of law. Application of Peacock, 78 NYS 2d, 416, 417.

The results which may and do emanate from this so-called broad and undefined discretion are aptly set forth by Mr. Lyon as follows:

"Probably such an occurrence as the recent conviction

of the former owner of the St. Louis Cardinals Baseball Club, has done more to frighten potential tax evaders than several hundred other cases not substantially different from his." (p. 481).

Was the case of this unfortunate tax evader under this broad undefined discretion seized upon for prosecution so that the Bureau could have at least one prominent citizen indicted for tax evasion as a result of the activities of the St. Louis Grand Jury? Was this unfortunate individual, under the same broad undefined discretion, seized upon to frighten other potential tax evaders? What happened to the "several hundred other cases not substantially different than his"? Certainly they were not prosecuted. No one has ever heard of them. Were they settled like
412 the two hundred automobile dealer cases in the Chicago area, which cases were "not substantially different" than the case of Mr. Achilli? This unfortunate individual was a lawyer, and, as a result of this prosecution, his license and means of livelihood were jeopardized. In effect, he was driven out of baseball. Press releases at the time of the indictment and the plea of nolo contendere indicate that the alleged fraudulent unreported income upon which this particular prosecution was based was negligible in comparison to the alleged civil deficiency. The "unnecessary harsh" fraud penalties attached to this entire deficiency. This tax evader, once he entered his plea, was given a rather substantial penitentiary sentence. "For example, heavier sentences by and large have been given so-called racketeer and grafting officials." (p. 479). Is it any wonder that this particular taxpayer, before he went to the penitentiary, raised the question whether or not he had been treated fairly.

Considering the overall facts of this particular case in the light of certain utterances of Mr. Lyon in his article, they emphasize what can happen to one particular taxpayer when Bureau administrative officials at different levels purport to act pursuant to a broad undefined discretion supposedly vested in each of them. A combination of these same facts emphasize the general overall lack of fairness, equality and consistency, which, of necessity, must arise when these cases are handled by the Bureau on the above basis. For the last several years, The Bur-
413 eau has been handling these cases pursuant to this supposed broad undefined discretion, exercised and

applied in various inconsistent ways, unequally against different taxpayers, by various officials at various administrative levels, rather than pursuant to definite legal discernible standards applicable at all levels and exercised and applied equally against all tax evaders by all officials in a like and consistent way at all levels. As a result, there has been a Government of men and not of law, and a flagrant denial of Due Process in all of these cases. They settled two hundred automobile dealer cases in the Chicago area, and they recommended the prosecution of a negligible few (five) including Mr. Achilli although all these cases "were not substantially different."

Deponent states the fact to be that there is no statutory authority for the so-called Racketeer Drive, or any part thereof, conducted by the Bureau during the last several years, and it was and is illegal in all of its phases. It is not, and has never been the right, power or function of the Federal Government as such, or any of its agencies, to police the States, punish State law violators, or dishonest State officials, even if done under the guise of and means of the use of the Federal Revenue Laws. The object and purpose of the Federal Revenue Laws is to collect the revenue for the benefit of all taxpayers, and not to be used as a means of punishing State law violators at the expenses of all taxpayers. If the Bureau, when the heat was on, sought to engage in this unlawful activity,

it should have first sought statutory authority from 414 the Congress rather than to have embarked upon this nefarious conduct upon the demand of individual members of the Congress and public clamor.

Had such authority been sought and obtained, it would have bristled with numerous Constitutional questions. Joint Anti-Fascist Refugee Com. v. McGrath, 341 U.S. 123, 95 L. ed. 817. This case and the opinions of the various Justices in support of the conclusion reached, condemns the illegal, arbitrary and capricious actions of the Bureau in the carrying out of this so-called racketeer drive in all of its phases in violation of the basic principals of Due Process. In part this case condemns the administrative listing and classification of citizens by the Attorney General in a certain category for administrative action without notice of hearing under a statute of Congress. In th instant case, Mr. Achilli, and other citizens

and taxpayers were listed and classified by administrative Bureau officials as racketeers, and their cases treated as racketeer cases under the circumstances heretofore developed, without notice or hearing, upon the rankest of hearsay, want of evidence and unsubstantiated rumor, without the semblance of statutory authority. As fully developed in this same case, any citizen or taxpayer, including Mr. Achilli, adversely affected by the action as aforesaid, has a right to complain.

The above article by Mr. Lyon is adopted by reference and made a part of this affidavit, and deponent states that the basic facts therein stated are substantially true.

Further, this deponent sayeth not.

415 Joseph A Struett

Subscribed and sworn to before me this 23rd day of July, A.D. 1953.

(Seal) s/Marilynne M. Olsen
Notary Public

416 And on the same day to wit, the 14th day of September, 1953 came William J. Giglio by his attorneys and filed in the Clerk's office of said Court his certain Motion, Affidavit In Support Of Foregoing Motion, And Copies Of Subpoena Duces Tecum Attached Thereto, in words and figures following, to wit:

417 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 53 CR 143) * *

MOTION.

William J. Giglio, who is under command of this Court in subpoenas duces tecum, one of which was served upon him by the plaintiff and one of which was served upon him by the defendants, to appear at the trial of the above-entitled cause at 9:00 A. M. on September 14, 1953 and produce certain books and papers which are more particularly described in the copies of each subpoena duces tecum hereto attached, by and through his attorneys, Henslee, Monek & Murray, moves this Court to quash the subpoena duces tecum of the Government and moves this Court to

modify the subpoena duces tecum of the defendants in such manner that only that portion of the defendants' subpoena calling for copies of the Federal income tax returns of David G. Lubben for the years 1943 to 1947 shall remain in force and effect upon the following grounds:

1. All of said books, records and all other papers required to be produced in both subpoenas, copies of which are hereto attached are his own personal papers and are privileged, except copies of the Federal income tax returns of David G. Lubbens for the years 1943 to 1947 required in the subpoena served upon him by the defendants in the above cause.

418 2. To compel the movant to produce said books, records and all other papers set out in said subpoenas duces tecum served upon him by the plaintiff, The United States of America and the defendants, The Shotwell Manufacturing Company, et al, and to testify in connection with the same will be in violation of his rights under the Fifth Amendment to the Constitution of the United States and will deprive him of the personal privilege against self-incrimination which he hereby claims by the Affidavit hereto attached.

Henslee, Monek & Murray
Henslee, Monek & Murray
139 N. Clark Street, Suite 810
Chicago 2 Illinois—STate 2-9525
John J. Naughton
John J. Naughton
Melvin L. Griffith
Melvin L. Griffith
Attorneys for William J. Giglio

Received a copy of this Motion together with copies of the Affidavit subpoenas duces tecum, brief and letter to the Honorable Gunnar H. Nordbye, Judge of the United States District Court, thereto attached, this 3rd day of September, A. D. 1953.

John Lackley
Attorneys for the Plaintiff
Vincent O'Brien
Thomas C. McConnell
William T. Kirby
Attorneys for the Defendants.

419 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

State of New York }
County of New York } ss

AFFIDAVIT IN SUPPORT OF THE FOREGOING MOTION.

William J. Giglio, being first duly sworn, on oath, says:

1. He is the William Giglio named in the Subpoena Duces Tecum hereto attached.

2. He was named in two informations numbered C133- and C133-195 filed September 14, 1950 in the United States District Court for the Northern District of New York. The former charges him with wilfully failing to pay part of his income tax for the year 1946. The latter charges him, along with others, of wilfully causing a corporation, American Brands Corporation, to fail to pay a tax for the same year.

3. While said informations were still pending, Plaintiff, The United States of America, caused a Subpoena Duces Tecum to be served upon him to appear before a Grand Jury sitting in the Southern District of New York and to produce books, records and other papers, including those mentioned in the Subpoenas Duces Tecum hereto attached, together with the Eatsum Food Company papers.

420 4. On September 2, 1952, Motions were made to quash the Subpoenas Duces Tecum served under the informations upon the individual defendants, including Affiant, which Motions were allowed by United States District Judge Sylvester J. Ryan, who ruled as follows:

"Ordered that the subpoena duces tecum heretofore issued in July of 1952 be and the same hereby is quashed as to the books, records and papers of the three partnerships recited in said subpoena, to-wit: Loraine Food Company, Tavern Fruit Juice Company and Eatsum Food Products Company, except as to those books and records of the foregoing three companies as he may have already produced."

5. In October, 1952, four superseding indictments numbered C 139-304, C 139-306, C 139-307 and C 139-308 were

returned in the United States District Court for the Southern District of New York charging Affiant and others with violations of the Internal Revenue Laws.

6. Motions were subsequently made by defendants, including Affiant, before United States District Judge Henry W. Goddard of said Court, to dismiss the informations and indictments on grounds that the documents were personal and the privileges of defendants, including Affiant, under the Fifth Amendment, had been violated. These Motions were opposed by the United States attorneys handling the case.

7. On March 27, 1953, Judge Goddard ruled on the Motions. In the course of his opinion, (not yet published), the Court found as to Affiant:

"In response to the subpoenas, Giglio appeared before the grand jury on July 15, 16th, 23rd, and September 2nd, 3rd, 4th and 5th, 1952. He was sworn and not warned of his constitutional privilege. He was questioned about the location and production of all the records of the corporations and partnerships named in the subpoena. Early in his examination on the first day, he said he would be happy to produce them if he was given a little time to get them together, but later, during that hearing, he repeatedly objected and said he would like to claim whatever constitutional rights he had against self-incrimination and that some of the papers requested were personal records. The interrogation was continued and he was taken before a judge of this court and directed specifically to answer certain questions relating to the corporations. The 421 next day, July 16th, on the return to the grand jury room, the attorney for the Government said to Giglio —'Yesterday morning, when you left here, the Grand Jury asked you to produce the books and records requested in the subpoena which was served upon you, and you were directed to bring all matters, books and records, which were in this area, excluding the books and records which were in Chicago, is that correct?' (emphasis added) Answer—'That's correct.' Question—'Have you now complied with that direction?' In reply Giglio said he had brought 30 large cartons containing records and would bring the rest later. In the interval between July 16th and the early part of September he had produced about 80 cartons of records, partnership as well as corporate records."

The Court further found:

"In the case at bar the defendants under criminal informations for tax violations previously filed, were subpoenaed in a grand jury investigation directly related thereto. They were questioned concerning matters which could incriminate them and partnership records were procured from them, without their being warned of their privilege, and thereafter the grand jury filed these indictments for tax violations, some of which indictments superseded the original informations, thereby substituting a felony charge for what was originally charged in the informations as a misdemeanor. The evidence obtained on the examination of the defendants at least furnished a link in the chain of evidence needed to convict them for the crimes charged. In Giglio's case, it was procured after he had pleaded his privilege. The constitutional rights of the defendants were thus clearly violated."

The Court ruled:

"The Motions to Dismiss the indictments numbered C139-206, 139-304, 139-305, 139-306, 139-307, 139-308 filed against Giglio, Livorsi, Lawn, and Poth are granted and the Government is directed to return, to the respective defendants, the partnership and personal records produced by them in response to the subpoenas."

Wherefore, Affiant prays that this court grant his Motion to Quash the Subpoenas Duces Tecum in recognition of his privilege under the Fifth Amendment to which he is here making timely claim.

Further Affiant sayeth not.

William J. Giglio

State of New York }
County of New York } ss

Subscribed and sworn to before me this 18th day of August 1953.

(Seal) Maria Couvaras
Notary Public
(Jurat attached but not copied)

422 Subpoena Duces Tecum Case No. 52 CR 143

UNITED STATES DISTRICT COURT
Northern District of Illinois

The President of the United States of America
To William Giglio (Business Address) c/o Heparin Inc.,

101 Fairmont Avenue, Jersey City, New Jersey—33 Comanche Road (Residence) Port Au Peck, New Jersey—Greeting:

We command you, that all business and excuses being laid aside, you and each of you attend before the Honorable Gunnar H. Nordbie one of the Judges of the United States District Court for said District, on the 14th day of September, A. D. 1953, at 9:00 o'clock in the forenoon in Room 209 United States Court House in Chicago, in said District, to testify and give evidence in a certain cause now pending and undetermined in said Court, wherein United States of America is Plaintiff and Shotwell Manufacturing Company, et al are Defendants, on the part of said United States of America And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, the following books and records of the Eatsum Food Products Company partnership for the period from June 1, 1945 to May 31, 1946, both inclusive:

1. Purchase Book or Books
2. Sales Book or Books
3. Accounts Payable Ledger or Ledgers
4. Account Receivable Ledger or Ledgers
5. Cash Disbursement Book or Books
6. Cash Receipts Book or Books
7. Cancelled Checks and Bank Statements
8. Check Stubs
9. Cash Authorization Slips
10. Purchase Invoices
11. Sales Invoice
12. Shipping Records for Incoming and Outgoing Shipments
13. General Journals
14. Accountants' Work Papers and Audit Reports
15. Any and all records relating to cash (currency) transactions and to cash boxes.
16. Any and all other records, memorandum, correspondence and documents relating to transactions had by the Eatsum Food Products Company partnership, David G. Lubben and William Giglio with The Shotwell Mfg. Company, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner.

together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and

paper writings whatsoever, that can or may afford any information or evidence in said cause. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshal of the District of New Jersey to execute and return in due form of law.

.....
Clerk

By.....
Deputy Clerk

Dated: August 4, 1953

423 Subpoena Duces Tecum Case No. 52 CR 143

DISTRICT COURT OF THE UNITED STATES OF AMERICA
Northern District of Illinois

The President of the United States of America
To William Giglio, Long Branch, New Jersey—Greeting:

We command you, that all business and excuses being laid aside, you and each of you attend before the Honorable Gunnar H. Nordbye one of the Judges of the District Court of the United States for said District, on the 6th day of April, A. D. 1953, at 10:00 o'clock in the forenoon in Room.....United States Court House in Chicago, in said District, to testify and give evidence in a certain cause now pending and undetermined in said Court, wherein The United States of America is Plaintiff and The Shotwell Manufacturing Company, et al, are Defendants, on the part of said United States of America And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, all books, records, documents and papers of Eatsum Food Products Co., whether the proprietorship or the partnership, together with copies of the Federal income tax returns of said companies and of David G. Lubben for the years 1943 to 1947, both inclusive, together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshal of the District of New Jersey and return in due form of law.

Witness, the Honorable Gunnar H. Nordbye, Judge of the said Court, at Chicago, in said District, this.....day of....., in the year of our Lord one thousand nine hundred and....., and of the Independence of the United States of America the.....year.

Seal Copy Roy H. Johnson
Clerk

424 And afterwards, to wit, on the 16th day of September, 1953, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry to wit:

425 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 154 * *

On motion of John J. Naughton, it is

Ordered that Lloyd Paul Stryker, Esquire, of the New York Bar be and he is hereby admitted to practice before this Court in this particular case. The motion of William Giglio to quash the plaintiffs subpoena duces tecum and part of the defendant's subpoena duces tecum served upon him is renewed and by stipulation of the parties by their counsel it is

Further ordered that the said motion to quash said subpoena duces tecum be and the same hereby is granted

426 And to wit, on the 14th day of September, 1953, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry, to wit:

427 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

It is ordered by the Court that leave be and is hereby given to Vincent O'Brien, Esquire, to withdraw his ap-

pearance as attorney for the defendant The Shotwell Manufacturing Company and that leave be and is hereby granted to Thomas C. McConnell, Esquire, to enter his appearance for said defendant that leave be and is hereby given to said Thomas C. McConnell to withdraw his appearance for the defendant Byron A. Cain and that leave be and is hereby granted to Vincent O'Brien to enter his appearance for said defendant

216-254 * * *

Tuesday, September 15, 1953
Chicago, Illinois
10:00 o'clock A.M.

255 And thereupon Mr. Lockley addressed the jury in opening statement on behalf of the Government.

At this time, ladies and gentlemen, it is customary for the government to make what is commonly known as an opening statement, the purpose of which is to outline in general the nature of the offense, the nature of the evidence which the government expects to produce in order to establish the proof of the commission of that offense.

His Honor has already read to you the indictment in this case. You will recall that it charges Byron Cain, Frank Huebner and Harold Sullivan and The Shotwell Manufacturing Company with evasion of the taxes, both income and excess profits, of the corporation for the years 1945 and 1946.

His Honor read the amount which the corporation reported in those years and the amounts which the government alleges it should have reported.

The omission in the year 1945 is approximately $177,000.00, leaving off the odd dollars and cents, and in the year 1946, approximately $323,000.00. In 1945, the
256 omission of that amount of income resulted in an understatement of the taxes by $163,000.00 and in 1946 the omission of the income resulted in an understatement of tax of approximately $122,000.00.

Now, the government intends to provide first that these tax returns were filed and we will do that by testimony of a government employee who has charge of those records in the office of the Collector, now the Director of Internal Revenue.

We will likewise do that through employees of the Shotwell Manufacturing Company itself who had to do with

these returns or with their accountants. We will prove furthermore that at the time the returns were filed, the three defendants named knew that they were not correct, that they deliberately, wilfully, intentionally omitted from those returns this additional amount of income, in the following manner:

257 The Government will establish that during the years 1945 and 1946 The Shotwell Manufacturing Company was engaged in the manufacture and sale of candies, marshmallows and so forth; that in those years, in 1945, they sold to an organization in New York known as the Eatsum Food Products Company, which was owned by one David Lubben, a substantial quantity of candy. In 1945 the Eatsum Food Products Company became a partnership. Mr. Lubben continued as one of the principal partners. In 1946, Mr. Lubben left the Eatsum Food Products Company and he began a corporation known as the General Confections. That company, in turn, continued to buy candy from The Shotwell Manufacturing Company, and in 1946, Mr. Lubben also established a corporation known as the Reserve Trading Company, the stock of which was owned entirely by the General Confections. It was a wholly owned subsidiary.

The Reserve Trading Company, we will also establish, had the sole purpose of dealing in corn syrup; that it purchased corn syrup from The Shotwell Manufacturing Company through the individuals named herein.

258 Now, in these dealings, for the most part, the the Government will show that The Shotwell Manufacturing Company gave an invoice to these various organizations which I have mentioned which were either owned by David Lubben or in which he had some interest or stock. The company gave an invoice to these various customers on which it showed the ceiling price which was charged for the various products, jelly beans and gum drops and candy of various sorts, and in addition to that invoice, they required the payment in currency of large amounts of so-called black market premium, over the ceiling, under the table—whatever you want to call it—cash. That cash was paid to Mr. Huebner, for the most part in currency—not by check—in currency, and it was paid to him in hotel rooms in New York City, sometimes in the Shotwell manufacturing plant in Chicago.

We will prove that other payments were made by agents of Mr. Lubben to the defendants, or one of them, and we will prove that various employees of The Shotwell Manufacturing Company received some of the money as agents for the corporation.

259 Now, in addition to the so-called over ceiling prices which were paid in currency over the amount recorded on the invoice, the defendants also sold carloads of candy—I mean railroad carloads of candy, without any invoice whatsoever. That was paid for entirely in currency. None of that currency was recorded on the books of the Shotwell Manufacturing Company either, from the over-invoice or the unbilled, so-called unbilled files. None of it, accordingly, was recorded in the books. None of it was reported in the income tax return.

Likewise, with corn syrup. We will show that there were certain invoices sent to the Reserve Trading Company, or to Mr. Lubben, and that the invoices were for the ceiling price of the corn syrup, and in addition to that a cash premium was required to be paid which was not reported in the income tax return of the corporation.

We will establish, in addition to the dealings in cash or currency, we will establish the willful intent of the defendants by certain conversations which they had,

260 or which Mr. Cain had at one time—at one time the defendant, Byron Cain attempted to induce the witness Lubben to leave the United States and go to South America so that he wouldn't be available to testify for the Government.

On another occasion, and these will be corroborated by other witnesses who were present, on another occasion Mr. Cain attempted to induce the witness Lubben to tell the revenue agents who were investigating the Shotwell Manufacturing Company, that there had been certein trades and exchanges between the corporation and Mr. Lubben's company so that he would be able to make some settlement or adjustment of his taxes.

There will be a great deal more. There will be many accounting exhibits introduced during the course of the trial.

We will try to make it as simple as possible so that you will understand it. We will also try to expedite it to the best of our ability.

There is one thing that you should keep in mind: That the issue in this case is very simple. It may not seem
261 so at times, but the issue is simply this: Did the Shotwell Manufacturing Company and these defendants receive the amount of money the Government said it received, or did they receive—did they report it on their income tax returns, and if not, did they willfully intend to leave it off for the purpose of evading the taxes?

I think when we get through showing you this evidence, you will be convinced beyond a reasonable doubt that they are guilty, and that that is the verdict you will return.

Thank you.

262 By Mr. McConnell: I want to object to that much of the opening statement referring to the individual income tax of the defendants. There is no charge, I understand, that there is anything wrong with their individual income tax returns.

By Mr. Lockley: I do not recall having made such a statement, your Honor. If I did, I would like the jury to be instructed to disregard it.

By the Court: I didn't understand the opening statement to refer to any individual income tax returns.

By Mr. O'Brien: Your Honor, we will pass the opening statement until the commencement of our case.

By the Court: All right. Now as I understand it, the witnesses, aside from the accountants, are going to be excluded from the courtroom until they are called. That is the understanding I have, so if there are any witnesses here on either side, and counsel can bear that in mind, they can leave the courtroom until they are called.

263 I take it after they have testified they may remain in the courtroom if they desire. Is that the understanding?

By Mr. Lockley: We have not reached that understanding, but the Government has no objection, provided, of course, they are not subject to recall.

By Mr. O'Brien: We don't make that agreement, your Honor. I don't want to make any agreement about it. It is too hard for us to follow. Witnesses might come in.

By the Court: We will have the understanding that the witnesses outside of those agreed upon by counsel will remain out of the courtroom except during the time they are on the witness stand.

By Mr. Lockley: That is satisfactory, your Honor.

And thereupon the Government to maintain the issues in its behalf, offered and introduced the following evidence:

264 HELEN MINES, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Mrs. Mines, what is your name?
A. Helen Mines.
Q. What is your address?
A. 7315 North Honore Street.

By the Court: Will you speak up. Give us your name again.

By the Witness: Mines, M-i-n-e-s.

By Mr. Lockley:

Q. What is your occupation?
A. Chief of accountants.

By the Court: Now, Mrs. Mines, you will have to speak out so that the last juror can hear you. Otherwise, you will be in difficulty and you will just have to keep your voice up.

By the Witness:

A. Chief of accountants in the office of the Director of Internal Revenue.

265 By Mr. Lockley:

Q. And how long have you been so employed?
A. Thirty-three years.
Q. What are your duties?
A. My duties are the assessment and the assessments of all taxes disclosed on all types of tax returns and the record of the payments applied thereto.
Q. And from the year 1945 to the present time, have you had, as a part of your duties, the custody and control of income tax returns filed with the Collector's office?
A. I have, until such time as returns were forwarded to the Commissioner of Internal Revenue.
Q. Where is the Collector's office located?
A. 22 West Madison Street.
Q. Is that in Chicago?
A. Chicago, Illinois.

Q. And what does the territory that the Collector's office service consist of?

A. The twenty-six northern counties.

Q. Does that include the County of Cook?

A. It does.

Q. Now, with what collection district are the
266 corporations having their principal place of business in Cook County required to file their returns?

A. Chicago, Illinois.

Q. And that is where you work?

A. That is correct.

Q. Are you familiar with the procedure followed in the Collector's office, what I believe you now call the Director's office, with respect to the filing and processing of corporate returns, both income and excess profits?

A. Yes, I am.

267 Q. Will you describe that briefly?

A. Well, the return—all mail is received in the Cashier's Division where the contents of the envelopes are removed and the returns of the checks, or remittances, any type of remittances enclosed with the returns, are attached with a pin on the face of the return, after which the receipted date of the return is stamped on the face of the return.

Then the amount of money, the amount of the remittance is blue marked on the upper right hand corner of the return, after which the checks are detached from the returns and remittance registered as listed on an adding machine for the checks and a document registered from the returns.

After the returns are balanced, they are forwarded to the Comptroller's Division, where the tax assessment is made by indicating a red circle around the amount taxed to be assessed. Then on the opposite side of the document register the amount taxed to be assessed is listed, after which the returns are sent—

By Mr. O'Brien: I object to the explanation. The document speaks for itself.

268 By Mr. Lockley: This is a matter of practice that I was going into, and that is all.

By the Court: You may answer.

By the Witness:

A. After which, the returns are sent to the Bookkeep-

ing room, where the amount of tax and payment are listed, and then to the Billing Section where the name and address and account number are listed on the assessment sheet.

By Mr. Lockley:

Q. Is that all?

A. That's all.

Q. Have you brought with you certain income tax returns?

A. Yes, I have.

Q. May I have them?

May I state at this time for the record, your Honor, that the Government has pre-numbered its exhibits for identification in order to save the time of the Court, and there may be times when the numbering may not be consecutive.

Q. I now show you Government's Exhibit 1 for
269 identification, purporting to be the income tax return of the Shotwell Manufacturing Company for the year 1945, and ask you to examine it and state if you know as to whether it was filed in the Office of the Internal Revenue Collector in Chicago?

A. Yes, by the "First District of Illinois." There is a stamp in the upper right hand corner.

270 Q. When?

A. Well, the receipt stamp has not been placed on this return. It was due to an error, but there was a letter attached which accompanied the return stating that the corporation return and the excess profits return were being mailed in the same envelope.

Q. All right. Then I show you Government's Exhibit for identification No. 1-A and ask you to examine it. It purports to be the corporate excess profits tax return of the Shotwell Manufacturing Company for the year 1945, and I will ask you to state if you know whether it was filed in the office of the Collector of Internal Revenue in Chicago?

A. Yes, it was, and it bears the receipted stamp of March 15, 1946, Collector of Internal Revenue, First District of Illinois.

Q. Are you able to state the date on which Government's Exhibit 1, the income tax return, was also filed?

A. That would be March 15, also of 1946.

Q. I now show you Government's Exhibit for identification No. 2 purporting to be the corporate income tax

return of the Shotwell Manufacturing Company for
271 the year 1946 and I will ask you to examine it and state if you can, whether that was filed in the office of the Collector of Internal Revenue of Chicago?

A. Yes, it was. It bears the stamp of the First District of Illinois in the upper righthand corner.

Q. Can you state when it was filed?

A. Yes. It was filed March 15, 1947.

Q. All right. I now show you Government's Exhibit for identification No. 3 purporting to be an amended corporate income tax return for the Shotwell Manufacturing Company for the year 1946 and ask you to state if you can whether that was filed in the office of the Collector of Internal Revenue in Chicago?

A. Yes, it was. It bears the receipt stamp of April 8th, 1947.

Q. Have you also brought with you certain assessment lists?

A. Yes, I have.

Q. I now show you Government's Exhibit for identification No. 4, purporting to be an assessment list with a certification attached. This is a photostatic copy consisting of eight pages. I ask you if that was prepared under
272 your supervision and direction?

A. This was prepared under my supervision.

Q. And is that—

A. And that is an income tax return for the year 1945, the corporation income tax return.

Q. Is that a part of the records that was kept by the Collector in the ordinary course of business?

A. It is. This reflects the amount of taxes assessed and the amount of payments made by the taxpayer.

Q. Did you search the records of the Collector's office for any other returns filed by the Shotwell Manufacturing Company for the years 1945 and 1946?

A. I did.

273 Q. Did you find any?

A. I didn't find any other returns. I did find additional assessments that were assessed by the Commissioner of Internal Revenue.

Q. I believe you previously testified that all of those income tax returns were kept under your supervision and direction?

A. Until such time as they were forwarded to the Commissioner.

By Mr. Lockley: I offer in evidence Government Exhibits 1 to 4, inclusive at this time.

By the Court: Perhaps we should take our morning recess now. We will have a recess for ten minutes, members of the jury.

(Whereupon a short recess was taken.)

274 By Mr. McConnell: If the Court please, we have no objection to these documents, except in so far as certain of the documents refer to the entire assessment made in this district, which we think is immaterial and irrelevant.

By the Court: I am sorry. I didn't hear the latter part of your statement.

By Mr. McConnell: Except that certain of these documents refer to the assessment certificate showing the assessment of taxes for the entire district, some three hundred eighty-five million dollars. We can't see any relevance in putting in evidence in this case what the government assessed in this entire district. We don't see how it is relevant.

By Mr. Lockley: Your Honor, included in that assessment is the amount of taxes assessed against the Shotwell Manufacturing Company. It is a part of the lump sum figure.

By Mr. McConnell: You show that by the actual assessment that is made against the company. I don't
275 think it is relevant in this proceeding.

By the Court: Do I understand that you have the entire assessment for this district on the exhibit?

By Mr. Lockley: Yes, your Honor.

By the Court: What is the relevance of that?

By Mr. Lockley: The relevance of it is merely that the amount assessed against Shotwell Manufacturing Company is included in that lump sum.

By the Court: Even so, I don't suppose that the total assessment in the entire district has any relevancy.

By Mr. Lockley: All right, your Honor, I will withdraw that portion of the exhibit.

By the Court: Yes.

By Mr. McConnell: Further than that we have no objection to the documents.

By the Court: You can detach that portion of it, can you, Mr. Lockley?

By Mr. Lockley: Yes, sir.

By the Court: Very well. With that detached the exhibits may be received in evidence.

276 (Said documents were received in evidence by the Court and marked respectively Government's Exhibits 1, 2, 3, and 4.)

By Mr. Lockley: Any cross examination?

By Mr. McConnell: Are you tendering the witness?

By Mr. Lockley: Yes.

By Mr. McConnell: Yes, I would like to ask a couple of questions. May I have the documents, please?

277 (Document handed to counsel.)

Cross Examination by Mr. McConnell.

Q. Did I understand you to say on your direct examination that you have a general practice of stamping the exhibits, or the returns on the date that they are actually received?

A. Yes, I did make that statement.

Q. But on this document, which is Government Exhibit 1, which purports to be the general income tax of the Shotwell Manufacturing Company for the calendar year of 1945, there was no such stamp?

A. That's correct. It was erroneously omitted from the return. The clerk stamping it probably—

Q. You have no explanation of it except that it was an error in your department, is that correct?

A. That's correct.

Q. So that in spite of your general, and customary and ordinary course of business, you do make errors in your department, like other people do?

A. Well, a clerk could naturally in stamping returns turn over two returns at the same time.

278 Q. Well, you can make errors, because you made one, isn't that right?

A. That is correct.

Q. Now, when did you actually receive payment on this?

A. The first payment?

Q. The first payment.

A. It was received the date the return was received.

Q. Well, what does this stamp on this document mean that the payment was received on March 23rd?

A. That is the date that the payment—that the check was sent to the bank. That is the deposit date, the date of the deposit. The round stamp is the date of receipt.

By Mr. McConnell: Do you have these marked by pages or just bulk exhibits?

By Mr. Lockley: Just one bulk exhibit.

By Mr. Kirby: That one is 4, Mr. McConnell.

By Mr. McConnell:

Q. I call your attention to an item, Shotwell Manufacturing Company, under date of 3-15 in the amount of $26,621.90, being an assessment list. From what document was that entry made?

A. That entry was made from the total amount of
279 tax due from The Shotwell Manufacturing Company on its 1945 income—or 1945 income tax return.

Q. That was just taken off the return?

A. That was taken off the return.

Q. And your receipt—

A. The date of receipt—

Q. The date of receipt—

A. —is 3-15, as is indicated in the column here, and the date of payment is in the credit column. This is your debit, and your credit, and new balance.

Q. So that you show on these documents that the amount of tax as shown on this return was paid—

A. That's correct.

Q. —on March 15.

A. That the quarterly installment was paid on March 15.

Q. That was all that was due at that time, was it not?

A. That's right.

Q. Will you look at these documents and tell the jury, if you will, how much tax Shotwell paid for the year 1945.

280 A. For the year 1945, the assessment of tax on the original return as filed by the tax payer disclosed a tax liability of $26,621.90, which was paid in four equal installments of $6,655.48.

Q. Did that include the Excess Profits Tax that year?

A. No, the Excess Profits Tax return disclosed a tax liability of $344,017.05, in four equal installments of $86,004.26.

Q. Your records show that that was paid?

A. They do.

Q. Now, for the year 1946, how much tax is shown by those returns to be due from Shotwell?

A. For the year 1946, the income tax return discloses a tax liability of $457,012.98.

Q. And how much was paid?

A. Payments of $114,253.24, in four equal installments, which paid the tax in full.

281 Q. The amount paid was four times that, was it not?

A. That's correct.

Q. Does that include the excess profits tax?

A. For the year 1946?

Q. Yes.

A. We do not have an excess profits tax return for the year 1946.

By Mr. McConnell: That is all.

By Mr. Lockley: Thank you, Mrs. Mines.

(Witness excused.)

JOHN C. SKILLING, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. What is your name?

By the Court: If you will give the Reporter your name and the Reporter will announce the name we will get along better.

By the Witness:

A. John C. Skilling.

282 By Mr. Lockley:

Q. Mr. Skilling, what is your address?

A. My home address is 352 West 46th Street, New York City.

Q. Keep your voice up so that the juror in the back row can hear you.

What is your occupation?

A. I am an employee of Manufacturers Trust Company of New York City.

Q. How long have you been employed there?

A. Seven years.

Q. And what is the nature of your duties?

A. I am a clerk, sir.

Q. Precisely what do you do?

A. I am a platform assistant in an officerial capacity and have officerial duties.

283 Q. Are you familiar with the practice of the Manufacturers Trust Company with respect to Recordaking checks which pass through it?

A. I am, sir.

Q. Now, were such Recordaks made by Manufacturers Trust Company as the regular part of its business in 1945 and in 1946?

A. Yes, sir; they were.

Q. Are such Recordaks kept in the regular course of business?

A. Yes, sir; they are.

Q. Do you have custody of those records as a part of your duty?

A. I do, sir.

Q. Now, during the year 1945 and the year 1946, did the Eatsum Food Products Company have an account with the Manufacturers Trust Company?

A. Yes.

Q. And what sort of an account was this?

A. A commercial account, a business checking account.

Q. When a check was drawn on this account, was it a part of the regular record keeping procedure of the bank to recordak said checks?

284 A. Yes, sir; it was.

Q. Were both the front and reverse sides Recordaked, or just one side?

A. Just the face, sir.

Q. There would be nothing to show what the endorsement was?

A. No, sir.

Q. Now, have you brought with you in response to a subpoena the Recordak films containing photographic copies of certain checks?

A. I have, sir.

Q. May I have them, please?

A. Yes, sir.

Q. Now, these are photographs, these are not the films themselves, I take it.

A. They are photograph reproductions.

Q. Well, I show you Government Exhibit for identification No. 50; purporting to be a check drawn by the Eatsum Food Products Company, June 11, 1945, to the Shotwell Manufacturing Company in the amount of $4,817.75, and ask you if that is a—what would you call that, a picture, a photograph?

A. It is a photograph.

Q. —of a Recordak film?

285 A. Of a Recordak film, that is correct, sir.

Q. And do you have the original Recordak film in your possession?

A. I do have, sir.

286 By Mr. Lockley: Will counsel stipulate that the pictures of the Recordak film may be introduced for indentification without the necessity of bringing the film itself and projecting it on a screen?

By Mr. McConnell: We will agree to that, if we get to that. We may object to the whole thing. As to the foundation made so far, we certainly would.

By Mr. Lockley:

Q. Now, with reference to Government Exhibit for identification No. 50, is that a true and correct photographic copy of the check as it appears in the microfilm or Recordak?

A. It is, sir.

By Mr. O'Brien: Is that the one for $4,817.00?

By Mr. Lockley: Yes.

Q. I show you Government Exhibit for identification No. 51, consisting of a check on the Eatsum Food Products Company account, No. 4113, dated June 11, 1945, payable to The Shotwell Manufacturing Company in

287 the amount of $12,888.52, and I ask you if this is a true and correct photographic copy of the check as it appears on the Recordak or microfilm.

A. It is, sir.

Q. What is the proper term for the film, is it Recordak?

A. Recordak.

Q. And you have the original film on which that check appears in your possession here?

A. I have, sir.

Q. I show you Government Exhibit for identification No. 52, which consists of a check drawn on the Eatsum Food Products Company account, No. 4637, in the amount of $11,395.47, to the order of The Shotwell Manufacturing Company—

By the Court: Dated?

By Mr. Lockley: June 15, 1945.

By Mr. Lockley:

Q. —and ask if this is a true and correct photographic copy of the check as it appears in the microfilm or Recordak.

A. It is, sir.

By Mr. O'Brien: Mr. Lockley, what was the number and the date of Exhibit 50 for identification?

288 By Mr. Lockley: The check number is 4131, the date is June 11, 1945.

By Mr. O'Brien: Is that 50 or 51?

By Mr. Lockley: No. 50.

For clarification, counsel, Exhibit 51 is 4113, dated June 11, 1945, in the amount of $12,888.52.

By Mr. O'Brien: And 50 is 4131.

By Mr. Lockley: Yes.

289 By Mr. Lockley:

Q. I show you Government Exhibit for identification No. 53, consisting of a check on the Eatsum Food Products Company account, dated July 2, 1945, to the order of the Shotwell Manufacturing Company, in the amount of $3,461.19, and ask you if this is a true and correct photostatic copy of the check as it appears in the Recordak?

A. It is, sir.

Q. Do you have the Recordak film in which that particular check is included in your possession here?

A. Yes, sir, I have.

Q. I show you Government Exhibit for identification No. 54, consisting of a check drawn on the Eatsum Food Products Company account, Check No. 190, dated July 9, 1945, payable to the Shotwell Manufacturing Company in the amount of $11,042.42, and ask you if that is a true and correct copy of the check as it appears in the Recordak?

A. It is, sir.

Q. And that Recordak is here for inspection?
A. Yes, sir.
Q. In your possession?
290 A. It is.
Q. I show you Government Exhibit for identification No. 56, consisting—
By the Court: 56 or 55? 55 is next.
By Mr. Lockley: No, your Honor. This is 56. I am sorry. We do jump at times.
By the Court: All right.
By Mr. Lockley:
Q. Exhibit for identification 56, is a check drawn on the Eatsum Food Products Company account, No. 1449, dated October 15, 1945, in the amount of $8,865.12, and ask you if that is a true and correct photostatic copy of the check as it appears in the Recordak in your possession?
A. It is, sir.
Q. The Recordak is in your possession, is that correct?
A. Yes, sir, it is.
Q. Now, I show you Government Exhibit for identification, No. 57, consisting of a check on the Eatsum Food Products Company account, check No. 1517, dated October 19, 1945, payable to the Shotwell Manufacturing Company,
in the amount of $10,976.00 and ask you if that is a
291 true and correct photostatic copy as it appears in the Recordak?
A. It is, sir.
Q. You have the original Recordak film with you?
A. I do have.
By Mr. O'Brien: What was the number of that check? I am sorry.
By Mr. Lockley: Check No. 1517.
By Mr. Lockley:
Q. I now show you Government Exhibit for identification, No. 58, which purports to be a check drawn on the Eatsum Food Products Company, Check No. 1625, dated October 26, 1945, drawn to the order of the Shotwell Manufacturing Company, in the amount of $13,171.20, and ask you if that is a true and correct photostatic copy of the Recordak film?
A. It is, sir.
292 Q. And you have that Recordak film here in your possession, is that correct?
A. Yes, sir.

Q. I show you Government's Exhibit for identification No. 59, consisting of a check drawn on the Eatsum Food Products Company account, No. 1883, dated November 16, 1945, to the order of the Shotwell Manufacturing Company, in the amount of $21,899.32, and ask you if that is a true and correct copy of the check as it appears on the Recordak film?

A. It is, sir.

Q. Do you have that Recordak film in your possession?

A. Yes, sir.

Q. I show you Government's Exhibit for identification No. 60, consisting of check No. 1900, drawn on the Eatsum Food Products Company account, dated November 19, 1945, payable to the order of the Shotwell Manufacturing Company, in the amount of $33,142.97, and ask you if that is a true and correct copy of the check as it appears on the Recordak?

A. It is, sir.

293 Q. I show you Government's Exhibit for identification No. 61, which purports to be a check on the Eatsum Food Products Company account, check No. 2048, dated November 28, 1945, in the amount of $52,708.14, payable to the order of the Shotwell Manufacturing Company and ask you if that is a true and correct photostatic copy of the check as it appears on the bank Recordak?

A. It is, sir.

Q. You have that Recordak picture in your possession, too?

A. Yes, sir.

Q. And that same answer goes for all of the other checks which I have already shown you?

A. Yes, sir.

Q. I show you Government's Exhibit for identification No. 62, consisting of, or purporting to be a check on the Eatsum Food Products Company account, check No. 2146, dated December 4, 1945, payable to the order of the Shotwell Manufacturing Company, in the amount of $28,580.86, and ask you if that is a true and correct photograph of the check as it appears on the Recordak film?

A. It is, sir.

294 Q. I now show you Government's Exhibit for identification No. 64 skipping a number again, purporting to consist of a check on the Eatsum Food Prod-

ucts Company account, No. 2212, dated December 7, 1945, in the amount of $13,384.73, and ask you if that is a true and correct photographic copy of the check as it appears on the microfilm or Recordak kept in the bank?

A. It is, sir.

Q. And that original microfilm is now here in your possession?

A. Yes, sir.

Q. I now show you Government's Exhibit for identification No. 65, purporting to consist of a check on the Eatsum Food Products Company account, check No. 2360, dated December 21, 1945, payable to the order of the Shotwell Manufacturing Company, in the amount of $25,865.87, and ask you if that is a true and correct photographic copy of the check as it appears on the Recordak film?

A. It is, sir.

Q. Do you have the original Recordak film with you on which that check appears?

A. Yes, sir.

295 Q. I show you Government's Exhibit for identification No. 66, which purports to be a check drawn on the Eatsum Food Products Company account, check No. 2453, dated December 28, 1945, payable to the order of the Shotwell Manufacturing Company, in the amount of $13,091.45, and ask you if that is a true and correct photographic copy of the check as it appears on the Recordak film kept by the bank?

A. It is, sir.

296 Q. And do you have the original Recordak film of that check in your possession?

A. Yes, sir.

Q. I now show you Government Exhibit for identification No. 67, consisting of an Eatsum Food Products Company Check No. 2535, dated January 4, 1946, payable to the order of the Shotwell Manufacturing Company in the amount of $13,603.79, and ask you if that is a true and correct photostatic copy of the check as it appears on the Recordak film?

A. It is, sir.

By Mr. O'Brien: Mr. Lockley, if the Court please, I thought we might save some time. As I understand it, these are checks to Shotwell?

Br Mr. Lockley: Yes, sir.

By Mr. O'Brien: Recorded on their books?

By Mr. Lockley: Yes, sir.

By Mr. O'Brien: And it is merely that you do not have the original checks that Mr. Lubben's company issued that you interrogate the witness to prove the photostats?

By Mr. Lockley: That is correct.

297 By Mr. O'Brien: Or you could prove it at our end by those payments from our own books, in accordance with invoices which we sent, and which were paid, is that right?

By Mr. Lockley: Oh, yes. These records—or these checks are recorded on the books of the Shotwell Company as received.

By Mr. O'Brien: Right. We don't wish to delay it or to exact this detailed proof. To the extent that all of the things you are talking about are of that kind, we will agree that these are photostats of items carried on the bank's microfilm, and that there are copies—true copies of that microfilm as the witness says.

By Mr. Lockley: Is it counsel's suggestion that I read the balance of these into the record as stipulated as true and correct copies?

By Mr. O'Brien: Right.

By Mr. Lockley: Very well.

Government Exhibit for identification, No. 68, consists of Check No. 2630, dated January 11, 1946, payable
298 to the Shotwell Manufacturing Company in the amount of $18,119.46.

Government Exhibit for identification No. 69, consists of Check No. 2714, dated January 18, 1946, payable to the Shotwell Manufacturing Company, in the amount of $11,565.72.

By the Court: What is the date of that?

By Mr. Lockley: January 18, 1946.

Government Exhibit for identification No. 70, consists of Check No. 2793, dated January 25, 1946, payable to the Shotwell Manufacturing Company in the amount of $13,967.59.

Government Exhibit for identification, 71, consists of Check No. 2867, dated February 1, 1946, in the amount of $10,370.26.

Government Exhibit for identification, No. 72, consists

of Check No. 3197, dated March 8, 1946, in the amount of $5,717.95, payable to the order of the Shotwell Manufacturing Company.

That is all of them.

By Mr. Lockley:

Q. Now, Mr. Skilling, did you also make a search
299 for the film, the roll film, which would contain the bank entries for November 27, 1945?

A. We did, sir.

300 Q. And where did you look for that?

A. On our Recordak film that is maintained in our possession and from which we can requisition from the Recordak Company.

Q. And were you able to find it?

A. We were not successful, sir.

Q. In other words, it has been lost?

A. Yes, sir.

Q. Now, when a check is drawn against an account and that check is presented to the bank what record, if any, other than the Recordak itself, is kept by the bank?

A. The bank maintains a ledger, or balance sheet, on all accounts and such items would appear on that ledger sheet at such time as they are paid and charged to the account.

Q. All right. Then I show you Government's Exhibit for identification No. 63—

By the Court: 63?

By Mr. Lockley: 63, yes. That is the one we skipped a few minutes ago.

By the Court: All right.

By Mr. Lockley:

Q. —which purports to be a ledger sheet of the
301 Eatsum Food Products Company account with the Manufacturers Trust Company, New York, for the period November 15, 1945, to November 30, 1945. I ask you if that is a true and correct copy of the Recordak of that ledger sheet which is kept by the bank?

A. It is, sir.

Q. Are such copies kept by the bank in the ordinary course of business?

A. Yes, sir; they are.

Q. What happens to the originals of the ledger sheets after the copies are made on the Recordak?

A. There is a file maintained.

Q. And do you have that file?
A. Not in my possession.
Q. Does the bank have the file?
A. The bank does maintain a file.
Q. Is the file available for the year 1945?
A. Yes, sir; it would be.
Q. Were you subpoenaed to bring the original with you?
A. No, sir. A copy was requested.
Q. A copy. Is that a certified copy?
A. This is a certified true copy, sir.

302 Q. Are such records kept under your supervision and control?
A. Yes, sir; they are.
Q. Now, is there contained in this ledger sheet an entry under the dates of November 27, 1945, in the amount of $36,148.35?
A. Yes, sir; there is.
Q. Now, what is the meaning of that entry?
A. It would be interpreted that a check in that amount was drawn by the Eatsum Food Products Company payable to someone and was subsequently paid by the bank and charged against that account, Eatsum Food Products Company.
Q. Now, have you also an account with the General Confections Company during the year 1946?
A. Yes, sir.
Q. And what sort of an account was that?
A. A commercial checking account.
Q. Was it the practice of the bank to make Recordaks of checks which passed through that account during the year 1946?
A. Yes, sir; it was.

303 Q. You might say now what happened to the originals of those checks after they have been photostated, or Recordaked, by the bank?
A. In the due course of business they are returned to the account.
Q. That is, to the customer?
A. To the customer maintaining the account.
Q. That would be true, likewise, would it, of the Eatsum Food Products Company checks which we had reference to earlier?
A. That's correct, sir.

Q. Now, I show you Government's Exhibit for identification No. 73, purporting to be a check drawn by the General Confections, Inc., on its account with the Manufacturers Trust Company, check No. 149, dated March 29, 1946, in the amount of $35,536.00, and payable to the order of Cash, and I ask you if that is a true and correct photographic copy of the Recordak of that check as it was taken by the bank?

A. Yes, sir, it is.

304 Q. Do you have the Recordak film on which the picture of that check appears?

A. Yes, sir; I have.

Q. I now show you Government Exhibit for identification No. 150 purporting to be a check drawn by the General Confections, Inc., on its account with the Manufacturers Trust Company, dated June 29, 1946, in the amount of $26,000.00, payable to the order of cash, and ask you if that is a true and correct photographic copy of the Recordak of that check as it was taken by the bank?

A. Yes, sir; it is

Q. Do you have the original film containing that Recordak picture in your possession?

A. Yes, sir.

Q. Mr. Skilling, what is the usual procedure in the bank when a check is received on an account kept by a customer of the bank?

A. Well, the check is presented to our bookkeeping department, entries are made on the ledger sheet we referred to, the amount is charged against the account, that amount extracted from the account, a file is maintained of those checks, and monthly those checks are returned

305 to the depositor, to the account, along with their monthly statement.

Q. And at what point during that procedure is the Recordak film taken of the check?

A. Usually on the same day that it is paid by the account, or charged to the account.

By Mr. Lockley: You may cross examine.

By the Court: Let's get one thing settled first. You are offering now exhibits that you have now tendered to counsel and which have been identified by this witness, is that it?

By Mr. Lockley: I can offer them at this time, or I

was going to wait until counsel had finished cross examination, if he cared to make any.

By the Court: Perhaps he has no objection. I don't know. Let's find out.

By Mr. Lockley: I will offer them at this time, then, your Honor.

By Mr. O'Brien: You are offering all those you had identified?

By Mr. Lockley: Yes.

By Mr. O'Brien: Well, I will ask the witness a few
306 questions. Then I have some objections, even without that.

Cross Examination by Mr. O'Brien.

Q. Mr. Skilling, does the bank make Recordaks of all the checks which it pays?

A. During the period in question.

By the Court: Speak up, Mr. Skilling, please.

By the Witness: Yes, sir; it did during that period.

By Mr. O'Brien: Talk to the jury. I can hear you.

By the Witness: During that period in question it did.

By Mr. O'Brien:

Q. Regardless of the amount?

A. Regardless of the amount.

Q. And since that time have you cut it in any way or do you still make them?

A. We presently do. There was a lapse of about a three-month period, but we are presently photographing all items paid.

307 Q. Now all of the checks in the first group, that is from Government's Exhibits 50 for identification through 72 for identification, those were checks on their face payable to Shotwell Manufacturing Company?

A. That is correct, sir.

Q. And all of those were drawn by Eatsum Food Products Company?

A. That is correct, sir.

Q. And after they were cleared, they were all returned to Eatsum Food Products Company?

A. That is correct, sir.

Q. Marked "Paid"?

A. That is correct, sir.

Q. The checks which you have last mentioned, namely Government's Exhibits—what was it, 149 and 50?

By Mr. Lockley: They were Government's Exhibits 73 and 50. The check number was 149 but the exhibits were 73 and 150.

By Mr. O'Brien:

Q. The last two checks which you have mentioned which were payable to cash, those were not to Shotwell, were they?

A. They were payable to cash.

308 Q. Payable to cash?

A. That is right.

Q. And not to Shotwell?

A. And not to Shotwell.

Q. Those were the ones for $35,536.00 and for $26,000,00?

A. I believe so.

Q. Now during the year 1946 when the checks in such amounts were presented payable to cash, was there any regulation or requirement of the Government that the bank return a form to the Treasury showing the handling of those items?

A. Not to my knowledge.

Q. If there was such a practice, would it have been handled by someone else in your bank rather than by you in your department?

A. Yes, sir, it would.

Q. Would that be done by one of the officers?

A. That is correct, sir.

Q. Did you at that time have an officer named Andrew Rose?

A. Yes, sir, we did.

Q. You are not presently able to tell the jury whether such forms were sent in to the Treasury in

309 respect to those last two checks?

A. No, sir, I am not.

Q. Now all of the checks which you have identified this morning, that is, the photostats, are pictures merely of the face of the check and not of the reverse side?

A. That is correct, sir.

Q. So that the Recordak or the microfilm, or whatever it is called, does not show the endorsements, if any, upon those checks?

A. That is correct, sir.

Q. And neither do your pictures show the endorsements?

A. No, sir.

Q. And to that extent, the items which you have identified are incomplete?

A. The—yes, sir. Yes, sir.

By Mr. O'Brien: Do you have any further questions?

Cross Examination by Mr. McConnell.

Q. I just want to ask one question.

Do you, as a matter of procedure there in your bank, photograph or photostat or Recordak the back of the check?

310 A. No, sir.

Q. You never do that? You never do it?

A. It is done, yes, sir. As a general practice, no.

Q. On what occasions do you do it?

By Mr. Lockley: If you know, Mr. Witness.

By the Witness:

A. I do not know, sir.

By Mr. McConnell:

Q. Do you do it where you have cash transactions?

A. I do not know, sir.

Q. Do you know whether or not you made a Recordak or a photostat of these two cash checks as to the endorsements, as to who got the money?

A. I do not know, sir.

Q. So that you can't testify whether or not you have produced all documents or all records of these transactions on your Recordak which your bank now has of these two cash items?

A. That is correct, sir.

By Mr. O'Brien: If the Court please, on the first group of exhibits, those paid to Shotwell, we, of course, have no objection to the receipt in evidence of those items.

311 There is no doubt at all they were paid to us and they were on our books as counsel has said, but the last two items, in respect to the offer of those, we say—

By the Court: Well, obviously, a sufficient foundation has not been laid to admit 63, 73, and 150. I don't think we need to prolong it. I will sustain the objection.

312 By the O'Brien: As to Exhibits 6—

By the Court: 63, 73 and 150.

By Mr. O'Brien: Yes, sir.

By Mr. Lockley: As to Exhibits 50 to 72, with the exception of 63, they are admitted in evidence, is that correct, sir?

By the Court: Yes.

By Mr. Lockley: And with the exception of Exhibit 55 which has not been identified yet.

By the Court: Exhibit 55 has not been identified but that is not included.

By Mr. Lockley: Yes, sir.

By the Court: But the other exhibits to which Mr. O'Brien has referred, they may be received. As to 63, 73 and 150, the objection will be sustained.

By Mr. Lockley: All right, sir.

Redirect Examination by Mr. Lockley.

Q. Mr. Skilling, in examining the Recordaked film for the pictures of the two checks to cash, Exhibits Nos. 73 and 150, did you see any other picture, negative, of those particular checks?

A. Would your clarify that for me, sir?

313 Q. When you would take the picture of the front of the check and also of the reverse, would those pictures be in consecutive order on the roll of film?

A. They would not, sir.

Q. They wouldn't? Did you make a search of that roll of film to determine whether the reverse side of the checks of Exhibits 73 and 150 had been photographed?

A. We did, sir, but it is a very difficult procedure to identify the face and reverse side of an item inasmuch as they are not in consecutive order.

Q. You are not able to identify—

A. You are not able—

Q. —to identify and locate the reverse side of those checks if you ever did have them pictured, is that correct?

A. That is correct, sir.

By Mr. Lockley: That is all.

By Mr. McConnell: No further questions.

By the Court: I believe that's all, Mr. Skilling.

By the Witness: Thank you.

(Witness excused.)

314 By Mr. Lockley: May this witness be excused, your Honor? He comes from New York City and the Government has no further need for him.

By Mr. O'Brien: We have finished our cross examination. He may be excused, so far as we are concerned.

By Mr. Lockley: May I ask that the reporter mark these exhibits admitted: Exhibits 1, 1-A, 2 and 3. They have now been admitted in evidence.

Likewise, Exhibits 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 71 and 72 have been admitted in evidence.

(Said documents were received in evidence by the Court and marked Government's Exhibits 1, 1-A, 2, 3, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 71 and 72, inclusive.)

315 By Mr. Lockley: Mrs. Morrill, please.

By the Court: Give your name to the reporter, please.

GLADYS MORRILL, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

By Mr. Lockley:

It is the Government's intention, your Honor, to call this witness for the purpose of identifying some documents at this time, after which time we would like to excuse her, subject to recall at a later time for further testimony in order to submit a more orderly presentation of the case.

By the Court: Very well.

By Mr. Lockley:

Q. Mrs. Morrill, what is your address?

A. 5707 North Kilbourn, Chicago.

Q. And what is your occupation?

A. Office manager—I was, of the Shotwell Manufacturing Company.

316 Q. Are you still employed by the Shotwell Manufacturing Company?

A. Yes.

Q. Are there any other employees of the company at this time?

A. No.

Q. What was your occupation in 1945?
A. In 1945, I was the general ledger bookkeeper.
Q. General ledger bookkeeper of the Shotwell Manufacturing Company?
A. Of the Shotwell Manufacturing Company.
Q. And in 1946?
A. In March, 1946, I was promoted to the office manager of the Shotwell Manufacturing Company.
Q. Now what was the duty of the general ledger bookkeeper?
A. Well, the general ledger bookkeeper posted all the entries of the business in the books, and balanced them, and assisted with the minor details in the office.
Q. What were the duties of the office manager?
A. The office manager employed the personnel, and handled the personnel and to see that the work was done, that we had to have our various duties out.
317 Q. Did you also have any control over the books and records which were kept by the corporation as office manager?
A. Well, I directed certain activities, yes.
Q. What activities?
A. Well, I taught the person who took over the books after I got through, how to make the entries and how to balance the books.
Q. Do you know the defendant, Byron Cain?
A. Yes, I do.
Q. Will you point him out?
A. Well, he is sitting—the man in the second row on the end.
Q. And the defendant, Frank Huebner?
A. He is sitting next to him.
Q. And the defendant, Harold Sullivan?
A. He is sitting at the end of the table there. (Indicating.)
By Mr. Lockley: Let the record show that Mrs. Morrill has identified the defendants.
By Mr. McConnell: The record shows what it shows, doesn't it?
318 By Mr. Lockley:
Q. What position did Mr. Cain occupy in the Shotwell Manufacturing Company in 1945, if you know?
A. He was President of the corporation.

Q. And in 1946?
A. He was president then.
Q. And what position did Mr. Harold Sullivan occupy in 1945, if you know?
A. I believe he was Executive Vice President then.
319 Q. And in 1946?
A. The same.
Q. What was the position of Mr. Frank Huebner in 1945?
A. Vice president.
Q. And in 1946?
A. The vice president.
Q. And did Mr. Sullivan spend any great amount of time at the plant?
A. Not very much time.
Q. And how about Mr. Cain?
A. The same thing applying there.
Q. And how about Mr. Huebner?
A. Well, Mr. Huebner spent all of his time there.
Q. He was a full time employee, was he?
A. Yes.
Q. In addition to being the vice president?
A. Yes.
Q. Now, I show you Government's Exhibit No. 1, or rather, Government's Exhibit No. 2, the corporation income tax return for the year 1946 and I ask you if that is your signature on the bottom?
By the Court: Whose signature?
By Mr. Lockley: Mrs. Morrill.
320 By the Witness:
A. Yes, it is my signature.
By Mr. Lockley:
Q. And you are identified as assistant treasurer?
A. Yes.
Q. Was that your position in 1946, in addition to being office manager?
A. Well, I was assistant secretary and treasurer then.
By Mr. Kirby: I can't hear you.
By Mr. Lockley: Assistant secretary and treasurer.
By the Witness:
A. Assistant secretary and treasurer, yes.
By Mr. Lockley:
Q. I show you Government's Exhibit 3 and ask you if that is your signature on the bottom of that?
A. Yes, it is.

Q. With reference to the income tax return for the year 1946, Exhibit No. 2, do you know who prepared that return?

A. Our accounting firm, Busby & Oury.

Q. Do you recall who instructed you to sign it?

A. Well, Mr. Graflund would have brought it to
321 me to sign.

Q. Who is Mr. Graflund?

A. He was vice president and secretary of the corporation.

Q. Are you presently in charge of the books and records of the Shotwell Manufacturing Company?

A. Yes, I am.

Q. Are you familiar with the bookkeeping system that was in effect in 1945 and 1946?

A. Yes.

Q. Did the bookkeeping system change any during those two years?

A. Well, in minor ways.

Q. Nothing substantial, I take it?

A. No.

Q. Well, are you familiar with the method by which the sales of the corporation were reported on the books?

A. Yes, I am.

Q. What was that method?

A. Well, as the merchandise was shipped, it was recorded by a sales analysis department as to the number of case of the certain item, plus the dollar amount,
and at the end of the month, all of those figures
322 were added together and became the sales journal, which was posted to the ledger.

Q. So that where did the original information come from for posting to the sales journal?

A. Well, that came from the accounting—or shipping copy.

By the Court: Came from where?

By the Witness: From a shipping copy of a set of invoices.

By Mr. Lockley:

Q. Will you describe what this set of invoices consisted of and how it came into existence?

A. Well, we had certain machines out there that did billing, that would accommodate about twelve copies of invoices. They were all billed together by carbon and

separated to our various departments and as the merchandise was shipped, the shipping ticket came in the next morning to the sales department, the sales analysis department, who did this reporting of the various items by cash amount and dollar amount.

Q. And you say that this machine bills about twelve or made about twelve copies at a time?

A. Yes, sir.

323 Q. And essentially what information was contained on that shipping ticket?

A. It told to whom the merchandise was billed and to whom it was shipped and the quantity of any given item and the type of item and the dollar amount.

324 Q. Was the dollar amount broken down into the amount per unit. or was it in a lump sum?

A. It would show some certain candy we billed per pound, and then it was totaled. Some we billed per case and then it was totaled.

Q. You say that you maintained the general ledger in 1945, is that correct?

A. Yes.

Q. Was there a sales account in that general ledger?

A. Yes.

Q. From what source were the monthly entries in the general ledger sales account obtained?

A. Well, the same source I outlined.

By Mr. O'Brien: A little louder, please.

By the Witness:

A. The same source that I outlined, from the sales analysis department, their recapping of the shipments.

By Mr. Lockley:

Q. Well, now, where did the original of this 12-copy shipping ticket go to?

A. The original went to the customer who purchased the merchandise.

325 Q. So am I correct then, that it was also an invoice?

A. Yes, it was an invoice.

Q. So the original was an invoice, and then you had about a dozen copies?

A. Yes.

Q. One went to the sales analysis department?

A. Well, we had an accounting copy. We had a salesman's copy. We had a file copy, a shipping copy, and a memo bill of lading, and then two bills of lading.

Q. And were all of these identical?
A. Yes, except I would say there was a special carbon made that showed the shipping—on the shipping or bill of lading where you saw no price. Is that the information you want?
By the Court: I think it is adjournment time. We will be in recess until two o'clock this afternoon.

(Whereupon a recess was taken in the above entitled cause until 2:00 o'clock of the same day, being Tuesday, September 15, 1953.)

326

(Caption—No. 52 CR 143)

Chicago, Illinois,
Tuesday, September 15, 1953,
2:00 o'clock P. M.

Court met pursuant to recess.

Present:
Mr. Edward J. Calihan, Jr.
Mr. John Lockley,
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following proceedings were had herein:—

327 GLADYS B. MORRILL, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Ctd.) by Mr. Lockley.

Q. You are the same Mrs. Morrill who was previously sworn and testified in this case this morning?
A. Yes, I am.
Q. Mrs. Morrill, with respect to the general ledger of the Shotwell Corporation during the years 1945 and 1946, what sales accounts were contained therein?
A. Well, we only had one sales account. We had divisions of that sales account.

Q. I see. And what were those divisions?

A. Well, we had what we called A Syndicate.

By the Court: You had what?

By the Witness: We had what we called A Syndicate. That was a certain group of stores, like Woolworths, and Grant, and Kresge, that we sold to. And I don't remember now if we had a B Syndicate or not. If we did, that would have been the small chain stores like Ben Franklin and Gem, dime stores, and so forth.

328 Then we had the jobbing accounts and we had house accounts. And then others—

By Mr. Lockley:

Q. Now, what is the house account?

A. That would be a sale of our merchandise for which no man received any commission. It was sold directly from the factory. At one time the Atlantic and Pacific stores were considered house accounts. These—

Q. Go ahead.

A. These categories change from time to time. I would have to refer to the general ledger to see if it was in effect at that year or not.

Q. And what was the account you mentioned before that?

A. Jobbing.

Q. Jobbing, yes. What is a jobbing account?

A. The jobbing would be a jobber. We had salesmen that went out and sold jobbers and they got commission for selling.

Q. Now, was there a corn syrup, raw material, purchase account on the books?

A. Sales account?

Q. Sales account.

329 A. No.

Q. There was no such?

A. No.

Q. Well, when corn syrup was sold, if you know, how was the sales account credited or other entry made?

A. Well, if we had sold any of our raw materials we would credit the purchase account, corn syrup, chocolate, or whatever you might sell.

330 Q. Well, now, when you made up these twelve copies of this record that you referred to this morning, the original of which I understood was sent to the customer as an invoice?

A. Yes.

Q. And the others became part of the internal bookkeeping system, and bills of lading, from what source did you get the information to put on those invoices?

A. Well, we would get that from the customer's order.

Q. The customer would send in an order?

A. That's right.

Q. All right. From what source did you get information as to the destination of the shipment in the event the shipment was to go to some place other than the customer?

A. Well, the customer would send that information to us.

Q. And from what source would you get the information as to the type of merchandise and quantity?

A. Well, that would also be noted on the order.

Q. And how about the unit price?

A. Well, sometimes your customer will put it in, 331 and sometimes he didn't. We have our price list and—

Q. If the customer knew the price he would include it in his order?

A. Sometimes.

Q. If there had been a change in the price in the meantime, I assume that you would correct it on the actual invoice that was sent to him, is that correct?

A. Sometimes. It depended on the customer.

Q. Who made the extensions, taking the number of units and the amount per unit to determine the total amount due?

A. The billing department would do that.

Q. Now, during the year 1946, if you know, were there any sales made by the Shotwell Manufacturing Company for which no invoices were issued?

A. Yes, I know there were some sales that were not invoiced.

Q. Well, on whose instructions were such shipments made?

A. I do not know.

Q. How did the Accounting Department get the 332 information so that it could record on the books in the manner you have described, the amount to be received from that customer in payment of that shipment?

A. In payment of a shipment not invoiced?

Q. Yes.

A. Well, the Accounting Department didn't get any information.

Q. Then if there was a shipment made without an invoice, the Accounting Department did not include it in the books, is that correct?

A. That's right.

Q. And the tax returns were prepared from those books, is that correct?

A. Yes, sir.

Q. Well, then, would such a shipment be included in the income tax returns?

A. No.

Q. Now, if you know, were there sales made during 1945 and 1946 for which amounts were received in excess of the price noted on the invoice itself?

A. Yes, I know that occurred.

Q. What would be the procedure with respect to
333 recording the amount actually charged for that shipment or sale?

A. Well, we just handled the amount that was invoiced.

Q. In other words, if the invoice showed, for example, $10,000, and actually $20,000 had been collected, only $10,000 would be recorded on the books, is that correct?

A. Yes.

Q. And would it be, likewise, true, that if that additional amount was not on the books, it would not be on the income tax returns?

A. That's right.

Q. Now, you are here in response to a subpoena to bring certain books and records with you, Mrs. Morrill. What books and records did you bring?

A. Well, I have a list. Shall I read it?

Q. Perhaps that would be best.

A. It is a long list.

Q. Go ahead and read it, please.

A. Corporate minute books; stock certificate books; stubs; stock certificates, and stock certificate agreements;
all ledgers and ledger cards for the years 1944, 1945,
334 1946, and 1947; all journals for the years 1944, 1945, 1946 and 1947; all cash receipts records for the years 1945, 1946 and 1947; all cash receipts summaries for the years 1945, 1946 and 1947; all cash receipts journal entries for the years 1945, 1946 and 1947; all cash receipts remittance advices for the years 1945, 1946, and 1947; all bank deposit tickets, and bank statements for the years 1945, 1946 and 1947; all records of cash receipts, if

any, not deposited in corporate bank accounts; all cash disbursement books fo. the years 1945, 1946, and 1947; all cash disbursement summaries for the years 1945, 1946 and 1947; all cash disbursement journal entries; all shipping records for outgoing shipments during the years 1945 and 1946, and specifically without limiting the generality of above, all shipping records and bills of lading covering merchandise sold to the Eatsum Food Products Company, sole proprietorship and partnership, General Confections, Incorporated, and Reserve Trading Company; all journal entry books and all entry summaries for the years 1945, 1946, and 1947; all account-
335 ants' work papers and audit papers covering the years 1941—to 1945, I assume, 1946 and 1947, together with all accountants' work papers and audit papers used in and/or relating to the preparation of the Shotwell Manufacturing Company Federal Income and Excess Profit Tax returns for the year 1945 and income tax return for the year 1946; all original Shotwell Manufacturing Com-
336 pany sales invoices to the Eatsum Food Products Company partnership during the period from June 1, 1945, to March 1, 1946, both inclusive; all original and photostats of Eatsum Food Products Company, sole proprietorship and partnership, and General Confections, Incorporated, canceled checks; all accounting copies of sales invoices to the Eatsum Food Products Company, sole proprietorship and partnership, General Confections, Inc., and Federal Reserve Trading Company for the years 1945,—1944, 1945, 1946 and 1947; all of Busby & Oury's work papers and audit reports of raw material purchases, production and sales for the years 1941, 1943, 1944, 1945 and 1946; all records relating to and reflecting cash transactions in the years 1945 and 1946 which were not recorded in corporate records; all cash disbursement vouchers, invoices, received records for the years 1941, 1943 through 1947; all journal vouchers, invoices and other supporting data for the years 1945, 1946 and 1947; all duplicate sales invoices for the years 1945 and 1946; all debit and credit memorandums with supporting data for the years 1945, 1946 and 1947; all employees' records, all
337 payroll, commission and bonus records for the years 1945 and 1946; all books, records, documents, correspondence, telegrams, memoranda, data, work papers, applications, affidavits, briefs, certificates, bank statements, de-

posit slips, canceled checks, analysis schedules in connection with and/or bearing on sugar rationing and allotment under OPA during the years 1941 through 1947; all books, records, documents, correspondence, telegrams, memoranda, data, work papers, applications, affidavits, briefs, analysis schedules in connection with and/or bearing on increases requested and/or granted by the United States Department of Agriculture on cocoa beans and chocolate for the years 1945, 1946 and 1947; all United States government contracts for the years 1943 through 1946, schedules prepared by the Shotwell Manufacturing Company on all United States government contracts for the years 1943 through 1946, showing all ingredients required to be used in such contracts and the poundage of each ingredient in each contract and the actual ingredients used and the poundage thereof on the production under such contracts with differences and losses.

338 Q. Now, Mrs. Morrill, are they the records which were used as the source of sales as reported on the income tax return of the corporation for the years 1945 and 1946?

A. Yes.

Q. Now, is there included in those records the receipt of any money on sales for which no invoices were rendered?

A. No.

Q. Is there included in those records any receipts from transactions in excess of the amounts listed on the invoice itself?

A. No.

339 Q. You were subpoenaed to bring with you a record of cash transactions, I think you said, of The Shotwell Manufacturing Company?

A. Yes. Well—

Q. Did you bring such record?

A. Well, you mean the cash recorded on the books?

Q. Yes.

A. No, I have no record to bring you like that.

Q. Did you bring with you a record of the unbilled shipments?

By the Court: Of the what?

By Mr. Lockley: The unbilled shipments, shipments for which no invoices were rendered.

By the Witness:

A. Well, I don't think you asked me for a record.

By Mr. Lockley:

Q. Is there such a record?

A. Well, there is a record that was made up.

Q. Was that made up during 1945 and 1946?

A. I couldn't give you the date as to when it was made out.

Q. Now you were also asked to bring with you certain accounting copies of sales invoices. Do you have
340 those?

A. Well, I was asked to have some segregated.

Q. Yes, ma'am.

A. I have those right here.

Q. May I have those, please.

A. The others are upstairs.

Q. Are these the accounting copies of the sales invoices —this is one of the twelve copies that you referred to originally?

A. That is right.

By Mr. O'Brien: Well, twelve copies or eleven copies, Mr. Lockley?

By Mr. Lockley: I don't know.

By the Witness:

A. I would have to count that out for you. They change different years. We might add to them. I think it was in those years, I think it was in 1945 and 1946 that it was about eleven.

By Mr. Lockley:

Q. Was the accounting copy one of the copies?

A. One of them, yes.

Q. That was prepared simultaneously with the original?

A. Right.

Q. And the original was sent to the customer?

341 A. Right.

Q. And I presume they were retained by him?

A. Yes.

342 Q. And are these accounting copies kept by the Shotwell Manufacturing Company in the regular course of its business?

A. Yes.

Q. Was it a part of their business practice to keep such records?

A. Yes, it was.

Q. Does this contain the same information as was on the original with respect to the customer?

A. Yes, it does.

Q. I now show you Government's Exhibit for identification 50-A, the letter "A"—which consists of the accounting copy of an invoice numbered C87659 for shipment sold to the Eatsum Food Products Company in the amount of $4,916.10.

Is that the original or is that an accounting copy such as you have previously identified?

A. Yes.

Q. And I show you Government's Exhibit for identification 51-A consisting of the accounting copy of an invoice numbered C88586 and beneath that in typewriting is the number 88585-A for 1350 cases Cardinal chocolates sold to the Eatsum Food Products Company, sale in
343 the amount of $12,096.00.

Can you explain the purpose for the two numbers on the invoice?

A. Well, we attempted to always account for every number and if perhaps a routing might get changed and the girl would use another bill of lading and typed in that number—they didn't always do what they were supposed to do.

Or, perhaps we might take two sets of these, destroy the bills of lading and type another one so we could ship it all on one bill of lading and save the customer shipping charges.

Q. Is that one of the accounting copies of the sales invoice kept in the ordinary course of business?

A. Yes.

Q. Is that a true and correct copy of the original?

A. Yes.

344 Q. I have a number of these.

I have a number of these, counsel, do you care to have me go through them one at a time?

By Mr. O'Brien: I am not clear on just what they are, Mr. Lockley.

By Mr. Lockely: These are accounting copies of the Shotwell Manufacturing Company invoices to the Eatsum Food Products Company. These are all billed items for which payment was made.

By Mr. O'Brien: When you say "Eatsum", does that mean the proprietorship, or the partnership, or are they both—

By Mr. Lockley: These are all partnership.

By Mr. O'Brien: May I see those?

By Mr. Lockley: You may look at those if you want to. I will get the others for you.

By Mr. McConnell: We would suggest that you identify them for the record, instead of just reading them. Will you please identify them? We have no objection to the documents.

345 By Mr. Lockley: All right.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 51-B, No. C89123. This is an accounting copy of a sale to Eatsum Food Products Company of 454 cases of gum drops for $1,055.55.

Is that a true and correct copy of the original?

A. Yes, it is.

Q. I now show you Government's Exhibit for identification 52-A, an accounting copy of Invoice No. C90598 dated June 6, 1945, a sale to the Eatsum Food Products Company of 506 cases of spice buttons for $1,252.35.

Is that a true and correct copy of the original?

A. Yes.

Q. I now show you Government's Exhibit for identification 52-B, an accounting copy of an invoice dated June 6, 1945, Invoice No. C90631, a sale to the Eatsum Food Products Company of 1158 cases of Cardinal chocolates for $10,375.68.

Is that a true and correct copy of the original?

A. Yes, it is.

346 Q. I show you Government's Exhibit for identification 53-A, an accounting copy of an invoice dated June 25, 1945, invoice No. C-94002, sold to Eatsum Food Products Company, 1,427 cases of spice buttons for $3,531.83.

Is that a true and correct copy of the original?

A. Yes, it is.

Q. I show you Government's Exhibit for identification 54-A consisting of accounting copy of invoice No. C-94986 dated June 28, 1945, sold to the Eatsum Food Products Company, 471 cases of spice buttons for $1,165.73.

Is that a true and correct copy of the invoice?

A. Yes, it is.

Q. I show you Government's Exhibit for identification

56-A consisting of accounting copy of invoice No. C-114184, dated September 29, 1945, of a sale to Eatsum Food Products Company of 353 cases of bulk chocolate nut meats for $3,897.12, and ask you if that is a true and correct copy of the original?

A. Yes.

Q. I show you—

347 A. That was the file copy (indicating). The original is in the file.

Q. I now show you Government's Exhibit for identification No. 56-B, which purports to be a file copy of the Shotwell Manufacturing Company invoice No. C-114549 of a sale to the Eatsum Food Products Company for 2400 cases of Puritan M. M.'s for $4,680.00.

What are Puritan M. M.'s?

A. Marshmallows.

Q. Is this file copy kept in the same course of busines as the accounting copies to which you have previously referred?

A. Well, we did pre-billing at the office. That meant we billed sometimes weeks i advance and the file copy immediately went to the file department in case we wanted to look it up for some reason. And if it was shipped prepaid, which this was, the freight charges were added on when we were ready to ship but we wouldn't go and get the file copy to do that. So, your original copy and your file copy had this freight on. When I was adding this up, this was not on one of the invoices (indicating), so I got this one.

348 Q. Did you search for that accounting copy of the invoice?

A. Yes, and I think Mr. Mammel had it, and I think he had the original.

Q. Was this copy struck at the same time, including the original and accounting copy you struck off?

A. Yes.

Q. With the exception you have noted as to freight charges, it is a true and correct copy of the original?

A. Yes.

By the Court: What is the date of that?

By the Witness: I don't have the dates on those.

By Mr. Lockley: We better take it off these exhibits.

By the Witness: You won't get it. They stamp a date when they ship it. We don't stamp any file copies. The original, you have it down on the paper.

By Mr. Lockley:

Q. Are you able to tell us the date of that exhibit, even though it is not recorded on the exhibit itself?

349 A. Yes, I think so. That was October 5, 1945.

Q. All right. I now show you Government's Exhibit for identification No. 57-A, which consists of an accounting copy of Invoice No. C117892, dated October 12, 1945, a sale from the Eatsum Food Products Company, shipped to William Barron Candy Company, in care of Bekins Storage, San Pablo, Oakland, 1,250 cases of Cardinal chocolate for $11,200.00.

Is that a true and correct copy of the original?

A. Yes, it is.

Q. I note on that there is the letter, or the letters "HSE" up in the center of the right hand side. What does that represent?

A. Well, that was the house sale. No commission is paid on it.

350 By the Court: I didn't understand that. That sale is by whom to whom?

By the Witness: It was by Eatsum Food Products Company.

By Mr. Lockley:

Q. No. It was by Shotwell.

A. Oh, it was sold by Shotwell to Eatsum Food Products and shipped to William Bond Candy Company in Oakland, California.

Q. Is that what would be referred to as a drop shipment?

A. Yes, it is.

Q. When the purchaser orders you to take a carload or other quantity of material and ship it to some other place?

A. That is right.

Q. But you bill the purchaser?

A. That is right.

Q. And he makes his settlement with the original—

A. Original person to whom he sells it.

Q. The person to whom it was sent?

A. That is right.

Q. I show you Government's Exhibit for identification 58-A consisting of an accounting copy of an

351 invoice numbered C119874, dated October 20, 1945, sold to the Eatsum Food Products Company shipped

to McDonald Candy Company, Eugene, Oregon, for 1500 cases of Cardinal chocolates for $13,440.00.

Is that a true and correct copy of the original?

A. Yes, it is.

By the Court: The amount again, please?

By the Witness: $13,440.00.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 59-A, purporting to be an accounting copy of invoice numbered C122518, dated November 2, 1945, of a sale to Eatsum Food Products Company shipped to F. W. Woolworth Company, Atlanta, for 2494 Cardinal assorted chocolates, $22,346.24.

Is that a true and correct copy of the original?

A. Yes, it is.

352 Q. I show you Government's Exhibit for identification 60-A, purporting to be an accounting copy of invoice No. C-120655, dated October 27, 1945, of a sale to Eatsum Food Products Company of 1,189 cases of chocolate nut meats, 776 cases of chocolate covered nut meats, and 1,067 of spice buttons for a total of $22,693.61, and ask you if that is a true and correct copy of the original?

A. Yes, it is.

Q. I show you Government's Exhibit for identification 60-B purporting to be an accounting copy of an invoice No. C-123402 dated November 12, 1945, of a sale to Eatsum Food Products Company shipped to Harry Simon of Chicago of 1,250 cardinal assorted chocolates, $11,200.00.

Is that a true and correct copy of the original?

A. Yes.

Q. I show you Government's Exhibit for identification 61-A purporting to be an accounting copy of invoice No. C-124206, dated November 17, 1945, of a sale to Eatsum Food Products Company of 1,689 cases of cardinal assorted chocolates, 338 cases of chocolate covered nuts, and 1,419 cases of chocolate covered nuts

353 or a total of $32,572.50, and ask you if that is a true and correct copy of the original?

A. Yes, it is.

Q. I show you Government's Exhibit 61-B, purporting to be an accounting copy of invoice No. C-125386, dated November 24, 1945, of a sale to Eatsum Food

Products Company of 656 spice buttons, cases of spice buttons, 838 cases of chocolate covered nuts, and 1,070 cases of chocolate covered nuts for $21,211.32.

I ask you if that is a true and correct copy of the original.

A. Yes, it is.

354 Q. I show you Government's Exhibit for identification 62-A, purporting to be an accounting copy of Invoice No. C122399, dated November 10, 1945, a sale to Eatsum Food Products Company of 2,934 cases of chocolate covered nutmeats, and 332 cases of spiced buttons for $29,164.14.

Is that a true and correct copy of the original?

A. Yes, it is.

Q. I show you Government's Exhibit for identification No. 64-A, purporting to consist of accounting copy of Invoice No. C126180, dated November 30, 1945, of a sale to Eatsum Food Products Company of 263 cases of Cardinal chocolates for $2,356.48.

Is that a true and correct copy of the original?

A. Yes, it is.

Q. I show you Government's Exhibit for identification No. 64-B, consisting of accounting copy of Invoice No. C126181, dated November 30, 1945, of a sale to Eatsum Food Products Company of 1163 cases of chocolate covered nuts for $11,234.58, and ask if that is a true and correct copy of the original?

355 A. Yes, it is.

Q. I show you Government's Exhibit for identification No. 65-A, consisting of accounting copy of Invoice C126517 dated December 8, 1945, to Eatsum Food Products Company for 2283 cases of chocolate covered nuts, 190 cases of chocolate covered nuts, and 603 cases of spiced buttons, for $25,640.93.

Is that a true and correct copy of the original?

A. Yes, it is.

356 Q. I show you Government's Exhibit for identification 65-B, consisting of an accounting copy, invoice No. C127316, dated December 14, 1945, of a sale to Eatsum Food Products Company shipped to Burry Biscuit Company of Chicago, 303 cases of spice buttons for $749.93.

Is that a true and correct copy of the original?

A. Yes, it is.

Q. I show you document with a heading of "Shotwell Manufacturing Company", confectionery specialists, invoice No. C296 sold to Eatsum Food Products with a description "Additional charge on invoice No. C126517—date 12/8/45 should have been billed" 2283 chocolate covered nuts, $2253.78. "As billed"—2283 chocolate covered nuts, $22050.00. "Additional charge, $3.78."

What does that purport to be?

A. Well, the girl who originally extended it, made an error and we sent what we call a debit memorandum for this additional amount to him. This is not made with this set.

Q. This is a correction on a billing, is that correct?

357 A. That is right.

By the Court: What exhibit number is that?

By Mr. Lockley: 65-C.

By Mr. Lockley:

Q. Now I show you Government's Exhibit for identification 66-A purporting to be an accounting copy of invoice No. C127425, under which is written or typed "C127424, dated December 15, 1945, a sale to Eatsum Food Products Company of 657 cases of Cardinal chocolates for $5,886.72."

Is that a true and correct copy of the original?

A. Yes, it is.

358 Q. And is the explanation with respect to the two numbers of the invoice the same?

A. It is the same. I think it is.

Q. I show you Government's Exhibit for identification No. 66-B, consisting of an accounting copy of invoice No. C-127844, dated December 20, 1945, a sale to Eatsum Foods Product, shipped to Imperial Candy Company, Youngstown, 740 cases of cardinal chocolates for $6,630.40.

Is that a true and correct copy of the original?

A. Yes, it is.

Q. I show you Government's Exhibit for identification 66-C, purporting to be an accounting copy of invoice No. C-127905, dated December 21, 1945, of a sale to Eatsum Food Products Company of 340 cases of spice buttons, $841.50.

Is that a true and correct copy of the original?

A. Yes.

Q. I show you Government's Exhibit for identification No. 67-A, purporting to be an accounting copy of invoice No. C-127742, dated December 19, 1945, of a sale to Eatsum Food Products Company of 900 cases of 359 chocolate covered nuts for $8,694.00.

Is that a true and correct copy of the original?

A. Yes, it is.

Q. I show you Goverment's Exhibit for identification No. 67-B, purporting to be an accounting copy of invoice No. C-127788, dated December 20, 1945, of a sale to Eatsum Food Products Company of 537 cases of chocolate covered nuts for $5,187.42.

Is that a true and correct copy of the original?

A. Yes, it is.

360 Q. I show you Government's Exhibit for identification No. 68-A, purporting to be an accounting copy of an invoice with the typewritten number C127425. The printed number is X-ed out. It is dated December 15, 1945, and is a sale to Eatsum Food Products Company of 1914 cases of chocolate covered nuts for $18,489.24.

Is that a true and correct copy of the original?

A. Yes, it is.

Q Now, I show you Government's Exhibit for identification No. 69-A, purporting to be an accounting copy of invoice number C130126 dated January 10, 1946, of a sale to Eatsum Food Products Company for 1069 cases of chocolate covered nuts, $11,801.76.

Is that a true and correct copy of the original?

A. Yes, it is.

Q. I show you Government's Exhibit for identification No. 70-A, consisting of accounting copy of invoice number C131641, dated January 17, 1946, of a sale to Eatsum Food Products Company of 1291 cases of chocolate covered nuts, $14,252.64.

Is that a true and correct copy of the original?

361 A. Yes, it is.

Q. I show you Government's Exhibit for identification No. 71-A consisting of accounting copy of invoice number C132508, dated January 19, 1946, of a sale to Eatsum Food Products Company shipped to Imperial Candy Company, Youngstown, 1065 cases of Cardinal chocolates for $9,542.40, 420 cases of spice drops, $1,039.50, or a total of $10,581.90.

Is that a true and correct copy of the original?

A. Yes, it is.

Q. I show you Government's Exhibit for identification No. 72-A, purporting to be an accounting copy of an invoice—

By the Court: Wait a minute. What exhibit number?

By Mr. Lockley: 72-A, consisting of accounting copy of invoice number C141335, dated February 28th, 1946, a sale to Eatsum Food Products Company of 604 chocolate covered nuts, cases of chocolate covered nuts, $5,834.64.

362 By Mr. Lockley:

Q. Is that a true and correct copy of the original?

A. Yes, it is.

Q. Now, did you also bring with you the Shotwell Manufacturing Company general journal for the year 1947?

A. Yes, I did.

Q. Will you get it, please?

Do you also have with you the Shotwell Manufacturing Company accounts receivable record for the Eatsum and General Confections Companies for the period from July 14, 1944, to May 11, 1948?

A. Yes, I do.

Q. Now, I show you Government's Exhibit for identification No. 200, purporting to be an accounts receivable ledger card of the Shotwell Manufacturing Company, an account with Eatsum Food Products and in pencil "David G. Lubben."

Can you tell from an examination of this exhibit whether there is any amount due from the Eatsum Food Products Company on this account?

By Mr. O'Brien: What period is covered by that, Mr. Lockley?

363 By Mr. Lockley:

Q. Will you tell him, please?

A. It begins with May of 1944 and ends with the last entry, May of 1948, covering the Eatsum and General Confections.

Q. And is there any balance due on account from David Lubben or the Eatsum Food Products Company?

A. As of today?

Q. Yes.

A. No.

By the Court: I didn't hear the last.

By the Witness:

A. As of today it shows the account is in balance.

By Mr. Lockley:

Q. The account is in balance. Was it all paid?

A. No. We wrote off something an uncollectible.

Q. And how much?

A. $665.56.

Q. How was that handled?

A. That was handled by a journal entry.

Q. As an uncollectible bad debt?

A. That is right.

Q. Now I show you Government's Exhibit for identification No. 200-A, which purports to be an ac-
364 counts receivable card of the Shotwell Manufacturing Company with Eatsum Food Products and ask you in what respect this differs from Government's Exhibit for identification No. 200?

A. Well, this was called "accounts receivable others" and pertains to sales that were other than what we manufactured, like—

By the Court: You turn your head and then I can't hear you. Will you look straight ahead so that I can hear you? When you turn your head I can't.

By the Witness:

A. This is what we call an accounts receivable others. We try to segregate the sales of our manufactured product from the sales of any raw materials we might make and we called it accounts receivables others and this card would be sales of some raw materials to Eatsum Food Products.

By Mr. Lockley:

Q. Do you know what sort of raw materials were sold?

A. Yes. There was some chocolate liquor and some corn syrup.

Q. Now, is there a balance due at this time on
365 that account?

A. There is nothing due at this time on this, no.

Q. Was any portion—

By Mr. O'Brien: At what time?

By Mr. Lockley: At the present time.

By the Witness:

A. There was no portion written off.

By Mr. Lockley:

Q. In other words, the account was paid in full?

A. That is right.

366 Q. I show you Government's Exhibit for identification 200-B, purporting to be an account receivable of the Shotwell Manufacturing Company with David Lubben, and ask you in what respect this differs from Exhibit for identification No. 200 and No. 200-A?

A. Well, I don't know why this card was made out to just David Lubben. Mr. Mammel came across it and asked me to look it up, and as I remember it, it was a transfer of some Hi-Mac bars he sold for us, that some account in New York could not sell. Why—I think it was just a clerk that made the card out to David Lubber.

Q. Was there an unpaid balance on that amount?

A. Not as of this date, no.

Q. Was the account paid in full?

A. Yes, it was.

Q. To correct the record, it appears that I gave the wrong invoice amount on Exhibit No. 56-B, which was dated October 5, 1945, invoice No. C-114549. The invoice amount is $5,053.77, is that correct?

A. Yes. That is with the freight added on to it.

Q. I see. Thank you. Now, you have the Shotwell Manufacturing Company journal?

A. Yes.

367 Q. For the period from January to June, 1947?

A. Yes.

Q. Well, what information is contained in that book?

A. Well, these are the entries that are posted to the general ledger, and they include the sales and Social Security charges, commission charges, any transaction that would go on your general ledger. Any transaction that would go on your general ledger is in here with the exception of the cash disbursement recap, which is in the general disbursement book.

Q. Now during the early part of 1947, did you know if David G. Lubben was a broker for The Shotwell Manufacturing Company?

A. The early part of 1947?

Q. Yes. Do you know? Can you determine from an examination of that record?

May this journal, for the period from January to June, 1947, be noted as Government's Exhibit 138 for identification?

By the Court: Yes.

By the Witness:

A. Yes, he was a broker then.

By Mr. Lockley:

Q. He was a broker?

A. Yes.

368 Q. Now, will you refer to the journal entries for the period from January through February, 1947, and determine whether he earned any commissions on sales during that period?

By Mr. O'Brien: I don't know the relevancy of that, your Honor. We are going into 1947. The connection escapes me.

By the Court: What is the relevancy?

By Mr. Lockley: I am attempting to establish, your Honor, that the full amount of the invoice purchases made by Mr. Lubben were made, with the exception of this $600.00 which was charged off to a bad debt, but not all of that was paid in cash. Some of it was by journal entry, which, in effect, took money which Mr. Lubben had earned as commissions and credited it against amounts which he owed.

By Mr. O'Brien: Well, how is that in issue here?

By Mr. Lockley: I am merely establishing that all of it was paid.

By the Court: As you say, you are getting into a matter now I don't know is relevant. In other words,

369 I haven't been informed. I don't appreciate the relevancy.

By Mr. McConnell: I object to it because it is outside of the period of the indictment.

By the Court: Yes. I will sustain the objection.

By Mr. Lockley:

Q. Now, with respect to the bills of lading, which I understood were carbon copies of the invoices and these accounting copies which we have previously identified, were the numbers on the bills of lading the same as the numbers on the accounting copies?

A. They should be.

Q. In other words, when the invoices were printed with

this number of copies, every copy had the same printed number on the top?

A. Yes.

Q. Then, for every bill of lading for candy that was shipped, there should have been an invoice bearing that same number as appeared on the bill of lading, is that correct?

A. Yes, there should have been.

Q. Did you bring with you work papers of Mr. Busby, the accountant?

370 A. Well, I don't have his work papers.

By Mr. Lockley: Your Honor, there is now in the office of the United States Attorney, pursuant to agreement with counsel, a substantial bulk of original records of The Shotwell Manufacturing Company. If necessary, we can have that brought down here and identified. The Government desires them only for the purpose of having an expert testify from his prior examination of those records and it may be possible that counsel will stipulate that those records are here, that they are available to both parties, and it will not be necessary to physically bring them into court.

By Mr. O'Brien: Well, we have no desire to have them physically brought into court, your Honor. We just had them brought here. If there is at this time available some summary of those findings, or whatever it is you are talking about, so that we could have that checked to save time, to verify that the papers are here, we could do that. I think we can save a good deal of time.

Mrs. Morrill, there are two truckloads of papers 371 here, aren't there?

By the Witness: One truck.

By Mr. O'Brien: There are many cases of them. I suppose, at this stage of the case, Judge, if we could see any such summary, we could make such a check without delaying the jury or delaying your Honor.

By Mr. Lockley: Your Honor, I only want them for purposes of identification. I don't wish to offer them in evidence. I don't think it is necessary. Of course, it is necessary that they either be identified or be under the custody of the Court and available to counsel so that he may determine the accuracy of the Government summary.

By Mr. O'Brien: May I suggest at this late date that

we shouldn't have to determine the accuracy right here.

372 By Mr. O'Brien: Well, my suggestion at this late date is that we shouldn't have to determine the accuracy right here all at once. If there is some such thing, we would undertake to verify it, if we could have a copy of it, whenever you get up to that point. We don't want to start verifying in open court, pulling out all those documents.

By the Court: Well, I assume you will be afforded a reasonable opportunity to familiarize yourselves with any exhibit that may have been offered and check it with the underlying data which is supposed to be the basis for the exhibit. If that arrangement is made between counsel, I haven't any objection. I think that is up to counsel.

By Mr. O'Brien: If that is all right with you.

By Mr. McConnell: It is all right with me.

By Mr. O'Brien: As long as we have the oppor-

373 tunity.

By the Court: I haven't any authority to order the production of any document at this time.

By Mr. Lockley: We would like to excuse Mrs. Morrill, after cross examination, but subject to recall, as I previously said.

You may cross examine.

By Mr. O'Brien: Might we have the recess at this time?

By the Court: All right.

(Recess taken.)

Cross Examination by Mr. Kirby.

Q. Mrs. Morrill, did I understand that you are now the only employee of the Shotwell Manufacturing Company?

A. Yes, that's right.

Q. Your work has recently been solely to assist in the preparation of the records for the trial, much as you have done here for the government today?

A. No, I wouldn't say that. I have cleaned up a lot of bad accounts that we had to collect. And we had

374 a lot of machinery to sell, and I helped to sell that, some of it. And we had to move out of our building. The building was sold. And I had to gather the records and get them out of there into another place.

Q. But in '45 and '46, Mrs. Morrill, when the business

was running, how big a business was it, in the number of employees?

A. Well, when we were going at a high speed there we had about five to six hundred employees, according to the seasons, you know.

375 Q. But since this trouble, it is all gone, and the business is closed?

A. Yes, that's right.

Q. Now, what type of candy did they make, and was it mostly a fairly cheap candy?

A. Yes, it was a candy that you find in the dime stores, a lot.

Q. And chain stores of all kinds?

A. Chain stores, that's right.

Q. Mostly bulk candy?

A. Bulk. And they made bars, a lot of bars in '45, '46.

Q. And some of the candy is priced on these invoices here, is that right?

A. Yes, they are.

Q. I notice from Exhibit 51-A, that the box chocolates sold for 37-1/3 cents a pound?

A. Yes.

Q. And the citrus drops sold for 13 cents a pound?

A. That's right.

Q. And the gum drops were 7-3/4 cents a pound?

A. Yes.

Q. Now, were those prices that I have read to you fixed by the OPA?

376 A. Well, we were under OPA.

Q. Well, Mr. Lockley asked you whether in making up—in the usual practice of the business, in making up invoices, you had access to a price list, and I think you said you did, didn't you?

A. We had a standard price list, yes.

Q. And that was an OPA price list?

A. Yes.

Q. And that under the law you were required to observe?

A. That's right.

Q. And if you didn't observe it, you could be fined three times the overage, and sent to prison for the OPA violation, couldn't you?

A. It was a large fine, yes.

Q. And triple damages?
A. Yes.
Q. Now, in 1945, you, of course, actually paid an income tax, didn't you?
A. Oh, yes.
Q. And that is shown on Exhibit 1 of the Government, and Exhibit 1-A of the Government, is that right?
A. Yes, this is right.
377 Q. And am I correct in thinking that the gross profit of the company in the year of '45, was $561,000 roughly?
A. Yes, roughly.
Q. And that on that $561,000 you actually paid a tax of $370,000, roughly?
A. Right.
Q. In other words, roughly three-quarters of the gross profit was paid in tax in that year, is that true?
A. Yes, that's right.
Q. Now, Mrs. Morrill, with respect to these invoices that you have talked about, and the prices we have talked about, those prices, as I understand it, that were on there, were fixed by the OPA?
A. Yes.
Q. If you made a profit then on that price, three-quarters of it then went in income tax?
A. Yes.
378 Q. Now, how many customers did Shotwell have in 1945 and 1946?
A. We had about twelve to fifteen thousand customers.
Q. Mr. Lockley was asking you about some transactions where there were some items of cash over ceiling prices that didn't go on the books. How many customers were involved in that?
A. Only one.
Q. And that one was Lubben?
A. That's right.
Q. Everything else went on the books?
A. Yes, it did.
Q. And the part that Mr. Lockley was asking you about was not the amount on these invoices. These invoices that are here, that went on the books?
A. Yes, it did.
Q. The OPA price went on the books?

A. Yes, it did.
Q. But that cash didn't?
A. No.
Q. But if it had you would have been responsible for triple damage, if you had put it on the books and the Government went after you?
A. Yes, that's right.
379 Q. But was that done with any other customer than this out of the twelve thousand?
A. No.
Q. Mrs. Morrill, were some raw materials under allocation in '45 and '46 by the OPA?
A. Well, sugar was rationed.
Q. And hard to get?
A. Oh, very. And chocolate, the suppliers would sell a certain per cent, according to what they had sold us in 1941. The same applied for—
Q. The fact is, though, Shotwell got a lot more in '45 and '46 than they had been able to buy in '41, didn't they?
By Mr. Lockley: Just a second. I object to the statement of counsel as a question. And I also object to the question itself on the grounds that it exceeds the scope of the direct examination.
By Mr. Kirby: I will rephrase it.
By the Court: I don't think it is proper cross examination, counsel.
By Mr. Kirby:
Q. In 1945 you didn't sign the income tax return that is Exhibit 1, or the return which is—
A. No, I didn't.
380 Q. In 1946—I show you Government's Exhibit 2 and Government's Exhibit 3, and you signed those, didn't you?
A. Yes, I did. Yes, I signed both of these.
Q. Mr. Lockley, asked you whether the books reflected any cash over ceiling from this one customer and I think you said no?
A. That's right.
Q. Mr. Lockley asked you whether the income tax reports were made up from such books and I think you said yes.
A. Yes.
Q. Mr. Lockley asked you whether, therefore, that

cash overage, whenever it occurred, with Lubben, went on the tax return, and I think you said no.

A. That's right.

Q. And you knew when you signed the return it wasn't on there?

A. Yes, I knew it wasn't on there.

Q. And were you intending to deprive the government of its tax revenue when you knew it was not on there?

A. No.

Q. Why did you leave it off?

381 A. Well, it actually—there wasn't any tax owed the government because this money that we took in, we went out and spent it to get raw materials that were hard to get, and that made more candy. It increased the candy sales and we paid the taxes on the candy sales.

Q. So that your transactions actually produced a higher income tax?

A. Yes.

Q. They had a young man here from New York from the Manufacturers Trust.

A. Yes.

Q. And he read off a number of checks to Shotwell, do you recall that?

A. Yes, I do.

Q. You were in the court room at the time?

A. Yes.

Q. Now, had you been asked by the government to pick out and have separately ready for your testimony the ledger which showed the dealings with Lubben on the company's books; didn't they ask you to do that?

A. Yes, ledger cards.

382 Q. Yes. Now, as that man from New York read off those checks payable to Shotwell, I noticed you turned and you had your ledger sheet out on your lap there, didn't you?

A. I was checking them, yes.

Q. Was there any check to Shotwell that that man mentioned that wasn't right on the books of the company?

A. All that I had checked were on there, yes.

By Mr. Lockley: That was stipulated, counsel.

By Mr. Kirby: But the fact can sometimes be made plainer by stating that the things are there than all this

mystery about Recordaks, and that sort of business. It was there and every one of them was there.

By Mr. Kirby:

Q. Mr. Lockley also had you identify a number of invoices here, and so far as you know, Mrs. Morrill, those invoices are posted on the books of the company?

A. They are.

Q. Mr. Lockley showed you Government Exhibit 200, and I take it that is the statement of Lubben's
383 account from '44 until '48?

A. Yes, it is.

Q. Well, I notice an expression about bankrupt here.

A. Yes.

Q. And assignment to trusteeship and bankrupt. That means Lubben was doing those different things?

A. Yes, that's right.

Q. Is that right?

A. Yes.

Q. And am I correct, as I look at these schedules, in thinking it was in 1946 that you started to have trouble, calling your attention particularly to the entries of September 5th, and thereafter, in collecting money from Lubben?

A. Yes, that was about the time he began to be very lax in his payments.

Q. Now, those ink writings that are alongside of the payments received, they indicate the date they were received?

A. That was the date we received it for that particular invoice.

384 Q. And the invoices he was getting in late summer he didn't pay for until November, December, or the next year?

A. Yes, there were some of those. And towards the end of the year he began making partial payments on some of these invoices, too.

Q. Mr. Lockley asked you about whether in 1947 Mr. Lubben was acting as broker; do you remember that?

A. Yes.

Q. Well, that simply means he earned some commissions?

A. That's right.

Q. But you didn't pay him the commissions, you applied them against his delinquent account?

A. Yes, he owed us a lot of money.
Q. And that was one of the ways to get it?
A. Yes.
Q. Mr. Lockley asked you about a journal entry which you explained that Mr. Mammel had called to your attenti n. Now, which of these two exhibits, 200-A or 200-B, is that?
A. Well, it wasn't on a journal. It's a ledger card.
385 Q. Which one is it now?
A. It is this one made out to Dave Lubben.
Q. That's 200-B. And that is the total of $1,028.16 in merchandise, is that right?
A. Yes. Twelve hundred, did you see that?
Q. Yes, those two invoices. The two would total somewhere around $1,200.00.
A. Yes.
Q. That was some Hi-Mac bars.
A. Bars, Hi-Mac and Shur-Mac. I had looked it up for Mr. Mammel quite some time ago. His boys came across the card.
386 Q. The card was right in the records of the com-
?
as right in with the other accounts receivable.
Q. ing strange about it?
A. No.
Q. And there is nothing strange about this 200-A, that is just a transaction for some eight or nine hundred dollars worth of raw materials?
A. That's right.
Q. Now, there were some other sales of raw materials, though, weren't there, to Mr. Lubben, that Lockley asked about?
A. Yes, he bought some corn syrup.
Q. Is that the corn syrup that was in the leaky barrels down at the same warehouse?
A. Yes.
Q. You talked about the way the billing machine would make up the invoices, and you said that the customer would get a copy?
A. Yes.
Q. How many copies would the customer get in 1945 and 1946?

A. Well, he would get one.

387 By Mr. O'Brien: He would get one copy.

By Mr. Kirby: Correct. He would get simply one, is that correct?

By the Witness: One. Unless he would specially ask for another one, and we would always put the invoice in duplicate, and there is nothing on there to indicate that,—

By Mr. Kirby:

Q. So far as Lubben's transactions were concerned, he got one invoice?

A. Yes.

Q. And on that invoice that the company sent out, the price that was stated was the OPA price?

A. Yes.

Q. You never put on an above the ceiling price?

A. No.

By Mr. Kirby: That is all I have to ask. Some of the other counsel may want to ask questions.

By Mr. McConnell: I want to ask a few questions.

Cross Examination by Mr. McConnell.

Q. Mrs. Morrill. I think Mr. Kirby covered this, but I want to be sure about it. So far as you knew, when

388 you were keeping the books and records for the Shotwell Company in 1945 the only amount due and owing to Shotwell on the particular invoices of candy which we referred to, as evidenced by those invoices, was the invoice price as shown on the invoice, isn't that true?

A. Yes.

Q. And that is the amount you put down on the books?

A. That's right.

Q. Now, did you hear counsel's opening statement here this morning when he said there was $177,146.23 of overage payments that came into Shotwell in 1945?

A. I heard him say it.

Q. Did you ever see any money of that kind coming in to Shotwell?

A. No.

Q. At any time?

A. No.

Q. Did you ever see any amount of money of $323,573.29, or anything like it, coming in, in 19—

389 By Mr. Lockley: This is beyond the scope of the direct examination.

By the Court: Sustained.

By Mr. Lockley: I have been very patient with counsel, I think.

By the Court: Sustained.

By Mr. McConnell:

Q. I understood you to say this morning that there were some cash payments that you knew about in some general sort of way?

A. I know about it since that time. I didn't know about it at that time.

Q. Well, this is something you have learned from government counsel in the course of the preparation of this case?

A. Well, I was in the courtroom in November when you had a motion.

Q. This is something you have learned about out of hearings, and out of the preparation of the case. You are not speaking now of your own knowledge at the time?

A. At the time I didn't know it.

Q. You didn't know anything about any overage in the amounts of this indictment?

390 A. No, I did not know it at the time.

Q. Now, are you familiar with the accounts of Shotwell at the different banks?

A. Yes.

Q. Did your cash accounts at the bank balance with your books?

A. Yes.

Q. At all times while you were there?

A. At all times, yes.

Q Did your books balance with any cash that you had knowledge of during that time while you were there?

A. I don't think I understand you.

Q. Well, did you know of any cash that was not in a bank account, or not somewhere else where you could see it, or touch it?

A. Did I know of any?

Q. Yes.

A. Yes, in late '45 I did.

Q. Now, what cash is that?

By Mr. Lockley: Here again your Honor, we are beyond the scope of the direct examination.

By Mr. McConnell: He brought out a general state-

ment here. I think I have a right to pin that down.
391 By the Court: I think she did say—I am not too clear, but I think she did say she was aware of certain payments received by Shotwell over the amount of the invoice. Is that what you have reference to?

By Mr. McConnell: I have a right to particularize that, I think, if the Court please. I submit that I do.

By the Court: Well, to the extent that she had knowledge at the time, she may answer.

By Mr. McConnell: All right.

By Mr. McConnell:

Q. Now, what cash are you speaking about in 1945?

A. Well, there was some cash.

Q. Late in 1945?

A. There was cash that came into the office in late 1945 that I helped to count.

Q. Now, what connection did you have with it?

A. Merely by assisting in counting, and sometimes giving it to somebody in the office who might ask me for it.

392 Q. All right. Now, was that cash put in some particular place?

A. Yes.

Q. And did you have custody of that place?

A. Yes.

Q. And where was that place, and where was it put?

A. It was put in a box in the company vault.

Q. And you had to do with the putting of it in and the taking of it out, is that right?

A. I assisted with doing it, yes.

Q. All right. Now, how much, approximately, cash was involved in that, all told?

A. In '45?

Q. Yes, in '45, or any time that you had any connection with the box?

By the Court: You are talking about '45 now?

By Mr. McConnell:

Q. Let's confine ourselves to '45.

A. I don't think I could tell you that answer.

Q. When did you first have the counting of it?

A. In the fall of '45, about in October or so.

Q. All right. How much cash did you have at that
393 time?

A. I didn't have charge of it, and I don't know.

Q. Well, you said you counted it at that time.
A. Well, I counted some money, but I can't tell you how much it was.
394 Q. Well, approximately how much?
A. Well, I know that I counted, say, between fifty and sixty thousand dollars, but it wasn't in '45, all of it.
Q. When was that?
A. Some in the fall of '45 and some in the beginning of '46, or during '46.
Q. Now, what was done with that money?
By Mr. Lockley: I object, your Honor. That is beyond the scope of the direct examination. I made no reference whatsoever during my examination to the expenditure of any cash, or any expenditure whatsoever by The Shotwell Manufacturing Company.
By Mr. McConnell: He made reference to our getting taxable income and I think I have a right to show by this witness on cross examination what she knows about it and whether or not any of that money ever stuck with Shotwell.
By the Court: You asked whether or not certain overage payments came to Shotwell, did you not?
By Mr. Lockley: I asked her whether she re-
395 ceived money. I didn't ask her whether she had done anything with it. And that is what they are now asking. They want to know if she knows what was done with the money that was in the box.
By the Court: You say you did not ask her what was done with the money in the box?
By Mr. Lockley: No, sir; I never asked her about the money in the box. They have opened this up on cross examination.
By the Court: Does that pertain to the overages you asked her about?
By Mr. Lockley: That is something that might be developed. At this point there is certainly no connection.
By the Court: Well, she may answer.
By Mr. O'Brien: Read the question.
(Question read.)
By the Witness:
A. Well, the money that I assisted in counting was put in the box and put in the company vault.
By Mr. McConnell:
Q. All right. Who had the key to it?

A. Mr. Roeser and I had the key.

396 Q. So that no one could go to the box without your knowledge, isn't that true?

A. That's right.

Q. All right. Now what happened after you got the box and had custody of it, what happened to the money so far as you know?

A. As far as I know the money was given out to buy corn syrup.

Q. Who was it given to?

A. Well, I personally gave it to either Mr. Huebner, Mr. Graflund, and that was all—or Mr. Roeser.

Q. Now, do you know of any money in that box beyond the amount of $60,000 that you have mentioned?

A. No, I don't.

Q. At any time?

A. No, I don't.

Q. When you had anything to do with it?

A. No, I do not.

Q. That would be the extent of the money you know anything about?

A. That's right.

Q. Now, you have had charge of the liquidation of this company, have you not?

A. Yes.

397 Q. And the company has been sold, has it?

A. Yes.

Q. And you have had to do with the winding up of its affairs?

A. Yes, I have.

Q. And during all that time, since that time, has it come to your attention that there is any money arising out of any of these transactions in any of the Shotwell Company's accounts, affairs, properties, or any place else, to your knowledge?

A. No.

Q. Now, what was the situation with reference to Mr. Lubben's account at the end of 1947—or, 1946, I mean? Have you got your book and records there?

A. I haven't got the cards.

I made the statement that toward the end of '46, his financial condition was getting pretty precarious, and he was—

Q. How do you know that?

A. Well, I can tell by the large balances that were open on the account.

Q. Now, what large balances were open on the account; what was the balance at the end of '46?

A. At the end of '46, he owed us $45,000.

398 Q. That's on invoiced goods, isn't it?

A. Yes.

Q. And I think you were telling Mr. Lockley on his examination that you were picking that up in some subsequent year out of his commission account, is that right?

A. Then after that, we started applying the commissions he earned against that amount due us.

Q. Commissions on his brokerage account?

A. Yes, to reduce the amount owing us.

Q. At the end of 1946, what was this, a corporation, you were dealing with?

A. The General Confections, Incorporated.

Q. Did you have some authority to do that, to apply that individual credit of David Lubben to the General Confections?

A. Well, I was told it was discussed with him, and he agreed to it, and we proceeded.

Q. So that was sort of a settlement, or adjustment, some way, of working out the open account?

A. Some way to get the money that he owed us, yes.

Q. Did you know that his company was in bankruptcy at that time?

A. We didn't know about it until March of '48.

399 We had a notice of it.

Q. Now, so far as you are concerned, so far as you know, if I get this correctly, you put on—everything on the books which you had any knowledge of was owed to that company that you were working for?

A. Yes, I did.

400 Q. And you put on the books what you thought was owed from Eatsum, from Lubben, and you got that from the invoices themselves?

A. Yes.

Q. Now, did you ever authorize anybody down at Eatsum, or did you ever authorize Mr. Lubben to mark up those invoices in any way?

A. Our invoices to him?

Q. Yes.
A. No.
Q. You were in charge of the bookkeeping, were you not?
A. Yes.
Q. You never told him he could go out and mark your invoice up, did you?
A. No.
By Mr. McConnell: That is all.

Redirect Examination by Mr. Lockley.

Q. Mrs. Morrill, I am a little confused by your testimony on cross examination. At one point I understood you to tell Mr. O'Brien that you knew at the time you filed the—or signed the 1946 return that it didn't
401 include all of the income the corporation had received, is that right?
By Mr. McConnell: I object to him cross examining his own witness.
By the Court: Overruled.
By Mr. Lockley: I am just attempting to straighten the witness's story out.
By the Court: She may answer.
By the Witness:
A. I said at the end—the '46 corporation return I did not know of all the income.
By Mr. Lockley:
Q. Yes.
A. Well, I didn't know at that time about the unbilled shipments.
Q. Did you know about the—
A. I knew about those overages.
Q. You did know about the overages?
A. Well, I saw money come in the place and I knew it was coming from him.
Q. Well, did you also tell—I believe it was Mr. Kirby, that you didn't know anything about this additional money until after this investigation had begun?
402 A. Well, I am sorry. I am confused on that.
Q. Well, so am I. That's what I am trying to get straightened out.
A. The unbilled shipments I didn't know about until they told about the disclosure. But I knew about the

overages, but not the total amount. You brought out the whole total amount. I didn't know about that.

Q. You knew about 60 or 70 thousand dollars?

A. Yes, that's right.

Q. That's 60 or 70 thousand dollars that was in the cash box or the vault?

A. That's right, in the company vault.

Q. Did you know of any money that wasn't in the cash box or in the vault?

A. Well, I knew they had some money in the bank vault downtown, but I had no access to it and I didn't know how much it was.

Q. That was separate from the money that was kept at the factory?

A. Yes.

Q. Was any record kept of that?

A. I don't know.

403 Q. Did you keep a record of it?

A. The money in the vault downtown, no.

Q. No, any of the money?

A. I had a personal record of what they gave me to put in the box, yes.

Q. Where is that record now?

A. I don't have it.

Q. Where is it?

A. I didn't preserve it. I threw it away.

Q. Why?

A. Well, it was my own personal record.

Q. Who told you to?

A. Who told me to keep it?

Q. Did anybody tell you to destroy that record?

A. One day I was cleaning up. I asked Mr. Cain if it was of any value, and he said, "No, throw it away." It was nothing that he had told me to keep, or nothing he ever saw.

Q. You also said that you put on the books all of the receipts that you had any knowledge of. Did you mean that you also put the premium payments that you knew of on the books?

A. No, but I think you were referring to invoices.

Q. Oh, then you did put on the books, of course,
404 all of the invoices, everything that is typed on the invoice went on the books?

A. That's right.

Q. But anything that wasn't on the invoices was not on the books, is that right?

A. Well, that money was not on the books, no.

Q. Now, reference was also made to marking up copies of invoices. As I understood it, the customer gets the original of these invoices?

A. Yes.

Q. Just the original, that is all?

A. Yes.

Q. It is his, isn't it, from that point on?

A. That's right.

Q. Anything he wants to do with it, it's all right?

A. Yes.

Q. So he can mark it up, if he pleases, can't he?

A. Yes, he can.

By Mr. O'Brien: Not with Shotwell's authority.

By Mr. Lockley:

Q. Now, reference was also made to some markings on Government Exhibit for identification, No. 200, to the effect that it says, "Bankrupt." Did the Shotwell 405 Manufacturing Company receive everything but $656.56 of that account, despite the fact that Mr. Lubben was a bankrupt?

A. Well, everything on that card, yes.

Q. That's what I mean.

A. Yes.

Q. No more money is due and owing to the Shotwell Company?

A. Not according to the cards.

Q. Who was the biggest customer Shotwell Manufacturing Company had during this period of time, 1945 and 1946, do you know?

A. Well, you would have to ask me what type of customer.

Q. Dollar-wise, I mean.

A. Well, if you ask me, F. W. Woolworth.

Q. Did you ship directly to F. W. Woolworth?

A. Yes.

Q. And how about Mr. Lubben? Was he a pretty big customer?

A. He was the largest of that type of account.

Q. He was the largest?

A. Yes.

By Mr. Lockley: That is all.

406 By the Court: Any further recross?

By Mr. McConnell: No.

By the Court: The witness now may be excused?

By Mr. Lockley: Yes.

(Witness excused.)

By Mr. Lockley: The Government offers into evidence Government Exhibits Nos. 50-A, 51-A, 51-B, 52-A, 52-B, 53-A, 54-A, 56-A, 56-B, 57-A, 58-A, 59-A, 60-A, 60-B, 61-A, 61-B, 62-A, 64-A, 64-B, 65-A, 65-B, 65-C, 66-A, 66-B, 66-C, 67-A, 67-B, 68-A, 69-A, 70-A, 71-A, 72-A, 200, 200-A, and 200-B.

By Mr. McConnell: No objection.

By the Court: The Exhibits may be received.

Am I correctly informed, Mr. Lockley, that these invoices purport to relate to shipments to Eatsum Food Products Company that were reflected on the books of Shotwell?

By Mr. Lockley: Yes, your Honor, at least to the amount of the price shown on the invoice, typewritten.

By the Court: All right.

407 (Said documents were received in evidence by the Court and marked respectively Government's Exhibits 50-A, 51-A, 51-B, 52-A, 52-B, 53-A, 54-A, 56-A, 56-B, 57-A, 58-A, 59-A, 60-A, 60-B, 61-A, 61-B, 62-A, 64-A, 64-B, 65-A, 65-B, 65-C, 66-A, 66-B, 66-C, 67-A, 67-B, 68-A, 69-A, 70-A, 71-A, 72-A, 200, 200-A, and 200-B.)

408 DAVID G. LUBBEN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Your name is David G. Lubben and what is your address, Mr. Lubben?

A. 1890 Pacific, Santurci, San Juan, Puerto Rico.

Q. What is your present occupation?

A. I am engaged selling lighting fixtures and church supplies in Puerto Rico.

Q. And what was your occupation previously?

A. I was formerly in the candy business.

Q. Keep your voice up so the jurors in the last row

there can hear you. When did you begin in the candy business?

A. In 1943, sir.

Q. And were you employed at that time?

A. Yes, sir.

Q. And by whom?

A. I was employed by the Berry Biscuit Company.

Q. What was the name of the organization for which you were employed?

409 A. For a while by the Berry Biscuit Company and then later on a company was formed to handle the candy division, Eatsum Food Products Company.

Q. And that was owned by the Berry Biscuit Company, was it?

A. Yes, sir.

Q. Now, after you had worked with the Eatsum Food Products Company, as a division of the Berry Biscuit Company, what did you do?

A. Later on I continued Eatsum Food Products Company as a sole ownership.

Q. You bought it from Berry Biscuit Company?

A. Yes, sir.

Q. And when did you purchase it?

A. I believe it was April or May of 1944, maybe a little earlier.

Q. And how long did you remain as the sole owner of the Eatsum Food Products Company?

A. Until June of 1945.

Q. And then what happened?

A. It became a partnership. I sold a fifty per cent interest in the company.

Q. Did the company name remain the Eatsum Food Products Company?

410 A. Yes, sir.

Q. And who were you partners with?

A. William Giglio.

Q. And any other partners?

A. Yes, sir. He was a general partner, and on his side there was a Frank Livorsi and a Frank Loperfido, and I believe their wives.

And on my side was a Ronald Stone, and a Roy Hankermyer.

Q. You and Mr. Giglio were so-called general partners and the balance of these were limited partners?

A. Yes, sir.

Q. Did they actually have any interest in the business, to your knowledge?

A. Well, I don't know about Mr. Giglio's—the partners on his side, whether they did or didn't, but this limited partnership, or this partnership, and these limited partners was something that went in at the very last minute, when we were in the lawyer's office, and I don't think that my—I am very sure that my people didn't have any interest in it. It was mine. I was fifty per cent owner of the business.

Q. Now, how long did you remain as a partner?

411 A. Until March 7th or 8th of 1946.

Q. What happened at that time?

A. I just left and they took certain assets and I took certain assets and I started General Confections, Inc.

Q. Was the partnership dissolved as of March 7th or 8th, 1946?

A. No, sir, it was not.

Q. It continued in existence, but without your presence, is that it?

A. That's right.

Q. Do you know when it was formally dissolved?

A. No, sir; but I knew it was in existence for some months after. When it was dissolved I really don't know, or if it ever was dissolved.

Q. Now, when you withdrew from the partnership, on March 7th or 8th, 1946, then what did you do?

A. When I withdrew from the partnership I formed General Confections.

Q. And is that a corporation?

A. Yes, sir; it was a corporation.

Q. And who owned the stock?

A. Well, I owned most of the stock, sir, I mean the control of it, I would say. Later on we sold the stock

412 to some people who invested in it. Whether I had the control or not, I was the largest individual stockholder.

Q. And were you also an officer?

A. Yes, sir; I was the president.

Q. And who were the other officers?

A. I believe Roy Hankermyer was vice president and I believe a Mr. Perkins was secretary or treasurer. I am not quite sure of that, sir.

Q. And who is Mr. Hankermyer?

A. He is an uncle of mine, sir.

Q. Is he now living?

A. No, sir; he died last year.

Q. Now, did you remain as the president of General Confections throughout 1946?

A. Yes, sir.

Q. And what eventually happened to that organization?

A. Well, March 8, 1948, General Confections went into receivership under the laws of the state of New Jersey.

Q. It went into receivership, not bankruptcy?

A. No. But to me it meant the same thing.

Q. Didn't have any money, is that it?

A. That's right, sir.

413 Q. Now, were there any other organizations in which you had a financial interest during 1946?

A. Yes, sir; there was a Saddle River Farms over in New Jersey. And on that property was my home, and it was twenty-six acres of land, and it had the factory on it, which later was used as a factory.

Q. And how about the General Confections, did it have any other interest?

414 A. Yes, sir; General Confections did, sir. It owned Reserve Trading Company, which was a wholly owned subsidiary of General Confections.

Q. That is, General Confections owned all of the stock in the Reserve Trading Company, is that it?

A. Yes, sir.

Q. What was the nature of the business conducted by the Eatsum Food Products Company when you were the sole proprietor?

A. Well, we bought—we started out repacking merchandise. By that I mean we bought candy in bulk, and packaged it in smaller packages. And we made—later on in the single sole proprietorship we started to manufacture some candy.

Q. What sort of candies were these that you repackaged?

A. Well, almost any kind of candy you could buy in bulk, sir. But anything that would come along in bulk, sir.

Q. And did the business remain the same during the period of the partnership?

A. Yes, sir; very much the same, although we didn't do so much repackaging of candies. We bought that, we didn't manufacture. We sold most of those candies we
415 bought on the outside in bulk. We sold them in the cases that they came in.

Q. You manufactured some, and you sold some, more or less as a broker, is that the idea?

A. No, sir; we bought and sold the candy. We would pay for it, and then turn around and sell it on an invoice.

Q. You were a jobber, then?

A. Yes, sir.

Q. What was the nature of the business of General Confections; did that change any?

A. No, very much the same, sir.

Q. When you formed the General Confections Corporation, what did you contribute as the assets for your stock.

A. The machinery that I had when I left the partnership. What I had was the leasehold, and the machinery that was in the plant, and I contributed that, and I think —I don't remember how much money, but it was very little money.

Q. Now, during this period of 1945 and 1946, did you keep regular books of account?

A. Yes, sir.

Q. Did you keep them personally?

A. No, sir.

416 Q. Who kept them for you?

A. When you say in '45 and '46, you are talking about the partnership, sir?

Q. 1945. I understood that there was a sole proprietorship until March 8th, you said—till June 1st, pardon me. A sole proprietorship until June 1st, then there was the partnership until March, '46?

A. Yes, sir. Those books were kept under the direction of Miss Beatrice Feldman for part of the time, until—when I left the partnership on March 8, 1946, Miss Feldman didn't come with me. That was the name of the bookkeeper. She didn't come with me for three or four months, but her assistant did come. So her assistant took care of the books, I'd say, from March until, say, about August the first.

Q. What was the assistant's name?

A. Freda Strum.

Q. Freda Strum, is that her present name?

A. Yes, sir. I think her name was Seider.

Q. Now, are you familiar with what Miss Feldman's duties were at that time, in 1945 and 1946 when she worked for you?

A. Yes, sir. She was in charge of the office, manager,

during the time I stated that she was in charge of the 417 books.

Q. was there anyone else who did any work on the books besides Miss Feldman and Miss Strum?

A. The accountant, sir.

Q. And who was that?

A. Mr. Bernard Bercu,

Q. Was he a certified public accountant?

A. Yes.

Q. What was the nature of the work he performed?

A. He just went over all the figures to see whether they were true and correct and would issue a statement.

Q. Did he make an audit, and so forth, make out a profit and loss statement?

A. Yes, sir.

Q. Did he prepare income tax returns and so forth?

A. Yes, sir.

Q. Do you know the defendants Byron Cain, Harold Sullivan and Frank Huebner?

A. Yes, sir.

Q. Will you point them out?

A. Well, the gentleman sitting in the back with the gray suit on is Mr. Frank Huebner and the gentleman sitting in front of him in the blue suit is Mr. Byron Cain, and the gentleman sitting with the gray hair and 418 glasses at the end of the table is Mr. Harold Sullivan.

Q. Indicating the defendants. When did you first meet them or any one of them?

A. In 1943, sir.

Q. Are you able to place the date any more definitely than that?

A. I think it was the latter part of 1943.

Q. Where was this?

A. It was at the office of the Shotwell Manufacturing Company here in Chicago.

Q. Who was there at the time?

A. Mr. Frank Huebner.

Q. Were the other defendants there?

A. I don't recall seeing them at that time, sir.

Q. Was there anyone else there besides just yourself and Mr. Huebner?

A. I think Mr. John P. Bond.

Q. Who is he?

A. Mr. Bond was a broker for the Shotwell Manufac-

turing Company in Los Angeles and he was a broker for Eatsum Food Products or the Berry Biscuit Company in Los Angeles.

Q. Well, you had previously known Mr. Bond, had
419 you?

A. Yes, sir.

Q. What happened at this meeting with Mr. Bond and Mr. Huebner?

A. Well, I had asked Mr. Bond—he told me he represented the Shotwell Manufacturing Company in California and I asked him if I could—

By Mr. McConnell: I object to this conversation. So far as the Shotwell Company is concerned, the conversation with Mr. Bond—my client is not bound by that.

By the Court: Yes. It was in the presence of the other defendants.

By Mr. Lockley:

Q. Did Mr. Huebner—was Mr. Huebner present during the course of this conversation?

A. That is correct.

By the Court: All right.

By Mr. Lockley:

Q. Just tell what the conversation was while Mr. Huebner was present.

A. Well, Mr. Huebner—as I say, I had asked Mr. Bond
to see if we couldn't get the Shotwell line of merchan-
420 dise to sell in New York.

By Mr. McConnell: Now, wait a minute. Is this conversation at this time or are you telling something that happened prior to that time?

By Mr. Lockley:

Q. Don't give us any background. Just tell us what happened at this particular time.

By Mr. McConnell: I move to strike out the conversation unless it shows who took part in the conversation.

By the Court: Yes.

By the Witness:

A. Well, sir, Mr. Bond introduced me to Mr. Huebner.

By Mr. Lockley:

Q. Now, tell us what was said.

A. I asked Mr. Huebner if I could represent the Shotwell Company in New York City as they, to my knowledge, had no representation.

Q. Yes.

A. And Mr. Huebner told me that they had very much oversold and they couldn't think of opening up any more territory because they were shipping all raw materials
421 and they couldn't produce enough candy as it was.

Then Mr. Huebner told me they were especially short of chocolate so he asked—Mr. Huebner, he asked me if I could get any chocolate, and I said, yes, I could, and if I could get them some chocolate, could I get the Shotwell Manufacturing line, and he said, well, he would see what he could do and I told Mr. Huebner that I can buy this chocolate and I can sell it to somebody else and I can make a profit and it would probably be ten cents a pound and maybe a little more but I will sell it to you for as near my cost as possible, or my cost, if you can arrange that I get the Shotwell line because I want to be a broker in New York City after the war is over and the Shotwell line was a very fine line as around this I felt I could build the nucleus of a good brokerage business, so if I could get the chocolate, would that help you?

He said he would check with Mr. Cain and he would let me know.

422 Q. All right. Did you subsequently sell some chocolate to the Shotwell Manufacturing Company?

A. I did, sir.

Q. Do you remember how much?

A. I believe I sold them a shipment of 50,000 pounds, which would be a carload, and maybe two or three other shipments of lesser amounts, 30,000, 20,000. Maybe it was generally twenty.

Q. Was there a ceiling price on that product at that time?

A. Well, it was sold on an invoice, sir. It was debatable whether it would be ceiling or not. I don't remember the type of chocolate it was.

I mean, I bought the chocolate from somebody else and resold it. To the best of my knowledge it would be a legitimate ceiling, because I was a jobber.

Q. Did you ultimately become a broker for the Shotwell Manufacturing Company?

A. Yes, sir, I did. The Shotwell Company paid me for that chocolate and they gave me an allocation of so many marshmallows, and so many of their Hi-mac bars for the New York area.

Q. First, perhaps you better tell us again what a 423 broker is?

A. Well, in the candy business, a broker is a commissioned salesman. He takes an order and takes it from the customer and sends the order to the factory, and the factory ships the order to the customer, and the customer will pay directly to the factory, and then the factory gives you a commission.

In this case, it was five percent.

Q. You said that you had an allocation. What did you mean by that?

A. Well, I was allowed to sell 10,000 bars of Hi-macs and I believe one car of marshmallows every month. I could have sold many times that amount.

Q. Well, did you attempt to get that allocation increased then?

A. Oh, yes, continuously, sir.

Q. Did you have any conversations with any of the defendants about it?

A. Yes, sir.

Q. And when, and with whom?

A. It was Mr. Huebner.

Q. Do you know when?

A. I believe it would be early in 1944. I asked him if they could increase my quota, or give me some of the 424 bulk candy that they were manufacturing.

Q. What did he say?

A. Well, Mr. Huebner did give me—

By Mr. McConnell: Where was this conversation? Can you fix a time and place?

By Mr. Lockley:

Q. Can you fix the place?

A. Yes, sir, I would say it was probably in April or May of 1944.

Q. And where?

A. In the Shotwell Manufacturing Company plant.

Q. In Chicago?

A. Yes, sir. I am sure it was there.

Q. Do you know who else was present besides yourself and Mr. Huebner, if anyone?

A. I don't recall, sir.

Q. All right. You may proceed with the conversation.

A. So, Mr. Huebner, as a result of this conversation, Mr. Huebner did give me six or seven shipments of so many—

By Mr. McConnell: Wait a minute. Have we got a conversation, or are we telling—

By Mr. Lockley:

Q. Just tell what was said.

425 A. Well, I asked Mr. Huebner, I told him, I said, "You make a bulk item known as baby spice drops, or citrus drops which is sort of a gum drop", and I asked him if I couldn't get some of these, and he told me they were very, very much oversold, and he would see what he could do, and he did give me, or did sell us, rather, that is, Eatsum Food Products, the sole owner, seven or eight shipments, for which we paid him.

I wanted to increase it, and I would say some time in August or September, I had a conversation with Mr. Huebner. Whether it was in New York or Chicago, I don't remember, but I was almost always looking for more candy, because the demand was so great, and they couldn't do—they couldn't do anything for me on the bars or the marshmallows because the packaging machines just couldn't pack so much, and I believe they had Government contracts, but with bulk candy he could get, I asked would he do something, but he said it wouldn't pay him to make them; there was a very low ceiling price, and they were losing their shirt, and it just didn't pay to make the candy and sell it at that particular price.

426 I said, "Well, Mr. Huebner, why don't you increase the price?"

He says, "Well, you can't do that. You can't get the OPA to go along with it."

I said, "As far as I am concerned, you can increase the price," but no, he couldn't do it.

Then he said, "Would you be willing to pay a cash premium for the merchandise?

And I said I would and it was decided on then—

Q. Did you discuss how much?

A. Yes, sir. I believe it was 10 cents a pound.

Q. On what type of item?

A. On an item called, I believe it was called citrus drops or spice buttons or which, as I say, was what they call gum work. It was a jelly piece.

Q. Do you know what the ceiling price was on that particular item?

A. Yes, sir. I believe it was thirteen cents a pound or twelve and a half cents a pound, something like that.

Q. You say you entered into an agreement. Was there anything ever done as a result of that agreement?

427 A. He asked me if I would be willing to pay it.

By Mr. McConnell: I object to a characterization of this conversation or agreement.

By Mr. Lockley:

Q. Well, was there anything done as a result of the conversation?

By the Court: Are you relating anything further that took place in the conversation?

By the Witness:

A. Yes, sir. Mr. Huebner told me, well, he would have to check with Mr. Cain.

By Mr. Lockley:

Q. And was there any more conversation?

A. Well, later, sir, I got the merchandise.

Q. Well, did you discuss it any more with Mr. Huebner?

A. Yes, I did, sir. Whether it was that day or the next day—he told me that I could get some merchandise and I would have to pay ten cents a pound in cash and I would be invoiced for the ceiling price on an invoice and then I was also, sir—he asked me how, what I intended to do with the merchandise and I told him I was going to repack it

428 or sell it and how would the—and the payments were to be made in cash, that is, the over the ceiling price.

Q. Now, during the period in 1945 from January 1st until, I believe, the 1st of June, you were the sole proprietor?

A. Yes, sir.

Q. Did you buy candy from the Shotwell Manufacturing Company at that time?

A. Yes, sir.

Q. What kind of an arrangement or what did you do with respect to paying for that candy?

A. Well, sir, when the invoices would come in for a shipment of candy, which would show the ceiling price, I would instruct my bookkeeper, Miss Feldman—

By Mr. McConnell: I object to what he had done there in New York with his bookkeeper. It is not binding on my people.

By Mr. Lockley:

Q. Never mind what you instructed your bookkeeper to do. What was done?

A. On the face of the invoice, we would add in pencil

the amount of the per pound of the overage and as far
429 as I was concerned that was the cost of the merchandise.

By Mr. McConnell: I object to that. It is not up to my client to account for what he did with his invoice in New York.

By the Court: It may stand.

By Mr. Lockley:

Q. With respect to the amount of the invoice price that was typewritten on the face of the invoice, how was that paid?

A. I beg your pardon, sir.

430 Q. How was the invoice price paid to the Shotwell Manufacturing Company?

A. By check, sir.

Q. Drawn to whom?

A. To the Shotwell Manufacturing Company.

Q. Now, with respect to the additional ten cents a pound over ceiling, or whatever, whatever the other amount was, how was that paid?

By Mr. McConnell: I object to the general characterization of how it was paid. I think we are entitled to know the time and place, and so forth..

By the Court: Yes, I think the place and the time, and the circumstances should be related of when they made payments other than by checks. That is what you are interrogating about, is it?

By Mr. Lockley: Yes, sir.

Q. Now, Mr. Lubben, I show you Government's Exhibit for identificati. . No. 18-B, and 18-A. 18-A purports to be an original of an invoice of the Shotwell Manufacturing Company, No. 6542623, dated November 27, 1944, sold to the Eatsum Food Products Company, 491 cases of citrus drops.

431 And the next one is Invoice No. C54388.

By the Court: What do you mean, the next one?

By Mr. Lockley: Exhibit 18-B. I am sorry.

Q. It is for 512 cases of citrus drops. Have you seen those exhibits before?

A. Yes, sir.

Q. And they have some writing in pencil or ink on the bottom. What does that purport to be?

A. Well, this is the amount of the overage. The in-

crease was the amount of the overage on this particular transaction.

By Mr. O'Brien: Your Honor, I think we will object to items in 1944. It is beyond the scope of anything of the indictment or the bill of particulars.

By the Court: What is your position on that?

By Mr. Lockley: If your Honor please, it establishes a continuous course of conduct going to the willfulness of the defendants in the first part, and for the second, it was my intention to show that this began in 1944, certain
432 payments were in 1944, and the shipments were made in 1945, and it thereby ties in with the line here.

By the Court: I will overrule it.

By Mr. Lockley: I am sorry. I didn't hear you, sir.

By the Court: I will overrule the objection.

By Mr. Lockley:

Q. Will you answer the question? Did you complete your answer, Mr. Lubben?

A. Yes, sir. That was the writing in ink. The writing in ink is my writing, and the writing in pencil, sir, is the writing of the bookkeeper figuring the amount of the overage.

Q. The unit price of this is 13 cents a pound, and the amount of overage then is 50 cents a pound. Now, I show you an Eatsum Food Products Company receiving ticket, No. 12478, Government Exhibit 18-B, dated December 1, 1944 for 491 cartons of cocoa almond candy. Is there any relationship between Government Exhibit for identification 18-A, and 18-B?

A. Well, sir, it is the same number of cartons,
433 and it is the same number of pounds but there is two different types of candy.

Q. Do you know what kind of candy was actually shipped?

A. Yes, sir, cocoa almonds.

Q. Do you know why the invoice shows that it was citrus drops?

A. Yes, sir, I do.

Q. Will you explain it, sir?

A. Yes, sir. Mr. Huebner called me on the phone—

Q. When was this?

By Mr. McConnell: Was this transaction in 1944?

434 By Mr. Lockley:

Q. When was this?

A. I believe it might be 1944, sir.

By Mr. McConnell: I object to it. It is outside of the indictment.

By the Court: Well, I think you should more definitely indicate the time than 1944.

By Mr. Lockley:

Q. Are you able to state more definitely the time?

A. Well, sir, I would say it was probably the first—maybe the latter days of November or the first days of December. It was just a few days before the shipment was made.

Q. He called you on the telephone or did you call him?

A. No, sir. Mr. Huebner called me.

Q. Did you recognize his voice?

A. Yes, sir.

Q. Did he identify himself?

A. Well, he probably says, "This is Frank." I mean, I knew him. I talked to him.

By Mr. McConnell: I object to what he probably said.

This is a serious business that we are in and we are 435 entitled not to have things guessed at.

By the Court: I suppose he is giving his best recollection. It may stand.

By Mr. Lockley:

Q. Do you know Mr. Huebner's voice on the telephone?

A. It was Mr. Huebner, sir.

Q. What did he say?

A. He told me that he had a substantial amount of cocoa almonds, which was an almond coated with some chocolate and then some cocoa on the side that were on the floor and I could have these almonds, or he would sell these almonds to me, but he would have to invoice them as citrus drops.

I says, "Why?"

And he said, "Well," he says, "they want a lot of money," or "a lot of cash money," and by shipping the citrus drops—with the 13 cent drop item—the price of the cocoa almonds, I believe, at that time was 48 cents—he would get that much additional cash.

So, I was agreeable and he shipped me 491 cases of citrus drops on this invoice and it states it was 491 cases of 436 citrus drops on the invoice at 13 cents a pound but in reality, it was 491 cases of cocoa almonds, which the weight would be the same, the only difference being instead

of getting 10 cents a pound premium on the citrus drops, he got 50 cents a pound premium on the shipment, or the amount of $5,401.00.

437 Q. How was that paid?

A. The $5,401.00?

Q. Yes.

A. This was added to a recap sheet which we kept of these overcharges in the office, and it was paid in cash.

By Mr. McConnell: I object to the summary and that it was paid in cash. I think we are entitled to have the time and place stated and what was paid where.

By the Court: Yes.

By Mr. McConnell: I move to strike that out.

By Mr. Lockley: I will connect it, if your Honor please.

By the Court: Very well.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 22-E which purports to be a yellow sheet of paper with some writing on it dated December 19, 1944. Have you seen that before?

A. Yes, sir, I have.

Q. What is it?

A. It is sort of a recap sheet.

438 By the Court: Mr. Lockley, you have to stand near the witness, I appreciate, when you have an exhibit, but when you stand next to him when you interrogate him, he just talks to you and it is difficult for me to hear. As soon as you can, will you go back to the counsel table after showing him an exhibit?

By Mr. Lockley: I am sorry.

By the Witness: I am sorry. I will speak louder. This is in my handwriting and it is a recap sheet showing certain payments of money or certain figures of money.

By Mr. Lockley:

Q. Are you able to state the amount of money shown on that recap sheet?

By Mr. McConnell: I object to that. The document speaks for itself.

By the Court: Yes. You are calling for the contents of an exhibit.

By Mr. Lockley:

Q. Are you able to state with respect to the payments which were made during the time around December, 1945

or 1944, rather, how much was paid to the defendants
439 at that time, in currency?

By Mr. McConnell: I object to that. It assumes that the payments were made, and it assumes that the payments were made in currency and the Court has already ruled that we are entitled to have the time and place fixed of the transaction.

By the Court: Yes.

By Mr. Lockley:

Q. Mr. Lubben, did you ever hear of the ABC Candy Shippers?

By the Court: A little louder, Mr. Lockley.

By Mr. Lockley: I am sorry.

Q. Did you ever hear of the ABC Candy Shippers?

A. I heard of them only by—that is, I have never heard of them. I have seen the name on a bill of lading.

Q. And in what connection did you see that name?

A. On a shipment of candy from The Shotwell Manufacturing Company.

Q. Was that a shipment which was sold to you?

A. Yes, sir.

Q. Did you have any conversation with any one of the defendants with reference to—

440 By Mr. McConnell: I want to get it clear.

You mean, sold to Mr. Lubben personally?

By Mr. Lockley:

Q. Is that your answer, that it was sold to you personally, sir?

A. By selling—it was sold to me, but it wasn't shipped to me.

By Mr. McConnell: Well, sold to you or your company?

By the Witness: It was sold to Eatsum Food Products Company, I believe. If you give me the date, I believe I can tell you, sir.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 146, which purports to be an original bill of lading from the ABC Candy Shippers to the Ace Forwarding Company in New York City. Have you seen that bill of lading before?

A. Yes, sir, I have.

441 Q. And in what connection?

A. Well, it was—it seems to me when there was a shipment of merchandise by the Shotwell Manufacturing

Company to the Ace Forwarding Company and which I paid for.

Q. Which you paid for?

A. Pardon me, sir. The General Confections, Inc.

By Mr. McConnell: I object. What was the occasion on which it was seen?

By the Court: Yes.

By the Witness:

A. I seen it several times.

By Mr. O'Brien: What was the date of that?

By Mr. Lockley: I was just going to get it. This was dated 3/4/46.

Q. Does that refresh your recollection as to whether that was shipped to the sole proprietorship or the partnership of the corporation?

A. That was a deal of the corporation, sir, General Confections, Inc.

Q. Do you have any recollection as to whether or not the General Confections paid for that shipment?

442 By Mr. McConnell: I object to that. If they paid for that, there must be some better evidence than his general recollection.

By the Court: It may be sustained.

By Mr. Lockley:

Q. Now, then, Mr. Lubben, do you have any recollection as to the time and place of the making of any payments to any one of the defendants?

By Mr. McConnell: That assumes that there were some.

By Mr. Lockley:

Q. Well, were there any payments?

A. Yes, sir, there were.

Q. Do you recall, do you have any recollection as to any particular time and place, any particular incident?

A. Any particular one instance?

Q. Which one incident?

A. Well, in regard to that shipment, I remember about the shipment you just asked me about to that forwarding company. I recall that instance.

Q. All right. Where was this?

A. Right here in Chicago.

443 Q. And when?

A. It was probably a day or two before that, the day the shipment went.

Q. And where? Where in Chicago? Can you be more specific?

A. I believe, sir, it was in the Sherman Hotel, in my room.

Q. Who was present?

A. Mr. Huebner.

Q. Well, what happened?

A. Well, Mr. Huebner told me that he could give me a lot of candy.

By the Court: He could give you what?

By Mr. Lockley:

Q. On this conversation?

A. Yes.

Q. At this particular conversation?

A. Yes, sir. I think that was an unbilled shipment.

Q. All right. Keep your voice up.

A. Mr. Huebner told me that his partners, Mr. Cain and Mr. Sullivan were always looking for more money, a lot of cash.

He says, "If you can keep the cash coming, I can give you a lot of merchandise."

444 By Mr. Kirby: I object to that, if your Honor please. It is not binding on the defendant Sullivan.

By the Court: All right. That was understood. But it is only binding on defendant Huebner and not binding on defendant Sullivan.

By Mr. McConnell: I would like to make the same objection as to the corporation.

By Mr. O'Brien: We all make the same objection.

By the Court: All right. That may be so understood.

By Mr. Lockley:

Q. Can you continue with the conversation, if there is any more?

A. He told me he could give me a lot of merchandise—but they had to have a lot of cash, that he wanted a lot of cash and instead of billing or taking the overage for ten cents a pound, that he could give me, I believe it was 80 or 100 thousand pounds of these citrus drops or spice drops or if I paid him 100 per cent cash—and by that I mean if I didn't—if I—there would be no invoice at all. Just

445 all cash. I was willing, so he sold them to me.

Q. And does that complete your recollection as to that particular conversation?

A. Well, sir, he wanted the money paid in advance on that shipment.

Q. I see.

A. And if I recall correctly, I went and borrowed the money on that shipment from somebody else and I paid him part of the profit.

446 By Mr. Kirby: I object. It is a pure guess, on his part, borrowing money from an unnamed person. It is a speculation. I move that it be stricken.

By the Court: I am sorry. I didn't hear that.

By Mr. Kirby: I say, it is a pure speculation on his part. He says he guesses he got it from somebody else. If he did, he can specify when and where he got the money.

By Mr. McConnell: I object to the same statement on the same ground. We are entitled to know when and where it was paid.

By the Court: He can testify as to the circumstances.

By Mr. Lockley: He has already testified, I think, to the place and time.

By Mr. O'Brien: No, he hasn't.

By Mr. McConnell: No, he hasn't. He is talking about a conversation.

By the Court: He can testify about the circumstances under which he paid him, paid Mr. Huebner this money.

447 By Mr. Lockley:

Q. What were the circumstances under which you paid Mr. Huebner the money?

By the Court: And where?

By Mr. Lockley:

Q. Where and when?

A. Well, I believe the money was paid, sir, in the office of the Shotwell Manufacturing Company and I believe—I feel very sure that it was paid by me to Mr. Huebner.

Q. Do you know how much it was?

A. I think it was more than $19,000.

Q. And in what form was the money paid?

A. Currency.

Q. Was anyone else present at that time?

A. Mr. Huebner.

By Mr. Lockley: That is all.

By the Court: All right. It is adjournment time. We will be in recess, Members of the jury, until ten o'clock tomorrow morning.

May I see counsel for a minute?

448 (Whereupon the following proceedings were had outside the presence and hearing of the jury:)

By the Court: I think we will hear that motion at nine thirty. I don't like to disturb the trial with a New York lawyer coming down here. I told the jury it would be ten o'clock tomorrow morning.

By Mr. Lockley: I don't know what train he is coming in on. He seemed to feel he would get here as early as he could.

I will call him tonight if he hasn't already left.

By the Court: I suppose he has already left New York. I thought I wouldn't interrupt the trial by hearing motions. At least if we could set it for nine thirty—

By Mr. Lockley: We can have him wait until Thursday and argue the motion at nine o'clock then, Thursday morning.

By the Court: We will talk it over. If you see him earlier, you can tell him.

By Mr. O'Brien: It makes no difference to us whether it is nine or ten o'clock, just so we know when he will be here.

449 By the Court: Suppose you come in at nine thirty tomorrow. He may be in here.

By Mr. McConnell: We will try to get his local counsel, and get him here at nine thirty.

(Whereupon an adjournment was taken in the above cause until 9:30 o'clock a.m. the following morning, being Wednesday, September 16, 1953.)

450-473 • • •

Chicago, Illinois
Wednesday, September 18, 1953
9:30 o'clock A.M.

474 By the Court: Well, if I understand Mr. O'Brien—and I suppose he speaks for other counsel—they are willing to stipulate that if Mr. Giglio was called to the stand he would claim his constitutional privilege and refuse to respond to the subpoena served on him by the government, and by the defendants, on the grounds that the production of the documents referred to therein would incriminate him.

Now, then, in light of that stipulation aren't you in a position to claim the same right, if you have it, to intro-

duce secondary evidence as you would as if he were formally called and put on the stand?

By Mr. Lockley: If that is your Honor's ruling, I think—

By the Court: That isn't my ruling. That is my question.

Well, give it some thought, Mr. Lockley, and perhaps during the morning we can dispose of it.

By Mr. Lockley: Well, I think, your Honor, if it would constitute notice to the Court that those records are unavailable because Mr. Giglio refuses to produce them on his constitutional grounds and your Honor recognizes
475 that there would be certain secondary evidence which would then be admissible, I think that would be enough.

By the Court: Well, I don't know that I am now asked to pass upon the admissibility of the secondary evidence. I gather the stipulation is merely to the effect that counsel for the defendant will stipulate—for the defendants will stipulate that if Mr. Giglio were called as a witness he would claim his constitutional privilege and that the Court, in light of that, should sustain his objection, and would sustain his objection. I suppose that would be part of the stipulation. Otherwise we wouldn't have any finality to the objection taken by Mr. Giglio.

By Mr. O'Brien: That may be considered as part of what I said.

By the Court: In other words, you recognize that the Court would be required to sustain his objection?

By Mr. O'Brien: Yes.

By Mr. Lockley: Yes.

By the Court: In light of his claim of constitutional privilege. That is the stipulation that defendants' counsel will, or are now making, right?

476 By Mr. O'Brien: Yes.

By Mr. Lockley: That is satisfactory with the government, your Honor.

By the Court: Very well.

I gather then that will dispose of your motion, Mr. Stryker. You may go back to New York.

By Mr. Stryker: I appreciate the opportunity of being here, sir. I was born in this town.

By the Court: All right. Call the jury.

Mr. Lockley, then I take it, so that the record may be

clear, that a formal order may be entered quashing the subpoenas?

By Mr. Lockley: Yes.

477 By the Court: In view of your stipulation, so the records may reflect it.

(Whereupon the following proceedings were had in the hearing and presence of the jury:)

By Mr. O'Brien: Judge, I had a number of collateral things to talk about, but with the jury in here I will ask only one, whether your Honor has entered the order on the statements.

By the Court: I have signed it, but I didn't submit it to Mr. Lockley.

By Mr. O'Brien: I gave him a copy.

By the Court: I assume it is satisfactory and I signed it yesterday.

I may say that I have the two documents submitted to me by Mr. Lockley and I have looked them over and when it is convenient I will take it up with counsel.

By Mr. O'Brien: Very well, sir. Could that be at the noon recess, Judge, so that we know what it is that we are dealing with?

By the Court: Yes, Well, there were some things I wanted to ask Mr. Lockley, because I am not entirely clear on them, we didn't discuss them. But I will take it up at the first opportunity.

478 Members of the jury, I regret that we had to keep you waiting, but we had some other matters to dispose of and that is why you were required to remain out in the ante room.

By the Clerk: 52 CR 143, The United States of America vs. The Shotwell Manufacturing Company, et al, case on trial.

DAVID G. LUBBEN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Ctd.) by Mr. Lockley.

Q. Mr. Lubben, you were testifying yesterday that you bought candy from The Shotwell Manufacturing Company,

and when you received an invoice you paid the amount shown thereon by check to The Shotwell Manufacturing Company.

A. That is correct, sir.

479 Q. Now, you stated that you also paid an additional price over and above the amount of the invoice.

A. Yes, sir; I did.

By Mr. McConnell: Wait a minute. I object to leading this witness as to this matter and characterizing whatever he did as payments. We are entitled to know what he did, when he did it, where it was, and the rest of it.

By the Court: I think it is a preliminary question. It may stand.

By Mr. Lockley:

Q. What I want to find out, Mr. Lubben, is what was your method of recording in your own books, what was your business practice. Now, when you received an invoice from The Shotwell Manufacturing Company, what did you do with it?

By Mr. McConnell: I object to what the practice was.

By Mr. Lockley: I think he is entitled to show, your Honor, what the business practice was.

By the Court: Well, generally, he may state.

480 By Mr. Lockley:

Q. Generally what was your practice?

A. When we got the invoice from The Shotwell Manufacturing Company it was entered in the book as a purchase and on the face of the invoice—this is during the sole proprietorship—we would enter the amount of the overage.

Q. Now, when it was entered in the purchase book in what amount was it entered?

481 A. To the amount—as far as I was concerned that was the cost of the merchandise, what they had billed us and the amount they got paid in cash, and that was the amount they paid—we paid for it.

By Mr. McConnell: I object to this witness giving explanations of what he thought about these transactions, and so forth. If he wants to show a bookkeeping transaction, there is a proper way of doing it, and how the entries are made, and so forth.

By the Court: Well, I overrule the objection.

By Mr. Lockley: That will be shown, your Honor.

By Mr. Lockley:

Q. Never mind what you thought, Mr. Lubben. Just tell what you did, what your general practice was.

Now, with respect to the checks—or, first, other than the amounts that you recorded on the invoice in pencil, and so forth, did you keep any record of the overages?

A. Yes, sir, we did.

482 Q. And what sort of a record was that?

A. Well, Miss Feldman would keep a piece of paper on her desk, a sheet of paper, and she would keep the number of the invoice, or the date of the invoice, and the number, the item, and the amount of overage, that is, by so much per pound and the total, and we would list these as the various shipments came in, until it came time to make a cash payment. Then she would draw a line and total it.

Q. Was that total in pounds, or dollars, or how?

A. The total would be listing all the shipments and it would be in dollars.

Q. And was there any breakdown on the sheet, this so-called settlement sheet, or recap sheet, as you called it?

A. Yes, sir; we broke it down by items, the various items we purchased from them, and the various amounts we paid in overage for the different items.

Q. What type of items would appear on it?

A. Well, it would vary from time to time. But we bought citrus drops from Shotwell, baby spice drops—

483 By Mr. McConnell: I object to the transactions. He is talking about transactions.

By the Court: I didn't hear your objection.

By Mr. McConnell: If your Honor please, I am objecting to his saying "we bought this and we bought that", and so forth, from Shotwell. We are talking about, as I understand it—he is trying to lay a foundation of how these books were kept. Now this man is telling us about transactions. We have no time, we have no place, we have nothing on which we can check in cross examination.

By the Court: If you are going into the transactions you have got to indicate the time and the place and the circumsances.

By Mr. Lockley: We will go into everyone of them, your Honor. I am just trying to lay a general foundation now.

By Mr. Lockley:

Q. When the time came for a settlement what was
484 your practice with respect to drawing checks?

A. Well, Miss Feldman would give me the total on the amount of the overages, the various overages, she would give me the total. Then I would make a cash disbursement slip, which was a printed form with the name —with the name of Shotwell on it, and the date, and what it was for. Then Miss Feldman would draw a check for this amount of money, and I would sign the check, and the check would be cashed, and I would give the money to Mr. Huebner.

By Mr. McConnell: I move to strike out all about the transaction with Huebner, and naming Shotwell, and so forth. If that was done, we are entitled to the documents. We are entitled to—

By the Court: I think unless you get the time and place it may be stricken.

By Mr. Lockley: All right, sir. I will connect it up right now.

By Mr. Lockley:

Q. Now, Mr. Lubben, I show you Government's Exhibit for identification No. 28-A, which is headed Shotwell Manufacturing Company. It has some entries called
485 spice buttons, gum drops, dates 1944 and 1945, amounts in pounds, and a figure of 10,849 in pencil at the bottom. Have you seen that before?

486 By Mr. McConnell: Now, I object.

By the Witness:

A. Yes; I have.

By Mr. McConnell: He has the document and read the contents.

By the Court: Yes, you shouldn't read the contents to the jury before it is offered in evidence. Have him identify it and lay the foundation, and make the offer.

By Mr. McConnell: May I ask that the jury be instructed to disregard that?

By the Court: Yes, what Lockley said as to the contents of the document, the jury is instructed to disregard.

By Mr. Lockley:

Q. Have you seen that before?

A. Yes, sir; I have.

Q. What is it?

A. This is a recap showing the amount of $10,849.00 that was given to Mr. Huebner.

By Mr. McConnell: I object and move to strike it.
By Mr. Lockley:
Q. Do you know when it was given to Mr. Huebner?
487 By Mr. Lockley: I am going to tie it up.
By the Court: Wait a minute. You can't read the contents of the document; unless you lay a foundation for it and then offer it in evidence, you can read it.
By Mr. Lockley: All right.
By Mr. Lockley:
Q. Now, Mr. Lubben, who prepared that?
A. Miss Feldman, sir.
Q. And when?
By the Court: If it is one of the original records of the office, I suppose you can approach it the way you offer any document.
By the Witness:
A. On or about January 19, 1945.
By Mr. Lockley:
Q. And was that a record kept by you in the ordinary course of business?
A. Yes, sir.
Q. Is it a true and correct report?
A. It is, sir.
Q. Was it a part of your business practice to keep such records?
A. Yes, sir.
488 Q. All right. Now, I show you Government's Exhibit for identification No. 27, purporting to be a check for cash and ask if you have seen that before.
A. Yes, sir; I have. This check is—
By Mr. McConnell: Wait a minute.
By the Court: You answer the question.
By Mr. Lockley:
Q. Is that your signature appearing thereon?
A. It is, sir.
Q. Now, turn it over. Whose signature is on the back, if any?
A. Freda Seider.
Q. Who is she?
A. Miss Feldman's assistant.
Q. What did she do?
A. She went to the bank and cashed it. We had given her that privilege, that permission.

Q. When she cashed it what did she do with the money?
A. She brought the money back and gave it to me.
Q. What did you do with it?
By Mr. Kirby: I object unless this man remembers that on that certain morning or afternoon she went out and
489 did that. Is that what he is testifying to, or as to a practice, or as to facts?
By the Witness:
A. I remembered this one, sir.
By the Court: I think, Mr. Lockley, we would get along better if you would lay a foundation for the document, if that is what you intend to do, and then upon laying a foundation offer it in evidence. Otherwise you are indirectly putting into evidence contents of the written instrument which isn't as yet in evidence.
By Mr. Lockley:
Q. Is that your check?
A. It is, sir.
490 Q. Was that check kept in the ordinary course of business?
A. Yes, sir; it was.
Q. And did it clear through the bank?
A. Yes.
Q. And then did it come back to you?
A. It came back to the company, sir, with all of the checks. But I remember this one.
Q. Did you say what you had done with the cash?
A. I gave the cash to Mr. Huebner. And I remember it distinctly, sir, because—
By Mr. Kirby: I object.
By Mr. McConnell: Object and move to strike it out.
By the Court: Unless you connect it up now. Let's get the time and place.
By Mr. Lockley:
Q. Where?
A. I gave it to Mr. Huebner in New York. And I remember the transaction because if you look on the back of that check—
By Mr. Kirby: I except to that.
By the Witness: It was broken down.
By Mr. McConnell: We are entitled to have him
491 ask the witness where it took place and who was there, and all the rest of it so that we can properly cross examine.

By Mr. Lockley:

Q. You say it was in New York City?

A. Yes.

Q. When?

A. January 19, 1945.

Q. And who was there?

A. Mr. Huebner.

Q. And what happened?

By Mr. Kirby: If your Honor please, the defendant Harold Sullivan, not having been there, there is no way he can meet this type of proof, and I ask that you instruct the jury that it must be disregarded so far as the defendant, Harold Sullivan, is concerned.

By the Court: I will instruct the jury that it is only binding upon the defendant Huebner in that he was the only defendant alleged to be there, and what took place is only binding—or relevant, rather, I should say to the defendant—competent as to the defendant Huebner.

492 By Mr. Kirby: That's right. I am glad to have the Court's instruction, because I don't want the jury to think there is anything improper in making that type of objection.

493 By the Court: It is perfectly proper for you to make that type of objection.

By Mr. Kirby: Thank you, your Honor.

By Mr. McConnell: We still don't know where this transaction took place.

By Mr. Lockley: In New York.

By Mr. Lockley:

Q. Are you able to fix it any more definitely than that?

A. Yes, sir. I am very sure it was in the Pennsylvania Hotel.

Q. Do you know who was present, if anyone, besides Huebner and yourself?

A. Yes, sir; at that time Mr. Sullivan was there and Mr. Cain was there.

Q. And do you recall whether there was any conversation at that time?

A. Well, I know there was a conversation. There were several conversations there. One conversation with Mr. Huebner.

Q. Was this in the presence of the other defendants?

A. This one was not.

Q. What was the conversation?

494 A. This conversation, sir—

By Mr. Kirby: May that conversation, in view of its having been in the absence of the defendants Cain and Sullivan be—

By the Court: If Mr. Huebner was there alone that conversation is competent only as to him.

By the Witness:

A. —because, sir, there was three five-hundred-dollar bills in the amount I gave Mr. Huebner. If you examine the reverse of the check, the bank wrote how they broke the money down and Mr. Huebner was very insistent that in the future we don't bring any bills larger than a hundred.

By Mr. McConnell: Can't we have conversation from this witness? He says insistent, and this and that.

By the Court: Tell us what was said.

By the Witness:

A. Mr. Huebner told me not to bring any more big bills, "Don't bring them any larger than hundreds and preferably in twenties."

By Mr. Lockley: Now, I offer Government's Exhibit 27, consisting of Eatsum Food Company check; 27-A, 495 consisting of a settlement sheet into evidence at this time.

By Mr. Lockley:

Q. Mr. Lubben, I offer you Government's Exhibit for identification—

By Mr. McConnell: Wait a minute. Can we see the document, please.

By Mr. Lockley: Sorry.

(Document shown to counsel.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 162—

By Mr. O'Brien: Wait till we look at it.

By the Court: Wait a little, counsel, until defendants' counsel have had an opportunity to look at the exhibits.

(Documents handed to counsel.)

By Mr. McConnell: I object to this on behalf of the corporation, if the Court please, first, that there is no proper foundation for this. It is not a bookkeeping record.

By the Court: Which exhibit are you talking about?

496 By Mr. McConnell: I am talking now about 27-A, if the Court please. It purports to be a typed memorandum of some kind. It has no indication of being a bookkeeping record at all and refers to transactions in 1944, which are outside the period of this indictment.

As to the check, I object to it as not binding upon the corporation.

By the Court: May I see it, please.

I am not clear as to this check. Did you say that you paid the cash and paid to Mr. Huebner this money?

497 By the Witness:

A. I did, sir.

By the Court: The $10,849.00.

By the Witness:

A. Yes, I did.

By the Court: It may be received in evidence.

I will receive the memo in evidence.

(Said documents were received in evidence by the Court and marked Government's Exhibits 27 and 27-A.)

By Mr. Lockley:

Q. I show you Government Exhibit for identification No. 162 and ask you if you have seen that before?

498 By the Court: So that we can get this straight, Mr. Lockley, this $19,000.00 that he contends he paid Huebner, is that the same $19,000.00 that you referred to yesterday?

By Mr. Lockley: No, sir.

By the Court: This is another transaction?

By Mr. Lockley: Yes, sir.

By the Witness:

A. Sir, this is my weekly expense account.

By Mr. McConnell: On that statement I move to strike all that evidence yesterday because that transaction showed —taking it at its face value—showed a transaction in 1944, consummated by the payment of cash, not embraced in the indictment, and has nothing to do with this lawsuit at all.

By the Court: I will deny the motion.

By the Witness:

A. Sir, this is my weekly expense account.

By Mr. Lockley:

Q. Now, was it kept in the ordinary course of business?

499 A. Yes, sir; it is in my handwriting.

Q. And was that kept as a part of the regular books and records of your company?

A. Yes, sir; it is.

Q. Was it true and correct at the time it was made?

A. It is, sir.

(Document handed to counsel.)

By Mr. McConnell: I object to it for the same reason as I did the others, and for the further reason that this shows on its face that it has been changed, January 20, 1944 to '45. It shows an alteration right on the face of the document.

By Mr. Lockley: I offer it in evidence, your Honor.

By the Court: Well, perhaps you had better interrogate the witness about the date.

By Mr. Lockley:

Q. Mr. Lubben, I call your attention to the entry on the upper righthand side, January 20, 1944. The '44 is crossed out and '45 is written over it. Do you have

500 any recollection as to how that happened?

A. Yes, sir; I do. Because December 31st is the end of the year and from force of habit I would keep on writing '44 and maybe for a week or two, until 1945. I mean, that's happened, sir.

Q. Do you know whether—

A. It is my handwriting.

Q. Do you know whether that was prepared in '44 or '45?

A. It was prepared in 1945, sir.

Q. Are there any other entries on there that would indicate that it was made in 1945?

A. Yes, sir; because it is from January 4th to January 20th, written over here on the side.

Q. And does it have the word forty-five alongside it?

A. No, sir; just the date, January 20. But I know it was in 1945.

Q. Are there any other entries on it that would indicate the date?

A. Sir, I think if you check with the florist shop in

the Hotel Pennsylvania that I sent flowers to Mrs. Huebner and Mrs. Cain and Mrs. Sullivan on this date.

501 By Mr. McConnell: I object to that, if he sent flowers to somebody.

By the Witness:

A. So I know it was in '45.

By Mr. McConnell: There is no question pending.

By the Court: Yes, that may be stricken.

By Mr. Lockley: Now, I offer it in evidence, your Honor.

By Mr. Kirby: I make the further objection that it is a self-serving document in the sense that Mr. Lubben has written up there a lot of different things which he wants to say he did.

By the Court: Well, I receive the document in evidence. I think sufficient foundation has been laid. If it isn't relevant I will entertain a motion to strike.

(Said document was received in evidence by the Court and marked Government's Exhibit 162.)

By Mr. Lockley:

Q. Now, Mr. Lubben, I call your attention to the

502 fact that this Government's Exhibit No. 27 is dated January 19, 1945. Are you able to state from the examination of your weekly expense account what you did on January 19, 1945?

A. Yes, sir. I had dinner that night with the Huebners, the Sullivans—

Mr. O'Brien: I object to that. The witness—

By the Witness:

A. —at Toots Shor's.

503 By Mr. O'Brien: The witness' recollection has not been shown to need refreshing.

By the Court: If he remembers, he may state what he remembers.

By Mr. O'Brien: Perhaps he doesn't have to have his recollection refreshed.

By Mr. Lockley:

Q. Do you remember, without reference to the travel expense account, what you did on that night; would you remember without that expense account?

A. No, sir, I couldn't remember that—back that far. I remember now after looking at it, I can remember the night.

Q. After seeing that expense account, is your memory refreshed?

A. Yes, sir.

Q. Well, now, are you able to state what you did on that night?

A. Yes, sir; we went to Toots Shor's for dinner.

Q. Who?

A. Mr. and Mrs. Cain, and the Sullivans, and I believe the Berry's, and Mr. Hankermyer and later on, we went to a place called Sammy's in the Bowery, and
504 then the Diamond Horseshoe which was a night club.

By Mr. Kirby: I want to object and ask that it be stricken. It is not a crime to go out with Lubben, although we now regret it.

By Mr. Lockley: I think that ties it up, your Honor. I am merely showing that on January 19th, which is the date of this check to cash.

By the Court: I will deny the motion.

By Mr. Lockley:

Q. Now, Mr. Lubben, I show you a check, Government Exhibit No. 28, and ask you if you have seen that before?

A. Yes, sir; I have.

Q. Is that your signature on the bottom?

A. Yes, sir.

Q. Is that a check which was issued by you in the ordinary course of business?

A. It was, sir.

Q. Was it cleared through the bank?

A. It was.

Q. Did it come back to you thereafter?

A. It did, sir.

By the Court: May I see Government Exhibit 27,
505 please?

(Document harded to the Court.)

By Mr. McConnell: The Corporation makes the same objection to this as it did to the other documents.

By Mr. O'Brien: May we have a standing objection to all the documents of this sort, Judge?

By the Court: No, I don't think I can entertain a standing objection.

By Mr. O'Brien: All right, sir.

By Mr. Lockley: I offer this check into evidence, your Honor.

By the Court: It may be received.

(Said document was received in evidence by the Court, and marked Government's Exhibit 28.)

By Mr. Lockley:

Q. Mr. Lubben, I show you Government Exhibit 28, a check to cash in the amount of $6,183.00. You say that is your signature on the bottom?

A. Yes, sir.

Q. What did you do with that check after you had it signed?

506 A. Miss Seider went to the bank and cashed it.

Q. And did you receive the money?

A. Yes, sir; I did. She came back and gave it to me.

Q. What did you do with it?

A. I gave it to Mr. Huebner.

Q. And do you know where?

A. Sir, my memory serves me, but I think it was in Chicago.

If you could refresh my memory—

By the Court: Louder, please.

By the Witness:

A. If you could refresh my memory. I see you have my expense voucher for that week. I mean, I feel I was in Chicago, sir.

By Mr. Lockley:

Q. You have no independent recollection at this moment?

A. No, sir.

Q. Then I show you the Government Exhibit for identification 163 and ask you if you have seen that before.

A. Yes, sir; I have. I wrote it.

Q. Was this the expense voucher which you previ-

507 ously testified was kept in the ordinary course of business?

A. Yes.

Q. Was this true and correct at the time you made it?

A. It is, sir.

Q. Was it part of your business records at the time?

A. Yes, sir.

By Mr. McConnell: The same objection to this document as to the other document.

By the Court: What exhibit number, please?

By Mr. Lockley: 163, your Honor. I offer it in evidence.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 163.)

By Mr. O'Brien: I object to it on the further ground, if the Court please, that it may be proper to refresh his recollection, that perhaps after examining it, he can state the time, but I don't think it it proper to be intro-
508 duced, and to receive the document in evidence.

By the Court: Well, he has laid sufficient foundation for it. I don't know the purpose for which counsel is going to make use of it.

By Mr. Lockley: Well, your Honor, it corroborates the witness' testimony as to where he was from time to time in company with the defendants, or one or more of them, and shows that there was the opportunity to make the payments in cash which he has referred to.

By the Court: I will receive it in evidence.

509 By Mr. Lockley:

Q. Now I show you Government Exhibit No. 27 which has been admitted in evidence. That is a check in the amount of $10,849?

A. Yes.

Q. What did you do with that money after you received it from Miss Seider?

A. I gave it to Mr. Huebner, sir.

Q. Where was that?

By Mr. Kirby: I object. He has already said that.

By the Witness:

A. I gave that to him at the Pennsylvania Hotel.

By Mr. Kirby: I object, your Honor. This has been gone over.

By Mr. Lockley:

Q. Do you remember any conversation before that?

By Mr. Kirby: I object.

By the Court: Let us get it straight, Mr. Lockley. Are you now referring to the incident of January, 1945, at the Pennsylvania Hotel?

By Mr. Lockley: I am sorry, your Honor. I picked up the wrong check.

510 By Mr. Lockley:

Q. I show you Exhibit No. 28, which is a check dated February 6th for $6,183.00. Now, do you have any recollection as to what you did with that money?

By Mr. McConnell: I object to that question. Why doesn't he ask him what he did with it?

By the Court: He said he brought the check to Mr. Huebner.

By Mr. Lockley:

Q. Now, do you recall any conversation at that time?

A. Yes, I do.

Q. What was it?

By Mr. McConnell: I object unless he states who was present.

By Mr. Lockley:

Q. Who was present?

A. Mr. Huebner was present.

Q. Do you remember about what time it was?

A. About February 7th. I would cash the check in New York, and I took the train that day.

Q. Was there anybody else present?

511 A. No.

Q. What was the conversation?

A. Mr. Huebner did take the money.

By Mr. Kirby: I object, if your Honor please.

By Mr. Lockley: Not that he took the money, but—

By Mr. Kirby: I ask that the jury be instructed that this conversation is not binding upon the defendant Sullivan.

By the Court: The jury will understand that when the witness says only one of the defendants was present when he had a conversation with that defendant, the testimony is competent only as to that defendant.

By Mr. Lockley: All right.

By Mr. Lockley:

Q. What was the conversation?

A. Mr. Huebner told me if I would keep the cash money rolling, and keep it coming in fast, that he could give me a lot of merchandise; that Mr. Sullivan and Mr. Cain were very hungry for cash, and I heard that many, many times.

512 By Mr. Kirby: I move to strike what he heard many, many times.

By the Court: That may be stricken.

By Mr. Kirby: If the Court please, that evidence is

surely incompetent as against defendant Sullivan: Surely the jury should be instructed that it should not be considered against the defendant Sullivan.

By the Court: I have so stated to the jury every time you asked me to state it. If I have overlooked it, I so instruct them now.

By Mr. Kirby: When Mr. O'Brien asked a question about a standing objection, I thought your Honor wanted us to make an objection each time the question was raised.

By the Court: Mr. O'Brien wanted a standing objection, as to these exhibits. I didn't think it was practical.

513 Any time you wanted me to instruct the jury with reference to conversations had with only one defendant as not being competent with the others, I have responded every time.

By Mr. Kirby: Yes, sir, but I am making an objection to this particular occasion.

By the Court: I will make a blanket ruling. I will be happy to do so if you wish.

By Mr. Kirby: Thank you.

By the Court: The jury will understand that if Mr. Lubben relates conversation as to a single defendant and that defendant alone is present, that such a conversation is competent evidence only as to such defendant and it will be disregarded in so far as the other defendants.

By Mr. Kirby: And it is not necessary for me to repeat that objection?

By the Court: No, sir.

By Mr. Kirby: Thank you, your Honor. I appreciate it.

By Mr. Lockley:

514 Q. Mr. Lubben, I show you Government's Exhibit for identification No. 40 and ask you if you have seen that before?

A. Yes, sir, I have.

Q. Is that your signature that appears thereon?

A. Yes, sir. It is my signature.

Q. I show you Government's Exhibit for identification No. 40-A and ask you if you have seen that before?

A. Yes, sir, I have. It is—yes, sir, I have.

Q. Was that exhibit kept by you in the ordinary course of your business?

A. It was, sir.

Q. Was it a part of your business records?

A. It was, sir.

Q. Was it true and correct at the time you made it?
A. It was, sir.
Q. With respect to Exhibit No. 40, is that also a part of your business records?
A. Which was No. 40?
By Mr. O'Brien: Just a minute. We are still looking at the first one.
By Mr. McConnell: I object to these documents
515 on the same grounds as to the others. No proper foundation and they are not binding on the corporation.
By Mr. O'Brien: I object to them too, your Honor, on the same grounds and also I would like to ask whether the offer includes the notations on the back of the check. Exhibit what? What is this, sir?
By Mr. Lockley: No. 40.
By Mr. O'Brien: Exhibit 40.
By Mr. Lockley: Yes, your Honor, those notations are apparently made in the ordinary course of business and I will establish that from the witness.
By the Court: I don't think you have established that notations were made.
By Mr. Lockley: I have not, your Honor. I will do so.
By Mr. Lockley:
Q. Directing your attention to the reverse of Government's Exhibit No. 40, do you know what the figures thereon purport to be? Have you seen those before?
A. No, sir, I haven't seen them.
516 Q. Were they made by you?
A. No, sir, they weren't.
Q. Do you know who made them?
A. Yes, sir. This is the bank teller that would make this. This shows I got ten packages—
517 By Mr. McConnell: Wait. He is talking about something when he wasn't there.
By Mr. Lockley:
Q. Were you present there at the time?
A. No, sir.
By the Court: That is not competent then.
By Mr. Lockley: As to the figures on the reverse, sir, the Government does not offer them in evidence. The balance of the check is offered.
By the Court: I will receive them in evidence.

(Said document was received in evidence by the Court and marked Government's Exhibit 40.)

By Mr. McConnell: I will ask to have the jury instructed to disregard the figures on the back of the check.

By the Court: The jury understands that there are some notations on the back of this check and other than the endorsement, the other figures are not in evidence. The other data is not in evidence.

By Mr. O'Brien: May we have the comment about
518 the bank teller stricken?

By the Court: Very good. It may be stricken.

By Mr. Lockley:

Q. I show you Government's Exhibit 40-A and ask you what that is.

A. This is a request for a cash—for a check to be written in that amount, $18,000.00 for cash and charged to Shotwell.

Q. On what date?

A. On March 6, 1945.

Q. And I show you check dated March 6, 1945, and ask you if that has any relation to the cash authorization slip.

A. Yes, sir. Here it is (indicating). It is the check that was written at my request.

Q. Now, when this check was cashed, did you receive the $18,000.00?

A. I did, sir.

Q. And what did you do with it?

A. I gave it to Mr. Huebner.

Q. And where?

A. I don't recall, sir, at the moment.

Q. Do you have anything that would refresh your recollection?

519 A. Yes, sir, my voucher.

Q. All right. I show you Government's Exhibit for identification No. 164 and ask you if that is the expense voucher you refer to.

A. Yes, sir, it is, sir. It is March—it is, sir. This is the expense voucher.

By Mr. McConnell: The same objection, if the Court please, that I made to the other documents.

By the Court: I don't know that you have laid any foundation for it. You have just asked if it is an ex-

pense voucher. You haven't asked if it was made out in the ordinary course of business.

By Mr. Lockley:

Q. Was this expense account kept in the ordinary course of business?

A. Yes.

Q. Was it part of your books and records?

A. Yes.

Q. Was it true and correct at the time you made it?

A. It was, sir.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 40-A.)

520 By Mr. Lockley:

Q. If you examine it, will it refresh your recollection?

A. Yes, sir.

Q. As to the time and place of payment of this cash?

A. Yes, sir.

Q. Where was it?

A. It was in New York that I gave Mr. Huebner this money.

Q. And who was present at the time?

A. I believe on this time—to the best of my recollection it was Byron Cain who was present this time, sir.

Q. Where was it in New York?

A. I think it was the Gotham Hotel.

By Mr. McConnell: Excuse me. It is not plain to me—he said he had no memory of it, and then you asked him to refresh his memory from that document, is that right? Is there anything about the Gotham Hotel in that document?

By Mr. Lockley:

Q. Is there anything about the Gotham Hotel on 521 your expense account?

A. No, sir, but after March—

By Mr. McConnell: There is nothing about Byron Cain on there?

By the Witness:

A. No, sir. I remember.

By Mr. Kirby: I ask that that portion of the testimony be stricken. First he said he doesn't know and then he.

is shown the document, and then he remembers. I ask that that be stricken and the jury be instructed to disregard it.

By the Court: I will deny the motion.

By Mr. Lockley:

Q. Do you have an independent recollection of this expense account sheet now that you have seen it?

A. Yes, sir, I have a recollection.

Q. Now speak up, Mr. Lubben. Did you have any conversation at the time?

A. I had a conversation, sir, with Mr. Huebner.

Q. Was there anybody else present?

A. Well, when I would come into a room, why, they would make it—

By Mr. McConnell: Can't he answer the question
522 yes or no?

By Mr. Lockley:

Q. Answer the question specifically, instead of just generally. On this specific occasion, do you have any present recollection of what happened?

A. Yes, sir. When I gave the money to Mr. Huebner, he counted it out in three piles on the bed, and said, "This one is for Harold, and this one for Byron, and this one for me." And after he had it counted out, he would skim off a little off of each pile, maybe a couple of hundred, and put it in the little pocket, in his watch pocket, and say, "This is for the horses", and "Keep your mouth shut", and "Don't tell them about this."

523 Q. Don't tell him about what?

A. That he was taking off a few hundred off of each pile. He would take one pile and put it in one pocket and he would take another pile and put it in another pocket and another pile in another pocket and the few hundred he took off each pile, he took it and put it in another pocket.

By Mr. McConnell: Was Mr. Cain present?

By the Witness: Mr. Cain was not present when he divided the money.

By Mr. Lockley:

Q. When the money was counted, there was just you and Mr. Huebner?

A. Yes, sir.

Q. What happened after that?

By Mr. Kirby: Was this at the Gotham Hotel?

By Mr. Lockley: Yes, in the Gotham Hotel.

By Mr. Lockley:

Q. Is that your recollection?

A. To the best of my recollection, sir, it was in the Gotham Hotel. I can't remember any specific conversation, any definite words that we had.

Q. Do you remember what happened?

524 A. Well, we walked out into the room and they would buy me a drink or something and I would be a fair-haired boy.

Q. What sort of a room was this?

A. The suite, sir.

Q. Was it a separate bedroom?

A. Oh, yes, sir.

Q. What was the other room, was it another bedroom?

A. Well, sometimes they would have two bedrooms, sir, and sometimes only one bedroom but they always had a great big parlor in the Gotham Hotel.

Q. A parlor?

A. With a fireplace and tables, very luxurious.

Q. Now, you are referring specifically to the time when this $18,000.00 was paid, is that correct?

A. Yes, sir.

Q. I now show you Government's Exhibit 40-B and ask you if you have seen that before?

A. Yes, sir, I have.

Q. And whose signature is that on the bottom?

A. Beatrice Feldman.

Q. Do you remember the signature?

A. I do, sir.

525 Q. Did she have authority to write checks?

A. She did, sir.

Q. Was that a check which was written in the ordinary course of your business?

A. Yes, sir. She would write this check after I gave her the authority to write it.

Q. Was the check cleared through the bank?

A. Yes, sir.

By Mr. McConnell: I object.

By Mr. Lockley: I offer in evidence this check, with the exception of the penciled notations.

By the Court: You are eliminating the penciled notations on the back?

By Mr. Lockley: Yes, sir.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Governments' Exhibit 40-B.)

526 By Mr. Lockley:

Q. I offer you Government's Exhibit for identification 40-C, and ask you if you have seen this before.

A. Yes, sir. This is the cash disbursement order.

Q. Never mind. Did you see it?

A. Yes, sir.

Q. Is that your signature on the bottom?

A. It is.

Q. Is this a record which is kept in the ordinary course of business?

A. It is, sir.

Q. Was it a part of your business records?

A. It is, sir.

Q. Was it true and correct at the time it was prepared?

A. Yes, sir.

By Mr. O'Brien: Could I see it just a moment?

By Mr. Kirby: Let us see No. 40-C too. May we see 40-C, please?

By Mr. McConnell: I make the same objection as to
527 the others. It is not binding upon my client.

By the Court: The exhibit may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 40-C.)

By Mr. Lockley:

Q. Now, Mr. Lubben, I show you cash authorization slip dated March 28, 1945, and ask you what that represents?

A. This is a request for Miss Feldman to draw a cash check for $15,000 to be cashed and given to Shotwell.

Q. Does the word "Shotwell" appear on them?

A. Yes, sir, right there (indicating).

Q. I now show you a check dated March 28, 1945, Government's Exhibit 40-B in the amount of $15,000 and ask you if that is the check referred to in that cash authorization slip?

A. It is.

Q. Was that check cashed?

A. Yes.

Q. By whom?

A. By Frieda Seider.

528 Q. She was your secretary or bookkeeper?

A. She was assistant bookkeeper, assistant to Miss Feldman.

Q. What did she do with the money?

A. She brought the money back and gave it to me.

Q. What did you do with it?

A. I gave it to Mr. Huebner.

Q. When?

A. I probably gave it to him on March 28th or 29th. If it was in New York, I gave it to him the same day. If it was in Chicago, it was the next day.

Q. Do you have any recollection as to where you were at the time?

A. No, sir. If you have any document for my refreshment, I would appreciate it.

Q. I show you Government Exhibit for identification No. 165. You have seen that before?

A. Yes, sir.

Q. What does that purport to be?

A. That is an expense voucher.

Q. Now is that kept in the ordinary course of business?

A. It is, sir.

529 Q. Is it written by you?

A. It was, sir.

Q. Was it true and correct at the time you made it?

A. It is.

Q. Was it part of your books and records?

A. Yes, sir.

By Mr. McConnell: I object to it on behalf of the corporation on the ground that it is not binding. It is a self-serving document.

By Mr. Lockley: I offer it in evidence.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 165.)

530 By Mr. Lockley:

Q. And now I show you Government's Exhibit No. 165 and ask you if you can refresh your recollection from that document as to where you were on or about March 28th.

A. On March 28 I left New York for Chicago.

Q. Does that refresh your recollection as to where you paid the money?

A. Yes, sir. At the--it was paid in Chicago, sir.

Q. Do you recall any more definitely then that or is that your best recollection?

A. No, sir. It would be in the Sherman Hotel.

Q. At the Sherman Hotel?

A. Yes, sir.

Q. Is that where you were staying at the time?

A. Yes, sir.

Q. And who was present at the time you paid the money?

A. Mr. Huebner, sir.

Q. Anybody else?

A. No, sir.

Q. Do you recall any conversation at that time?

A. Yes, sir.

Q. What was it?

531 A. Well, we got Mr. Huebner—Mr. Huebner would say, "Dave," Mr. Huebner said, "Dave, just keep this money rolling. I can do a lot for you, but I can't give you merchandise if you don't keep these cash payments coming in, and the faster you bring the cash in, the more I can ship. These people"—I think he said, "Byron and Harold"—he said, "Are very hungry for cash and they keep checking with me to see if you are making your cash payments."

And then he would go through the ritual of dividing the money on the bed, three different piles, and skimming some off the top for the race horses.

Q. Now I show you Government's Exhibit for identification No. 40-D; and ask you if you have seen that before.

A. Yes, sir.

By Mr. O'Brien: What is the number of it?

By Mr. Lockley: 40-D.

By the Court: That is the check, isn't it. That has been received, 40-B?

By Mr. Lockley: A, B, C, D.

By the Court: What?

By Mr. Lockley: A, B, C, D.

532 By the Court: Oh, I am sorry.

By Mr. Lockley:

Q. Do you remember this document?

A. I do, sir.

Q. Do you recognize the signature on the bottom?

A. I do, sir.

Q. Whose is it?

A. Beatrice Feldman.

533 Q. She was your bookkeeper at the time?

A. Yes, sir.

Q. Or office manager?

A. Yes, sir.

Q. Was this check written in the ordinary course of business?

A. It was, sir.

Q. Was it cleared through the bank?

A. It was, sir.

Q. After which it was returned to you?

A. Yes, sir.

By Mr. McConnell: I object to the check so far as the corporation is concerned. It is not binding on the corporation. On the showing made here on the check, dividing it up in three piles and part of it going to the horses, I don't know where the corporation figures in on that kind of a thing. It is not connected up with the corporation.

By the Court: All right. I will receive the check in evidence.

(Said document was received in evidence by the Court and marked Government's Exhibit 40-D.)

534 By Mr. Lockley:

Q. Mr. Lubben, did you ever purchase anything from Mr. Huebner in his individual capacity?

By Mr. Kirby: I object to that as calling for a conclusion.

By Mr. Lockley: I asked him if he did—

By the Court: The objection is overruled. He may answer.

By the Witness:

A. You mean did I buy something from Mr. Huebner as an individual?

By Mr. Lockley:

Q. That is right.

A. No, sir.

Q. From Mr. Cain?
A. No, sir.
Q. From Mr. Sullivan?
A. No, sir.
Q. You had transactions with the Shotwell Manufacturing Company. Do you know what position those gentlemen had with that company?
A. Sir, Mr. Cain was the president and Mr. Harold Sullivan was vice president and I knew Frenk Huebner was the general manager.
535 Q. Now, when you purchased items and paid for them by check and by cash, were you purchasing items that were manufactured by the Shotwell Manufacturing Company?
A. I was, sir.
By Mr. O'Brien: I object to the conclusion and characterizations, if the Court please. Whatever arrangements he wants to show, he can interrogate him about it, without the conclusions and characterizations.
By the Court: The answer may stand.
By Mr. Lockley:
Q. The shipments you received, were they billed on the billhead of the Shotwell Manufacturing Company?
By Mr. McConnell: Well, the documents speak for themselves.
By the Witness:
A. They were certainly unbilled.
By the Court: I am sorry. I didn't hear you, Mr. McConnell.
By Mr. McConnell: The documents will speak for themselves if they were billed on billheads.
536 By the Court: All right, I will sustain the objection.
537 By Mr. Lockley:
Q. I show you Exhibit 40-D in evidence, which is a check for $22,104.13, and ask you what was done with that check?
A. This check was cashed, sir.
Q. By whom?
A. By Frieda Seider.
Q. She was your assistant office manager at the time?
A. Yes, sir.
Q. And what did she do with the money?
A. She brought it back to the office and I got it.

Q. What did you do with it?
A. I gave it to Mr. Huebner.
Q. Was anybody else present at the time?
A. Well, not in the room where we counted the money, not where we counted the money out on the bed. Occasionally, sir—

By Mr. Kirby: I object to the description of what "occasionally" is.

By Mr. McConnell: We have no time fixed.

By Mr. Kirby: We don't know what city it is in.

538 By the Court: You all speak at one time, and I can't follow you.

By Mr. Lockley:
Q. Do you recall when this occurred?
A. Yes, sir.
Q. When?
A. On or about May 3rd.
Q. What year?
A. 1945.
Q. Do you remember where?
A. I don't remember exactly, sir, but I think this amount—I am not sure—was paid in New York.
Q. Is there anything that would help your recollection?
A. Yes, sir. My expense voucher.
Q. I show you Government Exhibit for identification 166, and ask you if that is your expense voucher?
A. It is.
Q. Was that prepared by you?
A. Yes, sir.
Q. Is it in your handwriting?
A. It is, sir.

Q. Was it kept in the ordinary course of business?

539 A. Yes, sir.

Q. Is it part of your books and records of your business?
A. Yes.
Q. Was it true and correct at the time you made it?
A. It was, sir.

By the Court: Well, I think we will take our morning recess now, members of the jury. We will suspend for ten minutes.

(Whereupon a short recess was taken.)

By the Court: You were offering Government Exhibit 156, is that it?

By Mr. Lockley: 166, your Honor.

By the Court: Oh, 166.

By Mr. Lockley: Yes, sir.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 166.)

By Mr. Lockley: Your Honor, was 40-D admitted in evidence?

By the Court: 40-D was admitted in evidence.

540 By Mr. Lockley:

Q. I show you Government Exhibit for identification No. 43, and ask you if you have seen that before?

A. Yes, sir, I have.

Q. Is that your signature?

A. It is, sir.

Q. Is that the record kept in the ordinary course of your business?

A. Yes, sir.

Q. Did that clear through the bank?

A. Yes, sir.

Q. And then it was returned to you?

A. Yes, sir.

Q. Was it true and correct at the time you made it?

A. Yes, sir.

By Mr. Lockley: I offer in evidence Government Exhibit 43.

541 By Mr. McConnell: I object to it as not binding upon the corporation.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 43.)

By Mr. O'Brien: What is the number of that?

By Mr. Lockley: 43.

By Mr. O'Brien: No, the check.

By Mr. Lockley: 3665..

By Mr. Lockley:

Q. Now Mr. Lubben, with respect to Government's Exhibit 40-D, a check for $22,124.13, what did you do with that check after you signed it?

A. I didn't sign this check.
Q. Who signed it?
A. Beatrice Feldman did, sir.
By Mr. O'Brien: He has already testified about that.
By the Court: Yes, according to by recollection.
By Mr. Lockley:
Q. And who cashed it?
A. Freda Seider.
542 Q. Did she give the money to you?
A. It was brought back to the office and I got the money, yes, sir.
Q. Do you know what you did with it?
A. Yes, sir.
By Mr. O'Brien: He has already testified.
By Mr. Lockley: Not on this check, Mr. O'Brien.
By Mr. O'Brien: On 40-D.
By Mr. McConnell: What part are you going to divide?
By Mr. Lockley:
Q. I show you Government's Exhibit 40-D in the amount of $22,124.13. It is dated March 3, 1945.
A. May 3rd.
Q. Does that bear your signature?
A. It does, sir.
Q. What did you do with it after you signed it?
A. After I signed it, Miss Freda Seider took it to the bank and cashed it and brought the cash back.
Q. What did you do with the cash?
A. I gave it to Mr. Huebner.
Q. Now I call your attention to the fact that those
543 checks both bear date of May 3, 1945. Do you have any recollection as to why two checks were drawn at that time?
A. Yes, sir. My recollection is that we had already prepared the recap which showed the $22,124.13 and that another shipment came along and I went ahead and paid the overcharge on that, as long as I was going to pay the other one and I got even Stephen, I got evened up.
544 Q. You testified then that you paid the $22,000 check in Chicago?
A. No, sir. I think I said New York, sir, but I may be wrong. I am not sure whether I paid it in Chicago or New York.
Q. Do you have any recollection as to where it was?

A. Sir, I see you have my expense voucher, and that would help me recollect.

Q. Would that refresh your recollection?

A. Yes.

Q. Does that show where you were on May 3rd?

A. Yes, sir. On May 3rd I left New York for Chicago, and stayed at the Sherman Hotel.

Q. Don't testify from this. I just wanted to know if you knew. Does that refresh your recollection?

A. Yes, sir, it does.

Q. Does that refresh your recollection as to anything concerning these particular payments?

A. Well, nothing more specific than the fact that the money—Mr. Huebner came in to the Sherman Hotel, and the money was divided up on the bed, and he
545 would go to one pile, "This is for Harold", and "This is for Byron", and "This is for me."

Q. Now, I show you Government Exhibit for identification—

By Mr. McConnell: Is this a different transaction than the one he has already testified to?

By Mr. O'Brien: It is the same one.

By Mr. Lockley:

Q. Is this the same transaction?

A. What?

Q. Let me ask you this: There were two checks?

A. Yes, sir.

Q. Were they paid at separate times in separate amounts?

A. No. It was at the same time, sir.

Q. The lump sum was paid all at the same time?

A. The lump sum, yes, sir. Yes, sir.

Q. And your testimony as to the one, naturally would be the same as to the other?

A. Yes.

Q. All right. I show you Government Exhibit 45 for identification, and ask you if you have seen that before?

546 A. Yes, sir.

Q. And whose signature appears thereon?

A. Beatrice Feldman's signature.

Q. Do you recognize it?

A. Yes.

Q. She had authority to write checks?
A. Yes, she did.
Q. Was that written in the ordinary course of business?
A. Yes, it was.
Q. Was it cleared through the bank?
A. It was, sir.
By Mr. McConnell: Are you offering the penciled memoranda on the back of the check?
By Mr. Lockley: No, I am not offering it.
By Mr. McConnell: I object to the check, as not binding on the corporation.
By Mr. O'Brien: What is the date of the check?
By Mr. Lockley: May 9, 1945.
I offer it in evidence, your Honor, with the exception of the penciled memorandum on the reverse side.
547 By the Court: The check may be received.

(Said document was received in evidence by the Court and marked Government Exhibit 40-D.)

548 By Mr. Lockley:
Q. Now, Mr. Lubben, this is a check to cash in the amount of $6,459.75. Do you recognize the signature on the reverse?
A. Yes, sir. It is Freda Seider.
Q. She was your assistant office manager?
A. Our bookkeeper, sir.
Q. Did you give her the check?
A. Probably so, sir.
Q. And do you know what she did with it?
A. She cashed the check and brought the money back to the office.
Q. And to whom did she give it?
A. To me, or brought it to the office. She may have brought it back to Miss Feldman but I think she gave it to me. I always got the money when they brought it back from the bank.
Q. What did you do with the $6,459.75?
A. I gave it to Mr. Huebner.
Q. Do you recall where?
A. No, sir, I don't.
Q. Do you recall when?
A. Well, within one day of that check, because, I

mean, I draw the check and the thing was in New
549 York. I mean, if it went to Chicago, he would get it the next day.

Q. Around May 9th?

A. Yes, sir.

Q. I show you Government's Exhibit for identification 167 and ask you if you have seen that before?

A. Yes, sir.

Q. Does that bear your signature?

A. Yes, sir, it does.

Q. Is it in your handwriting?

A. It is.

Q. What is it? Is it kept in the ordinary course of business?

A. Yes, sir, it is.

Q. And was it true and correct at the time you prepared it?

A. Yes, sir.

Q. Is it part of your customary business practice to keep such records?

A. It is, sir.

By Mr. Lockley: I offer in evidence, your Honor, No. 167.

By the Court: It may be received.

550 (Said document was received in evidence by the Court and marked Government's Exhibit 167.)

By Mr. Lockley:

Q. Now, I show you Government's Exhibit 167 and ask you if you can state from an examination of that where you were, or where you were around May 9th?

A. On May 9th, sir, I was in Chicago at the Sherman Hotel.

551 Q. Does that refresh your recollection as to the place where the payment was made?

A. Yes, sir, it does.

Q. Does it refresh your recollection as to who was present?

A. Mr. Huebner, sir.

Q. Anyone else?

A. No, sir.

Q. Do you recall any specific conversation at that time?

A. Well, sir—

Q. Speak up.

By the Court: If you would stand there when he talks to you, if you would go to the counsel table and stand there after you give him an exhibit, I think we will get along better.

By Mr. Lockley: Yes, sir.

By the Witness:

A. Sir, the conversation is, when I would have the conversation with Mr. Huebner, he would take out of his pocket a recap sheet that he had made, that he had brought with him, and then he would check it against my recap sheet. This was done on all the occasions.

552 Q. Did it happen on this specific occasion?

A. Yes, sir, it did. And then the money would be divided on the bed in three piles and then a certain amount of money would be taken off the top and that would be for the horses and that I shouldn't tell Byron or anybody about it and, "This is for Byron, this is for Harold, and this is for me."

By Mr. McConnell: Is he talking about this particular transaction or some other transaction?

By Mr. Lockley: It is this particular transaction.

By the Witness: Yes, sir.

By Mr. Lockley:

Q. Was that likewise his practice to have a settlement sheet?

A. It was the general practice. Mr. Huebner would even pick up the cents when you had a big amount of money like $22,489.16. He would take the sixteen cents with him.

By Mr. McConnell: May I see the document, if the Court please. I would like to examine it.

553 By Mr. Lockley: I have offered it and it has been admitted.

By Mr. McConnell: You are offering a check now?

By Mr. Lockley: I have offered that and it has been admitted.

554 By Mr. McConnell: I want to point out to the Court that shows that he was in Chicago both May 8th and May 9th.

By Mr. Lockley:

Q. Mr. Lubben, I call your attention to the fact that you were in Chicago, according to Government Exhibit

167, from May 6th to May 12th, and on that day you returned to New York.

I also call your attention to the fact that this check is dated May 9th, and signed by Beatrice Feldman.

Do you have any recollection as to how that check was actually received by you, or was it ever received?

A. Yes, sir. The money was received by me. I think in this particular transaction, sir, that Mr. Hankermyer brought this money to Chicago to me when he was coming out.

Q. Where is Mr. Hankermyer?

A. He died, sir, this year.

Q. I show you Government Exhibit 48, and ask if you have seen that before?

A. Yes, sir, I have. I did, sir.

Q. Do you recognize the signature on the bottom?

555 A. Yes, sir. It is Beatrice Feldman's.

Q. She had authority, did she, to write checks?

A. She did, sir.

Q. Was that check written in the ordinary course of business?

A. It was, sir.

Q. Was it cashed through the bank? If was cleared through the bank?

A. It was, sir.

Q. Please, Mr. Lubben, try to keep your voice up.

A. Yes, sir, I am sorry, sir.

By Mr. Lockley: The Government offers Exhibit 48.

By Mr. McConnell: I object on behalf of the corporation. It is not binding upon my client.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 48.)

By Mr. Lockley:

Q. I show you, Mr. Lubben, check dated May 25, 1945, to the order of cash in the amount of $4,455.00, Exhibit 48.

556 By the Court: 48, or 148?

By Mr. Lockley: 48.

By Mr. Lockley:

Q. I ask you whether you received the money. Is that the check?

A. I did, sir.

557 Q. What did you do with it?

A. I paid it to Mr. Huebner.

Q. Do you know where?

A. No, sir, I don't.

Q. Do you know when?

A. Well, the check is dated May 25th. I either paid it on that day if he was in New York or a day or so following if he was in Chicago.

Q. You have no further recollection as to the time and place?

A. No, sir, I don't.

Q. Do you have any recollection as to what specifically occurred at that particular time?

A. No, sir, I don't, other than the usual method of counting out the money.

By Mr. McConnell: Well, let us hear it. Let us hear that answer.

(Whereupon the answer was read.)

By Mr. McConnell: That is his recollection of it.

By Mr. Lockley:

Q. What was the usual method of counting out the money?

A. The usual method of counting out the money,

558 sir, was that I would go into the room and on the bed would lay the money and then I had a recap sheet showing the total amounts of payments, that this payment was for—I mean the total amount of shipments, and Mr. Huebner would have a similar sheet and would check my sheet against his, and then the money would be divided up and sometimes we would have—Mr. Huebner would have a couple of more shipments on the end of his and I was accounting for it at that particular time and the reason for it was that maybe his shipments were en route and—

By Mr. McConnell: Just the transaction is what we want.

By the Witness: You asked me the regular procedure we went through, sir, and I am telling you.

By Mr. Lockley:

Q. All right, Mr. Lubben, I show you Government's Exhibit 55 and ask you if you have seen that before?

A. Yes, sir, I have.

Q. Whose signature appears thereon?
A. It is a check of Beatrice Feldman. I mean, it is the signature of Beatrice Feldman.
Q. She was your office manager?
559 A. Sir?
Q. She was your office manager?
A. Yes, sir, she was.
Q. And authorized to sign checks?
A. Yes, sir.
Q. Was that check issued in the ordinary course of business?
A. It was, sir.
Q. Was it cleared through the bank?
A. It was, sir.
Q. And returned to you?
A. Yes, sir.
By Mr. McConnell: I make the same objection, if your Honor please, on behalf of the corporation.
By Mr. Lockley: I offer Government's Exhibit 55 in evidence.
By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 55.)

560 By Mr. Lockley:
Q. Now, Mr. Lubben, I show you Government Exhibit for identification 55-A, and ask you if you have seen that before?
A. Yes, sir, I have.
Q. Was that prepared by you?
A. It was prepared in the usual course of accounting for the overages paid to Shotwell.
Q. Who prepared it?
A. Miss Feldman, sir.
Q. Was that prepared in the ordinary course of business?
Q. Yes, sir, it was.
Q. Was it part of your business records?
A. Yes, sir.
Q. Was it true and correct at the time it was made?
A. It was, sir, and is now.
By Mr. McConnell: I would like to ask the witness a question about this, if I may.
By the Court: You may.

561 *Cross Examination by Mr. McConnell.*

Q. Did you see Miss Feldman prepare this yourself in your presence?

A. I don't recall specifically. I have stood at Miss Feldman's desk.

Q. Well, did you or didn't you?

A. That specific check, I can't remember anything unusual, if I stood at her desk and watched her sign it, no, sir.

Q. It is not a check. It is a typewritten memorandum. Did you see Miss Feldman prepare this in your presence? That is what I want to know.

A. Well, I specifically can't say this, no, but I have seen her prepare many of them.

By Mr. McConnell: All right. I move to strike the rest of it.

By the Court: Whether or not he remembers of his own knowledge, it is part of the records of the company, of the Eatsum Food Prducts Company. I think he so stated.

Direct Examination (Continued) by Mr. Lockley.

Q. You did say, Mr. Lubben, that that was a
562 record that was ordinarily kept in the ordinary course of business of the Eatsum Food Products Company?

A. Yes, sir.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 55-A.)

563 By Mr. Lockley:

Q. I show you Government's Exhibit for identification 55-B and ask you if you have seen that before?

A. Yes, sir, I have.

Q. Was that a record which was kept in the ordinary course of business?

A. It was, sir.

Q. Was it true and correct at the time it was made?

A. Yes, sir, it was.

Q. Do you know by whom it was prepared?

A. By Miss Feldman, her.

Q. Was it your business practice to keep such records?

A. Yes, sir.

By Mr. McConnell: I would like to ask him, if the Court please, a question.

By the Court: Yes.

By Mr. McConnell:

Q. Did you see Miss Feldman prepare this document?

A. Yes, sir, I did.

Q. This particular document?

564 A. Yes, sir. I am very sure I saw her prepare that one because it calls for an advance for Mr. Huebner, called for something like $20,000.00.

By Mr. Lockley: I offer it in evidence, your Honor. It is No. 55-B.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 55-B.)

By Mr. Lockley:

Q. Mr. Lubben, on Government's Exhibit 55-B are the words "Cardinals, 32,400 pound boxes at 18¾ cents, $6,075.00. What does the "18¾ cents" denote?

A. The amount of premium on black market overages paid to him for that particular amount of chocolates.

Q. Is that so much a pound?

A. Per box, yes, sir. There was one pound to a box.

Q. The words "spice buttons, 12,960 pounds at 10 cents."

By the Court: If you get back to the table, we will get along better.

By Mr. Lockley: I am sorry.

565 By Mr. Lockley:

Q. 12,960 pounds at 10 cents and the amount, $1,296.00. What does the "10 cents" denote?

A. The 10 cents denotes the amount of overage over and above the invoice price for that particular item.

566 Q. So the overage on 12,960 pounds would be $1,296.00, is that correct?

A. That is correct, sir.

Q. The words "gum drops, 12,620 pounds at 10 cents", what does that "10 cents" denote?

A. It denotes the overage that was paid over and above the invoice price.

Q. And the amount "1,362," what is that?

A. That would be the amount of the overage at 10 cents a pound in dollars and cents.

Q. On the sheet then, is the total 8,733 and below it the word "advanced" 20,000. What does that represent?

A. Well, the $20,000 was an advance payment that I had made to Shotwell.

Q. All right. I show you Government Exhibit 55, and ask you if that is the $20,000 advance payment?

A. I would like to correct my last answer. It was the amount—it was the advance I gave to Mr. Huebner.

Q. All right. Is that the check which you have in your hand, a twenty thousand dollar one?

A. Yes, sir, it was.

567 Q. Who endorsed the check?

A. Frieda Seider.

Q. Did she give the money to you?

A. Yes, sir.

Q. What did you do with it?

A. Paid it to Mr. Huebner.

Q. Do you know where?

A. I don't remember correctly whether it was in New York or Chicago, sir.

Q. It was one or the other?

A. Yes, sir. If it was in New York, he received the money May 25th. If it was in Chicago, it was a day or two later.

Q. Do you have any specific knowledge of that particular transaction at the moment?

A. I think, if I recall, sir, to the best of my ability, it was one of the first advances that I had given Shotwell. Mr. Huebner called me on the phone—

Q. When?

A. Oh, probably that recap sheet would tell me.

Q. Is that Exhibit 55-B? 55-A?

A. Well, sir, the first shipment of Cardinal chocolates on this for $32,400.00 was on May 25th, and this

568 check was drawn on May 25th, and I remember a number of times, specifically this one—I remember a number of times, but specifically this one, maybe not, but I remember.

By Mr. McConnell: I object to other times.

By the Court: Just this occasion.

By Mr. Lockley: Just this occasion.

569 A. All right. This time, sir, Mr. Huebner called me on the telephone and he told me, "Dave, I can get you some cardinal chocolates."

Now, I don't have my records, sir, but I believe this was one of the first shipments of cardinal chocolates, which was a very good item to get to sell, and he told me if I could get him a substantial payment, a big amount of money as an advance, that I could get a lot of candy and I asked him how much, and he said, "Twenty thousand dollars," and I drew the check and got it and he got the money.

Q. All right. Now I also call your attention to Exhibit 55-A. That likewise carries the notations of "cardinal chocolates" 32,400 pounds, with the date 5-25, and an additional entry of 6-6, for 27,792 pounds, or a total of 60,192 pound boxes at $11,286.00. There are three entries of spice buttons, 5-24, 6-6, 6-22, a total of 70,950 pounds at $7,095.00. Two entries of gum drops on 5-31.

By Mr. McConnell: I object to reading from the documents.

By Mr. Lockley: I am going to ask him about these.

By Mr. McConnell: Show him the documents.

570 By Mr. Lockley:

Q. The total amount is $24,111.00 less $20,000.00. Is there any relationship between Government's Exhibit 55-A and Government's Exhibit 55-B?

A. Yes, sir, there is. Government's Exhibit No. 55-B shows that after they got the $20,000.00, that The Shotwell Manufacturing Company, or Mr. Huebner,—or I had a credit of black market, a black market credit of $11,267.00. In other words, I had overpaid the amount of premiums that was due at that particular time.

571 Now, on the following sheet, that is Government's Exhibit 55-A, we pick up the 32,400 pounds of Cardinals and spice buttons and gum drops plus additional merchandise so that the total amount of money that I owed Shotwell that particular moment as premiums was $24,111.00, and I had advanced $20,000.00, which left a balance due of $4,111.00.

Now, on June 28th, we received another shipment of 14,130 pounds of spice buttons which would be $1,413.00. So then, the amount that was due at that particular time was $5,524.00.

Q. And was that amount paid?

A. To the best of my knowledge, it was.

Q. About when?

A. Well, within a day or two after the check went.

If the check was drawn—I mean, on that particular day he got the money if it was in New York. If it was the next day, it was in Chicago.

Q. Do you have any check to show it was drawn?

By Mr. McConnell: I object. He doesn't even say he delivered it.

By the Court: I think if you arise when you address the Court that I can hear you better.

572 By Mr. McConnell: He has not testified he made a payment. He is characterizing it as a payment and yet he doesn't say he made it.

By the Court: I think if you are going into additional details, you should indicate the time and place and the circumstances.

By Mr. Lockley:

Q. Was that amount paid?

A. This was in 1945.

Q. All right. Do you recall about when it was paid?

A. Yes, sir. I would say on or about June 28th.

Q. Do you know where?

A. No, sir, I don't.

573 Q. Do you recall anything about the transaction?

A. Sir, there were so many transactions where I paid him twenty-five or thirty—

By the Court: Answer the question. Answer whether or not you recall anything about the transaction.

By the Witness: No, sir. I do not.

By Mr. Lockley:

Q. But you are able to state under oath that you know that amount was paid?

A. Yes.

By Mr. McConnell: I object to that. It is a conclusion of the witness. He wasn't there. He can't testify from his own knowledge.

By Mr. Lockley: Well—

Q. Did you make the payment?

By the Court: I assume the witness is testifying from his own knowledge.

By Mr. Lockley:

Q. I show you Government Exhibit for identification 63-A, and ask you if you have seen that before?

By Mr. O'Brien: May I ask, on the last question—

574 will you read the last question, Miss Reporter?

(Whereupon the question and answer were read.)

By Mr. O'Brien: I object to that. Paid to whom?
By the Witness: Paid to Mr. Huebner, sir.

Cross Examination by Mr. O'Brien.

Q. And where?
A. Well, sir, if this was in New York, it was on—
Q. Well, do you remember where?
A. No, sir, but it was either Chicago or New York, and no other place.
By Mr. Lockley:
Q. Now, do you recognize—
By Mr. O'Brien:
Q. Excuse me. Was it paid by you to Mr. Huebner?
A. Yes, sir.
Q. You personally?
A. Me personally.
Q. Not anyone else in your place?
A. There were very few payments made by any-
575 body else to Mr. Huebner.
Q. This was not one of them?
A. No, sir. I mean, very few payments were made by anybody else to Mr. Huebner, outside of myself.

Direct Examination by Mr. Lockley.

Q. Did you state that you recognize Government Exhibit for identification 63-A?
A. Yes, sir, I do.
576 Q. And was that a record kept in the ordinary course of business?
A. Yes, sir.
Q. Was it true and correct at the time it was made?
A. Yes, sir.
Q. Do you know who made it?
A. Miss Feldman, sir.
Q. Is your business practice to keep such records?
A. Yes, sir.
By Mr. O'Brien: Did you have a check on this other thing, Mr. Lockley?
By Mr. Lockley: No, sir.
By Mr. O'Brien: You mean there wasn't any check?

By Mr. Lockley: No. There was no check. The witness is testifying from his direct recollection. I had one $20,000.00 check in advance.

By Mr. Kirby: What about the advance, did you show him that?

By Mr. Lockley: A $20,000.00 check is the advance. That is the only check.

By Mr. McConnell: I make the same objection to
577 this memorandum. It is not binding on Shotwell.

By Mr. Lockley: I offer Government's Exhibit 63-A.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 63-A.)

By Mr. Lockley:

Q. Now with respect to 63-A, dated November 27, 1945—

By Mr. O'Brien: May I interrupt to ask whether the Government has a check on that last transaction?

By Mr. Lockley: Are you referring to the amount of 5524?

By Mr. O'Brien: 5524.

By Mr. Lockley: No, sir.

By Mr. Lockley:

Q. First I will show you Government's Exhibit for identification 63-B and ask you if you have seen that before.

A. Yes, sir, I did.

Q. Where?

A. In the hands of Mr. Huebner, sir.

578 Q. Speak up.

A. In the hands of Mr. Huebner.

Q. Do you know who prepared that?

A. No, sir, I do not.

Q. What was the occasion at the time you saw it?

A. It was at the time, sir, that I was making a pay-off where I was paying the overages. Mr. Huebner would always have a piece of paper similar to this in his hand.

Q. And is that a so-called recap sheet?

A. This was his, sir, and this was where he would compare his shipments with mine (indicating).

Q. Did Mr. Huebner give that to you?

A. No, sir, he did not.

Q. How did you get it, or did you get it?
A. Yes, sir, I did.
Q. How?
A. It was just left in my hands and when he was checking, I picked it up and put it in my pocket and I brought it back and gave it to Miss Feldman and I said, "Miss Feldman, these are Huebner's last figures," and I put my initial on it and gave it to her to put in the file.

579 Q. Do you recognize this as the document you saw in Mr. Huebner's hands at the time?
A. I do, sir.
By Mr. O'Brien: Is this a different instrument, Mr. Lockley, than the one we were talking about?
By Mr. Lockley: I have Exhibit 63-A which has been admitted as a settlement sheet prepared by Mr. Lubben or his bookkeeper in the ordinary course of business. 63-B is a separate document.
Now, I offer it, your Honor.
By the Court: That exhibit may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 63-B.)

By Mr. Lockley:
Q. Now, Mr. Lubben, I want you to examine Government's Exhibits 63-A and 63-B and tell me if there is any relationship between the two. Will you speak up?
By Mr. McConnell: If the Court please, the document speaks for itself, whatever it is, or whatever
580 it shows. It is a matter of argument.
By the Court: He may answer.
By the Witness:
A. Yes, sir, there is.
By Mr. Lockley:
Q. What is it?
A. It shows, and I am talking about the paper I got from Mr. Huebner—shows a list of certain cars of candy, Cardinal chocolates that was shipped to William Barron Candy Company in Atlanta, the F. W. Woolworth Company in Chicago.
While we don't show who it went to, we show the number over here (indicating) and the amount of the pounds on our paper. These items, sir, are on this page here (Indicating).

Q. Are they in complete agreement?

By Mr. McConnell: That is a conclusion of the witness.

By the Witness:

A. No, sir, they are not.

581 By Mr. McConnell: That is a conclusion of the witness, complete agreement.

By the Court: I think it is competent for a witness who assumes to be acquainted with the documents to determine whether there is any similarity in the figures or whether they jibe with one another. How are we going to determine if the witness who is competent to answer that question cannot disclose that fact?

By Mr. Lockley: Those records would be meaningless unless they had some explanation.

By the Court: Yes.

By the Witness:

A. No, sir. There was additional shipments made on my ticket here. They show some other ones.

By Mr. Lockley:

Q. There are additional tickets on your 63-A, which are not on 63-B, is that correct?

A. That is correct, sir.

Q. I call your attention to the settlement sheet 63-A, prepared by you which shows a balance due of $36,148.35.

A. Yes, sir, that is correct.

582 Q. Was that paid?

A. It was, sir.

Q. Do you know whether a check was drawn for that particular amount?

A. Yes, sir, it was.

Q. Do you know where that check is at the moment?

A. No, sir, I do not.

Q. What period of time was that check drawn? Approximately when?

A. This was drawn during the partnership, sir.

Q. During the partnership?

A. Yes, sir.

Q. Do you know where the partnership books and records are?

A. No, sir, I do not.

Q. When did you last see them?

A. On or around March 8, 1946.

Q. And who had custody of them at that time?

A. Mr. Giglio. He continued to do business after I left.

Q. Then you haven't seen any of them since then?

A. No, sir, I have not.

Q. Now, I show you Government Exhibit for identification No. 63, and ask you if you have seen that
583 before?

A. Well, in the normal course of business, sir, I wouldn't pay any attention to it. It would come to Miss Feldman.

Q. Do you know what it is?

A. Yes, sir.

It is from the bank. It shows how much you deposited, and how much you have left. It shows deposits and withdrawals. It is a statement.

Q. Did you have an account in that bank?

A. Yes, sir.

Q. And did you receive monthly statements?

A. Yes, sir, I did. Or the company did.

Q. What did you do with those monthly statements?

A. Miss Feldman would get them, and the auditor would check them out.

Q. Do you know where they are today?

A. No, sir, I do not.

Q. When did you last see them?

A. March 8th or 9th of 1946, when I left the partnership.

By Mr. McConnell: May I see that other document you have there?

584 By the Court: I believe 63 has been received, hasn't it?

By Mr. Lockley: I understood, your Honor, it
585 had only been admitted for identification subject to further testimony connecting it up.

By the Court: All right.

By Mr. Kirby: Have you got the other one?

By Mr. McConnell: Let me ask the witness a question if I may, your Honor.

By the Court: Yes.

Cross Examination by Mr. McConnell.

Q. On this document 63-B, could you tell us—the one which you got from Mr. Huebner, and the one you are asked to compare with this other document of yours.

A. Yes, sir.

Q. Are there any dollar figures on that?

A. Doubt?

Q. Dollar figures.

A. No, sir. There was not any dollar figures, no sir.

Q. That just takes the amount of pounds and invoices shipments to your company?

A. That is correct, sir. Not to my company. To 586 various customers and the bills were sent to me.

Q. So all it is is what your invoices show, isn't it?

A. There would be no sense in preparing this from what my invoices show. I have my invoices.

By Mr. McConnell: I move to strike it all. All it is is a recap of the invoices.

By the Court: You move to strike what?

By Mr. McConnell: That document 63-B, if the Court please. There is nothing in it. It is nothing but a recap of the invoices which are shown in the book.

By the Court: Be that as it may, nevertheless it may be competent. I will receive it in evidence. I will deny the motion to strike.

By Mr. Lockley: I now offer Manufacturers Trust Company account Exhibit No. 63 in evidence.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 63.)

587 By Mr. Lockley:

Q. Mr. Lubben, you state that according to Exhibit 63-A there was a balance due of $36,148.35, is that correct?

A. That is correct, sir.

Q. Do you know on or about the date that that was paid?

A. Yes, sir. The day that the recap sheet would show it, at the top—which was November 27, 1945, or about that date.

Q. I show you Manufacturers Trust Company deposit ledger card, Exhbit No. 63, and ask if you find a withdrawal on November 27th in the amount of $36,148.35?

A. Yes, sir. On November 27th I find a withdrawal of $36,148.35.

Q. And that was the amount of the balance due?

A. That is correct, sir.

Q. Now, there is also an item of "Less advance $30,000.00".

A. Yes, sir.

Q. What does that represent?
A. That was an advance that I had made to Mr. Huebner in cash.
588 Q. Do you know about when that advance would have been made?
A. Well, it was—
By Mr. McConnell: If the Court please, we are back again to this general characterization of payments.
By Mr. Lockley: I am trying to lay the foundation.
By the Court: Be more definite.
By the Witness:
A. I would say, sir, if my memory serves me correctly, it was in October, early in October or September or in the latter part of September.
By Mr. Lockley:
Q. Do you recall whether you drew any checks to cash in that amount?
A. No, sir, I didn't draw a check to cash. It was $30,000.00.
Q. Do you know where you got the $30,000.00?
A. Yes, sir, I do.
Q. Where?
A. I got it out of the box in our office that was called the corn box. This was during the partnership. I remember this instance specifically, sir, because we were
589 selling corn syrup for an invoice.
By Mr. McConnell: There was no question asked about giving an explanation of the box. You asked him where he got it.
By the Witness:
A. Out of a cash box, sir.
By Mr. Lockley:
Q. You got it out of a cash box?
A. Yes, sir.
Q. Do you recall where you paid it to Mr. Huebner?
A. No, sir, I do not.
Q. Do you recall anything of the circumstances surrounding the payment?
A. No, sir. Either it was in Chicago or New York.
Q. Now, Mr. Lubben, I show you Exhibit F4-C for identification and ask you if you have seen that before?
A. Yes, sir, I have.
Q. Was that a record that was kept in the ordinary course of your business?
A. It was, sir.

Q. Was it true and correct at the time it was made?
A. It was, sir.
590 Q. Was it part of your business practice to keep such records?
A. Yes, sir.
Q. With respect to the writing on the box, do you know who made that writing?
A. I did, sir.
Q. Did you make it contemporaneously with the preparation of this record?
A. What do you mean, contemporaneously?
Q. At about the same time?
A. Yes, sir.
By Mr. McConnell: At or about the time of what?
By Mr. Lockley: At about the time the record was prepared.
By the Witness: Your Honor, may I be excused? I have to go to the bath room.
By the Court: We will take a recess. The witness asked if he could take a recess. We will now take the noon recess. We will recess now until 2:00 o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p. m. of the same day, Wednesday, September 16, 1953.)

591

* * (Caption—No. 52 CR 143) * *

Chicago, Illinois
Wednesday, September 16, 1953
2:00 o'clock P.M.

Court met pursuant to recess.

Present:
Mr. Edward J. Calihan, Jr.
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following proceedings were had herein:
By a Juror: Your Honor, on behalf of the jury, when

you admit or strike evidence, sometimes we can't hear you perfectly. And Mr. O'Brien, counsel for the defense,
592 we have difficulty hearing him at times.

By the Court: I will be glad to speak up so you will hear. I thank you for calling it to my attention.

By Mr. O'Brien: I will, too.

By Mr. Lockley: I offer Government Exhibit 14-C in evidence, your Honor.

By Mr. McConnell: I object, if the Court please, on the same basis as I have, to the other record, as self-serving, so far as my client is concerned, and also object to the handwritten notations on the back, as not being made in the course of business.

By the Court: Are you offering the handwritten notations on the back?

By Mr. Lockley: Yes.

By the Court: Have you identified that?

By Mr. Lockley: Yes, sir. The witness, as I recall, identified that as his handwriting made contemporaneously. He asked what I meant by the word contemporaneously.

By the Court: The exhibit may be received.

593 (Said document was received in evidence by the Court and marked Government's Exhibit 14-C.)

DAVID G. LUBBEN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Continued) by Mr. Lockley.

Q. Mr. Lubben, I show you Government Exhibit for identification No. 14, and ask you if you have seen that before?

A. Yes, sir; I have.

Q. Is that your signature on the bottom?

A. Yes, sir; it is.

Q. Is that a check which was written in the ordinary course of business?

A. Yes, sir. In fact, all the writing on the check is mine, sir.

(Document handed to counsel.)

By Mr. O'Brien: What is the exhibit number?

By Mr. Lockley: 14.

I offer it in evidence.

594 I will connect it up further later, your Honor.

By Mr. McConnell: I object to it, if the Court please. It doesn't show any payee, it doesn't show whether it has ever been cashed. It doesn't show any transaction.

By Mr. Lockley: I will connect it up, your Honor.

By the Court: Well, supposing you connect it up first, then offer it.

By Mr. Lockley: All right, sir.

By Mr. Lockley:

Q. Mr. Lubben: I show you Government Exhibit for identification 14-A, and ask you if you have seen that before?

A. Yes, sir; I have.

Q. Is that your signature on the bottom?

A. It is, sir.

Q. Is the entire document in your handwriting?

A. It is, sir.

Q. Was it prepared on or about the date it shows thereon?

A. Yes, sir; February 14, 1946.

595 Q. Don't tell me what the date is, just say yes.

By Mr. O'Brien: '46?

By Mr. Lockley: '46, yes.

By Mr. Lockley:

Q. Was this prepared in the ordinary course of business?

A. Yes, sir.

Q. I show you Government exhibit for identification 14-B, and ask you if you have seen that before?

A. Yes, sir; I have.

596 Q. Is that document in your handwriting?

A. Yes, sir.

Q. Is the signature on the bottom in your handwriting?

A. It is, sir.

Q. Did you prepare that in the ordinary course of business?

A. I did, sir.

Q. Now I show you Government's Exhibit No. 14-C and I ask you: What do the numbers and the names on the back thereof have reference to, 3017 Byron Cain, 3018 Harold Sullivan, and 3019 Frank Huebner?

A. The numbers are the numbers of the checks that I just identified and the names were the names that I wrote on the checks.

Q. As the payees?

A. Yes, sir.

Q. Now, with reference to the other numerical computations on the back of that sheet, what do they signify?

A. Well, I took the figures of $41,682.10 and divided it by three, and I got $13,894.03.

Q. And what did you do after you had determined that figure of $13,894.03?

597 A. I wrote three checks, one check No. 3017 to Byron Cain for $13,894.03.

Q. What is that number again?

A. 3017.

Q. Is this the check number 3017 that is referred to?

A. Yes, sir.

Q. And what else?

A. I wrote 3018 for a similar amount to Harold Sullivan.

Q. Is this the check 3018 to which you refer?

A. Yes, sir.

Q. Go on.

A. And I wrote check number 3019 to Frank Huebner.

Q. And is this the check 3019 to which you refer?

A. Yes, sir; it is.

By Mr. Lockley: For the record, check No. 3017 is Exhibit 14, 3018 is 14-A and 3019 is 14-B.

By Mr. Lockley:

Q. Now, what is the date on the settlement sheet in your hand?

A. February 6, 1946.

Q. Did you prepare these checks on February 14th,

598 on the date shown thereon?

A. Yes, sir.

Q. And what did you do with them after you had them prepared?

A. These checks were prepared in Chicago and I went to the plant of The Shotwell Manufacturing Company and I spoke to Mr. Huebner.

Q. And what day was that?

A. February 14, 1946.

Q. And was anyone else present?

A. Either that day or the next day, sir, but right around there.

Q. Was anyone else present?

A. No, sir; there was not.

Q. And what was the conversation at that time?

A. I told Mr. Huebner that we owed him fourteen thousand—by me, I mean the partnership, the Eatsum Food partnership—owed him $41,682.10, and that was overages that we owed him, and I told him I was getting ready to leave the partnership, and I could no longer have any access to the cash box to take money out to pay them. I also told him I was forbidden to draw any checks to cash for Shotwell, or for anybody else, for that
599 matter, and that I had to pay these people, and I said these—

Q. Who do you mean by these people?

A. I had to pay—I said, "We owe you this money and the only way that I can pay it to you is if you will take these checks for the amount that I owe. Otherwise"—I mean, so I said, "That's the only way I can pay you the money."

Q. Was there any further conversation?

A. Yes, sir. Mr. Huebner says, "Well, I don't know, Dave. I will have to check up and see." He says, "It is a little unusual." And I explained the circumstances. As I said, I had no way of paying him the cash or drawing a check for cash.

So he says all right, he would see what could be done. And so he—I am not quite sure if it was in my presence that he called either Harold Sullivan or Byron Cain, but I know he called one of them.

Q. And what did you do then?

A. If my memory serves me correctly, sir, I mean, I went to the Lott Hotel, to the Belden Stratford, where I saw Mr. Byron Cain.

600 Q. And who was present?

A. Mr. Cain and myself.

Q. And about when was that?

A. I would say it was around February 14, 1946.

Q. And do you have any recollection of a conversation?

A. Yes, sir—although I am just a little bit hazy on the date—with Byron Cain. But the conversation that I had with Byron Cain was that—

By Mr. McConnell: Who was present?

By Mr. Lockley: He has already said he and Byron Cain.

By the Witness:

A. Mr. Cain.

By Mr. Lockley:

Q. Speak up.

A. Yes, sir. To my knowledge, Byron Cain was there. And I explained that I was getting ready to leave the partnership, and I had to pay this bill, and I had no way of paying the money, and it was the only way I could pay the money, and so forth.

Q. Did he say anything to you?

A. Yes, sir. Byron Cain told me that—he said,
601 "Well, I don't know, Dave. We certainly didn't get in this thing to handle cash just for the sake of handling cash and paying taxes on it. And I don't want to take any check."

By Mr. O'Brien: Excuse me. Would you read the answer?

(Record read.)

By Mr. Lockley:

Q. Was there any further conversation?

A. Yes, sir; I was told to see Mr. Sullivan.

Q. Did you see Mr. Sullivan?

A. Yes, sir; I went to Mr. Sullivan's office.

Q. When?

A. Probably that same day.

Q. Do you know where it is located?

A. Yes, sir; it is on, I believe—it is on Dearborn Street, South Dearborn Street.

By Mr. Kirby: Is this February 14, 1946, that the witness is speaking of?

By the Witness:

A. To my knowledge.

By Mr. Lockley:

Q. Do you have any recollection as to the exact date?

602 A. No, sir; I don't have an exact recollection as to the exact date.

Q. But you did have a conversation with Mr. Sullivan in his office?

A. Yes, sir.

Q. Was it during the year 1946?
A. Yes, sir.
By Mr. Kirby: Can the witness fix it any closer than sometime in the year of 1946?
By the Witness:
A. No, sir; I can't.
By Mr. Lockley:
Q. You are not certain?
A. No, sir.
Q. Well, what was the conversation?
A. Well, sir, the conversation that I had with Harold Sullivan was that, as I say, as I mentioned in Byron Cain's conversation.
Q. Speak up.
By Mr. Kirby: I object to his references back. I would like to know if the witness has a memory of this alleged conversation.
603 By Mr. Lockley:
Q. Speak up and tell what happened at that conversation?
A. Well, sir, I told them I was going to start in a new business, and—
By Mr. O'Brien: Who was present in this conversation?
By the Witness: Well, when I spoke to Mr. Sullivan, sir, it was just Mr. Sullivan there.
By Mr. O'Brien: You said you told "them".
By the Witness: Yes, sir.
By Mr. O'Brien: That's why I asked.
By the Witness:
A. And, sir,—well, he didn't want to accept the check.
By Mr. Lockley:
Q. Was there any conversation?
By Mr. O'Brien: I move to strike his statement that he didn't want to accept the check.
By the Court: Yes, the conclusion may be stricken. Tell us what he said.
By the Witness:
604 A. Mr. Sullivan asked me, when I talked to him, how I was keeping any records of my cash payments, and was I marking this on my book—I mean, what was I doing.
By Mr. Lockley:
Q. What did you tell him?
A. I said, "No, sir; we were selling merchandise for

cash." And we were getting the cash payments and giving it to him.

He said, "Are you sure this is not appearing on your books any place?"

I said, "No, Mr. Sullivan, it is not."

Q. Was that a true answer?

A. No, sir; it was not. Because had I told—

By Mr. Kirby: I don't want any explaining why he lied.

By Mr. Lockley:

Q. All right, will you proceed?

By Mr. Kirby: It is admitted he lied.

By Mr. Lockley:

Q. Will you proceed with the conversation?

A. Sir, so—he (Mr. Sullivan) said, "Well, Dave, you know how it is. You have a place in New Jersey, a farm in New Jersey. This money I have been using in
605 my farm."

And if I recall correctly that day he told me—he said, "I am getting a new driveway," or something, "put in."

And he said, "That is the only way I can do it today, with the tax situations the way they are."

Q. Do you recall any further conversation about that check?

A. No, sir.

Q. With any one of the defendants?

A. No, sir.

Q. Now, did you get the checks back?

A. I got the checks back from Mr. Huebner.

Q. Do you remember if he handed them to you, mailed them, or how?

A. I don't recall, sir.

Q. Were the names cut out at that time?

A. I don't recall that either, sir.

Q. Where have they been in the meantime, since you received them back?

A. Well, sir, I brought them back, and when they came back, we put them in the file.

By Mr. Lockley: May Government Exhibits 14,
606 14-A, and 14-B now be admitted in evidence, your Honor?

By Mr. McConnell: Have you offered them?

By Mr. Lockley: Yes, sir.

By Mr. McConnell: I object to them as not binding on the corporation.

By Mr. Kirby: I object to them as having taken place, in their preparation, completely outside the presence of the defendant, Sullivan, and to have taken place in connection with some alleged conversations which also took place outside of the presence of the defendant, Sullivan.

By the Court: Well, the jury will understand that the conversations he allegedly had with these individual defendants will only be competent as to the individual defendant referred to.

I will receive the exhibits in evidence.

(Said documents were received in evidence by the Court and marked Government's Exhibits 14, 14-A, and 14-B.)

607 By Mr. Lockley:

Q. I now show you Government's Exhibit for identification No. 73-A and ask you if you have seen that before, or, rather, the original of that.

A. Yes, sir, I have.

Q. And where did you last see it?

A. The last time I saw this original was early in February, 1948.

Q. First, tell me, was that a record that was kept in the ordinary course of business?

A. It was, sir.

Q. Was it true and correct at the time it was made?

A. Yes, sir; it was.

Q. Do you know by whom it was prepared?

A. I believe this was prepared by Miss Strum, sir. Freda Strum or Freda Seider.

Q. And was it your practice to keep such records in your business?

A. Yes, sir.

Q. Now, you say the last time you saw the original was in the middle of February, 1948?

A. Yes, sir.

Q. Where was that?

A. At my home in Hillsdale, New Jersey.

608 Q. Who was there at the time?

A. Mr. Frank Huebner.

Q. Anyone else?

A. Mr. Davidson.

Q. And who is Mr. Davidson?
A. He is my attorney.
Q. What transpired at that time; was there a conversation?
A. Yes, sir. Mr. Huebner came over for—
By the Court: What date was this. I lost track.
By the Witness:
A. Early in February, 1948, sir.
By the Court: Go ahead.
By the Witness:
A. Mr. Huebner came over to get any records that I had pertaining—
By Mr. O'Brien: Just a minute. I would like to object, if the Court please, to a transaction in 1948 as being beyond the indictment period here.
By the Court: He can relate a conversation he had with any one of the defendants at any time, if it is competent.
609 By Mr. Kirby: Well, I wish to make the further specific objection that if a matter has occurred after the transactions within the indictment have come to rest, we then get into other rules, as I conceive them, and those rules would be that such statements would not be admissible at all, having in mind that the transactions supposedly in question ended in 1946.
By the Court: You are thinking of a conspiracy case. This isn't a conspiracy case. If the statement by Huebner is competent by way of an admission, or by way of any relevant statement that throws light on this controversy, it is competent.
610 By Mr. Lockley: I am only trying to lay a foundation at the present time for the absence of the original.
By the Court: Go ahead.
By Mr. Lockley:
Q. Can you state any conversation that transpired during the middle of February with Mr. Huebner?
A. Yes, sir. Mr. Huebner called me and told me he was coming over.
Q. On the telephone?
A. Yes, sir. From the Gotham Hotel. It was on a Sunday, sir. And he told me he was coming over for the records that we had previously discussed about, that had relationship to the overpayments to the Shotwell Manufacturing Company.

Q. Did you have a previous discussion with Mr. Huebner about such records?

A. Yes, sir; I did.

Q. When was this?

A. I had a previous discussion with Mr. Huebner, I believe, a few days one way or the other.

Q. Was anybody else present at that discussion?

A. Yes, sir; it was Mr.—it might have been in January, sir, when we had this discussion.

611 By the Court: A little louder.

By the Witness:

A. It might have been the latter part of January that we had the discussion, but I remember at the discussion that I had, that Byron Cain was present.

Q. Well, tell us what happened at the first discussion now, when Byron Cain was present?

By Mr. O'Brien: When was that?

By Mr. Lockley: He said the latter part of January.

By Mr. O'Brien: He said that's when Huebner talked to him.

By Mr. Lockley: This was the middle part of February?

By the Witness: Yes, sir.

By Mr. Lockley:

Q. Let's fix it again—fix it again. When was the conversation with Mr. Huebner and Mr. Cain?

A. The conversation, sir, with Mr. Huebner and Mr. Cain would be either a few days—around the early part of February, or in January, in there, and they asked me—

By the Court: Of '48?

By the Witness: Yes, sir.

612 By the Witness:

A. And Mr. Cain asked me if I had any record pertaining to my overpayments with Shotwell Manufacturing Company.

By Mr. Lockley:

Q. And what did you tell him?

A. I said I did.

Q. What did he say?

A. And he said, "What kind of records do you have?" And I told him the kind of records we had kept, that is, we kept recap sheets, and we drew the checks for cash.

Q. I see.

A. Mr. Cain was surprised that I kept such records.

Q. All right.

A. So on Sunday—

Q. Was there any further conversation at that time?

By Mr. O'Brien: I object to his statement about Mr. Cain's surprise, if the Court please.

By the Court: Well, the conclusion of the witness that Mr. Cain was surprised, which doesn't presume to re-
613 late to conversation, may be stricken.

By Mr. Lockley:

Q. Now, did Mr. Cain or Mr. Huebner or yourself say anything further at this first conference, conversation?

A. Yes, there was other discussion, sir. And they asked me—

By the Court: Keep your voice up.

By Mr. Lockley:

Q. Please talk up.

A. They asked me if I had any objections to giving them the records so they could check their records with them.

And I said, "No."

And so on this Sunday, which was early in February—no, early in February, 1948, Mr. Huebner called and told me he was coming out for the records.

Now, I don't recall that day whether I drove into New York and picked them up, or if he came out in a Cadillac limousine, but I do remember taking him back to New York.

Q. While he was in your house, what happened?

A. Sir, when I came back from that first conversation, I went into the barn where we had stored our
614 surplus records, I mean records from previous months, and I checked the files to see if I could find any of these records, and I did find the records, and I brought them in the house.

615 When Mr. Huebner came out to the house on that Sunday he himself wanted to go and look in the barn, too. And we went out and he looked in a few files, and he didn't find anything there. Then he went back in the house. And we had this pile of records lying on the table in the sun porch.

Q. And is that one of the records?

A. And this is one of the records, sir.

Q. What was done after that?

A. Well, he went through the records, and some rec-

ords he didn't want, and some records he did want. And the records he did want we put in a large envelope and I was going to give them to him.

Q. And did you give them to him at that time?

A. No, sir; I didn't.

Q. What did you do with them?

A. I put—well, I was going to give him the records, but then Mr. Davidson asked me—he was sitting there at the time, and I stepped outside, and he said, "Can I talk to you a minute?" And he went in the kitchen.

Q. Is this a conversation outside the presence of
616 the defendant?

A. Yes, sir.

Q. We won't go into that then. What was ultimately done with those records?

A. The ultimate was that the records were photostated. I went back and told Mr. Huebner that I wasn't going to give these records, because I had no way of knowing whether they were going to correct their records, or weren't going to correct their records, and these were my property to show the transactions I had with the company, and I didn't know if I was going to get them back or not.

Q. Is that one of the photostats you made at that time?

A. Yes, sir.

Q. What happened to the originals, do you remember?

A. No, sir; I don't.

Q. You don't have them at the moment?

A. No, sir; I don't.

Q. Have you searched for them?

A. Yes, sir; I have.

Q. You have been unable to find them?

A. Yes, sir.

617 Q. I show you Government's Exhibit for identification No. 73 and ask you if you have seen that before?

By the Court: Let's get one thing straightened out at a time.

By Mr. Lockley: I am trying to expedite things, your Honor.

I offer this in evidence. The exhibit stamp is on the back, sir.

By Mr. McConnell: I object to it on the same ground

that I objected to the other exhibit, as to the corporation, not binding on the corporation, no proper showing of this being a true copy of any original—

By the Court: I couldn't hear a word you said.

618 By Mr. McConnell: I am sorry, your Honor. I think part of the trouble is with this room. I don't think the acoustics are very good.

I said I object on the same ground that I had objected to the other exhibits, that they were not binding on my client, the corporation, Shotwell Manufacturing Company; and for the further reason that no sufficient accounting has been made of the originals from which this purports to be a photostat, and no showing that that is a photostatic copy of any original document.

By the Court: I think a further foundation should be laid as to what search, if any, or what may have happened to the original, and why you are relying on a photostat.

By Mr. Lockley:

Q. Mr. Lubben, is this a true and correct copy of the original?

A. Yes, sir; it is.

Q. Now, have you searched for the original?

A. Yes, sir; I have.

Q. Where?

A. Well, sir, I searched for the original a long

619 while ago when the Government wanted my records.

Q. When was that?

A. Several years ago.

Q. And what records—what is the date of that sheet?

A. March 27, 1946.

Q. Where would you normally keep the original of that document?

A. It would be kept in the files, sir, of the company.

Q. As far as you know, in whose hands was the original of that document the last time you saw it?

A. The last time I saw the document it was in Mr. Huebner's hands. And then Mr. Huebner wanted to take the package with him. And I said, "No, I want to have these photostated because I have no assurance that you are going to bring them back to me." And I gave it to Mr. Davidson.

By the Court: Who is Mr. Davidson again.

By Mr. Lockley: He is the attorney. He was Mr. Lubben's attorney.

By the Witness: Mr. Davidson is an attorney, sir.
By Mr. Lockley:
Q. Now, did Mr. Davidson return the originals to you?
620 A. No, sir; he did not, but he returned the photostats to me.
Q. You have not seen the originals since that time?
A. No, sir.
Q. Have you asked Mr. Davidson if he has them?
A. Yes, sir; I did.
Q. What did he say?
A. He said he believed he gave them to Shotwell, to Mr. Huebner or to Mr. Poses.
By Mr. McConnell: I move to strike that conversation as being outside the presence of any defendant at all.
By the Court: It purports to relate to the search he made. It isn't offered by way of conversation, except as it purports to relate to a fact, and it is an exception to the hearsay rule.
By Mr. O'Brien: My objection, your Honor, is that there is no proof of the making of an original, or of the existence of an original, which was part of the record, and I think, having in mind the time we are talking about, March of 1948, that any originals that were really originals and part of the records on file would have been
621 in the custody of the receiver of that company, and I don't think there is any showing here that there was an original—that the original, if any, of this was a part of the company record.
622 By the Court: Yes, I think that objection is well taken.
By Mr. Lockley: We will lay a further foundation by another witness at a later date, your Honor, and submit it at that time.
By Mr. Lockley:
Q. I now show you Government Exhibit for identification No. 73, and ask you if you have seen that before?
A. Yes, sir; I have.
Q. Is that your signature that appears thereon?
A. Yes, it is.
Q. Is the whole document in your handwriting?
A. No, sir; just the signature.
Q. Do you know who wrote the balance of it?
A. No, sir; I don't. I believe it—

Q. When was it prepared?
A. On March 29, 1946.
Q. And was that a document that was kept in the ordinary course of business?
A. Yes, sir; it was.
Q. And that is a check, isn't it?
A. Yes, sir.
623 Q. Did it clear the bank?
A. Yes, sir; it did.
Q. And do you know where the original of that check is today?
A. No, sir; I do not.
By Mr. O'Brien: Is this one of the documents produced by the bank?
By Mr. Lockley: Yes.
By Mr. O'Brien: Well, I object to it, your Honor, on the ground that it does not purport to be complete. The reverse side of the check is missing, anl also there has been no sufficient showing made of any effort to procure the original check.
By Mr. Lockley: If your Honor please, I laid a foundation for the issuance of this face part of the check and for the absence of the reverse through the testimony of the bank officer on the stand the other day.
By Mr. McConnell: If the Court please, I think he did not make a showing by the bank officer the other day, if I may say so. It seems to me what that bank officer
624 testified to was that they did photostat or Recordak the reverse side of the checks, and he had not made any search to determine whether or not they had the reverse photostated for these particular checks. And on that basis, if your Honor please, you refused admission of one document which I objected to.
By the Court: Well, insofar as it purports to be the face of the check, and I think the complete foundation has been laid for that—sufficient foundation—the face of the check may be received. We are not receiving the endorsement, so that is that.
By Mr. O'Brien: But there has been no showing to account for the absence of the original.
By the Court: Well, I think that is true, that you haven't laid any foundation as to where the original check may be, if it is in existence.
625 By Mr. Lockley:

Q. Mr. Lubben, when did you last see the original of this check?

A. I last saw the original of that check, sir, when it was cashed by the bank, when I signed it.

Q. Did you see it when it was returned by the bank?

A. No, sir; I did not. It wasn't my habit to check checks coming back.

Q. What was done with the canceled checks in your office when they were returned by the bank?

A. They were given to the accountant, and the bookkeeper, and they checked it out to arrive—to see that the balance was correct.

Q. Then what happened to those checks?

A. They were stored, sir, and filed.

Q. Where?

A. In a file drawer, sir.

Q. Do you know where the file drawer is today?

A. No, sir; I don't.

Q. Have you made any attempt to search for this particular check?

A. Yes, sir; I have. I looked all through the files
626 we had in the barn and I made them available to the Government to look through, so I don't know, sir.

Q. Were you accompanied by any Treasury agents during the course of your searches or search?

A. Yes, I believe it was Mr. Toohig, and another gentleman once when we looked upstairs.

Q. Were you able to find the check?

A. No, sir. We weren't looking for that specific check. If I remember, we were looking for checks in general, and things like that.

Q. What checks were you looking for?

A. Anything pertaining to what the Government wanted. They wanted all—I just put the records there and they took what they wanted.

Q. Was the Government looking for checks drawn to cash?

A. Yes, sir.

Q. Did you find some checks drawn to cash?

A. I don't recall, sir, whether we did or didn't.

Q. But you didn't find the original of this particular check?

A. No, sir; we did not.

Q. And you don't know where the original is
627 today?

A. No, sir; I do not.

By Mr. Lockley: I submit it again, if your Honor please.

By the Court: Well, are you going to establish what was done with the proceeds of the check?

By Mr. Lockley: Yes, if your Honor please.

By the Court: For that purpose I will receive the exhibit in evidence.

(Said document was received in evidence by the Court and marked Government's Exhibit 73.)

By Mr. O'Brien: May I ask him a question, Judge?

By the Court: Yes.

Cross Examination By Mr. O'Brien.

Q. When were you and the agents looking for these checks?

A. As I say, I don't know whether we were looking for the checks. I know they were looking for papers and things.

Q. Whatever it was that you were looking for, when was it?

628 A. I think it was May, 1948.

Q. And you were looking in the barn?

A. Yes, looking through those same records that you are going to get.

Q. When did the General Confections go into receivership?

A. On March 8, 1948.

Q. And were all the books and records and files turned over to the receiver, except those in the barn?

A. No, sir. Well, the receiver came and he took books and records and canceled checks.

Q. He took the whole office, didn't he?

A. No, sir; he did not.

Q. Well, did you continue to run the business after he came?

A. No, sir; the business was closed.

Q. All right. Did he take custody of everything?

A. He went out with a box full of papers and books and records and so forth.

Q. And you don't know whether he has the checks or doesn't have the checks, do you?

A. I don't know where the check is at, sir.

By Mr. O'Brien: That is all.

629 I renew my objection.

By the Court: I will receive the check in evidence.

Direct Examination (Continued) By Mr. Lockley.

Q. Now, Mr. Lubben, I show you Government's Exhibit 14-C, which is a settlement sheet showing an amount due of $41,682.10, and I also show you Government's Exhibits 14, 14-A and 14-B, which are three checks of $13,894.03; were those checks issued as a part of the $41,000.00—or in full payment of the $41,000.0 shown on the settlement sheet?

By Mr. McConnell: He just leads the witness through these transactions, your Honor. He never asks him what they represent, he tells him what they represent, and asks him to confirm it.

By the Court: Well, read the question.

(Question read.)

By the Court: He may answer.

By the Witness:

A. Yes, sir; they are.

By Mr. Lockley:

Q. Now, those checks were not cleared through

630 the bank, were they?

A. No, sir.

Q. And do you know whether the $41,682.10 was paid?

A. Yes, sir; it was paid at a later date.

By Mr. McConnell: Are you going to tell us when and where?

By Mr. Lockley:

Q. Do you have any independent recollection of when and where?

A. Yes, sir. On March 9, 1946—or March 8 I withdrew from the partnership of the Eatsum Food Products, Inc., and I formed the company called General Confections, Inc., which continued business at 40 West 170th Street, and we continued in the same line, manufacturing, and buying and jobbing candy.

Now, when the checks were returned to me, and they were returned by Mr. Huebner—

By Mr. Kirby: If the Court please, I object to this recital.

By Mr. Lockley: It is in response to counsel's question.

By Mr. Kirby: I wish he would answer the question which was posed to him, that is, when this money was paid, how it was paid.

631 By the Court: I think his answer is entirely responsive. He may continue.

By the Witness:

A. The money was paid out of General Confections, some time in March. While it was no obligation of General Confections—

By the Court: Just answer the question now. Just tell what was done.

By the Witness:

A. Yes. It was paid in March out of General Confections and a recap sheet was made.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 73-A and ask you if that is the recap sheet?

A. Yes, sir; it is. It is the recap sheet, sir, but there is an addition to it of one item.

By Mr. Kirby: If the Court please, you have already ruled that that exhibt may not be admtted and I submit it is improper for him to read from an exhibit you have ruled out.

By the Court: Well, if you are referring now to the exhibit as to which you are going to lay a further foundation, I think the objection is well taken.

632 By Mr. Lockley: I did not intend for the witness to read from it, your Honor. I was merely identifying it further.

By Mr. McConnell: I would still like to know who he paid that money to on March 8, 1946.

By Mr. Lockley: We will get to it, counsel.

By the Court: He has a right to lay a further foundation as to the exhibit, if that is what he is attempting to do.

By Mr. Lockley:

Q. Now, with respect to Government Exhibit No. 73, in the amount of thirty-five thousand and some odd dollars, did you cash that check?

A. Well, sir, it was probably cashed by Miss Seider, or somebody in—one of the girls in the office, and the money was given to me.

Q. And what did you do with the money?
A. I paid the money to Mr. Huebner.
Q. Do you recall when?
A. Yes, sir. I feel very sure that it was in New York at the Gotham Hotel.
Q. And who else was present at the time?
633 A. Present at the time was Byron Cain.
Q. Was there any conversation?
A. Yes, sir. Because this was an obligation of the partnership—
Q. Just tell me what the conversation was.
A. Well, the conversation was, "Dave,—"
By Mr. Kirby: When was this, please?
By the Witness:
A. On or about March 29, 1946. And the conversation was that, "Dave, you are a very honest fellow," because, as I stated—"Well, you are an honest fellow, and I appreciate what you have done."
By Mr. Kirby: I object, specifically that I don't wish that to be binding on the defendant, Sullivan.
By the Court: I think that the ruling the Court heretofore made will, of course, prevail.
Go ahead. Tell us what the conversation was.
By the Witness:
A. I was an honest fellow, and I appreciated—he appreciated it because this was an obligation of the
634 partnership which General Confections had assumed. I was unable to pay the money out of the partnership, and I paid it out of General Confections.
By Mr. Lockley:
Q. Was that the conversation?
A. Yes, sir.
Q. Was there any further conversation?
A. Well, I felt very good about it, too, sir.
By Mr. McConnell: I move to strike out how he felt about it.
By the Court: All right, that may be stricken.
By Mr. Lockley:
Q. I show you Government Exhibit for identification No. 13, and ask you if you have seen that document before?
A. Yes, sir; I have.
Q. In whose handwriting is it?
A. It is in my handwriting, sir.

Q. And when was it made?
A. I have no way of knowing, sir. I think it was made around April.
Q. April of when?
635 A. Of 1946.
Q. Was that true and correct at the time it was made?
A. Yes, sir.
Q. Was it a document, or a record which you kept in the ordinary course of business?
A. Yes, sir.
Q. And was it your practice to keep such documents?
A. Yes, sir.
636 Q. Do you know where the original of this is today?
A. No, sir.
Q. Have you searched for it?
A. Yes, sir.
Q. When was the last time you saw it?
A. Early in March, 1948, on the front porch of my home.
Q. It was in March?
A. Yes, sir. No, not March. February.
Q. Early in February, 1948?
A. Yes, sir.
Q. You had it at that time?
A. I had it and Mr. Huebner had it and it was given to Mr. Davidson to photostat.
Q. Have you seen the original since then?
A. No, sir.
Q. Have you made a search for it?
A. No, sir.
Q. Have you found it?
A. No, sir.
Q. You stated that that was in your handwriting?
A. Yes, sir.
Q. Completely?
637 A. Yes, sir.
Q. And is the photostat a true and correct copy of the original?
A. Yes, sir.
By Mr. O'Brien: I object to it on the same grounds as assigned to the admission of exhibit 73, if the Court

please, and on the further ground that it purports to be a direction to some undisclosed person and not a part of the record of the company.

By Mr. McConnell: I object to it on behalf of the Shotwell Manufacturing Company as being self-serving and not being binding on my client.

By Mr. Lockley: If your Honor please, I think this is an exhibit which is different from the other record which counsel objected to on the ground that there was no foundation laid to show its accuracy. This is in the witness's own handwriting. He has testified it is a true and correct copy of the original and to the best of his
638 knowledge, he has explained the absence of the original.

By the Court: Well, you haven't developed any circumstances as to why it was made up or what occasioned it and when it was made up, whether it was a part of his records at the time he left Eatsum Company. You haven't given us any particulars about it.

By Mr. Lockley: Well, he testified that it was made out in April, 1946, I believe he said.

By the Witness:

A. Yes, sir, to the best of my knowledge.

By Mr. Lockley:

Q. Why was it made out?

A. It was an instruction saying—

Q. To whom?

A. Mr. Heitmann.

639 Q. Who was Mr. Heitmann?

A. Mr. Heitmann was an employe of General Confections.

Q. What did you do with it after you made it out?

A. I gave it to Mr. Heitmann.

Q. Did you subsequently see it?

A. Yes, sir.

Q. Under what circumstances?

A. When he had completed the directions on that sheet, he had returned it to me.

By Mr. O'Brien: I object to the statement that he completed the directions on the sheet.

By the Court: Well, that portion may be stricken.

By Mr. Lockley:

Q. He returned it to you and what did you do with it?

A. We put it in the file, sir.

Q. It became a part of the records of the General Confections?

A. Yes, sir.

Q. Was it made in the regular course of business?

A. Yes, sir.

Q. Did you have occasion to make other such records?

A. Yes, sir. I have made records to keep track
640 of those things, yes, sir. There was nothing unusual about it.

By Mr. Lockley: I submit Government's Exhibit 13 again, sir.

By Mr. McConnell: I object to it.

By the Court: I don't know the purpose of the offer. Is it to refresh his recollection?

By Mr. Lockley: No, your Honor. It is to establish that certain payments were made by another witness whom we will call pursuant to the directions contained on this sheet and to corroborate the witness's own statements that such payments were made and to such extent as it is necessary, to refresh his recollection as to amounts and dates and circumstances. I think it is corroborative testimony. The witness has been saying that he wasn't—

By the Court: Perhaps you should defer your offer until the other witness is called and then the relevancy will appear more clearly than it does now.

By Mr. Lockley: All right, sir.

By the Court: Did I understand that you are going
641 to offer other evidence as to the search of the records of General Confections and Eatsum, the proprietorship, so that additional foundation may be laid for secondary evidence?

By Mr. Lockley: I can do so, sir. It had not been my intention to do it.

By the Court: I mean, do you intend to do it? In other words, are the Government men who examined these records going to be called?

By Mr. Lockley: We will call a Government agent who will lay further foundation for the absence of the original.

By the Court: Very well. I think you better defer your offer until you have completed your foundation.

By Mr. Lockley: I understand your Honor's ruling to refer specifically to the Exhibits 73-A and 13 which are photostats?

By the Court: That is right.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 92 and ask you if you have seen that document before.

642 By Mr. O'Brien: Is that 73 or 73-A, Mr. Lockley?

By Mr. Lockley: 73-A.

By the Witness:

A. Yes, sir, I did.

By Mr. Lockley:

Q. Is that your signature?

A. It is, sir.

Q. Was the balance of the document written by you?

A. No, sir, it was not.

Q. Do you know who did write it?

A. No, sir, I do not. I think it was a Miss Frieda Strum. I am not sure, sir.

Q. Was that done in the ordinary course of your business?

A. Yes, sir, it was.

Q. Was it true and correct at the time it was written?

A. Yes, sir, it was.

Q. Was it cleared through the bank?

A. Yes, sir, it was.

Q. Then it became a part of the records of General Confections?

A. Yes, sir, it did.

643 By Mr. Lockley: I offer it in evidence, your Honor, both the front and reverse.

By Mr. McConnell: That is objected to. It is not binding on the Shotwell Company.

By Mr. Lockley:

Q. Do you know the endorsements that appear on the reverse side of that check?

A. Yes, sir, I do.

Q. Were they written in your presence?

A. No, sir, they were not.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 92.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 93 and ask you if you have seen that before.

A. Yes, sir, I did.

Q. Is that your signature?
A. Yes, sir, it is.
Q. Was that prepared in the ordinary course of your business?
A. Yes, sir.
Q. Was it true and correct at the time it was
644 prepared?
A. Yes, sir.
Q. Was it cleared through the bank?
A. Yes, sir.
Q. Did it then become a part of the records of the General Confections?
A. Of the General Confections, yes, sir.
By Mr. Lockley: I offer in evidence Exhibit No. 93, your Honor.
By Mr. McConnell: I object to Exhibit 93 for the same reason I objected to Exhibit 92.
By the Court: It may be received.
(Said document was received in evidence by the Court and marked Government's Exhibit 93.)
By Mr. Lockley:
Q. Do you know what was done with these checks after they were written, Exhibits 92 and 93?
A. Yes, sir, I do.
Q. What was done with them?
A. They were given to Mr. Heitmann.
Q. Are you familiar with his signature?
A. Yes, sir, I am.
Q. Is that it that appears thereon?
645 A. Yes, sir it is.
Q. Mr. Heitmann was your employe?
A. Yes, sir.
Q. I show you Government's Exhibit 94 for identification and ask you if you have seen that before.
A. Yes, sir, I have.
Q. And was that kept in the ordinary course of business?
A. Yes, sir, it was.
Q. Do you know who kept it?
A. Part of it was kept by me—part of the writing is mine and part of it was Mr. Hankermyer's.
Q. Mr. Hankermyer?
A. Yes.

Q. Who is Mr. Hankermyer?
A. He was an uncle of mine.
Q. Is he the one who is now dead?
A. Yes, sir.
Q. Were the entries thereon true and correct at the time they were made?
A. Yes, sir.
Q. Were they made in the ordinary course of business?
A. Yes.
Q. Was it your custom to make such records?
646 A. Yes, sir.
Q. When was the last time you saw the original?
A. Early in February, 1948.
Q. Under what circumstances?
A. When Mr. Huebner was at my house for the records, for the originals.
647 Q. Was this one of the originals that was placed in the envelopes you testified to?
A. The original of that was one of the originals that was placed in the envelope, yes, sir.
Q. Have you seen it since that time?
A. No, sir, I have not.
Q. Is this a true and correct copy of the original?
A. Yes, sir, it is.
By Mr. Lockley: I will offer that at a later time, your Honor.
By the Court: Are you offering this?
By Mr. Lockley: No, sir.
By Mr. Lockley:
Q. I show you Government's Exhibit for identification No. 95 and ask you if you have seen that before, or the original?
A. Yes, sir, I did.
Q. Is that in your handwriting?
A. Yes, sir, it is.
Q. Entirely?
A. Yes, sir.
Q. Was that a record that was kept in the ordinary course of business?
648 A. Yes, sir.
Q. And did it become a permanent part of your
A. Yes, sir.
business records?

Q. Was it true and correct at the time it was prepared?

A. Yes, it was.

Q. Do you know where the original is?

A. No, sir, I do not.

Q. When was the last time you saw it?

A. Early in February, 1948.

Q. And what were the circumstances? Speak up.

A. When Mr. Huebner was on the sun porch and I was going to give him any records pertaining to the overages of the Shotwell Manufacturing Company.

Q. Have you seen it since that time?

A. No, sir, I have not.

Q. Did you say this was a true and correct photostat of the original?

A. Yes, sir.

By Mr. Lockley: I will not offer it at this time, your Honor.

By Mr. Lockley:

Q. I show you Government's Exhibit for identifi-
649 cation No. 96 and ask you if you have seen that before?

A. Yes, sir, I have.

Q. In whose handwriting is it?

A. It is in the handwriting of Mr. Hankermyer.

Q. Does any of your handwriting appear on it?

A. No, it does not.

Q. Are you familiar with Mr. Hankermyer's writing?

A. Yes, sir, I am.

Q. Did you see him make any of the entries thereon?

A. I don't recall seeing him specifically write this document.

Q. Were those entries or records made in the ordinary course of business?

A. Yes, sir.

Q. Was it your practice to make such records?

A. Yes, sir.

Q. Were they true and correct at the time they were made, if you know?

A. Yes, sir.

Q. What was the last time you saw the original?

A. Early in February, 1948, on the sun porch
650 of my home.

Q. Under the same circumstances that you have previously testified to?

A. Yes, sir.

Q. Have you seen the original since that time?

A. No, sir, I have not.

Q. I show you Government's Exhibit for identification No. 97 and ask you if you have seen that before?

A. Yes, sir, I have.

Q. In whose handwriting is it?

A. In the handwriting of Mr. Hankermyer.

Q. Are you familiar with Mr. Hankermyer's handwriting?

A. Yes, sir, I am.

Q. Was that a record that was made in the ordinary course of business?

A. Yes, it was.

Q. Was it true and correct at the time it was made, if you know?

A. Yes, sir, it was.

Q. When did you last see the original?

A. Early in February, 1948, on the sun porch of my home.

651 Q. Under what circumstances?

A. Similar circumstances, the same circumstances as the other.

By Mr. O'Brien: If the Court please, I would like to object to a repetition of the circumstances on the first occasion. The witness said he put some documents in an envelope and then after he talked with his lawyer, Davidson, he decided not to turn them over and he doesn't say and he didn't say he turned them over to anybody.

Now, there is an implication in every one of these questions. The last time he saw the originals, they were in Huebner's possession and, therefore, that he is entitled to come up with something secondary on it.

By the Court: I didn't understand him to say that the last time he saw them they were in Huebner's possession.

By Mr. O'Brien: And they were on the sun porch.

By the Court: Yes.

By Mr. O'Brien: At his home and Huebner was

652 present, although he has not said he gave any papers to Huebner at the time.

By the Court: He said he gave them to Davidson

to photostat and then he said he inquired for them and he couldn't find them. What Davidson said with reference to Huebner having the papers was stricken.

By Mr. O'Brien: He did not offer Government's Exhibit 96?

By Mr. Lockley: No.

By the Court: No.

By Mr. O'Brien: Very well.

By Mr. Lockley:

Q. Is this a true and correct copy of the original that you last saw—

A. Yes, sir.

Q. —in your home?

A. Yes, sir.

Q. I now show you Government's Exhibit for identification No. 98 and ask you if you have seen that before?

A. Yes, sir, I did.

Q. Do you know in whose handwriting it is?

A. Yes, sir. It appears in the handwriting of
653 Mr. Hankermyer.

Q. You are going to have to speak up again, Mr. Lubben.

A. Mr. Hankermyer, sir.

Q. Are you familiar with Mr. Hankermyer's writing?

A. Yes, sir, I am.

Q. Was that a record that was kept in the ordinary course of business?

A. Yes, sir, it was.

Q. Was it true and correct at the time it was made?

A. Yes, sir.

Q. Was it your practice to keep such records?

A. Yes, sir.

Q. When was the last time you saw the original of this?

A. Early in February, 1948, on the sun porch of my home.

Q. Have you seen it since that time?

A. No, sir, I have not.

Q. I show you Government's Exhibit for identification No. 100 and ask you if you have seen that before?

A. Yes, sir, I did.

654 Q. Is that a record made in the ordinary course of business?

A. Yes, sir.

Q. Do you know by whom it was prepared?
A. It was prepared by Mrs. Strum or Frieda Seider. It is Strum now. The lady has married since.
Q. Was it prepared at your direction?
A. Yes, sir, it was.
Q. Was it part of your regular books and records?
A. Yes, sir, it was, sir.
Q. Is that a true and correct copy of the original?
A. Yes, sir, it was.
Q. Where did you last see the original, if you know?
A. I don't recall, sir.
Q. I now show you Government Exhibit for identification No. 101, and ask you if you have seen that before?
A. Yes, sir, I did.
Q. Do you know in whose handwriting it is prepared?
A. That is my handwriting, sir.
655 Q. When was it prepared?
A. Sir?
Q. Do you know when it was prepared?
A. No, sir. I believe early in May.
Q. Of what year?
A. May of 1946. When I say it was in my handwriting, I mean all of it was in my handwriting with the exception of some computations over here (indicating) in the right hand corner which is not mine.
Q. Do you know whose handwriting it is?
A. Yes, sir. I believe it was Miss Seider's.
Q. Was that a record that was made in the ordinary course of business?
A. Yes, sir.
Q. Was it true and correct at the time it was made?
A. Yes, sir.
By Mr. Lockley: I offer in evidence Exhibit 101, your Honor.
By Mr. McConnell: I object to it as not binding on Shotwell. It is self-serving.
By the Court: It may be received.
656 (Said document was received in evidence by the Court and marked Government's Exhibit 101.)
By Mr. Lockley:
Q. Now with reference to Exhibit 101, will you explain the computations on the left hand side?
A. You mean the computations on the right hand side. There are some there.

Q. I am sorry. Yes.

A. Yes, sir. It shows so many cases of gum drops, spice drops, and so forth, at 10 cents a pound, and then further down on the page it shows so many thousand dozens of Cardinals, Cardinal chocolates, which is a one-pound box chocolate, at $2.25 a dozen, and the total of the gum candies at the top. The premium was $19,518.00, and the total of the chocolates was $14,049.00.

Q. Now I show you Exhibit for identification 102, and ask you if you have seen that before?

A. Yes, sir, I did, sir.

Q. Do you know who prepared Government Exhibit for identification 102?

A. I believe Miss Seider.

Q. And was that record made in the ordinary course of business?

657 A. Yes, sir, it was.

Q. And was it your practice to make such records in your business?

A. Yes, sir.

Q. Was it a true and correct record at the time it was made?

A. Yes, sir.

By Mr. McConnell: I object to it, if the Court please. It is a self-serving document, which is not binding on Shotwell.

By Mr. Lockley: I offer in evidence Exhibit, Government's Exhibit 102.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 102.)

By Mr. O'Brien: We make the same objection.

By Mr. Lockley:

Q. Now, Mr. Lubben—

By the Court: You haven't explained, and we don't understand it, unless you are going into more detail just what you are attempting to prove by it.

658 By Mr. Lockley: I am going to get it in right at this moment.

By Mr. Lockley:

Q. Mr. Lubben, will you look at Government's Exhibit 101 and Exhibit 102 and tell me if they have any relationship with each other?

A. Yes, sir, they do.

Q. What is the connection?

A. Well, the longhand is now typed for the gum work, which is the baby spice drops and spice strings and so forth, and the Cardinal chocolates is now typed and the total addition is the same and the—

Q. In other words, the typewritten copy is a copy of that portion of the handwritten exhibit, is that correct?

A. Yes, sir, and the two of them are added together, which showed $33,567.00 premium.

Q. Do you know if that premium was paid?

A. Yes, sir, it was.

Q. Do you know where?

A. It was paid in several manners, sir.

Q. All right. Take the first payment, if you know.

By the Court: How much was that amount again?

659 By the Witness: $33,567.00, sir.

By Mr. Lockley:

Q. The first payment, tell us when and where it was made, if you know?

By Mr. O'Brien: I object to his reading the memrandum. If he knows that the payments were made, then he can tell how and when they were made and if he saw them and so forth.

By the Court: I don't understand. He cannot read the memorandum as to how the payments were made, if they were made, unless to refresh his recollection as to dates.

By Mr. Lockley:

Q. Mr. Lubben, do you have any recollection as to how that amount of money was paid?

A. Well, I see here on the paper—

Q. Well, independently .f the paper.

A. Well, I know it was paid, sir.

Q. Well, independently of the paper, do you have any present recollection of the manner in which the payment was made?

A. Yes, sir, I do. I remember.

660 By Mr. O'Brien: Did he make the payment or did somebody else?

By the Witness: I made most of it, sir.

By Mr. Lockley:

Q. Well, do you remember the circumstances?

A. Well, sir, I remember driving Mr. Huebner to the farm.

Q. When was this?

By Mr. McConnell: Let us have him put away his memorandum and tell us as to what he knows.

661 By the Court: Well, if the memorandum is not a private memorandum, but purports to be part of the books and records, and if that discloses circumstances that refresh his recollection, I see no objection to the use of his books and records. It is not a private memorandum.

By Mr. McConnell: Well, he said he had a recollection of his own. Now, I think we have a right to have his own recollection.

By the Court: If the record refreshes his recollection, I don't see any reason why he can't refer to it. Go ahead.

By Mr. Lockley:

Q. Well, will this memorandum, Exhibit 102, help to refresh your recollection?

A. Yes, sir; it will.

Q. And was it a true and correct memorandum at the time it was prepared?

A. Yes, sir, it was.

Q. And you said it was kept in the ordinary course of business?

A. Yes, sir.

Q. As a part of your books and records?

662 A. Yes, sir.

Q. Will you state from that record, just how the payment was made?

A. Well—

Q. And where and when?

A. The total amount was $33,567.00 due, and then it says over here, "Less payments paid to Frank on way to farm, $1,488.00".

Q. Who was Frank?

A. Frank Huebner.

By Mr. McConnell: I object to his reading the document.

By the Court: It is in evidence.

By Mr. McConnell: I thought he was going to testify as to his payments. That is what the question was.

By the Court: His answer may stand.

By the Witness: The $1,488.00, sir, is tied up with

the first shipment of March 25th, calling for 14,880 pounds of gum drops, on which the premium was paid of ten cents a pound, which is $1,488.00, paid to Frank Huebner—paid to Frank on way to farm.

663 Q. Do you know when that was?

A. Within one or two days of March 25, 1946.

Q. By whom was it made?

A. By me, sir.

664 Q. Was anybody else present?

A. Mr. Huebner.

Q. Did you say you were on the way to the farm?

A. Yes.

Q. What farm?

A. This was—at the time, I had a farm in Hillsdale, New Jersey, sir, which later on became the candy factory.

Q. All right. Proceed with the next one.

A. The next item "Paid to Frank in check, $14,000.00."

Q. Do you know who made that payment?

A. I did, sir.

Q. Do you know when?

A. I believe it was some time in April of 1946.

Q. And do you know where in Chicago?

A. Well, either at the Hotel Sherman, sir, or at the laboratory of The Shotwell Manufacturing Company.

Q. And in what form was the payment made?

A. Currency, sir.

Q. Who is the "Frank" referred to?

A. Frank Huebner.

Q. Now will you take the next entry.

A. "Paid to Mr. Krasne for Mr. Cain, $1,450.00."

Q. Who is Mr. Krasne?

665 A. Mr. Krasne, sir, was a customer of The Shotwell Manufacturing Company in New York City.

Q. Do you know that?

A. Yes, sir.

Q. Did you ever have any conversation with any of the defendants relative to that payment?

A. Yes, sir, I did.

Q. With whom?

A. With Mr. Crane.

Q. When was this?

A. Not Crane—Mr. Cain, sir.

Q. Mr. Cain?

A. Yes.

Q. When was this?
A. Well, in May of 1946, sir.
Q. Who was present?
A. It was a telephone conversation.
Q. Did he call you or did you call him?
A. Mr. Cain called me.
Q. Did he identify himself?
A. Yes, sir, he did.
Q. Did you recognize his voice on the phone?
A. Yes, sir, I did.
Q. What did he say?
666 A. He said, "Dave,"—Mr. and Mrs. Cain had just been to New York just a short time previous—
Q. Is that what he told you?
A. Well, I knew that, sir, and he said that Sal, Sally bought a piece of jewelry—
Q. Who is Sally?
A. His wife.
Q. Mr. Cain's wife?
A. Yes, sir. He said she (his wife) has bought a piece of jewelry from some friend who is a jeweler who is a friend of the Krasne's and "Will you take over $1,450.00 and give it to Mrs. Krasne who will pick up the jewelry and bring it to Chicago on her way through to Palm Springs," and I said, "Yes, sir." I did.
Q. Did he tell you how the payments should be made?
A. Yes, sir. They were to be made out of the cash account.
Q. What do you mean by "out of the cash account"?
A. Well, we were paying him cash, sir. We kept records of the cash that was due him.
Q. All right. Did you go to Mrs. Krasne's?
A. I did, sir.
667 Q. Did you deliver the $1,440.00?
A. The $1,450.00, yes, sir, I did.
Q. Or rather, the $1,450.00. In what form did you deliver it?
A. Currency.
Q. What is the next entry?
A. The next entry is, "Paid to Frank by Hankermyer, $8,450.00." And then there is a total of those figures, sir, of $25,388.00.
Q. Is there a balance left?
A. Yes, sir, of $8,179.00 and on it says, "Paid to

Frank by Heitmann. This cleans up allowance on shipments to May 15th."

Q. Was the balance paid?
A. Yes.
Q. By whom?
A. Mr. Heitmann.
Q. Where?
A. Here in Chicago, sir.
Q. Were you present?
A. No, sir, I was not.

By Mr. Kirby: I object and ask that that portion be stricken.

668 By the Court: Well, the portion of that answer where he says Mr. Heitmann paid the money in Chicago will be stricken.

We will now take a recess, members of the jury, for ten minutes.

(Whereupon a short recess was taken.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 112 and ask you if you have seen that before, or the original?
A. Yes, sir, I have.
Q. Now, keep your voice up.
A. Yes, sir, I will. I have.
Q. Was that made in the ordinary course of business?
A. Yes, sir, it was.
Q. As part of the books and records of your business?

By the Court: Which business? The business of the Eatsum or the Confections?

By Mr. Lockley:

Q. Which business, do you know?
A. Yes, sir. It was of the General Confections, Inc.
Q. That was a part of the books and records of
669 the General Confections?
A. Yes, sir.
Q. And was it true and correct, to the best of your knowledge, at the time it was made?
A. Yes, sir.
Q. Do you know who prepared it?
A. Yes, sir, Miss Strum.
Q. When did you last see the original?

A. On the sun porch of my home, early in February, 1948.

Q. Have you searched for the original since that time?

A. I have, sir.

Q. Have you been able to find it?

A. No, sir, I have not.

By Mr. Lockley: I will offer it later on, your Honor.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 120 and ask you if you have seen the original of that?

A. Yes, sir, I have.

Q. And was that a record that was made in the ordinary course of business?

670 A. Yes, sir.

Q. Do you know by whom?

A. By Miss Feldman, sir.

Q. And was it true and correct at the time it was made?

A. Yes, sir.

Q. Was it made at your instruction?

A. Yes, sir.

Q. Under whose direction? Was it under your direction?

A. Yes, sir. I told her to make it up, so it was my direction, yes, sir.

671 Q. When did you last see the original?

A. Early in February, 1948.

Q. Have you searched—

By the Court: Does that purport to be the General Confections record?

By Mr. Lockley:

Q. Is this a record of the General Confections or Eatsum partnerships?

A. General Confections, sir.

By Mr. Lockley: I will offer that later, your Honor.

By Mr. Lockley:

Q. I now show you Government's Exhibit for identification—

By Mr. O'Brien: Excuse me just a minute, Mr. Lockley. Whose handwriting is this, Mr. Lubben (indicating)?

By the Witness: Miss Feldman's, sir.

By Mr. Lockley:

Q. I show you Government's Exhibit 122 for identification and ask you if you have seen that before.

A. Yes, sir, I have.
Q. Is that your signature that appears thereon?
A. Yes, sir.
672 Q. Did you write the balance of the document?
A. I did, sir.
Q. Do you remember where?
A. In the city of Chicago, sir.
Q. When?
A. On or about October 12, 1946.
Q. And is that a record of one of your businesses?
A. Yes, sir, it is.
Q. Which one?
A. General Confections, Inc.
Q. Was that a true and correct record at the time it was made?
A. It was, sir.
Q. It is a check, isn't it?
A. Yes, sir.
Q. Did that check clear the bank?
A. It did, sir.
Q. Was that then returned to you?
A. Yes, sir.
Q. And you keep it as a part of your ordinary books and records?
A. Yes, sir.
By Mr. Lockley: I offer in evidence Government's Exhibit 122, your Honor.
673 By Mr. McConnell: I object to it as not binding on Shotwell Manufacturing Company. It is a self-serving document.
By the Court: It may be received.
(Said document was received in evidence by the Court and marked Government's Exhibit 122.)
By Mr. Lockley:
Q. I show you Government's Exhibit for identification No. 122-D and ask if you have seen that before.
A. Yes, sir, I have.
Q. Does your signature appear thereon?
A. Yes, sir.
Q. Do you recognize the other handwriting?
A. Yes, sir. It is Miss Feldman's, sir.
Q. And when was that prepared?
A. October 7th of 1946.

Q. Was it a record made in the ordinary course of business?

A. Yes, sir, it was.

Q. Which business?

A. The business of General Confections, Inc.

Q. Was it a true and correct record at the time it was prepared?

674 A. Yes, sir, it was.

Q. Was it maintained as a part of your books and records?

A. Yes, sir.

675 By Mr. McConnell: I make the same objection as I made to the previous exhibit.

By Mr. Lockley: I offer in evidence Exhibit 122-D.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 122-D.)

By Mr. Lockley:

Q. Now, Mr. Lubben, with respect to Exhibit 122-D, what does that purport to be?

By the Court: Is that B or A?

By Mr. Lockley: That is D, as in dog.

By the Witness:

A. This is a cash disbursement sheet, sir, authorizing Miss Feldman to draw a check in the amount of $12,235.00 in cash, and the check to be drawn in cash for payment of overages to Shotwell.

By Mr. Lockley:

Q. How do you know it was for payment of overages to Shotwell?

A. Because it says so right here (indicating.)

Q. What was done after that cash authorization

676 sheet was prepared?

A. I drew a check, sir, in the City of Chicago in payment.

Q. When is that cash authorization sheet dated?

A. October 7, 1946.

Q. Now I show you a check dated October 12, in the amount of $12,235.00. Is that the check that was referred to in the cash authorization slip?

A. That is true, sir.

Q. Now, what did you do with that check?

A. I cashed it here in Chicago, in the City of Chicago.

Q. Did you personally cash it?
A. Yes, sir.
Q. What endorsement does it bear on the back?
A. It says, "David Lubben O.K. to cash. Edward T. Urban."
Q. Who was Mr. Edward T. Urban?
A. Mr. Urban was associated with Close and Company. It also says—that Mr. Urban is doing above for accommodation only and did not get the money, and it is written on the check in my handwriting, sir.
Q. Mr. Urban endorsed the check as an accommo-
677 dation and you got the cash?
A. Yes.
Q. What did you do with the cash?
A. I gave it to Mr. Huebner, sir.
Q. Where?
A. The laboratory of the Shotwell Manufacturing Company.
Q. When?
A. On or about the day that this check was—well, the same day that I cashed the check.
Q. Was there any conversation at that time that you can recall?
A. No, there wasn't. It was paid. The money was handled in the usual course it was handled in when we made payments of that type.
Q. Do you recall what this particular check was in payment for?
A. Well, sir, it was in payment of candy overages, sir.
678 Was there anyone else present in the laboratory at the time you were there with Mr. Huebner?
A. No, sir, but on occasion we went to the laboratory.
By Mr. Kirby: I object to his describing it "on occasion".
By the Court: Yes.
By Mr. Lockley:
Q. What about on this particular occasion?
A. I can't say any specific occasion, sir.
Q. What sort of laboratory was this?
A. The laboratory where they measure out the flavors or a regular laboratory, sir.
Q. Did you know whether or not people usually worked in there?

By Mr. O'Brien: I object, your Honor. How is that material?

By Mr. Lockley: Well, I want to find out whether anyone was in there at the time he was in there with Mr. Huebner.

By the Court: Well, it may stand.

By Mr. Lockley:

Q. Well, what happened when you went in with Mr. Huebner, if there were other people working?

679 A. Mr. Huebner would ask them to leave.

By Mr. Kirby: If the Court please, I think he has already said he didn't know what happened on this occasion. Is he talking about what happened on this occasion?

By Mr. Lockley:

Q. Do you recall, Mr. Lubben—

By Mr. Kirby: On the 12th.

By Mr. Lockley:

Q. Do you recall, Mr. Lubben, this specific occasion?

A. No.

By Mr. Kirby: I ask to have the answer stricken.

By the Court: Very well. The answer with reference to Huebner asking the other people to leave may be stricken.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 122-A, and ask if you have seen that before.

A. Yes, sir, I did.

Q. Was that a record kept in the ordinary course of business?

A. Yes, sir.

Q. What business?

680 A. General Confections, Inc.

Q. Do you know who kept it?

A. Yes, sir. A Miss Feldman.

Q. Were you present at the time?

A. Yes, sir. I was the president of the company.

Q. I meant at the time she actually prepared that record.

A. No, sir, I wasn't sir. It was on her desk and she prepared it.

Q. It was normal practice to prepare such records?

A. Yes, sir.

Q. Was it true and correct, if you know?
A. Yes, sir.
Q. Now when did you last see the original of that?
A. Early in March—early in February, 1948, on the sun porch of my home.
Q. Have you made a search for it since that time?
A. I have, sir.
Q. Have you found it?
A. No, sir, I have not.
Q. I show you Exhibit 122-C for identification and ask you if you have seen that record before.
A. Yes, sir, I have.
681 Q. In whose handwriting does it appear?
A. Miss Feldman's, sir.
Q. Was that record kept in the ordinary course of business?
A. Yes, sir, it is.
Q. Was it your business practice to keep such records?
A. It was, sir.
Q. Was it a true and correct record at the time it was made?
A. Yes, sir.
Q. Was it kept under your supervision and direction?
A. Yes, sir.
Q. When did you last see the original?
A. Early in March—early in February, 1948.
Q. Where?
A. On the sun porch of my home.
Q. Have you made a search for the originals since that time?
A. I have, sir.
Q. Have you been able to find it?
A. No, sir.
By Mr. Lockley: I will offer Government's Exhibits 122-A and 122-C at a later time, after I have laid further foundation.
682 By Mr. Lockley:
Q. Now, I show you Government's Exhibit for identification No. 124 and ask you if you have seen that before.
A. Yes, sir, I have.
Q. Is that your signature thereon?
A. Yes, sir.

Q. Did you prepare the balance of the written part of the document?

A. No, sir. That was prepared by Miss Feldman.

Q. Was that prepared in the ordinary course of business?

A. Yes, sir, it was.

Q. Which business?

A. General Confections, Inc.

Q. Was that a true and correct document at the time it was prepared?

A. Yes, sir.

Q. That is the check?

A. Yes, sir, it is a check.

Q. Did it clear through the bank?

A. It did, sir.

Q. Was it then returned to you?

683 A. Yes, sir, it was returned to us.

Q. Is that your endorsemert on the back?

A. Yes, sir, it is.

Q. Do you recognize the other endorsement?

A. Yes, sir. It is—

Q. Well, just say yes.

A. Yes, sir, I do recognize the other endorsement, sir.

Q. Was that written on in your presence?

A. Yes, sir.

By Mr. Lockley: I offer Government's Exhibit 124 in evidence, your Honor.

By Mr. McConnell: I make the same objection as I have made to the other check.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 124.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 124-A and ask you if you have seen that before.

A. Yes, sir, I have.

Q. Does your signature appear thereon?

684 A. Yes, sir.

Q. Did you write the balance of the document?

A. No, sir. It was written by Miss Feldman.

Q. Was that a record that was kept in the ordinary course of business?

A. It was, sir.
Q. Under your supervision and direction?
A. Yes, sir.
Q. Which business?
A. General Confections, Inc.
Q. Was that a part of your business records?
A. Yes, sir.

By Mr. Lockley: I offer Government's Exhibit 124-A in evidence.

By Mr. McConnell: I object to it. It is a self-serving document.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 124-A.)

By Mr. Lockley:

Q. Now Mr. Lubben, with reference to Exhibit No. 124-A, what does that purport to be?

A. This is a request to draw a cash check for
685 overages to the Shotwell Manufacturing Company.

Q. In what amount?
A. In the amount of $319.50.
Q. What is the date?
A. November 7, 1946.
Q. I now show you Government's Exhibit 124, as check—
A. Yes, sir.
Q. And what is the check date?
A. November 8, 1946.
Q. And in what amount?
A. $319.50.
Q. To whom is it drawn?
A. It is drawn to cash, sir.
686 Q. Who endorsed it?
A. I endorsed it. It was endorsed by me, sir.
Q. Did you get the money?
A. No, sir. It has another endorsement too.
Q. What is the other endorsement?
A. Edward—"O. K. to cash, Edward T. Urban."
Q. Was that placed thereon in your presence?
A. Yes, sir, it was.
Q. Well, did you get the money?
A. I did, sir.
Q. What did you do with it?
A. I gave it to Mr. Huebner.

Q. Where?
A. At the offices of the Shotwell Manufacturing Company in Chicago, in the laboratory.
Q. When?
A. On or about the date I cashed the check.
Q. Was anyone else present?
A. No, sir.
Q. Do you recall any of the conversation?
A. No, sir. Nothing other than in the conversations we have had before with the payments of the money and the usual method of dividing the money, and so forth.
687 Q. But nothing specific?
A. No, sir.
Q. What was the purpose for which that payment was made?
A. To pay for an overage on candy.
Q. I show you Government's Exhibit for identification 126 and ask you if you have seen that before?
A. Yes, sir, I have.
Q. Is that your signature that appears thereon?
A. Yes, sir, it is.
Q. Did you write the balance of it?
A. No, sir. It was written by Miss Feldman.
Q. Was that a record kept in the ordinary course of business?
A. Yes, sir, it was.
Q. In which business?
A. General Confections, Inc.
Q. Was it your practice to keep such records?
A. It was, sir.
Q. Was it true and correct?
A. Correct, sir. Or, it is, sir, now.
Q. Was that check canceled through the bank and returned to you?
A. Yes, sir, it was.
688 Q. I show you Government's Exhibit for identification 126-D and ask you if you have seen that before?
A. Yes, sir, I have.
Q. Is that your signature that appears on that bottom?
A. Yes, sir.
Q. Do you know in whose handwriting the balance of it is prepared?
A. Miss Feldman, sir.

Q. And when was it prepared?
A. On November the 7th, sir, 1946.
Q. Was that a record kept in the ordinary course of business?
A. Yes, sir, it was.
Q. Which business?
A. General Confections, Inc.
Q. Was it a true and correct record?
A. Yes, sir.
Q. Was it kept under your supervision and direction?
A. Yes, sir.
Q. Was it your practice to keep such records?
A. Yes, sir.

689 By Mr. McConnell: I object to it for the same reason I objected to the others. It is self-serving.

By Mr. Lockley: I offer in evidence Government's Exhibit 126-D.

By the Court: Did you offer the check?

By Mr. Lockley: Yes, sir, 126.

By the Court: Did I rule on that?

By Mr. Lockley: I was under the impression that you had, your Honor.

By the Court: 126 and 126-D may be received in evidence.

(Said documents were received in evidence by the Court and marked Government's Exhibits 126 and 126-D.)

By Mr. Lockley:

Q. Now, Mr. Lubben, what does Government's Exhibit No. 126-D purport to be?

A. It is a cash disbursement slip, sir, showing the amount of overages for certain invoices of the Shotwell Manufacturing Company.

Q. What was the amount of overage?
A. $2,004.00, sir.

690 Q. Is there any indication of the exact nature of the invoices?

A. Yes, sir. It gives the invoice numbers and the amount of overages for those particular invoices, and then it is added together, the number of pounds.

Q. Now, was that amount paid?
A. Yes, sir, it was.
Q. By whom?
A. By me, sir.

Q. Where?

A. In the laboratory of The Shotwell Manufacturing Company here in Chicago.

Q. And to whom?

A. Mr. Frank Huebner.

Q. Was anyone else present?

A. No, sir.

Q. Do you remember any conversation at that time?

A. No more than—no more outstanding than the other ones when I paid them money and there was no different way we paid it.

By Mr. Kirby: I object to that statement and ask that it be stricken. He either does or doesn't re-
691 member what was said.

By the Court: I think it is fairly responsive.

By Mr. Kirby: I understand it was divided in piles. Is that what he means? I honestly am confused myself, your Honor, by that answer.

By the Court: Well—

By Mr. Lockley:

Q. Can you answer?

A. Yes, sir, I can answer.

By Mr. Kirby: On that specific occasion, now?

By the Witness: Yes, sir, because the pattern didn't change, sir, in the method of payment.

By Mr. Lockley:

Q. You mean every instance was the same?

A. Yes, sir, every instance was the same except several shipments—several payments were made by other people and several of them pertained to some other money, sir, but all of these we have been talking about here were all the same, sir.

By Mr. Kirby: I must apologize to the Court,
692 but I am confused. He is talking about payments made by others. He excepts those as a different pattern. Of course I wonder what was done with this money, if he can say—

By the Court: I don't think it is very clear, Mr. Lubben, what you mean when you say it was made the same as the others that were made by you. Do you mean that on each one of these occasions when you made payment to Mr. Huebner he divided it into three piles?

By the Witness: Yes, sir. Each time I paid Mr.

Huebner, Mr. Huebner would bring a recap sheet out of his pocket and he would compare it with my figures.

When he was satisfied the figures were correct for the amount of invoices involved, the money would be counted on the bed. It lay on the table or on the bed and the money would be divided into three piles and then Mr. Huebner would take one pile and he would put it in his one pocket and say, "This is for me," and take
693 another pile and put it in this pocket and say—

By Mr. McConnell: Wait a minute. You have got the horses before the others, haven't you?

By the Court: Wait until he completes his answer.
694 By Mr. Kirby: Excuse me—

By the Witness: (Continuing) —"and this pile is for Harold Sullivan."

By Mr. O'Brien: I am interested in knowing where he got the other pile. He has got two pockets full now. Where did he put the third?

By the Court: He will be turned over to you for cross examination and you can inquire of him at that time.

695 By Mr. Lockley:

Q. I now show you Government's Exhibit for identification 126-A and ask you if you have seen that document before?

A. Yes, sir; I did.

Q. Is that a record kept in your ordinary course of business?

A. Yes, sir.

Q. Which business?

A. General Confections, Inc.

Q. Was it kept under your supervision and at your direction?

A. Yes, sir.

Q. Is it a true and correct record?

A. Yes, sir.

Q. When did you last see the original?

A. Early in February, 1948, on the sun porch of my home.

Q. Have you made a search for the original since that time?

A. I have, sir.

Q. Did you find it?

A. No, sir.

Q. I will show you Government's Exhibit for iden-
696 tification 126-B and ask you if you have seen that document before?

A. Yes, sir, I did.

Q. Do you know in whose handwriting it is?

A. It is in the handwriting of Miss Feldman, sir.

Q. She was your office manager?

A. Yes, sir.

Q. Was that record kept in the ordinary course of business?

A. It was, sir.

Q. At your direction or under your supervision?

A. Yes, sir.

Q. Is it your practice to keep such records?

A. Yes, sir.

Q. Is that a true and correct record, to the best of your knowledge?

A. It is, sir.

Q. Do you know where the original is?

A. No, sir; I do not.

Q. When was the last time you saw the original?

A. Early in March—or early in February of 1948, on the sun porch of my home.

Q. Have you attempted to locate it since that time?

697 A. I have.

Q. Have you been successful?

A. I have not, sir.

698 By Mr. Lockley: I will withhold offering 126-A and 126-B until a later time, your Honor.

By Mr. Lockley:

Q. Mr. Lubben, I now show you Government's Exhibit for identification No. 133, and ask you if you have seen that document before?

A. Yes, sir; I did.

Q. Does it bear your signature?

A. It does, sir.

Q. Was the balance of the document written in your handwriting?

A. It was, sir.

Q. Will you turn it over on its other side?

A. Yes, sir.

Q. And do you know whose signatures appear thereon?

A. Yes, sir; my signature, and then it says, "Okay to cash only."

Q. Don't testify from it.
A. Pardon me, sir.
Q. Were those signatures written in your presence?
A. They were, sir.
699 Q. Is that a record that was kept in the ordinary course of your business?
A. Yes, sir.
Q. Which business?
A. General Confections, Inc.
Q. Is it a true and correct copy?
A. Yes, sir.
Q. This is a check. Did it clear the bank and then come back to you?
A. Yes, sir.
Q. And was kept in the ordinary course of business thereafter?
A. Yes, sir.
By Mr. Lockley: I offer Government Exhibit 133, your Honor.
By Mr. McConnell: I make the same objection that I have to the other checks, if the Court please.
By the Court: It may be received.
(Said document was received in evidence by the Court and marked Government's Exhibit 133.)
700 By Mr. Lockley:
Q. Mr. Lubben, I show you Government's Exhibit for identification 133-A, and ask you if you have seen that before?
By the Court: 133?
By Mr. Lockley: Yes, sir; 133-A.
By the Witness:
A. Yes, sir; I have.
By Mr. Lockley:
Q. Does your signature appear thereon?
A. Yes, sir; it does.
Q. Is that a record that was kept in the ordinary course of business?
A. Yes, sir.
Q. Which business?
A. General Confections, Inc.
Q. Did you prepare the document in full?
A. No; it was prepared by Miss Feldman.
Q. Was it true and correct at the time it was made?
A. Yes, sir.

Q. Was it your practice to keep such records in your business?

A. It was, sir.

701 By Mr. Lockley: I offer Exhibit 133-A.

By Mr. McConnell: I object to it, self serving.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 133-A.)

By Mr. Lockley:

Q. Now, Mr. Lubben, what is Exhibit 133-A?

A. It is a request, sir—it is a cash disbursement ticket, and it is a request for Miss Feldman to draw a check for cash in the amount of $17,190.25 for Shotwell.

Q. And how do you know it is for Shotwell?

A. Because, sir, it lists here so many—75,660 pounds of drops at 10 cents, and 52,704 pounds of Cardinal chocolates at 18¾ cents, making a total of $17,408.00.

Q. What is the amount again?

A. $17,408.00.

702 Q. Now, I show you a check, which is exhibit No. 133, and ask you if there is any relation between those two exhibits?

A. Yes, sir.

Q. Turn the check over and tell me the signatures that appear on the back.

A. My signature, sir, and below my signature it says, "O.K. to cash only, Edward T. Urban." And in pencil, "Close & Company."

Q. And what did you do with that check?

A. I gave this check, sir, to my brother-in-law, James Moran.

Q. To your brother-in-law?

A. Yes, sir.

Q. When?

A. On or about December 4, sir.

Q. Did you give him any instructions at that time?

A. I did, sir.

Q. What were they?

A. To hold—

By Mr. McConnell: I object to what he told his brother-in-law outside of the presence of my client.

703 By the Court: Yes. Yes, I will sustain the objection.

By Mr. Lockley: Very well, your Honor. We will bring in the brother-in-law later.

By Mr. Lockley:

Q. Do you know, Mr. Lubben, who got the $17,190.25 represented by this check?

A. Yes, sir; Mr. Huebner.

By Mr. McConnell: I object, unless he—

By Mr. Lockley:

Q. If you know.

By the Court: Wait a minute. The objection is made and I didn't hear you.

By Mr. McConnell: I object to it unless he handled the transaction himself. He can't testify from hearsay.

By the Court: Frame your question again.

By Mr. Lockley: I asked him, sir, "If you know."

By Mr. Lockley:

Q. Can you tell who got this check; do you know?

By the Court: He said his brother-in-law did.

704 By Mr. Lockley: But who got the money after the check was cashed?

By the Court: I suppose very obviously that calls for conversation that he had with his brother-in-law, as to what the brother-in-law did, and the objection is made and I will have to sustain it on the ground that it is hearsay, unless there is other direct evidence that you have, if he talked to one of these men, or one of the defendants. If you have that type of evidence, good and well. But then if you do have, you better reach it directly.

By Mr. Lockley:

Q. Well, did you have any conversation on or around December—the early part of December, 1946, with any one of the defendants?

A. I did, sir.

Q. And with which one?

A. Mr. Frank Huebner, sir.

Q. Where was that?

A. In the office of the Shotwell Manufacturing Company.

Q. And who was present?

A. Mr. Huebner.

705 Q. Anyone else?

A. No, sir.

Q. And what was that conversation?

A. The conversation was, sir; that I come in to make a payment for overages that I owed him, and I didn't—

By Mr. McConnell: Let's have the conversation.

By Mr. Lockley:

Q. Go on.

A. I didn't have the money with me, sir. And I said I expected to pick up the money here some place in Chicago, and that I would see that he got it within the next few days.

Q. All right. And then?

A. I told him, sir, that I had to go back to New York and that my brother-in-law, Jimmy Moran, would pay him, would bring the money over.

Q. And what did he say, if anything?

A. He didn't like it, sir.

By Mr. O'Brien: I object and move it be stricken.

Q. What did he say?

706 A. He said, "Why haven't you got the money? And I said, "Well, the customers haven't paid me and I just don't have the money."

By Mr. O'Brien: I object to the conversation. It has nothing to do with direct evidence of payment of the money.

By the Court: It is conversation with one of the defendants.

By Mr. O'Brien: I still move to strike his statement about he didn't like it.

By the Court: I deny the motion.

By Mr. O'Brien: He didn't like it, that particular part.

707 By Mr. Lockley:

Q. Did he say anything other than what you have already testified to?

A. Yes, sir. He was furious.

Q. Did he say anything?

A. Yes, sir. "Why haven't you got the money?"

By Mr. O'Brien: I move to strike that.

By the Witness: I said, "I will have it before the next few days. In Chicago I am going to collect some money, or I will get the money."

By the Court: The statement that Huebner was furious, may be stricken out.

By Mr. Lockley:

Q. Now, what is the date of the check?

A. It is dated December 4, 1946.

Q. Will you turn it over and tell us what day it cleared the bank?

A. December 20th. It was cashed at Mid City Bank on December 20th.

Q. And do you know where the Mid City Bank is?

A. Yes, sir; Madison and Halsted Street, sir.

Q. Now, Mr. Lubben, I show you Government Ex-
708 hibit for identification No. 157, and ask you if you have seen that before?

A. Yes, sir; I have.

Q. Did you receive that from the Defendants, or from the corporation?

A. Yes, sir; from Shotwell Manufacturing Company, sir.

A. And in what connection?

A. For the sale of some corn syrup, sir.

Q. Was that a record that was sent to you in the ordinary course of business?

A. Yes, sir.

Q. And was it subsequently preserved by you as a part of the records of your office?

A. Yes, sir.

Q. Was it a true and correct record at the time it was received?

A. Yes, sir.

Q. Was it your practice to keep such records?

A. Yes, sir.

Q. Was the record in connection with what business?

A. The record, sir, was in connection with the business of Reserve Trading Company, Inc.

709 Q. I think you stated that that was a wholly owned subsidiary of General Confections?

A. It was, sir.

By Mr. Lockley: I offer Exhibit 157 in evidence, your Honor.

By Mr. Lockley:

Q. I now show you Exhibit 157-A—

By the Court: What do you call it? What is the name of this document?

By the Witness: That's an invoice, sir.

By the Court: An invoice?

By the Witness: Yes, sir. It means I owed them money.

By the Court: An invoice from Shotwell to Reserve Trading?

By the Witness: Yes, sir. They made it to General Confections, but it was Reserve Trading, sir.

By Mr. Lockley:

Q. Was that prepared by you?

A. No, sir.

Q. By whom was it prepared, if you know?

A. By the Shotwell Manufacturing Company.

By the Court: It may be received.

710 By Mr. Lockley:

Q. I now show you Government Exhibit—

By Mr. O'Brien: I would like to note an objection to it, your Honor. It is outside the scope of the indictment, and the bill of particulars.

By the Court: Let me see the document again.

(Document handed to the Court.)

By the Court: Well, is there any date on this Mr. Lubben?

711 By the Witness: No, sir; there isn't any date on it.

By the Court: Have you established the time when this transaction is supposed to have taken place?

By Mr. Lockley: No, sir; I had not.

By the Court: Well, I think you should.

By Mr. Lockley:

Q. Can you state the time of the transaction referred to in this invoice?

A. Yes, sir. I believe it was around October, 1946.

By the Court: The Exhibit may be received, and I will deny counsel's motion to strike.

(Said document was received in evidence by the Court and marked Government's Exhibit 157.)

By Mr. Lockley:

Q. I now show you Government's Exhibit for identification 157-A, and ask you if you have seen that before?

A. Yes, sir; I did.

Q. Is that your signature that appears thereon?

A. Yes, sir.

712 Q. Is that a record made in the ordinary course of business?

A. Yes, sir.

Q. And when was it made?

A. It was made, sir, on October 17.

Q. In connection with what business?

A. Reserve Trading Company—Reserve Trading Corporation, sir.

Q. Was that a true and correct record at the time it was made?

A. Yes, sir. I signed it.

By Mr. Lockley: I offer Exhibit 157-A, in evidence.

By Mr. O'Brien: I make the same objection, your Honor, as I did to 157.

By the Court: Well, I don't believe I fully comprehend or understand the scope of your objection, or what it refers to.

By Mr. O'Brien: I say it is not within the scope of the bill of particulars.

By the Court: In what way isn't it within the bill of particulars?

By Mr. O'Brien: Because the bill of particulars doesn't charge us with any such receipt.

713 By Mr. Lockley: I think it does, your Honor, and I think I can convince counsel.

By the Court: I don't know as yet that it appears just what this leads to. I am assuming that counsel is going to connect it up. Later on, if you have a valid motion to strike, I will entertain it.

It may be received in evidence.

(Said document was received in evidence by the Court and marked Government's Exhibit 157-A.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 157-B, and ask if you have seen that before?

A. Yes, sir; I did.

Q. Is that your name that appears thereon?

A. Yes, sir.

Q. Did you write the balance of it?

A. Yes, sir. No. No, sir, I didn't write the balance. It was written by Miss Feldman.

Q. Is that record kept in the ordinary course of business?

714 A. Yes, sir, it was.

Q. What business?

A. Reserve Trading Corporation, sir.

Q. And when was it prepared?

A. October 17, 1946.

Q. Is that a true and correct record?

A. It is, sir.

Q. And is it maintained by you as a part of the records of your business?

A. Yes, sir.

By Mr. Lockley: I offer Exhibit 157-B in evidence.

By Mr. O'Brien: Why don't you offer them all altogether, Mr. Lockley? My objection will stand to the three.

By the Court: The Exhibit may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 157-B.)

By Mr. Lockley: Do you object to the offer?

By Mr. O'Brien: I make the same objection to all three of those checks.

715 By Mr. Lockley: Do you stipulate that the witness would answer the same questions with respect to 157-C?

By Mr. O'Brien: Yes.

By the Court: Well, you better—

By Mr. Lockley: Lay the foundation? All right, sir.

By Mr. Lockley:

Q. Mr. Lubben, I show you Government Exhibit for identification 157-C, and ask you if you have seen that before?

A. Yes, sir; I did.

Q. Is that your signature that appears thereon?

A. Yes, sir.

Q. Was it a record made and kept in the ordinary course of business?

A. Yes, sir.

Q. What business?

A. Reserve Trading Corporation.

Q. And when was it prepared?

A. October 17, 1946.

Q. And do you know by whom?

A. By Miss Feldman, sir.

Q. Was it true and correct at the time it was pre-

716 pared?

A. It was, sir.

By Mr. Lockley: I offer Exhibit 157-C in evidence.

By Mr. O'Brien: The same objection.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 157-C.)

By Mr. Lockley:

Q. Now, Mr. Lubben, with reference to Exhibits 157 and 157-A, B, and C, will you examine those and tell me if they are in any way related to each other?

A. Yes, sir.

717 Q. In what way?

A. Well, sir—

Q. Speak up.

A. The total of these three checks, sir, is $30,796.98. One check is for $10,000.00, another one for $10,000.00 and one for $10,796.98, and they are in payment of this invoice.

Q. And what is the amount of the invoice?

A. The amount of the invoice is $30,796.98.

Q. That was the business of the Reserve Trading Company?

A. Yes, sir.

Q. How was that billed?

A. This was billed by the Shotwell Manufacturing Company to General Confections, and then it was changed to Reserve—the word Reserve was written on top.

Q. Was the billing then in error on the part of Shotwell?

A. It was, sir.

By Mr. O'Brien: What was the question?

By Mr. Lockley: Was the billing in error?

By Mr. Lockley:

718 Q. Was it supposed to have been sent to Reserve or to General Confections, do you know, at this time?

A. It was supposed to have been sent to Reserve Trading Corporation, sir.

Q. Were they both at the same location?

A. They were, sir.

Q. And what was the product involved in that shipment?

A. Corn syrup, sir.

Q. Did you ever see any of that corn syrup?

A. No, sir; I didn't, but I—no, sir; I didn't.

Q. What was done with it, do you know?

A. Yes, sir, it was sold—reshipped to customers of the Reserve Trading Company.

Q. So those three checks are in payment of the invoice price?

A. Yes, sir.

Q. Now, I show you Government's Exhibit for identification No. 158 and ask you if you have seen that before?

By the Court: Did he say it was the invoice, 157, that covers corn syrup?

By Mr. Lockley: Yes, sir.

719 By Mr. Lockley:

Q. Have you seen that before, Mr. Lubben?

A. Yes, sir; I have, sir.

Q. Is that your signature that appears thereon?

A. It is, sir.

Q. Did you prepare the balance of the document?

A. I did, sir.

Q. About when?

A. On October 12th, sir.

Q. Is that a record that is kept in the ordinary course of your business?

A. Yes, sir.

Q. Which business?

A. Reserve Trading Corporation.

Q. Is that a true and correct record?

A. It is, sir.

Q. Was it your practice to keep such records?

A. Yes, sir.

By Mr. McConnell: I object to it for the same reason that I objected to the other checks, not binding on the corporation.

By Mr. Lockley: I offer Exhibit 158 in evidence.

720 By the Court: Well, I assume you are going to connect it up.

By Mr. Lockley: Yes, your Honor.

By the Court: Make it relevant.

By Mr. Lockley: Yes, immediately.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 158.)

By Mr. Lockley:

Q. I now show you Government's Exhibit for identification 158-A and ask if you have seen that before?

A. Yes, sir; I have.

Q. Is that your signature that appears thereon?

A. Yes, sir; it is.

Q. Is that a record that was made in the ordinary course of business?

A. Yes, sir; it was.

Q. Which business?

A. Reserve Trading Corporation, sir.

Q. When was it made?

A. On or about—on October 17th, 1946.

Q. Is it a true and correct record?

721 A. Yes, sir; it is.

Q. Was it your custom to keep such records?

A. Yes, sir.

By Mr. Lockley: I offer Exhibit 158-A in evidence.

Just a moment, sir. I would like to lay a further foundation.

By Mr. Lockley:

Q. Is that your name that appears on the back, your signature, I mean?

A. Yes, sir; that is my signature.

Q. Did you cash that yourself?

A. Yes, sir; I did.

Q. I call your attention to the penciled notations. Were you present when those were placed upon the check?

A. Yes, sir; I was.

By Mr. Lockley: I offer the exhibit into evidence.

By Mr. O'Brien: Well, may I ask a question?

By Mr. O'Brien:

Q. You say you were present when they were put on. When were they put on?

722 A. When the bank teller—the man that cashed the check was making some kind of figures on what kind of bills to give me.

By the Court: You refer to these pencil notations here?

By the Witness: Yes, sir.

By the Court: They were made by the bank teller?

By the Witness: Yes, sir; as far as I can remember, sir.

By the Court: The check may be received in evidence.

(Said document was received in evidence by the Court and marked Government's Exhibit 158-A.)

By Mr. Lockley:

Q. I now show you Government's Exhibit for identification 158-B and ask you if you have seen that before?

A. Yes, sir; I have.

723 Q. Is that your signature that appears thereon?

A. Yes, sir; it is.

Q. Is that a record that was kept in the ordinary course of business?

A. Yes, sir.

Q. Which business?

A. Reserve Trading Corporation.

Q. When was that record made?

A. October 17, 1946.

Q. Was it true and correct at the time it was made?

A. Yes, sir.

Q. Was it your custom to keep such records?

A. It is, sir.

By Mr. McConnell: I object to it as self-serving.

By Mr. Lockley: I offer 158-B into evidence.

By Mr. O'Brien: I object to it, your Honor, on the ground that our invoice was to General Confections, and there was no authority from us to change it.

By the Court: What do you call this paper?

724 By the Witness: That's a request for Miss Feldman —it is a cash disbursement ticket, sir.

By the Court: All right, it may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 158-B.)

By Mr. Lockley:

Q. Now, Mr. Lubben, you stated that you had purchased some corn syrup from the Shotwell Manufacturing Company through the medium of Reserve Trading Corporation?

A. Yes, sir.

Q. The three checks which you have identified, 157, 157-A—rather, 157-A, B, and C, paid for the price shown on the invoice?

A. Yes, sir.

Q. Was there any additional premium that you paid in connection with that purchase?

A. There was, sir.

Q. And what was the amount of that premium per pound, or gallon, or however it was computed?

A. By the pound, sir. Seven cents a pound.

725 Q. Seven cents a pound. How many pounds—can you determine from this how many pounds were purchased from this invoice?

A. It appears to be the total of these figures here, sir, where it shows for the weight. It appears to be 513,282 pounds.

By the Court: Two hundred what?

By the Witness: 513,282 pounds at six cents a
726 pound.

By Mr. Lockley:

Q. Six cents a pound.

A. Was the invoice price.

Q. The invoice price.

A. Yes, sir.

Q. And you said the additional price was how much?

A. Seven cents a pound.

Q. Now, I show you Exhibit No. 145-B and ask you what that purports to be.

A. This is a request to—cash—for Miss Feldman to draw a cash check for Shotwell for $35,928.81.

Q. And is that in your handwriting?

A. It is, sir.

Q. Will you read it.

A. It says, "Reserve Trading Corporation, 40 West 170th Street, October 17, 1946."

By Mr. O'Brien: That isn't in evidence.

By the Court: What?

By Mr. O'Brien: That is not in evidence.

By Mr. Lockley: Yes, it is.

By the Court: 158-B is in evidence.

By Mr. O'Brien: All right. Sorry.

By the Witness:

727 A. It says, "Cash". Then in parenthesis, "Shotwell, amount $35,929.81 for overage on syrup purchase at rate seven cents a pound on their invoice No. 191554."

And that is 191554, sir.

And I say, "I have already given them $10,000.00 so all we are now giving is $25,929.81."

728 By Mr. Lockley:

Q. And here is a check for cash in the amount of $10,000 dated October 12. Does that have any connection with that transaction?

A. Yes, sir; it does.

Q. What is that connection?

A. Well, this is the ten thousand dollars that I gave them.

Q. And when did you give that?

A. I gave it to them, sir.
Q. To whom?
A. I gave it to Mr. Huebner.
Q. Where?
A. At the offices of Shotwell Manufacturing Company.
Q. And when?
A. Around October 12, sir. On or about October 12.
Q. Was anyone else present?
A. No, sir; it was in the laboratories of the Shotwell Manufacturing Company.
Q. Do you remember any specific instance at that time?
A. Yes, sir. I think that was the day I paid that invoice over there, sir. If I could refresh myself with those
729 three checks.
Q. You mean these checks.
A. Yes, sir. I think that was the time I paid that. No, sir. I paid these three when I paid the balance of the money. I remember the transaction about these three checks, sir.
Q. All right. Now the ten thousand dollars was paid about when?
A. October 12, sir, 1946.
Q. And what is the date of the cash authorization slip?
A. The date of the cash authorization slip is October 17, 1946.
Q. And in what amount is the second balance?
A. $25,929.81.
Q. I show you Government Exhibit 158-A, which is a check in that amount, and ask you if there is any relation between those two documents?
A. Yes, sir. Those two documents go together to make up $35,929.81.
Q. Now, with respect to the twenty-five thousand odd dollars, what did you do with it?
A. I cashed it, sir.
730 Q. You cashed the check?
A. Yes, sir.
731 Q. And what did you do with the cash?
A. I gave the money to Mr. Huebner, sir.
Q. Where?
A. In the offices of Shotwell Manufacturing Company, sir.

Q. In Chicago?
A. Yes, sir. In the laboratory.
Q. When?
A. Oh, no. Wait a minute, sir. No, sir. This money, sir, here, at this time, sir, I believe this money was given to Mr. Graflund, this money here, this $25,929.00 was given to Mr. Graflund.
Q. Who is Mr. Graflund?
A. Mr. Graflund, sir, was the comptroller of The Shotwell Manufacturing Company.
Q. In what way did you—I mean, at whose instructions or direction, if any, did you give it to Mr. Graflund?
A. On Mr. Huebner's, sir.
Q. When was this conversation with Mr. Huebner?
A. This conversation, sir, was in the laboratory of The Shotwell Manufacturing Company when I brought the money to pay him.
Q. And do you recall any of the details of the con-
732 versation?
A. Yes, sir. Mr. Huebner told me to—on the corn syrup transaction to take the money down and give it to Stanley Graflund as Stanley was getting wise that there was a lot of cash—there was some cash overages over there and to tell him it was just for the corn syrup and give it to him and don't tell him anything else.
Q. That was Mr. Huebner's language to you?
A. That was Mr. Huebner's language, sir.
By the Court: It is four-thirty, counsel. We will be in recess now, members of the jury, until ten o'clock tomorrow morning.
(Whereupon an adjournment was taken to Thursday, September 17, 1953, at 10:00 o'clock a. m.)

Chicago, Illinois,
Thursday, September 17, 1953,
9:30 o'clock A.M.

733-752 • • •

753 DAVID G. LUBBEN, called as a witness heretofore on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Continued)

By the Court: You may proceed.
By the Witness: Your Honor, I would like to correct

a little testimony that I gave yesterday, and I feel that I am in error in the—

By the Court: Well, you have that right.

By the Witness: Shall I go ahead?

By the Court: You may state it.

By the Witness: Yesterday, sir, when the—

By the Court: Speak up.

By the Witness: Yesterday, when Mr.—when the prosecutor here gave me three checks on which the names
754 were cut out, I remember the transaction of giving the checks to Mr. Huebner, and I thought that that was the time I had gone to see Mr. Cain and Mr. Sullivan, but that wasn't the time, sir. I went to see him on another time but it wasn't in regard to those three checks, around February 19th, it wasn't at that time, sir.

I did go, however, to see Mr. Cain and Mr. Sullivan on another date. The exact date, I don't remember, but I went there, to their offices.

By Mr. McConnell: Did I understand you to say that these conversations with Mr. Cain and Mr. Sullivan did not take place as you testified to?

By the Witness: Sir, the conversation—the conversation I had with Sullivan did take place, but it did not take place on that day. The conversation with Byron Cain was a conversation where I went and I believe it was with reference to sole payments, where I was to bring the cash money home, and it was not with reference to the checks.

755 By Mr. Lockley:

Q. Did I understand then that you actually had the conversations?

A. Oh, yes, sir, I had the conversation and I had the conversation with Mr. Sullivan and I had a conversation with Mr. Cain.

Q. But you were in error as to the time?

A. Yes, sir.

By Mr. Kirby: I object to the use of the word "error" by counsel.

By the Court: The witness stated he was in error so I don't suppose counsel is assuming something he doesn't know.

By Mr. Kirby: We can't take his word that it was an error. We have to abide by the witness's testimony that it was an error.

By the Court: I will overrule the objection.

By the Witness: Sir, I spoke to him but it wasn't at the time of the three checks, at the time we had these checks come back, or the money wouldn't be taken in checks. The checks were returned to me later by Mr. Huebner.

756 By Mr. Lockley:

Q. Has anything transpired since you were on the stand yesterday that more nearly refreshes your recollection as to what the time of those meetings was?

A. Yes, sir. To the best of my recollection, it was some time around September or October of 1946, and I believe, sir—I remember, sir, that it was—there was a time when we were having a little difficulty getting up the payments, the cash payments in time, and that is the time, to the best of my recollection that I talked to Mr. Huebner and Mr. Sullivan.

Q. Is your testimony changed in any respect other than the conversation instead of taking place I believe you earlier said, around February, that it took place later in the year?

A. Later in the year, sir, but it wasn't in regard to the checks. The checks, I remember Mr. Huebner came and gave me the checks back and said that they decided they didn't want to take them.

Q. Well, have you arrived at this more refreshed recollection just through your own mental processes
757 or have you had something that you have seen that helps to refresh your recollection?

A. Sir, I have seen nothing but each day and each night I ask for divine guidance to remember as correctly as I can possibly can.

This happened back in 1946 and I am trying very hard and I don't want to say anything that is not true. I am doing the very best I possibly can.

758 Q. Now, is there anything else that you have testified to that you wish to change in any respect?

A. No, sir. Just—that is all.

Q. Now, Mr. Lubben, I show you Government's Exhibit 159 for identification and ask you if you have seen that before?

A. Yes, sir, I have.

Q. Do you know where it came from?

A. Yes, sir. The invoice came from the Shotwell Manufacturing Company.

Q. Was that a document received in the ordinary course of business?

A. It was, sir.

Q. Was it a document that you ordinarily kept in your business records?

A. I did, sir.

Q. Was it a true and correct document to the best of your knowledge?

A. Yes, sir.

Q. Do you know by whom it was prepared?

A. By the Shotwell Manufacturing Company, sir.

Q. And you received it through the mail, or
759 do you know how?

A. I don't know, sir, how we received it.

Q. Do you know about the time you received it?

A. Around October the 18th of 1946.

By Mr. Lockley: I offer in evidence Government's Exhibit 159.

By Mr. O'Brien: We object to the penciled notations, if the Court please, as not being a part of the invoice, as far as we are concerned.

By the Court: Are you offering it?

By Mr. Lockley: In full, your Honor.

By the Court: Then you better lay a further foundation as to the penciled notations.

By Mr. Lockley:

Q. Mr. Lubben, I direct your attention to the pencil and pen notations on the bottom, and ask you if you have seen those before?

A. Yes, sir, I have seen them before.

Q. Do you know in whose handwriting they are?

A. Miss—it appears to be Miss Feldman's, sir.

Q. And were those notations or records made in the ordinary course of business?

760 A. Yes, they were.

Q. Which business?

A. The—well, the invoice is directed to General Confections, Incorporated, but the records were kept—the records of this transaction were of Reserve Trading Company, Inc. The purchase was entered in that book.

Q. Were those true and correct pen and pencil notations to the best of your knowledge?

By Mr. O'Brien: I also object, your Honor, on the ground it is beyond the scope of the bill of particulars.

By the Court: Well, the exhibit may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 159.)

By Mr. Lockley:

Q. I now show you Government Exhibit for identification 159-A, and ask you if you have seen that before?

A. Yes, sir, I have.

Q. Is that your signature that appears thereon?

A. It is, sir.

Q. Is the balance of the document in your handwriting?

761 A. No, sir, it is not.

Q. Do you know in whose handwriting it is?

A. It appears to be the handwriting of Miss Feldman, sir.

Q. Was that a record made in the ordinary course of business?

A. Yes, sir.

762 Q. Was it a true and correct record at the time it was made?

A. Yes, sir.

Q. That is a check, I believe?

A. Yes, sir.

Q. Was that cleared through the bank?

A. Yes, sir.

Q. And then returned to your office?

A. Yes, sir.

Q. Did you keep it then in your ordinary course of your business as a part of your books and records?

A. Yes.

By Mr. McConnell: I have no objection to it.

By Mr. O'Brien: I have the same objection, your Honor.

By Mr. Lockley: I offer Government's Exhibit 159-A in evidence, your Honor.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 159-A.)

By Mr. Lockley:

763 Q. I show you Government's Exhibit for identification No. 159-B and ask you if you have seen that before.

A. Yes, sir, I have.
Q. Is that your handwriting that appears on the bottom?
A. Yes, sir, it is my signature.
Q. Did you write the balance of the document?
A. No, sir, I did not.
Q. Is that a record that was kept in the ordinary course of business?
A. It was, sir.
Q. Which business?
A. The Reserve Trading Corporation.
Q. Was that a true and correct record at the time it was made?
A. Yes, sir.
Q. This is a check. Was it cleared through the bank?
A. Yes, sir, it was.
Q. And the cancelled check was then kept as a part of your records?
A. Yes, sir.
By Mr. O'Brien: The same objection.
764 By Mr. Lockley: I offer in evidence Government's Exhibit 159-B.
By Mr. O'Brien: The same objection as to the last check.
By the Court: It may be received.
(Said document was received in evidence by the Court and marked Government's Exhibit 159-B.)
By Mr. Lockley:
Q. Now, Mr. Lubben, I call your attention to Exhibit 159. Will you describe what that is?
A. Yes, sir. It is an invoice for corn syrup.
Q. And to whom is it directed?
A. General Confections, Inc.
Q. And for what product?
A. Corn syrup, sir.
Q. How much?
A. Two—I believe it is 274 barrels.
Q. Will you remember to keep your voice up, Mr. Lubben?
A. Well, it is for 187,810 pounds.
Q. What is the price?
A. Six cents per pound.
Q. What is the total price?
765 A. $11,268.60.
Q. All right. Now, I show you checks dated No-

vember 13th, Exhibits 159-A and 159-B.

By Mr. O'Brien: May I interrupt, Mr. Lockley. Are you asking the total price? Are you extending the poundage times the six cents?

766 By Mr. Lockley:

Q. Is that the total price which is shown on the invoices itself?

A. It is the total price, sir. That is typed on the invoice.

Q. That is the total weight of the corn syrup at 6 cents a pound, is that correct?

A. Yes, sir. The only thing, sir, is the invoice here was typed by the Shotwell office as to the amount of dollars, and over here (indicating) there is four cars of corn syrup, forty seven thousand some odd pounds, and 48, 43, and then there is a line drawn under it, and in pencil the total of the corn syrup, 187,110 pounds.

Q. Do you know who made the total of the poundage?

A. It appears to be the handwriting of Miss Feldman.

By Mr. O'Brien: I don't think he has answered the question, Mr. Lockley, as to whether the dollars are poundage times the six cent price.

By Mr. Lockley:

Q. Can you answer that question?

767 A. Yes, sir. This is the poundage of that. The total poundage times six cents, and there is the total, $11,268.60.

Q. I show you Government's Exhibit 159-A, and ask you if that check was sent in part payment of that invoice?

A. It was, sir.

Q. And how much is the amount of the check?

A. It is $6,000.

Q. To whom is it written?

A. To the Shotwell Manufacturing Company.

Q. And by whom is it signed?

A. By me, sir.

Q. By anybody else?

A. No, sir.

Q. Is there a stamp above your signature?

A. Yes, sir, Reserve Trading Corporation, sir.

Q. So the Reserve Trading Company had a checking account, did it?

A. It did, sir.

Q. Where?

A. At the Manufacturers Trust Company, 1819 Broadway.

Q. Is that drawn on the Manufacturers Trust
768 Company?

By Mr. O'Brien: The check speaks for itself, your Honor.

By the Witness:

A. Yes, sir.

By Mr. Lockley:

Q. Will you turn over the check and look on the back?

A. Yes, sir.

Q. By whom was it endorsed?

A. By the Shotwell Manufacturing Company.

Q. I now show you Government's Exhibit 159-B, a check for $5,268.00. To whom is that check written?

A. The Shotwell Manufacturing Company, sir.

Q. And by whom is it signed?

A. It is signed—it is a Reserve Trading Corporation check, signed by me.

769 Q. What is the total of the two checks I have handed you?

A. The total is $11,268.60.

Q. Is that also the total of the amount shown due on the invoice?

A. Yes, sir, it is.

Q. Will you turn over the second check and tell me by whom it is endorsed?

A. It is endorsed by the Shotwell Manufacturing Company, sir.

Q. Now, if you know, Mr. Lubben, did you pay any further money for that particular shipment of corn syrup?

A. I did, sir.

Q. Do you know how much?

A. Seven cents per pound.

Q. I show you Government's Exhibit for identification No. 160 and ask you if you have seen that before?

A. Yes, sir, I did.

Q. Is that your signature that appears thereon?

A. It is, sir. It is a Reserve Trading Corporation check.

Q. Was that a record that was kept in the ordi-
770 nary course of business?
A. Yes, sir.
Q. Was it true and correct at the time it was made?
A. Yes, sir.
Q. Was it your practice to keep such records?
A. Yes, sir.
Q. Did this clear through the bank?
A. It did, sir.
Q. It was then returned to you?
A. Yes, sir.
By Mr. McConnell: I have no objection to these checks. Oh, this is a cash check?
By Mr. Lockley: It is cash.
By Mr. McConnell: I object to the cash. It is not connected up with my client.
By Mr. Lockley: I offer Government's Exhibit 160 in evidence, your Honor.
By Mr. O'Brien: I make the same objection.
By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 160.)

771 By Mr. Lockley:
Q. I show you Government's Exhibit for identification No. 160-C and ask if you have seen that before?
A. Yes, sir, I did.
Q. Does your handwriting appear on it?
A. Yes, sir. My signature is on it, sir.
Q. Do you know who wrote the balance of the document?
A. Yes, sir. Miss Feldman.
Q. Was that a record kept in the ordinary course of business?
A. Yes, it was.
Q. Was it kept under your supervision or direction?
A. It was, sir.
Q. Was it true and correct at the time it was made?
A. Yes, sir.
Q. May I have it just a second.
By Mr. McConnell: I make the same objection as I made to these other documents, as being self-serving.
By Mr. Lockley: I offer in evidence Government's
772 Exhibit 160-C.
By Mr. O'Brien: I object to it too, Your Honor.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 160-C.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 160-A and ask if you have seen that before?

A. Yes, sir, I have.

Q. Does your handwriting appear thereon?

A. Yes, sir.

Q. The balance of the document, is that typewritten?

A. Yes, sir.

Q. Do you know by whom it was prepared?

A. No, sir.

Q. Was it prepared under your supervision and direction?

A. Yes, sir.

Q. Was it a part of the bookkeeping records of your business?

A. Yes, sir.

773 Q. Of which business?

A. The Reserve Trading Company, sir.

Q. Was it true and correct at the time it was made?

A. Yes, sir.

774 By Mr. McConnell: Same objection as to the others. It is self-serving.

By Mr. O'Brien: I make the same objection as to the checks.

By Mr. Lockley: I offer in evidence Government's Exhibit 160-A.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 160-A.)

By Mr. Lockley:

Q. Mr. Lubben, you testified that you were required to pay seven cents a pound overage for that particular shipment?

A. Yes, sir.

Q. I show you Government's Exhibit 160-A and ask you to describe that document.

A. Well, this is a slip of paper, sir, that is—that calls for 187,810 pounds of syrup at seven cents a pound, or a total of $13,146.70 and it is marked paid and my initial is on it, sir.

Q. Now I call your attention to Government's Exhibit 159 and ask you how many pounds of syrup were invoiced.

775 A. 187,810 pounds, sir.

Q. And that is the same amount that appears on Exhibit 160-A?

A. Yes, sir.

Q. Now the seven cents a pound, what would be the amount?

A. $13,146.70.

Q. I show you Government's Exhibit 160, a check for $13,146.70, and ask you if those documents have any relationship.

A. Yes, sir, they do. This is the cash check that was drawn for this money.

Q. I show you Government's Exhibit 160-C and ask if you can explain what that document is.

A. This is the request for cash disbursements that was made out, or I requested the check to be drawn for $13,146.70.

Q. What does the cash disbursement slip say on the face of it?

A. $13,146.70.

Q. Is there any description as to whom it should be paid?

A. Yes, sir. It says, "Cash, Shotwell Manufacturing Company."

776 Q. For what?

A. It says, "Difference between cost price on 187,810 pounds at thirteen cents and billed price of 187,810 pounds at six cents", and the difference, sir—there are some additions, and the total price of this merchandise was at thirteen cents a pound.

Q. Now did you have a conversation with any one of the defendants prior to entering into this transaction of corn syrup?

A. Yes, sir, Mr. Huebner.

Q. Do you know when that was?

A. I believe it was around September or October, sir, of 1946.

Q. And was that in person, by telephone, or how?

A. No, sir. It was on one of my trips to Chicago, I believe.

Q. What was said at that time?

A. He said he had a lot of corn syrup on hand.

By Mr. McConnell: Where was this?

777 Q. In Chicago? Are you able to fix it more definitely?

A. In Chicago, sir.

By Mr. McConnell: Where?

By the Witness: Sir?

By Mr. O'Brien: Go ahead.

By the Witness: In Chicago.

By Mr. O'Brien: We object to that, your Honor. We would like to have him state the place.

By the Court: Well, where was it in Chicago? What place was it?

By the Witness: Well, sir, the only place I ever met Mr. Huebner was at a hotel or in the Shotwell Manufacturing Company. This specific conversation, I can't tell where it took place, but it was in Chicago. That I know. And he told me that they had a lot of corn syrup on hand, and it was coming in from manufacturers, and corn had loosened up, and it wasn't so hard to get, and they thought that they would refuse the shipment from the corn people that supplied it.

778 In other words, they would say, "Don't ship us a carload". They would feel that they wouldn't want it and if things tightened up, they wouldn't be able to get corn syrup, so they said, "We would like to sell this", so I said, "All right, sir, we will buy it."

By Mr. Lockley:

Q. Did you make any arrangements for payment?

A. Yes, sir.

Q. What were they?

Br Mr. McConnell: Let us have the conversation, and not the conclusion he is drawing.

By Mr. Lockley:

Q. What was the conversation?

A. I asked Mr. Huebner how much he wanted for the corn syrup. I think he wanted more than I actually gave him. Mr. Huebner finally told me—

By Mr. O'Brien: I object to what he thinks.

By the Witness: I am not thinking, sir—

By the Court: Just relate the conversation.

779 By the Witness:

A. Mr. Huebner told me he wanted seven cents a pound in cash, and six cents a pound on an invoice.

By Mr. ckley:

Q. Was there any further conversation at that time?

A. There was further, sir, but I just can't pick the words out.

Q. Now, with respect to this check to cash in the amount of $13,146.70, will you look at the reverse side and tell me who endorsed it?

A. The check was endorsed by David Lubben, and below it, it says, "O.K. to cash only, Edward T. Urban."

Q. Who was Edward T. Urban?

A. He is a partner of Close and Company in Chicago.

Q. You knew him, did you?

A. I did, sir. This check was cashed in Chicago, sir.

780 Q. Were you present at the time?

A. Yes, sir.

Q. Did you receive the money?

A. Yes, sir.

Q. What was the purpose of Mr. Urban's endorsement?

A. He knew somebody in the bank and I cashed it here, otherwise I wouldn't be able to cash the check here unless someone knew me.

Q. After you had received the money from the bank, what did you do?

A. I gave it to—no. I went back to the Shotwell Manufacturing Company with it, sir, and I went upstairs in the laboratory and the money was counted.

Q. Now, when was this?

A. I would say one day either way that this check was cashed.

Q. Can you look at the reverse side of the check and tell when you got the cash?

A. On November 8th. The check was written on November 7th. That meant I came to Chicago at that time, and I was here on November 8th.

Q. All right. This was November 8th at the Shotwell laboratory?

781 A. Yes, sir.

Q. Who was present?

A. Mr. Huebner, sir.

Q. Anyone else?

A. No, sir.

Q. What happened?

A. Oh, when I gave the money for the corn syrup, sir, I was told after he counted the money, I was told to take it down and give it to Stanley Graflund and tell him specifically, "This is the overage on the corn syrup."

Q. Did you do that?

A. Yes, sir, and I was told not to ever mention anything about candy overages, just on the corn syrup, and I went down and gave it to Mr. Graflund, sir.

By Mr. McConnell: Who told you that? Was that part of the conversation?

By the Witness: Yes, sir. That was part of the conversation with Mr. Huebner.

By Mr. Lockley:

Q. Mr. Lubben, did you also receive an invoice from the Shotwell Manufacturing Company in your transactions with them?

782 A. No, sir, I didn't.

Q. Can you remember any occasions when you made purchases for which you received no invoice?

A. Yes, sir, I can.

Q. Can you recall the first one?

A. Yes, sir.

Q. When was it?

A. Sometime in March, early in March. It was probably the 3rd or 4th.

Q. Of what year?

A. 1946, sir.

Q. Did you have a conversation with any of the defendants at that time?

A. Yes, sir. Prior to that, I had a conversation with Mr. Frank Huebner.

Q. And can you state about when the conversation was?

A. Well, not just right around that time, sir. It might have been anywhere from September to February 19th until the 25th—anywhere from the 19th of February to the last or so of the month, right in there, of 1946.

Q. Did you see Mr. Huebner at that time or was it a telephone conversation, or how?

A. I saw Mr. Huebner, sir.

783 Q. And where was this?

A. In the city of Chicago.

Q. Was anybody else present?

A. No, sir, there were not.

Q. Was there a conversation?

A. Yes, sir.

By Mr. O'Brien: I still would like to know where, if he can say.

By the Witness: Sir, I believe it was in the offices of The Shotwell Manufacturing Company.

By Mr. Lockley:

Q. Any special office? Can you fix it any further than that?

A. No, sir. I believe—I think this conversation was down town, sir. I just—I just feel it was down town. There is something that tells me inside of me it was down town.

Q. But you don't know for sure?

A. No, sir.

Q. You did have a conversation, you are sure of that?

A. Yes, sir, I did.

Q. Well, what happened at the time?

A. Mr. Huebner told me that he—you see, I told
784 Mr. Huebner I was leaving the partnership and I was starting a new company and that we were going to continue the method of business, continue on as we had before, as we bought before, and we would like to continue on and so forth.

I also believe, sir, that this conversation took place at the time I was making an accounting of the money that I owed on the partnership for the overages.

He said, "Well, I can get you a lot of merchandise." So, Mr. Huebner told me, "I can get you a lot of merchandise, Dave, and you got a chance to make real dough. I will do all I can to help you get started and give you some real volume, but we have to have all cash."

I said, "What do you mean, all cash?"

He says, well, the cost of merchandise that I had been invoiced previous, plus the overage added together—let's see. If I gave him ten cents and the cost of an item was thirteen cents a pound, he wanted twenty-three cents a pound cash, all cash.

He says, "If you can do that, I can get you a lot of merchandise." I said, "I can." He told me he would
785 not give me any bill; it wouldn't make any difference on my bookkeeping. I said, "No, it wouldn't make any difference."

He told me—I believe, sir, he told me he could give me ninety thousand pounds of spice buttons or something almost at once and so many thousand dozen or hundred dozens of box chocolates and so we did, sir. I mean, I got the shipment and it was sent to my customers.

786 Q. Did you ever get an invoice for it?

A. No, sir.

Q. Do you recall whether there were any later shipments?

By Mr. O'Brien: If I may interrupt, I move to strike the statement volunteered by the witness "we did, sir" and "I sent it to my customers."

By the Court: It may stand. I will deny the motion.

By Mr. Lockley:

Q. Do you recall any further shipments for which you received no bills, invoices?

A. Yes, sir. I believe there was one in June, 1946, and there might have been one in April, but there was about seven or eight shipments throughout 1946, and I believe the last one was around in October.

By Mr. O'Brien: I object again, your Honor. The best evidence of the shipments and of the time of the shipments, which is important, is a record of it. He must have billed his customers. He is just generalizing and guessing on it.

787 By the Court: I suppose you can bring it out on cross examination.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 146 and ask you if you have seen that before.

A. Yes, sir, I have.

Q. Was it prepared by you?

A. No, sir, it was not.

Q. Do you know by whom it was prepared?

A. Well, this was received from The Shotwell Manufacturing Company, sir.

Q. There are some pencilled notations. Do you know who made those?

A. No, sir. It was someone in the office.

Q. In whose office?

A. In the office of General Confections, sir.

Q. Was that a record that was kept in the ordinary course of business?

A. It was, sir.

Q. Of the General Confections business?
A. Yes.
Q. Is it true and correct, to the best of your knowledge?
788 A. Yes, sir.
Q. Was it a part of your business practice to keep such records?
A. Yes, sir.
By Mr. Lockley: I offer Government's Exhibit 146 in evidence, your Honor.
By the Court: Well, did I understand this is a bill of lading made out by Shotwell to one of your customers, is that it?
By the Witness: Yes, sir, it was.
By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 146.)

By Mr. Lockley:
Q. Now Mr. Lubben, I show you Government's Exhibit 146 and ask you to tell us what that document is.
A. It is a bill of lading calling for the shipment of one thousand cases of candy to the Ace—consigned to the Ace Forwarding Company, 63 Beach Street, New York City.
Q. According to the bill of lading, who was the
789 shipper?
A. The ABC Candy Shipper, Chicago, Illinois.
Q. Did you ever do any business with an ABC Candy Shipper?
A. No, sir. I never heard of them.
Q. You never heard of ABC Candy Shipper?
A. No. I never done any business with them.
Q. Does that bill of lading indicate the kind of shipment that was made?
A. Written in pencil, sir. It contains spice buttons, special spice buttons.
Q. Do you know who made spice buttons?
A. Yes, sir. The Shotwell Manufacturing Company.
Q. Did anybody else, to your knowledge, make spice buttons?
A. No, sir, not that I know of.
Q. Did you ever purchase spice buttons from anybody else?
A. No, sir.

Q. Was that bill of lading made up at your instructions or not?

A. No, sir. I told Mr. Huebner where to ship the merchandise to because the man I sold it to, he gave me instructions where to ship it, and I told Mr.
790 Huebner where the merchandise was to go, so many cases to this customer and so many cases to that customer.

Q. That portion of the bill of lading which has "Ace Forwarding Company"—is that the name?

A. Yes.

Q. That was made under your direction?

A. Yes, sir.

Q. Did you instruct them to put "ABC Candy Company" as the shipper?

A. No, sir, I did not.

Q. Are you able to tell from examination of this document the amount of money that was paid for that shipment, if it was paid?

791 By Mr. McConnell: I object to a question like that, "How much was paid, if it was paid?"

By Mr. Lockley:

Q. Well, did you pay for that shipment?

A. Yes, sir, I did.

Q. Do you know how much?

A. Yes, sir. I would say 10 cents a pound overage and I believe the cost of the merchandise was 12 or 13 cents, so, this would be 30,000 pounds of candy because there was 30 pounds in a case and a thousand times 30 is 30,000 pounds of candy.

If the cost of the merchandise was 12 cents or 13 cents and the overage was 10 cents a pound, it was 30,000 times 2 and that is how much I paid.

Q. Do you know to whom you paid it?

A. Yes, sir, I do.

Q. Who was that?

A. Mr. Huebner.

Q. Do you know where?

A. Yes, sir. In the offices of the Shotwell Manufacturing Company, sir, in the lobby, I mean—I mean in that laboratory.

Q. When?

792 A. A few days before it was shipped.

Q. You paid for it before it was shipped?

A. Yes, sir. I had to borrow the money here in Chicago to pay for that shipment, sir.

Q. You didn't write a check to cash on this particular shipment?

A. No, I did not.

Q. From whom did you borrow the money?

A. From Mr. Urban, sir.

Q. It is the same Mr. Urban whose name appears on some of the checks you endorsed?

A. I did, yes, sir.

Q. I now show you Government's Exhibit for identification No. 147 and ask you if you have seen that before?

A. Yes, sir, I have.

Q. Was that document prepared by you or under your supervision and direction?

A. No, sir. This—the shipping instructions are my instructions, yes, sir.

Q. Do you know where it was prepared?

A. Yes, sir. It came from the Shotwell Manufacturing Company, sir.

Q. Was that record kept in the ordinary course 793 of business?

A. My business, sir?

Q. Yes.

A. Yes, sir.

Q. Which business was that?

A. General Confections, Inc.

Q. To the best of your knowledge, is it true and correct?

A. It is, sir.

By Mr. Lockley: I offer Government's Exhibit 147 in evidence, sir.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 147.)

By Mr. Lockley:

Q. Now, Mr. Lubben, I show you Government's Exhibit 147 and ask you if you can describe that document?

A. Yes, sir.

Q. What is it?

A. This is an original uniform straight bill of lading and it is dated at Chicago, Illinois, March 5, 1946, con-

signed to William Barron in care of Bekins.

794 Q. Was William Barron one of your customers?

A. Yes, sir.

Q: Who was the shipper?

A. The ABC Candy Shippers, Chicago, Illinois.

795 Q. Did you know any ABC Candy Shipper at that time?

A. No, sir, I did not.

Q. What was the merchandise shipped on that bill of lading?

A. Cardinal chocolates, sir, box chocolates.

Q. Did you make the purchase of cardinal chocolates?

A. Yes, sir.

Q. Did you purchase cardinal chocolates?

A. Yes, sir, I did.

Q. From whom?

A. From The Shotwell Manufacturing Company.

Q. What are cardinal chocolates?

A. It is a one-pound box of chocolates, sir.

Q. Is that a type of chocolate or a trade name or brand, or what?

A. Well, cardinal, sir, was the name they gave to us, sir. How the name "cardinal" came out sir, is that originally—

By Mr. O'Brien: We object to that.

By Mr. Lockley:

Q. All I want to know is, is cardinal chocolate a trade name, the brand name, or is it a type of chocolate?

796 A. No. Cardinal is a brand name.

Q. How was that type of chocolate retailed, in bulk, or in boxes, or do you know?

A. It was a one-pound fancy box, sir, with a ribbon on it.

Q. Was there any printing on the box?

A. Yes, sir. It says "Cardinal". It says "Packed for"—I believe it says "General Confections, Inc."

Q. Were there any other names on the box?

A. No, sir.

Q. Do you know of any candy manufacturer who made Cardinal chocolates?

A. Yes, sir, I do. You mean, made the brand Cardinal?

Q. Yes.

A. Shotwell Manufacturing Company. They made them for us.

Q. Did you pay for that chocolate?

A. I did, sir.

Q. How much did you pay?

A. I believe it was 37—it figures out 37 and a third price, or 37 and a half cents or 37 and a quarter cents per pound. That was a one pound box, and then
797 the overage was eighteen and three-quarters cents, or the overage figure, $2.25 a dozen.

Q. Will you explain or are you able to determine from an examination of the bill of lading what the cost of that shipment was to you?

A. No, sir, I am not.,

Q. Do you know how much you paid for that shipment?

A. Well, I can see it was 1,250 cases of candy which I know was Cardinal, which we shipped to Barron in California, and I know what we billed him for it and I know the cost of the merchandise and I know where the merchandise came from.

Q. Well, I am trying to find out how much was paid for it.

A. Well, 37⅓ and 18¾, sir, is about 54 cents. I am not good in addition. But, if you added it together, that is how much it was.

Q. 54 cents a box?

A. About 55 cents a pound.

Q. How many pounds were in that shipment?

A. Well, it was 1,250. The gross weight over here (indicating) where it say 38,750 pounds, but that
798 includes the carton, so, you take 1,250 and you multiply it by 24, and that is the number of pounds of candy because they were packed 24 in a carton.

Q. Did you pay anyone for those chocolates?

A. I did, sir.

Q. Who did you pay?

A. Mr. Huebner.

Q. Where?

A. I believe it was in the office of The Shotwell Manufacturing Company, sir.

799 Q. And when?

A. Almost about the same time as I paid for the

other merchandise. I would say it was early in March. I mean, somewhere right in that neighborhood.

Q. How did you pay it?

A. In cash, sir.

Q. Was there any conversation at the time, that you recall?

A. Yes, sir. There was a conversation that he would give me some more cars later on and he was going to get me some more boxes and could I handle any more and I says, "I can take everything you can make."

Q. You stated that the boxes were imprinted with the wording "Cardinal" and "General Confections", is that right?

A. Yes, sir.

Q Now, you were the president of General Confections?

A. Yes, sir.

Q. Did you order those boxes to be so printed?

A. No, sir.

Q. Do you know who did?

800 A. Yes, sir, I do.

Q. Who was it?

A. The Shotwell Manufacturing Company.

Q. Did you have any conversation with anyone of the defendants with reference to that?

A. Yes, sir, we did. I had previously purchased—

Q. No. See if you can place the time.

A. Well, during the time of the partnership, I believe I got several cars of box chocolates from Shotwell and I sold them to some of the customers. One of the customers I remember was F. W. Woolworth. I believe it was in Atlanta, Georgia.

Now, Shotwell also sold the Woolworth Company and when they saw Shotwell's merchandise coming through us, there were some embarrassing questions. I mean, in fact they were upset. In fact, the broker who sold it to me wanted to know—

By Mr. McConnell: I object to the conversation outside of the presence of our defendants.

By the Court: I will sustain the objection. You are now asking him how it happened that the product of Shotwell bore the name "General Confections"?

801 By Mr. Lockley: Yes.

By the Court: Bring him up to some conversation in that respect.

By Mr. Lockley:

Q. Did you have any conversation with one of the defendants?

A. Yes, sir. Mr. Huebner told me—

Q. When was this?

A. I can't remember specifically.

Q. Well, can you give the year?

A. I would say it was—no, I can't give it.

By Mr. O'Brien: We would like the time.

By the Witness: The only way we bought was boxes with the name on it. I remember that.

By Mr. Lockley:

Q. Was it in 1945 or 1946, either one of those years, if you remember?

A. I can't remember the exact years, sir.

Q. I show you Government's Exhibit 148 and ask you if you have seen that before?

A. Yes, sir.

Q. Is that a record that was kept in the ordinary course of business?

802 A. Yes, sir, it was.

Q. Is it true and correct, to the best of your knowledge?

A. Yes, sir.

Q. Does it bear any writing, any handwriting on it?

A. Yes, sir, it does.

Q. Do you know whose handwriting that is?

A. No. Well, over in the corner, sir, it tells—"Del Monte O. K." and then it says "600 citrus drops".

Q. Never mind reading from it. I just asked you if you recognized whose handwriting it was.

A. No, sir, I don't.

Q. Is this a record that was kept by you as a part of your business records?

A. Yes, sir.

By Mr. Lockley: I offer Government's Exhibit 148 in evidence.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 148.)

By Mr. Lockley:

803 Q. Mr. Lubben, I show you Government's Exhibit 148 and ask you if you will describe that document. What is it?

A. It is an original uniform straight bill of lading.
Q. Where did you receive it?
A. I believe it came in the mail, sir.
Q. From whom?
A. From the Shotwell Manufacturing Company.
804 Q. Who is indicated on the bill of lading as the shipper?
A. The shipper is the ABC Candy Shipper, Chicago, Illinois.
Q. And to whom was it sent?
A. The bill of lading? The merchandise?
Q. The merchandise.
A. The merchandise was consigned to Tom Fagel, 60 Ames Street, Lawrence, Massachusetts. It was hauled by the Spector Motor Freight Company.
Q. Was Mr. Fagel a customer of yours?
A. Yes, sir.
Q. Does the bill of lading state the nature of the product shipped?
A. Yes, sir. It was one thousand cases of candy and has 31,500 pounds as the gross weight, and then written—yes, sir.
Q. Did you buy that candy?
A. Yes, sir, I did.
Q. From whom?
A. From Mr. Huebner.
Q. Do you know how much it cost?
A. Yes, sir. I am not familiar with the billing price, so if I say 12 cents, and it happened to be 13 cents
805 for the item, it is because I don't know. It is one or the other, but the overage was ten cents a pound. Assuming it was 13 cents a pound, 13 plus 10 is 23 cents. There is a thousand cases of merchandise and it weighed 30 pounds to a case. A thousand times 30 is 30,000 pounds, and the other 1500 pounds on the bill of lading makes it 31,500, sir, the gross weight of the box, including the box, sir.
806 Q. That was 30,000 pounds of candy, is that right?
A. Yes, sir.
Q. And approximately 20 cents a pound?
A. No, sir; 23 cents a pound, 22 or 23 cents a pound.
Q. If my mathematics is right, that would be around $6,900?

A. I would have to figure it.
Q. Now, did you pay for that candy?
A. I did, sir.
Q. First, did you get an invoice for it?
A. No, sir; I did not.
Q. How did you know how much you owed?
A. Because I knew—I talked to Mr. Huebner, and Mr. Huebner told me about that, he was going to give me so many pounds of candy without an invoice, and this is part of it.
Q. When did you talk to Mr. Huebner?
A. The latter part of February, or early March, 1946.
Q. Did you have just one conversation with him about these various shipments you have referred to, or was there a separate conversation on every shipment?
807 A. No, sir, just about—he told me he could ship me so much money if I could give him so much cash.
Q. Is that one conversation?
A. Yes, sir. That was the total number of pounds and I stated before, I think, the number was ninety or a hundred thousand pounds of gum work.
Q. Gum work?
A. Yes, sir. This is gum work, jelly beans—I mean jelly beans, but those little candies that are like gum drops, little tiny things.
Q. With respect to this shipment, you didn't get any invoice for it; did you pay for it?
A. Yes, sir; I did.
Q. Do you know when?
A. Yes, before the merchandise was shipped, sir. I mean, I paid it before that other shipment was shipped.
Q. To whom did you pay the money?
A. To Mr. Huebner, sir.
Q. And how did you pay it?
A. In cash.
Q. And where?
A. In the offices of the Shotwell—well, in the
808 offices of the Shotwell Manufacturing Company, sir. I generally always paid the money up in there, in 1946.
Q. And what was the nature of your business organization at that time?
A. Well, sir, I was just leaving the partnership and starting General Confections.

Q. Was that a part of the business of General Confections then?

A. This shipment here was picked up as part of the business of General Confections.

By Mr. McConnell: We haven't got the date yet, have we?

By Mr. Lockley:

Q. Did you testify as to when it had been paid?

A. Yes, sir; I believe a few days prior to that other shipment.

809 By Mr. Lockley: I thought he said that.

By Mr. O'Brien: Prior to the other shipment?

By Mr. McConnell: We have had a lot of shipments.

By the Witness:

A. I just talked about a thousand cases of candy, sir, and this one, I don't know, but I think you are going to come up with another one here which will make that 90 or 100 thousands pounds of gum work. And I paid them all at one time for it.

By Mr. Lockley:

Q. Now, with respect to all of the merchandise that you have testified to so far, do you know who manufactured it?

A. Yes, the Shotwell Manufacturing Company, sir.

Q. Do you know who shipped it?

A. Shotwell Manufacturing Company.

Q. Did you buy any of it from any of the defendants in his individual capacity?

A. No, sir.

Q. I show you Government's Exhibit for identification 149 and ask you if you have seen that before?

810 A. Yes, sir, I have.

Q. Is that a record that was kept in the ordinary course of business?

A. Yes, sir.

Q. Do you know where it was prepared or by whom?

A. It came from the Shotwell Manufacturing Company, sir.

Q. Is it true and correct, to the best of your knowledge?

A. Yes, sir.

Q. A permanent part of your business records?

A. Yes, sir.

Q. And what business, at that time?

A. General Confections, Inc.

By Mr. McConnell: Are you offering the penciled memoranda?

By Mr. Lockley:

Q. There are certain pencil memoranda on it, Mr. Lubben. Do you know who made those memoranda?

A. No, sir; I don't.

Q. Do you know if they were made in the office of the General Confections?

A. Well, sir, if I could look at the handwriting I could probably tell.

811 No, sir, I can't identify the handwriting, sir.

Q. When that record, including the handwriting was kept in your office, was the complete record, handwriting and typewriting and printing, a part of your business records?

By Mr. O'Brien: I object to that. If I understand it correctly, he doesn't know anything about the handwriting.

By the Court: He can't identify the handwriting. Why dont' you offer the exhibit—

By Mr. Lockley: I will offer it without the handwriting, your Honor. That's 149.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Governments' Exhibit 149.)

By Mr. Lockley:

Q. Mr. Lubben, I show you Government's Exhibit 149 and ask you to explain what that is.

812 A. This is a uniform straight bill of lading. It is the original copy. The merchandise was shipped from Chicago on March 11—it is dated March 11, sir, but it was picked up by Spector Motor Freight on March 9, 1946. And it is consigned to the Bermer Candy Company, 2739 Atlantic Avenue, Brooklyn, New York.

Q. Is that a customer of yours?

A. The man that I sold this whole shipment, this whole ninety thousand pounds, gave us instructions where to ship the merchandise, and the shipper is the ABC Candy Shipper, Chicago, Illinois.

Q. And from whom did that shipment actually originate?

A. From the Shotwell Manufacturing Company, sir.
Q. Did you receive an invoice for that shipment?
A. No, sir; I did not.
Q. Did you pay for it?
A. Yes, sir; I did.
Q. How?
A. With cash.
Q. To whom?
A. Mr. Huebner.
Q. When?
813 A. Early in the latter part of February or early in March, 1946.
Q. Where?
A. Here in Chicago.
Q. Are you able to remember how much?
A. I think, sir, that it was around $19,000.00 on this gum work.
Q. That particular shipment?
A. No, on these three shipments. The last three shipments we talked about, I think, will be about $19,000.00.
814 Q. Well, will you look at Government Exhibits 146, 147, 148 and 149, and see if that will help to refresh your recollection, and if there is any connection between them?
A. Well, sir, in regard to the $19,000, there is a connection between Exhibits 148, 146, and 149, but there is no connection with that $19,000 to Government Exhibit 147.
Q. Well, was the money then, the $19,000 you referred to, paid in connection with Exhibits 146, 148 and 149?
A. It was paid for 148, 146, and 149, yes.
Q. I show you Government Exhibit for identification No. 151 and ask you if you have seen that before?
A. Yes, sir; I have.
Q. Is that a record kept in the ordinary course of business?
A. Yes, sir; it was.
Q. Is that a part of your regular business records?
A. Yes, sir.
Q. Is it true and correct to the best of your knowledge?
815 A. Yes, sir.
Q. Do you know by whom it was prepared?

A. It was prepared by the Shotwell Manufacturing Company, sir.

Q. Was it then forwarded to you in some manner?

A. Yes, sir.

Q. Is there any handwriting on it?

A. Yes, sir.

Q. Do you know whose it is?

A. No, sir. Yes, sir; I can see right here whose it is.

Q. Can you tell?

A. Yes, sir. It is the handwriting of the man—the railroad agent.

By Mr. Lockley: I offer Exhibit 151, your Honor.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 151.)

By Mr. Lockley:

Q. Mr. Lubben, can you tell from an examination of Exhibit 151 what sort of merchandise was shipped on that bill of lading?

816 A. Yes, sir; I can.

Q. And what was it?

A. Well, there is nothing written on here, but I know what was shipped. I can tell here what went to the customer.

Q. All right. What was it?

A. It was 1,989 fiber cases of candy with a gross weight of 61,658 pounds.

Q. Are you able to identify the type of candy?

A. Yes, sir; that was box chocolates.

Q. How do you know that?

A. Because it's McDonald Candy Company. We had an order from McDonald Candy Company and we never shipped them any bulk merchandise.

Q. From whom did you purchase that shipment?

A. From the Shotwell Manufacturing Company, sir.

817 Q. Well, who is the shipper shown on the invoice?

A. General Confections.

Q. I mean the bill of lading.

A. General Confections, Inc.

Q. General Confections, Inc., was your company, wasn't it?

A. Yes, sir.

Q. Did you give Shotwell instructions to so designate you as shipper?

A. I told them to ship it, sir, out to the customer, and there was no reason, probably, why they couldn't use my name. It was—the boxes had our name on it and it says it came from Chicago, Illinois. We had no plant here.

Q. Did you have any inventory here, any merchandise?

A. No, sir.

Q. In a warehouse?

A. No, sir.

Q. Did you receive an invoice for that shipment?

A. No, sir; I did not.

Q. Did you pay for it?

A. Yes, sir; I did.

Q. Do you know how?

818 A. In cash, sir.

Q. Do you know when?

A. No, sir; I can't specifically say when, but it was—I paid for it.

Q. Who did you pay?

A. Mr. Huebner.

Q. Where?

A. I don't know whether I was in Chicago or not then, but I paid for it.

Q. What price per pound did you pay?

A. 37 1/3 cents, the regular price.

By the Court: How much?

By the Witness:

A. 37⅓ or 37½ cents per pound, whichever it is, sir, plus 18⅓ or 18¾ overage. And you add them together and that is how much I paid per pound.

By Mr. Lockley:

Q. Can you tell how many pounds there were, or did you already testify to that?

A. Well, sir, if you take 1,989 cases and you multiply it by 24, that's how many were pounds.

Q. There were 24 pounds or pound boxes in a case?

A. Yes, sir. And the rest of that would be—

819 Q. Speak up now.

A. The rest of that would be weights for, you know, ice, or something. I don't know. I believe there were 24 pounds in a case, sir.

By Mr. Lockley: I ask the indulgence of the Court a moment, your Honor. We apparently overlooked one of these in pre-numbering them.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 152 and ask you if you have seen that before?

A. Yes, sir.

Q. Is that a record kept in the ordinary course of business?

A. Yes, sir.

820 Q. Is it true and correct, to the best of your knowledge?

A. Yes, sir.

Q. Do you know by whom it was prepared?

A. Yes, sir.

Q. By whom is that?

A. The Shotwell Manufacturing Company.

Q. Did you receive it from them in the course of business?

A. Yes, sir; I did.

Q. And it then became a permanent part of your records?

A. Yes, sir.

By Mr. Lockley: I offer Exhibit 152 in evidence, your Honor.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 152.)

By Mr. Lockley:

Q. I show you Government's Exhibit 153, Mr. Lubben, and ask if you can tell me what that is.

A. This is a uniform straight bill of lading. It is 821 dated at Chicago, Illinois, and on June 8, 1946.

Q. And who is the shipper?

A. General Confections, Inc.

Q. To whom is the shipment consigned?

A. William Barron, Oakland, California.

822 Q. Was he one of your customers?

A. Yes, sir.

Q. What sort of product was shipped?

A. Box chocolates, sir.

Q. How much?

A. Seventy cases.

Q. What would be the weight of that?

A. The gross weight, sir, would be 2,170 pounds, on the bill of lading.

Q. Can you tell the net weight from any examination of that document?

A. Yes, sir; it would be 70 times 24.

Q. Did you receive an invoice for that shipment?

A. No, sir; I did not.

Q. Did you pay for it?

A. Yes, sir, I did.

Q. How?

A. In cash, sir.

Q. To whom?

A. Mr. Huebner.

Q. Where?

A. I don't recall whether it was Chicago or New York, sir.

Q. Do you know when?

823 A. No, sir; I don't.

Q. Can you tell from an examination of the date of the shipment what was before—whether it was before or after, or about the time of that?

A. No, sir. It says June 8—

Q. Speak up.

A. It says June 8, here, sir, and I don't know whether I gave it to him on June 8 or before or after. I can't remember this specific shipment, sir.

824 Q. Can you tell how much you paid per pound for that merchandise?

A. Yes, sir. 37½ times 18⅓, and that—

Q. You mean 37½ plus or times, which is it?

A. 37½ plus 18⅓, and that was the cost of the merchandise.

Q. For the number of pounds?

A. Yes, sir.

Q. I show you Government's Exhibit for identification 154 and ask if you have seen that before?

A. Yes, sir; I have.

Q. Is that a record kept in the ordinary course of business?

A. Yes, sir.

Q. Do you know by whom it was prepared?

A. Yes, sir; it was prepared by the Shotwell Manufacturing Company.

Q. Does that record have any handwriting on it?

A. Only the handwriting of the agent, sir, the agent for the railroad. This was shipped by the Chicago, Milwaukee, St. Paul & Pacific Railroad.

Q. Is that a true and correct record, to the best of your knowledge?

A. Yes, sir.

825 Q. Was it kept as a part of your business records?

A. Yes, sir.

Q. And what business?

A. General Confections.

Q. Would that same answer be true with respect to all of these bills of lading I have shown you?

A. What is that, sir?

Q. General Confections, was that the business entity then in existence?

A. Yes, sir.

By Mr. McConnell: Do I understand that he is making records of these transactions in his office; is that what you are showing?

By Mr. Lockley:

Q. Mr. Lubben, did you have any records other than the bills of lading, did you receive any invoices for these?

A. No, sir, I did not.

By Mr. Lockley: You can't keep records when there aren't any.

By Mr. O'Brien: Judge, I think our objection is to the characterization of bills of lading as being records

826 that were made or prepared by his office or made in the regaular course of business within the shop book rule.

By the Court: They were retained by him in the ordinary course of business.

By Mr. O'Brien: Very well. But not otherwise.

By Mr. Lockley: He has not stated that he made them. He stated they were made by the Shotwell Manufacturing Company.

By Mr. McConnell: I haven't heard any evidence here of where he got them, or how he got them from Shotwell. I don't know how he knows how Shotwell keeps the records.

By the Court: The exhibit may be received.

827 (Said document was received in evidence by the Court and marked Government's Exhibit 154.)

By the Court: We will have our morning recess now.

(Short recess.)

By Mr. Lockley:

Q. Mr. Lubben, I offer you Government's Exhibit 154 and ask you to describe that document.

A. Yes, sir. This is a uniform straight bill of lading. It is dated on August 9, 1946, at Chicago, Illinois. It is consigned to McDonald Candy Company, Medford, Oregon.

Q. Was McDonald Candy Company a customer of yours?

A. Yes, sir; it was.

Q. Do you know what sort of merchandise was shipped on that bill of lading?

A. Yes, sir; box chocolates.

Q. Box chocolates?

A. Yes, sir. I can tell that very easily because it says, "To be iced with 6,000 pounds of chunk ice." And you only ice chocolates, sir.

828 Q. Where did that shipment originate?

A. It originated at the Shotwell Manufacturing Company.

Q. What city?

A. In Chicago, Illinois.

Q. And who is listed on the bill of lading as the shipper?

A. The General Confections, Inc.

Q. Did you buy that merchandise from the Shotwell Manufacturing Company?

A. Yes, sir; I did.

Q. That is, the General Confections bought it?

A. Yes, sir.

Q. Did you get an invoice for it?

A. No, sir, I didn't.

Q. Did you pay for it?

A. Yes, sir; I did.

Q. Do you know how much you paid?

A. 37⅓ times 18¾, and that's the total, sir. I haven't a chance to add it up.

Q. You said times?

A. Well, 37⅓ plus 18¼, and that was the total.

Sir, I know this came from the Shotwell Manufac-

829 turing Company because it says the routes, Chicago, Milwaukee, St. Paul and Pacific, and the Shotwell Factory in Chicago is on the Chicago Milwaukee and St. Paul tracks.

Q. And did you pay for that shipment?

A. Yes, sir; I did.
Q. How?
A. In cash, sir.
Q. You mean currency, is that it?
A. Yes, sir.
Q. And to whom?
A. Well, this shipment, sir, if I recall correctly, was paid not in one lump. I mean, we didn't have the money, and if I—
Q. Speak up, Mr. Lubben.
A. If I remember correctly, sir, I paid part of the money. I think Mr. Heitmann paid for part of it.
By Mr. McConnell: I object to what Heitmann did.
By the Court: If he knows.
By the Witness: Well, sir—
By Mr. Lockley: Just a minute.
By Mr. McConnell: Unless he was present when
830 Mr. Heitmann paid it, I object to it.
By the Court: Yes. You must connect it up.
By Mr. Lockley:
Q. Did you pay for it yourself, for all of it?
A. No, sir.
By Mr. McConnell: Then I move that the statement be stricken that it was paid, as hearsay.
By the Court: Well, the statement that Heitmann paid part of it is hearsay and may be stricken.
By Mr. Lockley:
Q. Where was it paid, the portion that you know of, from your own knowledge?
A. Well, sir, we had some records here yesterday, and I remember an instruction sheet to Mr. Heitmann, and it was some of the money that I believe Mr. Heitmann had on the instruction sheet was for this.
Q. That instruction sheet is not in evidence, Mr. Lubben, so we can't testify from that.
You can only testify from your own personal knowledge.
831 Did you pay for any of that yourself?
A. I believe I did, sir. The amount I can't tell you.
Q. Do you know where?
A. No, sir; I don't.
Q. Do you know when?
A. Very close to around the shipment of this car of chocolates, sir.

Q. When was that?
A. On August 29th.
By Mr. O'Brien: I object to that.
832 By the Witness:
A. August 9, 1946.
By Mr. O'Brien: He said he doesn't know where or when, so how would he know?
By the Court: It may stand. He has a right to look at the bill of lading to refresh his memory, if that aids him in determining when he paid it.
By Mr. O'Brien: My point for the record is that he doesn't know when he paid it, or where he paid it.
By the Court: He said he paid part of it around August 9, 1946.
By Mr. McConnell: He hasn't told us how much. He didn't know how much of it.
By the Court: He says he doesn't remember.
By the Witness: I know how much was paid for the total amount of the car, sir.
By Mr. Lockley:
Q. Do you know that it was paid in full?
A. Yes, sir.
By Mr. McConnell: I move to strike it. It has already been shown that the only knowledge he had was some-
833 thing—
By the Court: Yes. On this you lay a further foundation. The testimony is not competent and his answer may be stricken.
By Mr. Lockley:
Q. Mr. Lubben, do you have any personal knowledge that all of the amount of that shipment was paid?
By Mr. McConnell: If the Court please, this—
By the Court: He may answer that yes or no.
By the Witness: Yes, sir; I have a knowledge that it was all paid.
By Mr. Lockley:
Q. And do you know how, I mean?
By the Court: Well, counsel, there is no use going into that unless he was there when Heitmann paid the money, or you have other facts that would establish his statement that he knows how it was paid.
By Mr. McConnell: I move to strike, and suggest that it is highly improper after the Court has ruled on an
834 objection, and overruled counsel on it, to have him ask the same thing in a different way, and get it before the jury that way.

By the Court: Well, I think the evidence now discloses that he paid part of it, and he doesn't know the amount that he paid. And whether the balance was paid or not hasn't been established by competent evidence.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 155, and ask you if you have seen that before?

A. Yes, sir.

Q. Is that a record kept in the ordinary course of business?

A. Yes, sir.

Q. From whom did you receive it, if you know?

A. I received it from the Shotwell Manufacturing Company, sir.

Q. Do you know by whom it was prepared?

A. Yes, sir; by the Shotwell Manufacturing Company, sir.

Q. Do you know how it was received from them?

A. In the regular course of business. I wouldn't
835 know whether it came by mail or messenger, sir. They mostly came by mail.

Q. Is it true and correct to the best of your knowledge?

A. Yes, sir.

Q. Was it kept as a part of your regular books and records?

A. Yes, sir.

Q. Is that a record kept in the ordinary course of business?

A. Yes, sir.

By Mr. Lockley: I offer Exhibit 155 in evidence.

By the Court: Is there a date on here?

By Mr. Lockley: Only the year 1946, sir. But I will establish the date by other memoranda.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 155.)

By Mr. Lockley:

Q. I show you Exhibit 155-A, and ask you if you have seen that before?

836 A. Yes, sir; I have.

Q. Do you know by whom it was prepared?

A. By the receiving clerk of the Eatsum Food Products Company.

Q. Do you recognize the handwriting thereon?

A. May I correct that, sir? This is received by the receiving clerk of General Confections, Inc.

Q. Do you know the handwriting?

A. I have seen the handwriting. I can't remember his name, but we had him for some time.

Q. Please speak up, Mr. Lubben. Down at this end it is difficult to hear you.

A. I can't name the man's name, but he worked for us.

Q. Was that a record kept in the ordinary course of business of the General Confections?

A. Yes, sir; every shipment that came in had one of these things.

Q. Was it true and correct at the time it was prepared?

A. Yes, sir.

Q. Was that a part of your books and records?

A. Yes, sir.

Q. Is it your practice to keep such records?

837 A. Yes, sir.

By Mr. Lockley: I offer 155-A in evidence.

By Mr. McConnell: I object to the receiving ticket. It purports to be an Eatsum Food Products receiving ticket, and this, as I understand it, is General Confections.

By the Witness: I can explain that, sir.

838 By Mr. Lockley:

Q. Can you explain your testimony that that was a transaction of the General Confections Corporation, whereas the printing on the receiving ticket is Eatsum Food Products?

A. Yes, sir; I can.

Q. What is it?

A. Well, sir, we had some old stationery left over from the Eatsum Food Products downstairs and I didn't see fit to throw it out for a receiving ticket, and they may have picked up a pad that day. It says Eatsum Food Products, but the date says in 1946 and that was during the time of General Confections, Inc., and the bill of lading says 1946, and that was during the time of General Confections, Inc. And it was consigned to General Confections, Inc., sir. And there was no Eatsum Food Products at 40 West 170th Street at that time.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 155-A.)

By Mr. Lockley:

839 Q. Now, what does Government's Exhibit 155-A purport to be?

By the Court: 155-A?

By Mr. Lockley: A; yes, sir.

By the Witness:

A. That is a receiving ticket for 335 cases of 30 pound Coronet Mix received from The Shotwell Manufacturing Company, Chicago, Illinois, on August 26, 1946, shipped via Spector Motor Freight.

By Mr. Lockley:

Q. Does that have any connection with Government's Exhibit 155, the bill of lading?

A. Yes, sir. This is the 335 fiber cases of candy that came in.

Q. And what do you mean, came in, where?

A. Came from Shotwell Manufacturing Company.

Q. On the bill of lading who is listed as the shipper?

A. Shotwell Manufacturing Company, sir.

Q. And on the bill of lading who is listed as the consignee?

A. General Confections, Inc.

Q. And that was consigned to the General Confections warehouse where?

840 A. 40 West 170th Street, Bronx, New York, and shipped via Spector Motor Freight.

Q. What sort of product was shipped?

A. If I remember correctly, Coronet Mix, sir, was a little something extra, had different types of gum drops, or jellies, and so forth, mixed in a box.

Q. Do you know who made that shipment?

A. Yes, sir.

Q. Who made that type of merchandise?

A. Yes, The Shotwell Manufacturing Company, sir.

Q. Did you receive an invoice for that shipment?

A. No, sir; I did not.

Q. Did you pay for that shipment?

A. I did, sir.

Q. How much did you pay per pound?

A. Well, I remember the overage was ten cents a pound, but I think the cost for the price of this merchandise was more. It wasn't like those spice buttons, or

something like that, I think this cost may be twenty cents a pound, or twenty-two cents a pound, but it was—I believe it was a little more than I had paid before, but the overage was the same, per pound ten cents.

841 Q. How was that paid?

A. In cash, sir.

Q. Both the 20 or 22 cents and the ten cents overage?

A. Yes, sir.

Q. Do you know where?

A. No, sir, I don't know where.

Q. Do you know when?

A. I think it was—this one here I think was paid before the merchandise was shipped.

Q. It was prepaid?

A. Yes, sir.

Q. Do you know to whom?

A. Mr. Huebner, sir.

Q. It was paid about the date of the shipment to Mr. Huebner, but you don't know where?

A. No.

By Mr. O'Brien: I object to the leading question.

By Mr. Lockley: He has already testified to that.

By Mr. O'Brien: I don't so understand it. He testified it was paid for before the merchandise was shipped.

842 By Mr. Lockley:

Q. How long before was it paid?

A. Not very long, sir.

By the Court: The answer may stand.

By the Witness:

A. Within a few days one way or the other, sir.

By Mr. Lockley:

Q. What was the weight of the merchandise in that shipment?

A. It's 335 30-pound cases, and the net weight would be 10,050 pounds, and the gross weight would be 10,720 pounds, and the difference is made up in the weight of the cases.

Q. You only paid for the product, you didn't pay for the cases?

A. No, just the net weight, sir.

By the Court: May I see 155, please?

(Document handed to the Court.)

By the Court: I don't know whether the record is clear, but both 155-A and 155 may be received in evidence.

By Mr. Lockley:

Q. I call your attention to the fact that 155, the bill of lading, bears only the date 1946. Are you able
843 to fix the exact or approximate date of that shipment?

A. Yes, sir; I would say it left Chicago about August 23, 1946.

Q. And how do you determine that?

A. Because it was received at our plant on August 26, 1946, and it only took it several days on the trucks.

Q. I show you Government's Exhibit for identification No. 153-A and ask you if you have seen that before, or the original?

A. Yes, sir; I have, sir.

Q. Is that in your handwriting?

A. Yes, sir.

Q. When was it prepared?

A. It was prepared on June 17th, 1946.

Q. Was that a record kept in the ordinary course of business?

A. Yes, sir; it was.

Q. Which business?

A. General Confections.

Q. Was it true and correct at the time it was made?

A. Yes, sir.

Q. Was it your practice to keep such records in
844 your business?

A. Yes, sir.

Q. Turn it over on the other side. Were those writings also made by you or by someone else?

A. No, sir; this appears to be the writing of Miss Feldman.

Q. Would such writings be made under your supervision and direction?

A. Yes, sir.

Q. Were they made in the ordinary course of business?

A. Yes, sir.

Q. Were they true and correct at the time they were made?

A. It appears to be just the addition, where she is making the addition, sir, to arrive at the figures. So it is correct, sir.

Q. When did you last see the original of that document, if you know?

A. The last time I saw the original of this document, sir, was early in February, 1948.

Nos. 470-471

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HAROLD B. WILLEY

In the

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11108 *vs.*

THE SHOTWELL MANUFACTURING COMPANY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11109 *vs.*

BYRON A. CAIN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11110 *vs.*

FRANK J. HUEBNER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11111 *vs.*

HAROLD E. SULLIVAN,
Defendant-Appellant.

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

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TRANSCRIPT OF RECORD FILED MARCH 1, 1956
PRINTED RECORD

In the
United States Court of Appeals
For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11108 *vs.*

THE SHOTWELL MANUFACTURING COMPANY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11109 *vs.*

BYRON A. CAIN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11110 *vs.*

FRANK J. HUEBNER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11111 *vs.*

HAROLD E. SULLIVAN,
Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

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Q. And where was that?
A. On the sun porch of my home.
Q. Have you seen it since that time?
845 A. No, sir; I have not.
Q. Have you searched for it?
A. Yes, sir; I have.
Q. Do you know where it is?
A. I do not, sir.
By Mr. Lockley: I will offer that at a later time, your Honor.
By Mr. Lockley:
Q. I show you Government's Exhibit for identification No. 153 and ask you if you have seen that before?
A. Yes, sir.
Q. Is that your writing that appears thereon?
A. Yes, sir.
Q. Did you sign it?
A. I did, sir.
Q. Was that a record kept in the ordinary course of business?
A. It is, sir.
Q. Which business?
A. General Confections, Inc.
Q. And about when was it prepared?
A. The date on the check, sir, is June 18, 1946.
Q. Did that clear through the bank?
846 A. Yes, sir; it did.
Q. And was it thereafter returned to you?
A. Yes, sir.
Q. And was that kept in the files of the General Confections, Inc.?
A. Yes, sir.
By Mr. McConnell: Are you offering this one now? You didn't offer the other one, so there is no point in objecting to that. Are you offering this?
By Mr. Lockley: I am offering the check, yes.
By Mr. McConnell: I object to the check. It purports to be a check signed by David Lubben, to David Lubben, endorsed by David Lubben. It is not binding upon my client.
By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 153.)

By Mr. Lockley: Did I understand, your Honor, that it would be admitted?

By the Court: Yes.

847 By Mr. Lockley:

Q. Will you tell us what that check is, Mr. Lubben?

A. It is a check for $27,000.00.

Q. Now, I show you Government's Exhibits 152 and 151 and ask you if that check has any relation to those two exhibits, if you know?

A. Yes, sir; to the best of my knowledge this check here is the payment of these two invoices here, sir.

Q. That check is signed by you?

A. Yes, sir.

Q. It is drawn to your order?

A. Yes, sir.

Q. And was endorsed by you?

A. Sir, it doesn't look too much like my signature. Maybe it is and maybe it isn't. I don't know.

Q. Did you get the money for it?

A. Yes, sir; I got the money. I am sure of that.

Q. What did you do with the money?

A. Any money I got, sir, for cash payments I gave it to Mr. Huebner.

Q. Do you have any recollection as to when?

By Mr. O'Brien: I object and ask that the answer 848 be stricken. I don't think it is responsive.

By the Court: Yes, the objection is well taken. The answer may be stricken.

By Mr. Lockley:

Q. Do you have any recollection as to what you did with that particular $27,000.00?

A. No, sir; I don't. But I paid for the merchandise. I didn't get it for free.

By Mr. O'Brien: I ask that be stricken.

849 By the Court: Well, the answer is not responsive. It may be stricken.

By the Witness: Sorry, sir.

By Mr. Lockley:

Q. Now, Mr. Lubben, directing your attention to the period of 1948, did you have a conversation with Mr. Byron Cain?

A. Yes, sir; I did.

Q. How did that conversation come about?

A. Do you mean the conversation, sir, in the Riviera Night Club?

Q. Let's lead up to it. Where was it?

A. Well, sir, in August of 1948, around August of 1948, I received a telephone call one night in my home in Hillsdale, New Jersey.

Q. From whom?

A. From Mr. Byron Cain.

Q. Did you recognize his voice?

A. I did, sir. In fact, he identified himself.

Q. What did he say?

A. And he said, "Dave, what are you doing?" It was around ten or ten thirty at night. I said, "I am sitting here watching television."

So he said, "I would like to have you come over 850 to the Gotham Hotel."

And I said, "It is pretty late, sir."

At this time—and he was sitting there at the moment—Mr. Davidson lived in Hillsdale and he came to my home very frequently. And I turned to him and said, "Byron Cain is on the phone and wants us to come to New York." It was very late.

I said, "It is very late, sir. Couldn't I make it another day?"

He said, "No, this can't wait." Or words to that effect. And he turned to somebody—I could hear him talking—and he says, "Dave, do you know where the Riviera Night Club is at?" I said, "Yes, it is on the bank of the Hudson River, just across George Washington Bridge."

"How long will it take you to get there?"

"Twenty-five, thirty minutes."

He said, "How about meeting me there?"

I said, "All right, sir."

And I got in my car. I asked Mr. Davidson to go with me.

Q. And did you go to the Riviera Night Club?

851 A. We did, sir.

Q. And where did you go after you got to the Riviera?

A. We met Mr. Cain, and I believe he was standing inside the door, if I remember correctly, and he escorted us to a—"Hello, Dave," and "Hello, Sam." And he escorted us to a table, sir, inside of the night club, up sort of on a little balcony. You had to walk up two or three steps.

Q. Was anyone else present?

A. Yes, sir; there was a man there, sitting there, sir.

Q. Were you introduced to him at that time?

A. I don't think we were introduced right away, sir.

Q. That was Mr. Cain, yourself, Mr. Davidson, who was your lawyer?

A. Yes, sir.

Q. And this other person?

A. Yes, sir.

852 Q. What was the conversation?

A. Well, sir, the conversation started off, "What are you doing, Dave?"

The factory of General Confections had closed down on March 8, 1948.

"What are you doing?" I said, "I am trying to get the thing rezoned," because we had got mixed in some zoning trouble, and I said, "I am trying to get it rezoned so we can get the factory reopened."

And he said, "Dave, I don't think you should stay in the manufacturing business. You ought to just stick to selling. It is less headaches," and everything else like that, and so forth. Very pleasant conversation.

And finally I said, "Well, Byron, you didn't call me over to tell me that. What am I here for?"

He said, "All hell has broken loose." He said, "You are up to your ears in a peck of trouble."

And I said, "What do you mean?"

He says, "Well, a couple of agents came into our office and asked for all of the records of anything
853 we had, doing with you, or any of your companies.

And Stanley Graflund, like a damn fool, gave them to him."

And he says, "It's a terrible mess."

He says, "I wasn't there at the time it happened, and they called me after they had given the records." And he said, "I have got hold of Bob Hannegan."

Q. Did he identify Mr. Hannegan?

A. Yes, sir. That was the man that used to be the Postmaster General of the United States.

Q. Proceed.

A. And he says, "I got hold of Bob Hannegan, and I had him come out to my house, and he spent a couple of days. And he told me to get in touch with Pat Grace here."

And I believe that was when I met Pat Grace.

Q. Now, Pat Grace, he was the fourth member at this conversation?

A. Yes, sir. And Pat Grace—"He told me to get in touch with Pat Grace. He was his contact man in Brooklyn who knew how to handle these tax things."

854 By Mr. McConnell: Is this conversation now, or is this a conclusion?

By Mr. Lockley:

Q. Was that part of the conversation, or was that your conclusion?

A. No conclusion, sir. It is part of the conversation.

Q. All right. Try to put it into the words of each individual as you go along.

A. So then Pat Grace said he would be down to the office of Mr. Dan Bollig.

Q. Did he identify Mr. Bollig?

A. Well, no, sir—yes, sir; he says he was the big shot with the government in the Income Tax, and so he would be down to see him. And he says, "This thing is going to be a real stinker when it comes out," that "they have some records on Mr. Giglio, and you, and us," and he says, "We don't want to become involved in it."

And then it was suggested, sir—he said—

855 Q. Who suggested it?

A. Byron Cain, sir.

Q. What did he say?

A. Well, sir, he told me that—he said, "You have been down to South America. You have been down to the West Indies a couple of times. What did you do down there?"

I just said, "I just like it, and I think it has a lot of possibilities."

I don't recall directly whether he suggested it at the moment, sir, or Mr. Pat Grace, but one of them suggested that I take a trip to South America, and, sir. I think it was Byron Cain, that I take a trip to South America for two years.

He says, "You go down there, Dave," and he said, "Stay down there a couple of years and this thing will all blow over."

I says, "I don't want to go. I have my sister and my family here. I don't want to leave."

Q. Did they explain what your going down to South America would help blow over?

A. Yes, sir. They told me, sir, that it would be all handled by Mr. Grace kind of quietly; that if the Government's case came up and they had no witness—
856 Byron told me, "You don't want to be in a position to put your finger on your friends?" And I says, "No, I don't." He says, "Well, if you are not here the Government hasn't got any case."

He says, "There is no witness and the case will all be collapsed." So, I says, "Well, I got the house in Hillsdale." He says, "A syndicate can be formed or will be formed or may be formed with Mr. Eddie Urban and Close & Company and Morley Kramer, and you can figure it is worth seventy-five thousand dollars. Now, we will form a syndicate and the syndicate will buy the property and give you the money and you don't have to hang around here and then we will sell the property and get the money back.

They weren't going to give me any money, sir. They were just going to get the money back and help themselves to the property. I says, "I have some obligations." I owed the First Federal Savings & Loan Association. I owed my 1946 taxes.

They said, "We will give you so much money and you can pay your taxes."

They said, "They will get you back here on the
857 taxes, or something." They said if I had paid my taxes, I was only a witness and you can't bring a witness back, so, I believe, sir, I was requested by Mr. Cain—I mean, as the impression is in my memory, the last few days, sir—what I mean is, ever since I knew this case was coming on—I believe Mr. Cain asked me to contact Mr. Kramer in Boston.

Q. Who is Mr. Kramer?

A. President of Gum Products.

Q. Why?

A. I had an overpayment with Gum Products.

Q. You had so-called black market dealings with—

A. And Eddie Urban. They are both in the candy business.

So Mr. Davidson at this time said, "Wait a minute," or something like that. "You don't have to leave here. What does Lubben have to run away for?" And he says, "Well," he says, "this tax business"—

He says, "I know Lubben's case. He doesn't have to run around. He owes Uncle Sam for 1946 taxes, but," he says, "I fail to see where he has to go."

858 He says, "You don't want him to be in a position to have to put a finger on the people and tell who gave them the money."

I said, "I assure you, sir, I am not happy here."

By Mr. McConnell: I move to strike that out. It is not part of the conversation.

By the Court: Very well. It may be stricken as not responsive.

By the Witness: So, sir—

By Mr. Lockley:

Q. Does that exhaust your recollection of the conversation?

A. No. There are some other things. I know they are coming but I just lost my train of thought for a minute. I will pick it up.

Q. All right. Think about it for a second.

A. And he said that Pat Grace would take care of all these things and I would be able to come back in a couple of years and at the end of two years, Byron told me, he says, "I will give you the Shotwell account for the syndicate stores."

He said, "You know what that account is."

859 "Yes," I says, "I know what it is."

He says, "Dave, I will give you a contract." I says, "I don't want any contract." And he says, "I will give you my word, I will give you the Shotwell account and when you come back—you know that account"—I was going to get it as a broker—"It makes me $25,000.00."

I says, "Byron, I had your account once and when I needed it you took it away from me." That was just shortly prior to my factory closing up and I was earning eight hundred or nine hundred in commissions and I could have used it during the time the factory closed, so I said, "I don't want your account."

So he says, "Well, Dave, you think it over."

Davidson said, "No, no."

And I was advised to get my passport, sir, and be all set and to contact Mr. Grace at a later date and to think it over and Mr. Grace would tell me some more things he had learned about the case.

Q. Did you get a passport?
A. Yes, sir, I did.
Q. Did you use it?
860 A. I have never used it, sir.
Q. Where are you living now?
A. In Puerto Rico, sir, a possession—
Q. Is that of your own free will?
A. Yes, sir. It is a possession of the United States and a passport is required and I am there at my own free will.
861 Q. Did you have any further conversation at that time?
A. Yes, sir. I asked him—I think Byron Cain says, "We don't deny getting this money, Dave. We don't deny getting it, but," he says, "you cause a lot of embarrassment to a lot of people."
And I says, I believe in this conversation, sir, I says,—well, I think I asked him where the money went and it went here and there and everywhere else and I says, "I bet a lot of it went to Harold Sullivan's farm in Marengo, Illinois." The reason I remember Marengo is that I used to live there.
By Mr. O'Brien: Is this conversation now?
By the Witness: This is conversation. I am reciting a conversation.
By the Witness:
A. He says, "That is one of the reasons, sir, you will have to leave the country."
By Mr. Lockley:
Q. Is that all of that conversation that you can recall?
A. There was more, sir, but I can't remember it.
862 I mean, there was a conversation for a couple of hours, I believe, sir.
Q. Now, did you later have another conversation with Mr. Cain?
A. Yes, sir, I did.
Q. Do you recall when that was?
A. Yes, sir, in the year 1951.
Q. Do you know about when?
A. Around August.
Q. And where?
A. I had a conversation, sir, in New York City.

Q. Well, start with the beginning and tell us, how did that conversation come about?

A. Well, one night, sir, a friend of mine called me on the telephone and he said, "Byron Cain called me today and wanted to know what your home phone number was." And I had an unlisted telephone number at the time and he said, "I did not know whether to give it to him or not, but," he says, "if you want to call him, here is his number."

So, I waited that night until Mr. Davidson could come over and I recited it, I was to get in touch with him, and I said, "Should I call him or shouldn't I?"

863 He said, "Go ahead and call him." So, I asked Mr. Davidson to get on the extension as I called him and so I called Mr. Cain at his home in Wilmette and Mr. Cain answered the phone and said, "Dave, when are you going to come to Chicago? I would like to see you."

I says, "I don't have any business in Chicago at the time, Mr. Cain, and I have no reason to come."

And he says, "Well, I would like to see you. Are you going to be around the latter part—the rest of the week, the next week?"

I said, "Yes, sir, I am."

And he says, "Well, all right. I will call you, Dave, and I will let you know when I am coming."

I said, "O. K., sir."

864 So, that was on a Thursday and I remember it very well, sir, and the next day was Friday and a telephone call came from Mr. Cain.

Now, Mr. Cain asked me if I could meet him at the La Guardia Airport the next day.

By Mr. Lockley:

Q. The next day being what?

A. The next day being Saturday.

Q. All right.

A. And so I said, "Yes, I am—I can." He says, "Well, I am taking an American Airlines plane," so and so, "around eight o'clock, which will get me to La Guardia Field around 11:00 or 11:15."

And so I says, "All right. I will meet you there, sir."

So, the next morning I took Sam Davidson with me and I drove to the airport and we met Mr. Cain and we got there before the plane and he got off the plane.

Q. You met him at the airport gate?

A. Yes, sir.

Q. Do you know about what time of the day it was?

A. About 11:15, 11:00 or 11:15, somewhere around that time.

865 Q. Was there a conversation at that time?

A. "Hello, Dave." And he says, "Oh, hello, Sam." So he says, "Where can we go to talk?" I says, "I don't know. Do you want to go to the farm?" He said, "No. It is pretty far. I have to take a plane this afternoon."

And so I says, "Well, how about the Gotham Hotel? We had a lot of business in the Gotham Hotel."

So we went to the Gotham Hotel for lunch.

Q. Now who was there?

A. Mr. Cain, Mr. Davidson, and myself.

Q. All right. Was there a conversation in the Gotham Hotel?

A. Yes, sir, there was a conversation at the hotel, sir, and if I remember correctly, it started off a little bit—well, I think we discussed the time of the day or something, a little pleasantries in respect to the hotel.

When he got to the hotel, he says, "Dave, you are going to be visited by a couple of Revenue agents from Chicago."

Q. Did he name them?

A. Yes, sir. A Mr. Sam Crane and a Mr. Mammel.

866 He says, "This fellow Mammel is a real son of a—he is a real so and so." That is what he said, sir.

867 Q. All right. Proceed.

A. And he said, "He has come into my office and has grabbed the records and has been ordering people around." He says, "He has been doing it until everybody knows we are going through a tax investigation."

He said, "I ordered him out and told him to get the 'h' out, and just threw him out."

And then he said, another time a Mr. Mammel had a heart attack or something in his office and they took him out. He says, "Do you think it will soften him up?" He said, "Not a bit."

He was particularly bitter against Mammel. He said, "He is the one that put Annenberg in jail, and he wants me as a career, and he wants to put me in jail."

He says, "These fellows are going to come up and ask you questions, and you are going to be here next week." He said, "You are going to be asked questions about loans and exchanges."

I said, "What do you mean by loans and exchanges, Mr. Krane—I mean Mr. Cain?"

868 He says, "By that, I mean where you gave us merchandise and we exchanged merchandise for you, or where you paid money to people to ship merchandise to us which was used in our factory and which we gave you merchandise."

I said, "Mr. Cain, we didn't have any of those loans and exchanges."

And he says, "Well, what difference does it make, Dave? I am trying to settle this case. I am pushing it. I am trying to get it over with."

He said, "I want to get it settled." He says, "It is—it doesn't mean anything to you." He said, "You are not liable." He says, "It just reduces my tax liability."

So, I said, "Mr. Cain, we didn't have any. I mean, if we did, I would tell you." I said, "I can't remember of any loans or exchanges. I remember selling you three or four carloads of chocolate in the beginning, and peanuts, but the peanuts you used to apply on what I owed you, and I got an invoice for the chocolate."

He says, "Well, Dave, this thing is making me a sick man." He said, "I am a millionnaire five times
869 over." I think he said that before. He says, "I am a director of fourteen corporations." And I believe he says, "I am something on some university", and he says, "It is causing me untold embarrassment."

He says, "In fact, it has caused a split between Harold and myself."

He says, "Harold is now taking his properties, and I have taken certain properties that we used to hold jointly together, and be interested in."

He says, "The only thing we have together is the Shotwell Manufacturing Company, and we are getting ready to sell that when this tax thing is brought out."

He said, "When I get rid of that, that will be the last we hold jointly." He says to me, he says, "Dave, I don't deny getting the money. It is only that I want to get that tax straightened up." And he says, I believe he

told me he had offered the Government three hundred and fifty or four hundred and fifty thousand dollars. He says, "I just wanted to get it cleared up."

Mr. Sullivan—Mr. Huebner came and told me
870 this thing wouldn't have got that far if Bob Hannegan was alive.

That Harold Sullivan didn't want to do anything. He felt he would be taken care of, but now Hannegan is dead. That we have another fellow, George Bodon, a big attorney in Chicago, certainly a big tax man, and he up and dies. He said, "I am just pushing this thing for solution." That is what he said, sir.

871 Then he asked me what I was going to do and I told him after I had got the plant sold in Hillsdale, they took it back to court because it was spot zoning. I had decided to throw up the sponge and quit. I was liquidating the place.

He said then, "Where are you going?" I said, "I am going down to Puerto Rico and become a manufacturer's agent." He said, "Are you having any difficulty selling the House?"

I said, "No, sir. I had a zoning problem and nobody wanted to buy it."

He says, "Well, that is my business, Dave. I will come back here and maybe I can arrange for somebody to help you sell the property." And I told him what I was doing in Puerto Rico. I said, "Oh, I can sell things. There is a deal down in the Virgin Islands. I bought a pier. I just got the deal." And he said, "I have got a man who has a lot of money who will be looking for something like that. I tell you what I will do: I will come back next week, or, if you go down there any sooner, let me know and I will go down there with you."

I believe Mr. Cain told me he had just sold some
872 oil wells or bought some oil wells and, well, there may have been some other conversation, sir, and then he told me he had to get back to Chicago in a hurry because he had left his dress suit at the Drake Hotel and he had to rush from the airplane there because Mayor Kelly's wife—former Mayor Kelly's wife—he was dead then—was having some tax trouble, or not tax trouble—somebody had stolen some money from the estate and he had to advise her and he was going to meet her that night.

Q. Does that conclude the conversation at the Gotham Hotel?

A. Well, there may have been other things but I can't pick them up at the moment. We had a conversation, sir, from about twelve o'clock until about three o'clock or three-thirty, and then he took the four o'clock plane or three-fifteen. I just drove him to the airport and he said goodbye.

Q. Did you accompany him to the airport?

A. Yes, sir, I did, and Mr. Cain—

Q. Was Mr. Davidson with you at that time?

A. Yes. Mr. Cain was very pleasant to me this time.

873 By Mr. Kirby: If the Court please, would the Court be kind enough to now advise the jury, as I know you have under other occasions, but I would like to have it stressed, that conversations at which the other defendants were not present cannot be and are not to be considered against them under the law.

By the Court: I instruct the jury that the conversation allegedly had with Mr. Cain is competent evidence only as to the defendant Cain and the jury will disregard it as to the others.

By the Witness: Sir, I remember—

By Mr. Kirby: That applies to both the Riviera conversation and the Gotham conversation.

By the Court: That is right.

By the Witness: Sir, I remember one other little point.

By the Court: Perhaps you better wait. Mr. Lockley, the witness says he remembers another point. I told him to wait until you are agreeable.

By Mr. Lockley: All right.

874 By Mr. Lockley:

Q. Proceed.

A. Byron came and told me he wanted to pay the tax. He said he always wanted to pay the tax. He said it would have been paid before if it hadn't been for Harold Sullivan.

I said, "Where are you going to get the money?"

He said, "It is just like me, Dave. I am the guy that will have to dig up the money because the rest of them haven't got any money, or they say they haven't got any."

By Mr. Kirby: I am not clear on that "rest of them". Does he mean Mr. Cain and Mr. Sullivan had no money?
By Mr. Lockley:
Q. Is that what you mean, sir?
A. What is that, sir?
Q. You referred to Mr. Cain's statement that the rest of them didn't have the money.
A. Well, he meant—he referred to Harold Sullivan and Frank Huebner and he said that it looked like he would have to pay the tax and he wanted to pay the tax and that is what he was up here—I thought, sir,
875 that that was what he was going to, to pay the tax, sir.
Q. Is that all you can remember of that conversation?
A. Yes, sir, at the moment that's all I can remember.
Q. Now, what types of products did you buy from the Shotwell Manufacturing Company? Can you name them?
A. Yes, sir, I can. We bought—at one time, we bought some chocolate liquor—yes, chocolate liquor, sir. It is baking chocolate in a big cake and which they resold us. I think we bought some cocoa at one time and those were raw materials.
And then, we bought these spice buttons or jelly drops or jelly strings, which is a piece of candy, sir, that is just like a little tiny gum drop and it is in various shapes, and so forth. And then we bought box chocolates which are the same kind of chocolates you see in boxes in stores, big pieces and little pieces, with a ribbon around it.
Q. Did you pay overages on everything you bought?
A. No, sir, I did not.
By Mr. O'Brien: I object to the question, if the
876 Court please.
By Mr. McConnell: Wait a minute.
By Mr. O'Brien: It is a conclusion, all of counsel's assertion.
By the Court: I think that answer may stand.
By Mr. Lockley: His answer was no.
By Mr. O'Brien: Regardless.
By Mr. Lockley:
Q. What didn't you pay on?
A. Sir, I believe in 1944 we made seven or eight ship-

ments of merchandise of this jelly candy on which we didn't pay any overages, which was paid with regular checks and no overages whatsoever.

Q. 1944, was it, did you say?

A. Yes, sir, in 1944.

Q. Well, did you ever buy any marshmallows from them?

A. Yes, sir. I sold mostly marshmallows. I sold the marshmallows and I got 5 per cent for selling the marshmallows.

Q. Did you pay any overage on that?

A. No.

877 Q. How about Hostess Candies?

A. I think once there was a shipment of something they called Hostess Candy, which was little cellophane bags of candy. I don't recall whether I paid any overage on that or not.

Q. How about Pampinoes?

A. I don't think so.

Q. And this special chocolate liquor?

A. That is bricks of chocolate. I paid overage on that once, sir.

Q. Once.

A. I am very sure. I could be wrong, but if I had my records—I am very sure I paid overage on what is called special chocolate liquor.

Q. How about the so-called gum items, that is, jelly beans, and so forth?

A. All except those shipments in the beginning, I paid overage on. I paid the invoice price plus the overage.

Q. What was it?

By Mr. McConnell: If the Court please, counsel has been going in detail over each of the transactions which are set forth in the bill of particulars on which he
878 bases his case. Now he is going back to the same line of proof by general questions which do not deal specifically with the transactions. I object to that procedure. It has been covered once.

By the Court: Are you going outside of your bill of particulars now?

By Mr. Lockley: That has not been my intention, no, sir. I am just about finished with this witness. I will ask him one more question.

By Mr. Lockley:

Q. Mr. Lubben, do you know the total amount of overages paid to the Shotwell Manufacturing Company during 1945 and 1946?

By Mr. Kirby: If the Court please, I want to object to that question which, Mr. Lockley, with his many years in the Department of Justice knows is improper because this witness has already said, with respect to a large number of payments, that he could not remember, and it is improper to ask a question in the form of a general conclusion, when we have already had testimony showing
879 that he cannot remember.

By the Witness: I remember this one, sir.

By Mr. Kirby: That is not the right way to ask a question, though.

I object to it.

By Mr. Lockley: If your Honor please, he has testified as to certain individual transactions. The purpose of this now is to permit him to make such mental arithmatic—which the jury itself could do—but to submit him to mentally tabulate, if he knows, the total amounts that he paid.

By the Court: You mean that he personally paid?

By Mr. Lockley: Yes, sir, if he knows.

By Mr. McConnell: I object.

By the Court: If he is able to state the amount of overages that he himself personally paid, I think he may so state.

880 By Mr. Lockley:

Q. If you know, Mr. Lubben.

A. Yes, sir.

By Mr. McConnell: Just a minute.

By the Witness: The amount of overages that I paid is around half a million dollars.

By Mr. McConnell: I move to strike out the answer on the ground it is an over-all conclusion that we cannot cross examine him on. He doesn't give us the time.

By the Witness: Sir, that includes the unbilled shipments.

By the Court: There is no question pending.

By the Witness: Oh, pardon me.

By Mr. McConnell: Just letting the witness sum up the whole case in a conclusion. I object and move that it be stricken.

By the Court: Well, do you mean by that, Mr. Lubben, that the incidents you refer to total that amount, or is that just a general statement on your part?

By the Witness: No, sir. I have lived with this thing, sir.

By Mr. Kirby: I object and ask that that be
881 stricken. He has lived off of it but not with it.

By the Witness: No, sir. I think you have lived off of it.

By the Court: I don't think that your characterization is proper here, in keeping with the testimony today. I don't believe that his statement of a general nature is competent evidence.

I will grant that motion to strike.

By Mr. Lockley: Very well. I will withdraw the question. If your Honor please, may we have our recess at this time? I think Mr. Lubben will be turned over for cross examination but I would like to consider it during the noon recess.

By the Court: We will adjourn to two o'clock.

(Whereupon a recess was taken to 2:00 o'clock P. M. of the same day, being Thursday, September 17, 1953.)

882

* * (Caption — No. 52 CR 143) * *

Chicago, Illinois,
Thursday, September 17, 1953,
2:00 o'clock P. M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley,
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein.

By Mr. Lockley: You may cross examine the witness.

883 DAVID G. LUBBEN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination by Mr. McConnell.

Q. How old are you, Mr. Lubben?
A. Forty-three, sir.
Q. You are now living in Puerto Rico?
A. Yes, sir.
Q. Where did you live prior to the time that you moved to Puerto Rico?
A. Hillsdale, New Jersey, sir.
Q. You had a home there?
A. I did, sir.
Q. And how long did you live there?
A. About six years, sir.
Q. Prior to that time where did you live?
A. 40 West 170th—no, 35th and Madison Street, sir.
Q. In New York City?
A. Yes, sir.
Q. Was that an apartment?
A. Yes, sir.
884 Q. How long did you live there?
A. I believe about a year, sir.
Q. Did you live any other place in New York City?
A. Yes, sir; I believe I lived on 23rd Street in an apartment building.
Q. Are you a married man?
A. No, sir.
Q. When were you with the Kroger Grocery Company?
A. 1942, sir.
Q. You started with them in 1942?
A. No, I believe I started in 1941, sir. Maybe in '40. I don't quite remember the number of years.
Q. And how long were you with the Kroger Grocery Company?
A. To the best of my recollection, sir, about two years.
Q. And from there you came to New York?
A. Yes, sir.
A. And with whom?

A. I came with the Burry Biscuit Corporation.

Q. Was that headed by a man by the name of George Burry?

A. Yes, sir.

Q. I want to leave your earlier transactions for
885 a moment and go to something immediate, which is more familiar to our minds. In your direct examination you spoke of three checks which you had tendered, I believe you said, to the defendants, but which you later changed to say you tendered to Mr. Huebner?

A. Yes, sir.

Q. And you gave as an explanation for tendering those checks that you had lost control of the corn box; do you recall that?

A. I didn't say I lost control of the corn box.

Q. Did you say you hadn't any access to the corn box?

A. Yes, sir. Or words to that effect.

Q. All right. What was the corn box?

A. It was a box in which cash money was kept.

Q. Well, now, I think on your direct examination, if I recall, you told Mr. Lockley that the business that you were engaged in, in the sole proprietorship, in the partnership, and in the corporation was the making of candies or the brokeraging of candies, or the packaging and selling of candies?

A. Yes, sir.

Q. Now, what connection, if any, was there be-
886 tween corn and the packaging and selling or the purchase and sale or the manufacture of candy?

A. Well, sir, when we first went into the corn deal, it was to get corn syrup for the factory.

Q. And you are speaking now of your factory?

A. I am speaking of Eatsum Food Products partnership.

Q. The partnership?

A. Yes, sir.

887 Q. And you had a factory over in the Bronx, didn't you?

A. Yes, sir.

Q. In which you manufactured candy?

A. Yes, sir.

Q. And as part of that you had a corn box. Now,

what was the connection between corn and the corn syrup that you used in the candy?

A. Well, sir, you want me to explain it?

Q. Yes, if you will, please.

A. Sir, you couldn't buy any corn from the corn refiner —

By the Court: You mean corn syrup?

By the Witness:

A. I couldn't buy any corn syrup from the corn syrup refiner unless you had a quota, unless you had been in business prior to a certain year. Eatsum Food Products was not. And the corn products people—I mean the corn people, the people, the refiners would say, "Well, we can't get the corn. If you can get the corn we will sell you back a certain number of pounds of corn syrup that that corn would make, if you can expedite the sale of corn to the corn refiner."

888 By Mr. McConnell:

Q. Now, do I understand you to mean then that this corn box contained cash money which was used for the purchase of corn?

A. No, sir. Well—

Q. What was that money used for?

A. Well, sir, in the beginning, when we started the corn box we drew a check for cash, because the elevator wanted premiums before they would sell the corn to the corn refiner. And later on, sir, why, we were going to sell the corn syrup, and my partner insisted that we sell corn syrup for cash and an invoice.

Q. Well, now—

A. And the cash went into the cash box.

Q. Let's pass for a moment the corn syrup you were going to sell. My inquiry for the moment is directed to the corn syrup that you were going to use in the manufacture of your candy. And you said you had no quota. Now, how did you get the corn syrup? Just tell us the mechanics of it, how you did it?

A. Sir, you had to go to the elevator, or a farmer in the country, and you would have to pay that elevator

889 or that farmer a premium.

Q. Now, do you mean by a premium an over-the-ceiling price?

A. Yes, sir.

By Mr. Lockley: If your Honor please, I am at a loss to know just what this has to do with Shotwell Manufacturing Company. This is, as I understand it, a practice of the Eatsum Food Products Company, unless counsel can connect it up in some way.

890 By Mr. McConnell: I think I will connect it up. The corn box is very material in this whole controversy.

By Mr. Lockley: It is certainly beyond the scope of the direct examination.

By Mr. McConnell: We can't both talk at once.

By the Court: Counsel says he is going to connect it up.

By Mr. McConnell: Will you read the question to the witness, please?

(Record read by the reporter.)

By Mr. McConnell:

Q. And you say you paid that to the farmer?

A. It was paid, sir, to a farmer or to a grain elevator.

Q. Then what happened?

A. Then they, in turn, would ship a certain number of bushels to the corn refinery. The corn refinery would pay for the corn at the regular ceiling price. And then through a pre-arrangement they would agree—the corn refinery agreed to sell the person—in our case it was Eatsum Food Products—the people who procured the

891 corn, or expedited it, a certain number of pounds of corn syrup, at the ceiling price.

Q. So that by shipping the corn, or obtaining the shipment of the corn to the refinery, you were able to get corn syrup at the ceiling price?

A. That's correct, sir.

Q. But you had to pay premiums to get the corn, is that correct?

A. That is correct.

Q. How much corn syrup did you get for a bushel of corn?

A. I believe, sir, that the corn syrup made 34 pounds—a bushel of corn weighed 64 pounds, and I believe you got 32 or 34 pounds of corn syrup to the bushel, and which the refinery would sell you anywhere from 8, 10 or 12 pounds back at the regular ceiling price, and they would keep the rest for the regular customers, people

who had done business with them before.

892 Q. Now, that practice—or what you have related to us, was that pretty general in the candy business at that time?

A. Well, sir—.

By Mr. Lockley: I object, your Honor, to what the general practice was.

By the Court: He may answer.

By the Witness:

A. Sir, it was general for anybody who didn't have a quota with the corn refiner.

By Mr. McConnell:

Q. In other words, if you didn't have the quota, or if you were living up to your quota, the only way you could get any more quota was by this method you are talking about?

A. That's the only way I know of, sir.

Q. Now, you testified as a witness, did you not, before the Kefauver Committee?

A. I did, sir.

By Mr. Lockley: I object to that, your Honor. I don't see that it has any materiality on the question of the Shotwell income taxes. It certainly wasn't gone into on the direct examination.

893 By the Court: It may or may not. I don't know what the testimony was. It may have some relevance. I trust counsel will connect it up.

By Mr. McConnell: I think it will become obvious before we get very far along.

By Mr. McConnell:

Q. You did testify, did you not?

A. I did, sir.

Q. And did you testify before that committee that there was over $400,000.00 in this corn box during the time you were in that partnership?

A. I don't recall my exact figures, sir, but if you have the copy there—

Q. Then I would like to refresh your recollection a little.

A. I would like it, sir.

Q. Do you recall that Mr. Halley asked you this question and that you gave this answer, with reference to the corn box:

"Q. Do you recall the precise figure; it was $410,000.00, wasn't it?"

"Mr. Lubben: I don't recall the figure, but it
894 was $400,000.00. It is a big figure. $400,000.00."

Did you say that?

A. Sir, I believe if you will read a little above that you will find I didn't say there was $400,000.00 in the box at one time. I don't think that I said that, sir.

By Mr. Lockley: What page, Counsel?

By Mr. McConnell: Well, I am reading from page—starting at 1109.

By Mr. Lockley: You have a different book from mine, I am afraid.

By Mr. McConnell: Well, that has to do with another transaction, but I will start—yes, 1109, about the middle of 1109.

By Mr. McConnell:

Q. Did he ask you this question and did you make this answer:

"Have you a recollection of the total amount of cash received as a result of these transactions during the last—would it be about five months of 1945?

"Mr. Lubben: It was a tremendous figure, sir.

895 "Mr. Halley: Was it over $400,000.00 in cash received?

"Mr. Lubben: I would say so.

"Mr. Halley: It was at least that much?

"Mr. Lubben: Yes, sir. Maybe more.

"Mr. Halley: Do you recall the precise figure; it was $410,000.00, wasn't it?

"Mr. Lubben: I don't recall the figure, but it was $400,000.00. It is a big figure. $400,000.00, some place in there."

Now, did you so testify?

A. Yes, sir; but that says the total amount of money that was—

Q. I just asked you, did you so testify?

A. I did, sir.

Q. Now, you didn't say anything about that in your direct examination, did you, about that business done by the copartnership?

896 A. No, sir; I only answered what I was asked.

Q. You weren't asked anything about that part of the co-partnership business?

A. No, sir.

Q. But it was part of it, wasn't it, during the period you were speaking of in your direct examination?

A. Yes, sir.

Q. Now, that $400,000.00 that was received in that cash box, that represented over the ceiling cash which you received, didn't it?

A. Well, sir, it didn't have to be over the ceiling cash.

Q. Well, was it on cash transactions?

A. Yes sir.

Q. Not invoiced or billed transactions or paid by check, but transactions in which your company received cash?

A. That is correct, sir.

Q. And that cash wasn't in any bank account, it was in a tin box, wasn't it?

A. Yes, sir.

Q. And that tin box was kept in your office?

A. Well, not in my office, sir. I mean, it was kept 897 in the office of the company.

Q. It was kept in an office?

A. It was kept in the offices—

Q. It wasn't a company, was it; it was a co-partnership, was it not, at that time?

A. I guess that's a company, sir.

Q. Now, that is what you called the corn box?

A. Yes, sir.

Q. And that is what you were talking about this morning when you said you couldn't make any more payments because you didn't have any access to the corn box, wasn't it?

A. That is correct, sir.

Q. Now, did ou have more than one box?

A. Yes, sir.

Q. What other box did you have?

A. Well, there was supposed to be a box for candy.

Q. Was there a box for candy?

A. There was, sir.

Q. And you put cash receipts from candy sales in that candy box, didn't you?

A. I don't recall any candy sales, sir, that were sold for cash.

Q. You can't recall of any candy sales, but can 898 you recall of any cash that went in the candy box?

A. No, sir; I can't.

Q. So you just had an empty box, is that it?

A. I wouldn't know whether it was empty or not. I don't recall of any cash that went in it.

Q. You don't recall whether there was any cash in it?

A. No, sir.

Q. Did you ever keep any record of it yourself?

A. I don't think the candy box was hardly ever used, if any, sir.

Q. Did you ever keep a record of it yourself? That's the question.

A. No, sir.

By Mr. McConnell: I will ask that this be marked Defendants' Exhibit 1, and each page A, B, C, and so forth.

(Said documents were marked Defendants' Exhibits 1-A, 1-B, and 1-D for identification.)

By Mr. McConnell:

Q. I show you documents which have been marked for identification 1-A to 1-D, consecutively, which are
899 photostats which were turned over to us by the Government counsel, and I ask you to examine these and state whether or not they are in your handwriting, or any of the entries are in your handwriting.

A. Yes, sir; these are in my handwriting.

Q. Now, does that purport to be a record of the cash box, the ins and outs of the cash box?

By the Court: Which cash box are you now speaking about?

By Mr. McConnell:

Q. Well, of the candy cash box.

A. This last page here, sir, doesn't seem to—

By the Court: A little louder.

By the Witness:

A. This last page here doesn't seem to tie up with the other pages. And what period are you talking about, sir?

By Mr. McConnell: I am not talking about a period. Just read the question to the witness, please.

(Question read.)

By the Witness:

A. Yes, sir; but these appear to be—

900 By Mr. McConnell:

Q. Now, that is all I want, just yes.

And these entries are in your handwriting, are they not?

A. They are, sir. At least some of them are, sir.
901 Q. Well, suppose you point out the ones that are not in your handwriting.
A. There is a few items over here on the second page.
Q. No, read them, so we can get a record of them.
By the Court: It isn't in evidence yet. You can't have him read them.
By Mr. McConnell: All right.
By Mr. McConnell:
Q. Name them by number, the number of the page, first, second or third, down the page.
A. The fourth line on page two.
Q. Give us the exhibit number, will you; 1 what? Each page is numbered with a letter.
A. I don't see any exhibit numbers on these, sir.
Q. You are referring to the second page or third page?
A. Second, sir.
Q. You are referring to Defendant's Exhibit 1-C for identification. Now, which item?
A. Oh, I didn't know what that meant. This item right here, sir.
Q. That's Item Number—under date of 21, item
902 number 4 on the page.
A. And this one here, sir, doesn't appear in my handwriting.
Q. That's the 26th. That's the sixth item, is that it?
A. Yes, sir. And this one over here doesn't appear in my handwriting.
Q. That's the first item in the second column.
A. And this one isn't in my handwriting.
Q. That's the third item.
A. And the fourth item, and the fifth item, and the sixth item, are not in my handwriting. And on the third page, this item third from the bottom is not in my handwriting, nor the second from the bottom is not in my handwriting.
Q. Let's see what that exhibit number is. That's Defendant's Exhibit 1-B for identification.
A. The rest of them, sir, are in my handwritng.
Q. On your direct examination, in answer to counsel's question as to what corporations you were interested in, what companies you were interested in, you gave us the name of the Eatsum Food Products, and General Con-

fections, and some farm company. What was the farm company?

903 The Saddle River Farms, sir.

Q. Saddle River Farms?

A. Yes, sir.

Q. Then you gave us a company, Reserve Trading?

A. Yes, sir.

Q. You were pretty modest in that enumeration, were you not, as to the number of your companies at that time?

A. Well, that's all I could think of at the moment.

Q. That's all you could think of?

A. I can think of one more now, sir.

Q. Let's see if I can help you a little. Did you have any interest in the Dave Lubben Company?

A. Well, the Dave Lubben Company, sir, was a company that was formed solely for—primarily for the handling of the merchandise we sold on a brokerage account.

Q. Did you have any interest in the Dave Lubben Company, was my question?

A. Well, yes, that was just me.

Q. It was not a corporation?

A. No, sir.

Q. Was there a company by the name of D. Lubben

904 Associates?

A. There might have been. Yes, sir; I think there was in the beginning.

Q. Did you have any interest in that company?

A. Yes, sir. But I don't think that was ever used, sir.

Q. Did you have any interest is all that I asked you.

A. Well, sir, it was a company—I believe we contemplated having a number of associated people to sell merchandise on a brokerage basis.

Q. I didn't ask you what the company was.

I move that be stricken.

By the Court: It may stand.

By Mr. McConnell:

Q. Did you have any interest in a company called D. Lubben Specialties?

A. I don't ever recall that company, sir.

Q. Did you have any interest in the Roy Hankermyer Company?

A. No, sir; I did not, ir.

Did you have any interest in the Haberkorn Candy Company?

A. No, sir; my sister did.

905 Q. You never had any interest in it?

A. No, sir.

Q. Did you ever have any interest in the Rittenhouse Candy Company?

A. For a short time, sir. The Eatsum Products Company did.

Q. Well, you had it during the time you were being interrogated about on your direct examination, did you not?

A. When, sir?

Q. During the time of the Eatsum Food Company, you had an interest in the Rittenhouse Candy Company, didn't you?

A. What Eatsum Company, sir?

Q. Either of them, or both of them?

A. Well, during the period of the sole proprietorship, sir, I had an interest in the—that is, we had an interest in the Rittenhouse Candy Company, sir.

Q. Well, the sole proprietorship was named Eatsum wasn't it?

A. Yes, sir.

Q. Eatsum Food Products Company?

A. Yes, sir.

906 Q. Did you have any interest in the Blue Ribbon Trucking Company?

A. I, personally?

Q. Yes.

A. No, I personally didn't have any, sir.

Q. Well, did your company have?

A. Well, during the period of the partnership, we purchased stock in the Blue Ribbon Trucking Company for $17,500, so that Mr. Cary could buy his partner out.

Q. All right. Did you acquire some interest in the Blue Ribbon Trucking Company when you organized the corporation?

A. It wasn't really—I didn't acquire it. It was wished on me.

Q. Well, did you acquire it? You know what I mean.

A. No, sir; I don't.

Q. Did you get the stock; you got 50 percent of the stock, didn't you?

A. I had to pay for it, sir.

Q. Did you get it?

A. Yes, and paid for it, too, sir.

Q. Did you get it?

907 A. Yes, sir.

Q. Did you get any interest in the stock of the Cole Trading Company?

A. No, sir.

Q. You never had any interest in that?

A. We sold them some merchandise, I believe, sir.

Q. Did you have any interest in the Burlan Corporation?

A. The Burlan Corporation, sir, was owned by the partnership. It was a wholly owned subsidiary.

Q. Of which you were a partner?

A. Yes, sir.

Q. Did you have an interest in the Pur Ams Company?

A. No, sir.

Q. You never had any interest in that at any time?

A. No. Later on, sir, General Confections purchased Pur Ams for the purpose of getting the sugar quota.

Q. Did you have any interest in Ell Gee Company?

A. I never heard of it, sir.

Q. Did you ever have an interest in Commodity Trading Company?

908 A. No, sir.

Q. You testified that your company had an interest in Reserve Trading Company?

A. Reserve Trading Company, sir, was a wholly owned subsidiary of General Confections.

Q. Did you ever have an interest in the company called Nebbul, which is Lubben spelled backwards?

A. Yes, sir; I believe I did. That was in 1949.

Q. What was that company?

A. That company, sir, was a company that was used—that owned the property, sir, that we got back from the receiver, if I remember correctly.

Q. Now, to go back for a minute to the beginning of this matter—

First, before I leave those checks—where are those checks that had the names cut out of them?

(Documents handed to counsel.)

By Mr. McConnell:

Q. Mr. Lubben, I show you documents which are, I believe, received in evidence in this case under document number 14, and 14-A, and 14-B. Are these checks

909 written in your handwriting?

A. Yes, sir; they are.

910 Q. Now, that is something that you did yourself, is it not; nobody in your office did it?

A. No, sir; me, sir.

Q. That was your own idea?

A. It wasn't my idea, sir, it was a necessity.

Q. Well, did you think of it yourself or did someone suggest it to you?

A. I probably thought of it myself, sir.

Q. And the necessity was, as I recall now, and as what you have confirmed on your cross, that you no longer had access to the cash box?

A. That's correct, sir.

Q. And so you wanted to pay this money which you claim you owed to these three individuals. Now, who were they again?

A. Byron Cain, Harold Sullivan and Frank Huebner.

Q. And that is the way you thought the money should be paid, is it?

A. Yes, sir; it was the only way I knew how to get it to pay it to them.

Q. Mr. Lockley asked you this morning if you knew at all times, and if you were dealing at all times with the product of the Shotwell Manufacturing Company, a corporation, and you answered that you were, didn't

911 you?

A. I don't recall that specific question being asked of me this morning.

Q. You don't recall that you said that you were dealing not with individuals, but with the corporation in these transactions?

A. Oh, you mean that I wasn't buying this merchandise from—this candy—

Q. From these individuals, yes.

A. Yes, sir; I didn't buy it as an individual, sir.

Q. The product you were dealing with was the Shotwell Manufacturing Company product?

A. That's correct, sir.

Q. And yet you are not making out a check to Shotwell but making it out to three individuals, is that right?

A. Yes, sir.

Q. And you knew that these individuals were fiduciaries and officers of this corporation, did you not?

A. I knew they were officers.

Q. You knew they were officers. Do you know what a fiduciary is?

912 A. No, sir.

Q. Have you been an officer of a corporation?

A. No, sir.

Q. You have been an officer of a number of them, haven't you?

A. Yes, sir.

Q. President of a number of them?

A. But the word "fiduciary"—

Q. It doesn't mean anything to you?

A. I didn't say it doesn't, I just don't know what it means.

Q. Well, do you know enough about it to know that a president of a company can't deal for his own account with his company's goods; do you know that much about it?

A. Yes, sir; but I thought—

Q. Do you know that much about it? That is all I am asking you.

A. The president of what company, sir?

Q. Any company.

A. That is not so, sir.

Q. Well, anyway, knowing that you were buying goods of the Shotwell Company, you, on your own behalf, with nobody telling you what to do, you sit down

913 and you write out three checks in equal amounts to Byron Cain, Harold Sullivan and Frank Huebner, isn't that the fact?

A. Yes, sir.

Q. You knew that was corporation money, didn't you?

A. No, sir; this was black market money, sir.

Q. It was black market money and didn't belong to the corporation; is that your position?

A. Sir, I don't know what they do with the premiums after they got the money but, sir, I know this was black market money that these checks were in payment of.

Q. And your understanding was it was to go to these three individuals, is that it?

A. Well, sir—

Q. Was that your understanding?

A. Yes, sir.

Q. While we are on that subject we might as well go

to these piles of money. As I understood your testimony this morning, and it was reinforced by a question that the Court asked you as to whether on all occasions you had three piles of money counted out by Mr. Huebner—now, is that your testimony?

914 A. Yes, sir; but—except the time, sir, when—there may have been one or two instances when it wasn't counted out in three piles, but to the best of my recollection, sir, that was only the time when he counted out the corn syrup money and told me to take it down to Stanley Graflund.

Q. So except for the corn syrup money—oh, yes, that was Mr. Graflund, that was the comptroller of the company, was it?

A. I don't know what he was, sir.

Q. Didn't you testify this morning that he told you he was the comptroller of the company?

A. I don't remember testifying to that, sir.

Q. You don't remember that they told you he was the comptroller of the company and not to say anything about this to him?

A. I didn't say—I don't remember saying he was the comptroller of the company. I remember, sir, that Mr. Huebner told me to go downstairs and keep my mouth shut about the candy money.

Q. So you went down and kept your mouth shut about the candy money and you paid over the corn syrup money?

A. Yes, sir.

915 Q. Is that it?

A. But later on, sir, I didn't keep my mouth shut.

Q. I think we understand it. I am just asking whether you kept your mouth shut at that time to Mr. Graflund?

A. Yes, sir.

916 By Mr. McConnell:

Q. We are going to come back to the piles of money. You mentioned something that we might as well develop right now, and that is the corn syrup.

Now, when were these transactions with the corn syrup?

A. What corn syrup?

Q. Well, corn syrup money you were taking down to Mr. Graflund, with the exception general rule of the three piles?

A. Well, sir, that was around September or October of 1946.

Q. Now, as I understand it you were paying to the company, or to Mr. Graflund, an overage, is that right?

A. Yes, sir.

Q. An overage on what?

A. An overage on the corn syrup that I bought from Shotwell.

Q. You were paying Shotwell an overage on the corn syrup you bought from Shotwell?

A. Yes, sir.

Q. In other words, you were paying Shotwell more
917 than you paid for it?

A. Yes, sir.

Q. Were you making them a gift of that much money?

A. It wasn't any gift, sir. It was the condition of the sale.

Q. Of the corn syrup?

A. Yes, sir.

Q. Well, you said you paid them an overage. Now, I want to know what the overage is over?

A. It was 7 cents a pound, sir.

Q. And what was that, a ceiling price?

A. No, sir.

Q. What was it?

A. A premium.

Q. Seven cents, a premium over seven cents?

A. Yes, sir.

Q. According to you it was all paid in cash, wasn't it?

A. Only the premium, sir.

Q. Only the premiums. The rest of it was paid by check?

A. Yes, sir.

Q. Well, there wasn't an overage over an over ceiling price, was there?

918 A. Yes, sir, I believe it was.

Q. Then you think it was?

A. Yes, sir.

Q. Are you sure of it?

A. Well, I don't know whether the ceiling price went up at that particular time or not. I don't recall, but there was some time in there—

Q. That would be the logic of it, wouldn't it, to pay

the ceiling, and then pay an overage above the ceiling?

A. I don't know what you mean by "logic", sir.

Q. Well, you are paying overages. You are referring to overages all the way through your testimony on direct. You were referring to over ceiling prices, were you not? Isn't that what you were talking about?

A. Yes, sir.

Q. Now you are talking about overages here on the corn syrup. Are you still talking about over ceiling prices?

A. I am just talking about premium payments.

Q. So you aren't talking about overages?

A. I am talking about overages or premiums that I paid to Shotwell. Whether at this time it was an
919 over ceiling price on corn syrup or not, I don't know, but I paid them seven cents a pound on corn syrup.

Q. As a matter of fact, there wasn't a ceiling on corn syrup at that time, was there?

A. I dont' know, sir.

Q. Now, to get back to the piles of money: Except for that one time down in Mr. Graflund's office, every time you met with these men, Mr. Huebner would get the money on the bed, and then he would put it in one pile, and another pile and another pile, is that it?

A. Well, sir, I think there was—I think there was twice that I went to Mr. Graflund with the money. Not once, sir, but I think it was twice.

Q. All right. Except for the times you went to Mr. Graflund, is that the fact?

A. Sir, almost every time I can remember paying money to Mr. Huebner. Outside of those times, Mr. Huebner went through that ritual.

920 Q. Did he do that always on a bed or was it on a table, or what were the circumstances, do you remember?

A. Well, sir, if it was in the laboratory, it was on the laboratory table, but generally, it was on the bed because it was a lot of money and he would spread it all over and he would count it and everything else.

Q. What were the denominations of the bills you paid?

A. Sir, one time there was some five hundred dollar bills that Mr. Huebner objected to strenuously that he didn't want any more denominations of that type. Then

he didn't want any hundred dollar bills, but we gave him some, I believe, but he preferred ten's and twenty's.

Q. So he spread it all over the bed?

A. Yes, sir.

Q. And then he piled it up?

A. Sir, I would bring it in, and the first time he would do it—first we would go in and he would check my figures against his figures and then I would open up the bag or my brief case, whatever I had the money in, and he
921 would take all the piles, and he would put the five's, the dollar bills, and he would count them out. He would count them out here, and he would count them out there and make sure he had all the different moneys, and then he would figure out how much was a third and he would divide it in three piles.

Q. He did that in New York as well as in Chicago?

A. I cannot remember, sir, whether it was any different than that.

Q He did it in New York, even though he was going to take the train and get on a Pullman; he had to have it in three piles, one for Harold and—

A. Sir, he would say, "This is for Harold and this is for Byron and this is for me," and sometimes he would say other things too, sir.

Q. And he did that in your presence?

A. Yes, sir.

Q. And he took the money off each pile in your presence?

A. In my presence, sir.

Q. And told you not to tell the other people, is that it?

A. He told me to keep my mouth shut. He told me that they had so damned much money that they didn't
922 know what to do with it.

Q. He told you who had so damned much money they didn't know what to do with it?

A. Mr. Sullivan and Mr. Cain.

Q. But he did not, is that it?

A. Sir?

Q. But he didn't and he was going to equalize it, is that it?

A. I don't know what he was going to equalize. I just told you what the man said.

Q. Do you know how much stock he had in that company?

A. No, sir.

Q. Do you know whether he had any stock?

A. No, sir, I don't.

Q. Do you know who the stockholders of the Shotwell Company are?

A. Yes, sir, I do. I heard of it.

Q. Who?

A. Well, he told me that Harold Sullivan had some stock and that Byron Cain had some stock and Mr. Shotwell, and I think he told me Federal Judge Sullivan had some stock.

923 Q. Did he tell you Loyola University had stock in the Shotwell Manufacturing Company?

A. I never heard of that, sir.

Q. Did he tell you some 20 or 30 other people had stock in it?

A. No, sir.

Q. Anyway, you knew you weren't dealing with the sole stockholders of the Shotwell Manufacturing Company, didn't you?

A. Repeat that question.

By Mr. McConnell: Will you please read the question?

(Question read as above recorded.)

By the Witness:

A. As far as I was concerned, Mr. Sullivan and Mr. Cain were the company.

By Mr. McConnell:

Q. They were the people you were dealing with anyway, is that right?

A. Yes.

Q. After this money was all divided up in these piles, you say he put one pile in one pocket and another pile in another pocket, is that it?

A. Yes, sir.

924 Q. Where did he put the third pile?

A. Well, sir, he used to use a pocket here (indicating) and I think other times he would use a pocket here (indicating), and in his coat pocket. He put it in three different spots, sir.

Q. Then he had some more pockets. He had a pocket for the horses. Where did he put the money for the horses?

A. If I remember correctly, sir, that was in his watch pocket.

Q. He put that in his watch pocket. And the loose change, what did he do with that?

A. I didn't pay much attention, sir, other than the fact that he counted it.

Q. This happened whether he was in New York or Chicago, is that it?

A. To the best of my knowledge, it happened just about every time I paid him except there was times with the corn syrup and then he just counted the money.

Q. Now, all of this money that we have been talking about, all of this cash was money which you drew out of this company or out of the partnership on a cash check, wasn't it?

925 A. I wouldn't say all of the money, no, sir.

Q. Well, would you say a substantial amount of it?

A. Yes, sir, a substantial amount, sir.

Q. We have had the checks here, haven't we? You have identified them here?

A. Yes, sir.

Q. In your direct examination?

A. Yes, sir.

Q. So that when we get to the bank, at least that money, that cash comes to rest in your pocket, doesn't it?

By the Court: Counsel, I would like to see both of you. I can't see counsel at the table when you stand there.

By the Witness: Will you please repeat that question?

(Whereupon the question was read as above recorded.)

By the Witness:

A. Yes, sir, that is correct.

By Mr. McConnell:

Q. All right. At that moment, unless you can substantiate that you paid it to somebody else, you

926 are chargeable with that cash, aren't you, on the books and records of all of those companies?

A. Why, yes, sir, if I have company funds in my pocket and I don't show where it went to, I am responsible.

Q. Now, let us return for a moment to the beginning of this. What was your salary with the Kroger Grocery Company?

A. I believe it was $125.00 or $150.00 a week, sir.
Q. That was in 1944?
A. No, I didn't say 1944, sir.
Q. What year was it?
A. I believe it was 1941 or 1942, sir, 1941 or 1942.
Q. Do you know somebody by the name of Fred Brewster, F. E. Brewster?
A. Yes, sir, I do.
Q. Who is he?
A. He is an officer of the Burry Biscuit Corporation.

927 By Mr. McConnell: May I ask that these documents be marked Defendants' Exhibits No. 2 and 3 for identification, and will you mark this Defendants' Exhibit 4 for identification.

(Said documents were marked Defendants' Exhibits 1, 2, 3, and 4 for identification.)

By Mr. McConnell:
Q. I show you a document which has been marked Defendants' Exhibit 2 for identification, which purports to be a photostatic copy under date of March 13, 1944, of a letter, and ask you to examine that and state whether or not you received the original of it?
A. Yes, sir. I remember receiving that.
Q. Did he prepare your income tax for that year?
By Mr. Lockley: I object, your Honor. As I understand it, this is a 1944 matter which is beyond the scope of the indictment, in the first place. It certainly was not gone into on direct examination and it appears to be immaterial to the issues. The witness isn't under

928 prosecution for income tax evasion.

By Mr. McConnell: If the Court please, I would like to develop by cross examination, the motive of this witness in laying off sums of money which came into his possession in the operation of these companies through black marketing operations. To do that, I have to show he starts with nothing and ends up with hundreds and hundreds of thousands of dollars to account for it. I think it goes to the motive of the witness, the almost compelling motive of the witness as to his motive in laying off upon these defendants the monies.

By the Court: Have you asked him whether or not he paid an income tax?

By Mr. McConnell: No, I am not asking him that. I am simply asking him to identify a letter which came from a person who did prepare his income tax, and I want to show by his income tax what his income was when he started in these transactions.

By the Witness: Your Honor, may I say one word?

929 By the Court: Wait a moment. Wait until a question is put to you.

By Mr. Lockley: I object to it, your Honor. I don't think it is proper cross examination. It is beyond the scope of the direct examination. It is immaterial to the issue whether the Shotwell's taxes were evaded. If he is going to attack Mr. Lubben's—

By Mr. McConnell: Mr. Lubben is testifying falsely in this case.

By the Court: You asked him what his salary was when he started with the Kroger Company, and he told you. I suppose you can ask him generally what his background has been, whom he worked for, where he was working. I see no objection to that. I see no purpose of going into his income tax statements.

By the Witness: Your Honor, may I ask a question?

By the Court: No. You wait until the questions are asked.

By Mr. McConnell:

930 Q. Did you have any investment at that time?

By the Court: When?

By Mr. O'Connell:

Q. In 1943.

By Mr. Lockley: I object to that, your Honor. I don't see what—

By the Court: I will sustain the objection.

By Mr. McConnell:

Q. Did you have any other income aside from your salary from the Kroger Company?

By Mr. Lockley: When?

By Mr. McConnell:

Q. In 1943?

By Mr. Lockley: I object to that.

By the Court: He may answer.

By the Witness:

A. I don't recall, sir.

By Mr. McConnell:

Q. You don't recall that you did?

A. I don't recall that I did, or didn't.

By Mr. McConnell: Well, your Honor, now I think I have a right to refresh his recollection from his income tax as to whether he did or didn't.

931 By Mr. Lockley: Your Honor, this is an indirect way of getting his income tax into evidence.

932 By the Court: Well, ask him whether or not he had other income from such and such a concern.

By Mr. O'Connell:

Q. When did you enter into your arrangement with Mr. Burry?

By Mr. Lockley: I object to that, your Honor. He hasn't said he was in any arrangement with Mr. Burry yet.

By the Court: Well, he worked with Mr. Burry in the Burry Biscuit Company, if that is what you have reference to.

By Mr. McConnell: That is what he testified to on his direct examination, as I recall it.

By Mr. Lockley: That is not an arrangement.

By the Court: Are you referring to his employment with Mr. Burry?

By Mr. McConnell: Yes.

By Mr. McConnell:

Q. What was your salary or your arrangement for compensation with Mr. Burry?

A. I believe, sir, I had an arrangement with

933 Mr. Burry where I got $125.00 or $150.00 a week and my expenses and then later on Eatsum Food Products was formed and I received a percentage of the profits.

Q. Now when did you start with Burry Biscuit Company?

A. I believe it was in 1942, sir.

Q. What was your arrangement as to compensation at that time?

A. I told you, sir, $125.00 or $150.00 a week and my expenses.

Q. How long did that arrangement last?

A. To the best of my recollection, sir, about five or six months, maybe less, maybe a little more.

Q. Well, after that time what was your arrangement as to compensation?

A. I believe it was the same salary and expenses plus a percentage of the profits of the Eatsum Food Products.

Q. Which was Mr. Burry's company?

A. No, it wasn't his, sir. It belonged to the Burry Biscuit Corporation. It was a subsidiary.

934 Q. It was a subsidiary of the Burry Biscuit Company?

A. Yes, sir.

Q. Which you were running?

A. Yes, sir.

Q. For the Burry Biscuit Company?

A. Well, sir, I wasn't running it. I was just handling the sales.

Q. Do you remember what the profits of that organization were?

By Mr. Lockley: Well, I object to that, your Honor. I doubt that it is material.

By the Court: Yes, I will sustain the objection.

By Mr. McConnell:

Q. Well, do you remember what you received from it?

By the Court: When?

By Mr. McConnell:

Q. In 1943.

A. I believe, sir, it was fourteen or fifteen thousand dollars, or thirteen. It is only a guess, sir. It is somewhere in that neighborhood, I believe.

Q. So you received a salary and twelve or thirteen

935 thousand dollars from it, is that it?

A. Well, that is a guess, sir. It was ten per cent of the profits, but I don't remember now what they were.

Q. What were you doing in that company? Was that a black marketing operation?

By Mr. Lockley: I object, your Honor. The question should be more specific, and I object.

By the Court: I will sustain the objection.

By Mr. McConnell:

Q. Well, were you engaged in black marketing transactions when you were working for that company?

By Mr. Lockley: Will you fix the time, if there was any such transaction?

By Mr. McConnell:

Q. 1943.

By Mr. Lockley: I object, your Honor. Whether or

not the Burry Biscuit Company engaged in black market transactions is immaterial.

By the Court: I will sustain the objection.

936 By Mr. McConnell:

Q. Did you buy out the interest of the Burry Biscuit Company and that company, Eatsum Food Products?

A. Will you repeat the question, sir?

(Whereupon the question was read as above recorded.)

By the Witness:

A. You mean, did I buy out the interest of Burry and the Eatsum Food Products?

Q. Yes.

A. The answer is, yes, sir.

Q. Now when did you do that?

A. I believe, sir, in the latter part of 1943 or the first part of 1944.

Q. And what did you pay for it?

A. Well—

By Mr. Lockley: Well, I object, your Honor. I don't see that it is material.

By the Court: I will sustain the objection.

By Mr. McConnell: May I ask that this document be marked for identification Defendants' Exhibit 5?

937 By the Court: You had 4 already.

(Said document was marked Defendants' Exhibit 5 for identification.)

By Mr. McConnell:

Q. I show you a document which purports to be a photostatic copy of an agreement between the Burry Biscuit Corporation and Mrs. L. M. Petersen and Co., Inc.—

By Mr. Lockley: Counsel, I object to your reading from it.

By Mr. McConnell: I have a right to identify it.

By the Court: Let him identify it. You are not the one to identify it. He is the one to identify it, the witness.

By Mr. McConnell:

Q. I show you Defendants' Exhibit 5 and I ask you to look at that document and state whether or not your signature is on it.

A. Yes, sir, my signature is on it.

Q. What are the other signatures on it?

By Mr. Lockley: I object, your Honor. I have no idea what that document is but if there has been no foundation laid and it is immaterial to the issues—

938 By the Court: Well, he can identify it, if he knows.

By the Witness:

A. Yes, sir. The other signatures are the signatures of George Burry, Abigale Norman and Frank Hankermyer.

By Mr. Lockley: Will you lay a foundation as to the date?

By Mr. McConnell:

Q. Now, is that the agreement whereby you acquired the interest in the Eatsum Food Products Company.

By Mr. Lockley: Your Honor, I think we are entitled to know whether this is in the period that has relevancy.

By the Court: These are all just foundation questions.

By the Witness: Sir, I don't see any date.

By Mr. McConnell:

Q. I didn't ask you about seeing any date.

Will you read the question to the witness.

(Whereupon the question was read as above recorded.)

939 By the Witness:

A. I don't know, sir, unless I read the whole paper.

By Mr. McConnell: The question is raised here as to whether I am properly questioning him on cross examination. Now in his direct examination he was asked:

"Q. Now, after you had worked with the Eatsum Food Products Company, as a division of the Burry Biscuit Company, what did you do?

"A. Later on I continued Eatsum Food Products Company as a sole ownership.

"Q. You bought it from the Burry Biscuit Company?

"A. Yes, sir.

"Q. And when did you purchase it?

"A. I believe it was April or May of 1944, maybe a little earlier."

I certainly have a right to cross examine the witness on that transaction.

940 By the Court:

You haven't a right to cross examine him on details of the purchase, because that is immaterial. The mere fact that Mr. Lockley went into some of his past experience doesn't mean you have to go into all of the details of his experience. It is immaterial.

We are not concerned with the Burry Biscuit Company, his career with that company, except in so far as he bought the Eatsum Food Products Company from it. The terms of the sale are immaterial.

By Mr. McConnell: It is material in this respect, if the Court please, if I may suggest the materiality here: That this witness can be shown by these documents to have received—

By Mr. Lockley: If counsel is going to argue before the jury, your Honor, I would request that the jury be withdrawn.

By the Court: I think if you have an offer of proof, you should make it to the Court.

By Mr. McConnell: I don't want to make any offer
941 at this time, in the midst of my cross examination.

By the Court: I am sorry. I didn't hear that.

By Mr. McConnell: I say, if I make an offer of proof, I will make it later, at some other time. There is no need to excuse the jury now. There is no need to interrupt the trial for that.

Now, is there a question before the witness?

By the Court: I guess he answered it. He said he couldn't tell whether that is an agreement unless he went into the entire agreement, or something to that effect.

By Mr. McConnell:

Q. Do you know of any other agreement that you signed with Mr. Burry yourself, with reference to that business?

A. I don't recall, sir.

Q. Now, how long did you operate this Eatsum Food Products Company as sole proprietor?

A. Until about June 1st of 1945.

Q. From what date?

A. I only hazard—I mean, it appears to me it
942 was around the early part of January or February of 1944. I might be wrong, sir. You are talking about a sole proprietorship?

Q. Did you carry on the same bookkeeping system after you had bought out the interest of the Burry Biscuit Company?

A. Sir, I don't know what system of bookkeeping they had. I didn't take their books.

Q. You didn't take over their books?

A. No, sir.

Q. You started a new bookkeeping system of your own, did you?

A. Yes, sir.

Q. And you set those books up at the time you bought from Burry, is that right?

A. To the best of my recollection, yes, sir.

Q. Now, what happened in 1945, so far as the termination of the sole proprietorship was concerned?

A. I sold 50 percent of my business.

Q. And you sold it to whom?

A. To a Mr. William Giglio and—

Q. And for how much?

943 By Mr. Lockley: I think that is immaterial, your Honor.

By the Court: I will sustain the objection.

944 By Mr. McConnell: Well, I think, if the Court please, we have a right to examine him on this because it involves the integrity of the whole bookkeeping system of this Eatsum Products.

By the Court: No. I will sustain the objection.

By Mr. McConnell:

Q. Who was Mr. William Giglio?

A. Who is he, sir?

Q. Who is he?

A. He is a man.

Q. I understand that. Where was he from?

A. I don't know where he was from, sir.

Q. Well, he became your partner. What was the occasion for his becoming a partner of yours?

A. I sold him a 50 per cent interest.

Q. Where did that transaction take place?

By Mr. Lockley: I object, your Honor. I fail to see the materiality of when they became partners or where.

By the Court: Well, are you questioning that he became a partner?

945 By Mr. McConnell: We are questioning the whole bookkeeping system involved here and why these entries were made and why these transactions were made.

It is tied up with the question of relationship with Mr. Giglio.

By the Court: You didn't answer my question. I asked you whether you are questioning that Mr. Giglio was a partner. He stated he had 50 per cent interest.

By Mr. McConnell: I don't question he became a partner.

By the Court: Well, I think your question—I think I will sustain the objection.

By Mr. McConnell:

Q. Well, after Mr. Giglio became a partner in Eatsum Food Products Company, was there any change made in the bookkeeping system?

A. Well, a slight change, sir, for the first month or two.

A. Yes, sir.

Q. Now, tell us what change was made or what you had had when you were running alone?

946 A. Well, sir, when I was running it alone and when a customer wanted a payment in cash in addition to his premium—

By the Court: Speak up, Mr. Lubben.

By the Witness:

A. When I was running it alone, when a customer, when a supplier wanted a payment in cash in addition to his regular invoice price, we drew a check and we cashed that.

And then when Mr. Giglio's associate and accountant Mr. Roth came in, Mr. Roth insisted that we change that, but that he wanted us to sell a certain amount of merchandise for cash and keep that in a book or keep that in a box and pay the cash premiums out of the box.

This was objected to, sir, and later on—I mean, the practice, I mean. It stopped for a while and then it was insisted. It was a source of constant conflict, sir, during the nine months I was in partnership with him.

By Mr. McConnell:

Q. That is the $400,000.00 box you are talking about?

947 A. No, sir. That is a candy box. Sir, that was kept in what you call a candy box. It was just a cash box that was kept in the beginning, sir, of the partnership.

Q. Now, that is the box out of which you made these

cash payments but into which came cash payments which you received from people you dealt with, wasn't it?

A. Yes, sir, and a record of that was kept, sir.

Q. It was not on the books?

A. I wouldn't know whether it was on the books or not but I know a record was kept of who paid the money to us and who we paid it to.

948 Q. In other words, you had one set of books for your bank account, and another set of books for what was in the cash box, is that right?

A. I didn't say that.

Q. Well, is that true?

A. I don't know that it is true, sir.

Q. Is that what you had your dispute about with Mr. Giglio?

A. Yes, sir.

Q. About whether or not you should keep a cash book, or a cash box?

A. Yes, sir.

Q. Well, now, you kept a cash box in the sole proprietorship, didn't you?

A. There may have been one, sir, but I can't recall that it was ever used.

Q. You kept more than one, didn't you, as a matter of fact?

A. Sole proprietorship?

Q. The sole proprietorship, yes.

A. I don't recall that, sir.

By the Court: Perhaps we can take our afternoon recess now. We will suspend for ten minutes.

949 (Short recess.)

A Juror: Your Honor, may we have the witness and counsel speak a little louder, please?

By the Court: Yes. Gentlemen, the jury has trouble hearing, and I gather that refers both to counsel and the witness. I told the Marshal to turn off the fan, thinking it might help some, but I think the witness and counsel have to bear in mind the acoustics apparently aren't too good, and you will have to raise your voices so the jury won't have to strain their ears.

Mr. Lubben, you will have to remember that you have a habit of dropping your voice. Unless you continually bear in mind that you have got to speak louder so the last

juror can hear you, much of it, you say, will be lost. The jury tells me they have difficulty hearing you.

By the Witness: I am sorry, sir. I will be more careful in the future.

950 By Mr. McConnell:

Q. During the period, Mr. Lubben, when you were operating this business as the Eatsum Food Products Company, as a sole proprietorship, approximately how much business did you do?

A. I don't recall, sir.

By Mr. Lockley: I object to it, your Honor. It seems to me to be immaterial.

By the Court: Oh, it is a correct question.

By Mr. McConnell:

Q. Did you do around twelve million dollars of business?

A. When, sir?

Q. With Eatsum Food Products?

A. No, sir.

Q. Well, approximately how much did you do?

A. What period of the Eatsum Food Products are you asking me? You asked me about the sole proprietorship?

Q. Well, I am asking you about the sole proprietorship, when you were operating it alone?

951 A. I can't recall, sir. I had a certified public accountant to keep my statements. If you have one, or if the Government has one, I could refresh my memory with it, sir.

By Mr. McConnell: I ask that this document be marked Defendants' Exhibit No. 6.

(Document so marked.)

By the Court: Pardon me. Mr. Marshal, I think if you will close that door, we will avoid noises in the hall, and that will help some.

By Mr. McConnell:

Q. Who is Mr. Bernard Berku?

A. A certified public accountant, sir.

Q. He was your certified public accountant?

A. Yes, sir.

Q. I ask you to examine this document and state whether or not you can identify your signature and the signature of Bernard Berku?

A. Yes, sir, I can identify my signature.

By the Court: A little louder, please.

By the Witness: I can identify my signature, and it appears to be the signature of Bernard Berku here (indicating.) I haven't seen his signature enough to be
952 familiar with it, with whether it is his or not, sir.

By Mr. McConnell:

Q. Now that is a balance sheet of April 30, 1945. How long had your company been in business as a sole proprietorship at that time?

A. I would say, sir, about—this is only a guess, but about maybe a year or a year and two months, or three months, something like that, or maybe a little more or a little less.

953 That shows total assets of $429,327.20, doesn't it?

By Mr. Lockley: I object, your Honor, to his reading from the document.

By Mr. O'Connell: He has testified—

By the Court: I suppose if you are going to introduce the document you should lay the foundation and then make an offer rather than reading from the context.

By Mr. McConnell: I had the signatures on it identified and it is out of turn for me to offer it, I believe, your Honor, at this time while I am cross examining him.

By the Court: It doesn't make any difference. You don't have any more right to read from a document on cross examination than you have to read from it on direct.

By Mr. McConnell: If the Court please, at this time I will offer in evidence Defendants Exhibit 6 for identification into evidence. It is dated April 30, 1945.

By Mr. Lockley: I object to it on the grounds it
954 is improper at this time for the defense to be offering exhibits in evidence. There has been no relationship and there is no connection between that and the case at issue and it is beyond the scope of the direct examination.

By the Court: As I understood your testimony, Mr. Lubben, you identified this as a certified copy of the balance sheet prepared by your CPA, Mr. Berku?

By the Witness: Yes, sir.

By the Court: For the year April, or as of April, 1945.

By the Witness: Yes, sir.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Defendants' Exhibit 6.)

By the Court: Now, then, may I call your attention, Mr. McConnell, to the fact that as long as you stand by the witness, we don't get the benefit of his testimony. I appreciate that when you have the exhibit you must be near him but as soon as you are through pointing
955 out something, some figures, or whatever you have in mind, then if you would repair to your table, we would get along much better.

By Mr. McConnell: I certainly want to do everything that is possible to make this easier for all of us. I have got to hand the document to the witness.

By the Court: I know.

By Mr. McConnell: I can't do it any other way.

By the Court: I know.

By Mr. McConnell:

Q. Now, after looking at this document, will you tell us, after its being in existence for some nine months, what the net worth of your business was as of that date?

A. It says "net worth after taxes, $67,074.28 plus provisions for taxes, $43,000.00."

Q. And how much does it show that you have drawn out of the business yourself during that period of time?

A. I wouldn't know where to look for that, sir. I don't see it on here.

956 By Mr. Lockley: Your Honor, I think I am going to object to that on the ground it is immaterial how much he drew out of the business during that time.

By the Court: The exhibit is in evidence. Counsel has a right to examine him as to the contents.

By Mr. McConnell:

Q. This was drawn by you?

A. These were drawings of who?

Q. Was there anybody else drawing except yourself out of your own business?

A. Well, I don't know what drawings mean.

Q. You don't know what a drawing is? Was there anybody drawing any money out of your business, Eatsum Food Products, the sole proprietorship, except yourself?

A. Well, we were paying the rent, we were paying the electric light, we were paying a salary and we were buying merchandise.

Q. Do you think that that means that is a drawing?

A. I wouldn't know it.

Q. Let me ask you, did you draw out of that business for your own account, put in your own pocket,
957 $41,000.00 during that period?

A. If that is what it says, sir, that is what I drew.

Q. And you had a net worth after taxes of $67,074.28, according to the exhibit, didn't you?

A. After a provision of 43,000 for taxes.

Q. Well, you never paid that, did you?

A. Oh, yes, sir.

By Mr. Lockley: I object, your Honor, to counsel testifying.

958 By Mr. McConnell: I am just cross examining. This is just cross examination, as I understand it.

By the Court: Cross examination, of course, is limited to material evidence and not immaterial matters.

By Mr. Lockley: I object on the ground that it is immaterial.

By the Court: It may stand.

By Mr. McConnell:

Q. Now, you can't tell us without a reference to a document how much business you did during the co-partnership, is that right?

A. Well, sir, I don't have those records. I am trying to rack my mind and think where they are and I could almost—

Q. Let me ask you this: How long have you been working with the preparation of this case with the Government agents?

A. What do you mean by "working", sir?

Q. How long have you been in Chicago prior to this time?

A. I have been here a week, sir.

Q. What have you been doing during that time?

959 A. Well, sir, one day I went up to Green Bay, Wisconsin, to see about some school desks for Puerto Rico.

Q. Did Mr. Twohig go up there with you?

A. Yes, sir.

Q. Have you spent any time in the prosecutor's office preparing, going over your testimony in this case?

A. I believe on Sunday we did, sir.

Q. Have you spent any time with Mr. Twohig going over your testimony, preparing it?

A. No, sir. I have not. I did ask him the other day if they could—where my expense vouchers were at because my expense vouchers showed where I was at on those days.

Q. Did Mr. Twohig come down to Puerto Rico to see you to go over your testimony in this case?

By Mr. Lockley: I think it is immaterial, your Honor.

By the Court: Well, yes.

By Mr. McConnell:

Q. Mr. Twohig was with you down in Hackensack when you were down there, you were down there as a witness?

960 A. Yes, sir.

Q. Did you go over your testimony with him at that time?

By the Court: What is the testimony in Hackensack? Was that about this?

By Mr. McConnell: I am talking about this matter, whether he went over this testimony here.

By the Witness: No, sir, I haven't gone over my testimony. Geez, the Government has been asking me questions. I mean, this was before I went to Puerto Rico, for years.

By Mr. McConnell:

Q. So you were going over your records and answering questions for the Government for years before you went to Puerto Rico, weren't you?

A. They wanted to know where the money was, and so forth. They took my books. They called me down and asked me questions. I can't just flip it away, sir. It is the United States Government.

Q. Then you had some familiarity with what your business was?

A. Sir?

Q. You had some familiarity with what your busi-

961 ness was in answering their questions, didn't you?

A. Well, I knew what my business was.

Q. How much did you do? That is what I am trying to find out.

A. During the time of the partnership?
Q. Yes.
A. A very substantial amount, sir.
Q. Well, how much?
A. Well, if I only had those records, sir, I could tell and I think I know where the records are at.
Q. What records are you talking about now?
A. I mean the records of the partnership. I think I know where part of them are at.
Q. Did you testify before the Kefauver Committee as to how much business you were doing?
A. I believe, sir.
Q. What did you tell them there?
A. I don't recall at the moment. If you have the notes there and if you could refresh my memory—because this has been several years, I think it has been a number of years. I think it is four or five million dollars that we did in the partnership. I may be wrong.
962 Q. That was four or five years ago?
A. Several years ago. I said four or five—it was several years ago. I said, sir, I said four or five million dollars.
Q. How long ago was your Kefauver testimony?
A. I think, sir, it was in 1950.
Q. You have trouble remembering what you testified to?
A. No. I will not forget that day, sir.
Q. Do you remember what you testified to?
A. Yes, sir.
Q. What did you testify to?
A. The truth.
By the Court: Oh, well, now, that is just a general question. Obviously he can't answer that.
By Mr. McConnell:
Q. I mean on this amount, this figure.
A. I testified to the truth, sir.
963 Q. Well, how much, four or five million dollars?
A. I believe so. That is only a guess, sir.
Q. You recollect the exact conversations which were had with Mr. Cain and Mr. Huebner back in 1946. You recollected that on the witness stand this morning, didn't you?
A. The exact conversations, sir, with who, sir?
Q. Well, let us take Mr. Huebner. You recollected the exact words he used, didn't you?

A. What words were those? I don't recall any exact words.

Q. You testified this morning about conversations you had with Mr. Huebner.

A. I had many of them.

Q. Well, sir, you remembered exactly what he said and what you said, didn't you?

A. Pertaining to particular transactions, yes, sir.

Q. In 1946?

A. I had something to refresh my memory.

Q. It was seven years ago. Have you anything to refresh your memory as to what exactly was said at those conversations seven years ago?

A. What conversations, sir? Anything specific?

964 Any specific conversation?

Q. Any of them.

A. Yes, sir.

Q. What?

A. Well, sir, when we paid Mr. Huebner the money, it was the same ritual and there was dozens and dozens, hundreds I would say, telephone calls from Mr. Huebner. It was "Get the money up. Get the cash down here. The more cash that comes down here, the more merchandise you are going to get," sir.

Q. Do you have—.

A. Also, at times he said, "Give me,"—I mean, "I can give you a lot of merchandise if you can give me a hundred per cent cash."

Q. Do you have a memoranda of the specific conferences, as to what he said and what you said?

A. No, sir. I have no specific—but I have it in my head.

Q. You remember that perfectly and it was seven years ago?

A. I didn't say I remember it perfectly.

Q. Well, you remembered it word for word?

A. I didn't say it was word for word.

By Mr. McConnell: Will you mark this document

965 Defendants' Exhibit 7 for identification.

(Said document was marked Defendants' Exhibit 7 for identification.)

By Mr. McConnell:

Q. I show you a document which purports to be a statement—

By Mr. Lockley: I object to counsel reading from the document. Hand it to the witness and see if he recognizes it.

By the Court: I don't think he was reading from it. I think he was merely incorporating some matters in his question in order to put it to the witness. Go ahead.

By Mr. McConnell:

Q. I show you a document which purports to be Eatsum Food Products Company statement of income, profit and loss from June 1st to December 1st of 1945—Bernard Berku purports to be—for the month of December, 1945. Will you look at that?

A. Yes, sir.

Q. Does that refresh your recollection as to how much your business was per month?

966 A. Sir, you didn't ask me how much my business was per month.

By the Court: Speak up.

By the Witness: You didn't ask me how much my business was per month, sir.

By Mr. McConnell:

Q. I am asking you now if it refreshes your recollection as to what your business was per month.

A. It doesn't show how much my business was per month, sir, except one month, in the month of December.

Q. How much was that?

A. $204,210.00. It says "Total income".

967 Q. Now, the Shotwell Company wasn't the only company your company was doing business with, was it?

A. No, sir.

Q. Who was Mr. Kramer?

A. Crane?

Q. Kramer.

A. Mr. Kramer, you mean Morley Kramer?

Q. Yes, I mean Morley Kramer.

A. He was the president of Gum Products Company in Boston and I believe of Two-Star Confections.

Q. And you did business with him?

A. Yes, sir.

Q. You did a cash business with him?

By Mr. Lockley: I object, your Honor, to what he did with Mr. Kramer. It has no bearing on the issues in the case and it is beyond the scope of the direct examination.

By Mr. McConnell: I think it has some direct bearing.
By the Court: He may answer.
By the Witness: What was the question, ma'am?

(Whereupon the question was read as above recorded.)

By the Witness:
968 A. By that, what do you mean, by "cash business", sir?
By Mr. McConnell:
Q. Well, did you pay him over the ceiling payments in cash?
A. Yes, sir, I did.
Q. Did you do any business with Mr. Close?
A. No, sir.
Q. Or Close & Company, Mr. Urban, Mr. Edward Urban?
A. Yes, sir, I did.
Q. Did you make payments to him over the ceiling cash?
A. Yes, sir.
Q. Now these goods you bought and paid over the ceiling prices for, what did you do with those goods?
A. Resold them, sir.
Q. And you sold them for over the ceiling price, did you?
By Mr. Lockley: I object, your Honor, to what he did. It is immaterial to the issues. It is beyond the scope of the direct examination.
969 By the Court: He may answer.
By the Witness:
A. No, sir. We applied, in many cases, for other ceiling prices.
By Mr. McConnell:
Q. Was there a ceiling on these different kinds of candies?
A. What kind, sir?
Q. Well, was there a ceiling on these spice drops?
A. It depended upon who made it, sir. I mean, what the ceiling was.
Q. Was there a ceiling on it, if you know?
A. You mean, an over-all blanket ceiling of the United States?
Q. Was there a ceiling on a sale to a store?

A. Well, there were ceiling prices, sir, but whether any specific item—I can't say yes or no.

Q. Well, on spice drops you paid over the ceiling prices, didn't you?

A. That was Shotwell's ceiling price, sir. The same ceiling price may not apply to somebody else.

970 Q. Well, whatever the ceiling price was that applied, you paid over it, didn't you?

A. For what candy, sir? What specific candy are you talking about?

Q. Let's talk about Mr. Kramer for a minute. Did you pay over the ceiling prices for his candy?

By Mr. Lockley: I object, your Honor.

By the Court: What is the materiality of it?

By Mr. McConnell: The materiality of it, I can't discuss in front of the jury. I know I am subjecting myself to counsel's criticism.

By the Court: Are you going to connect it up?

By Mr. McConnell: Yes, I am definitely going to connect it up.

By the Court: If I have your assurance that you are going to connect it up so as to make it material to this law suit—

By Mr. McConnell: I am certainly going to make it material to this law suit.

By the Court: All right. Go ahead.

By Mr. McConnell: Will you read the question?

971 (Question read by the reporter.)

By the Witness:

A. Well, sir, I wouldn't know whether I paid over the ceiling prices for his candy. All I know, sir, I paid him cash premiums. Whether it was an over the ceiling price or not, I wouldn't know.

By Mr. McConnell:

Q. After you paid him cash premiums what did you do with his candy?

A. Resold it, sir.

Q. And how did you resell it?

By Mr. Lockley: I object, your Honor. It is immaterial, beyond the scope of the direct examination.

By the Court: I don't think that a transaction that he may have had in selling products that he purchased from somebody else could have any bearing on the issues in this law suit.

By Mr. McConnell: Well, it attacks the credibility of his books, the way they are recorded.

972 By the Court: No, we haven't any books here as yet, except the isolated records. You may attack them.

By Mr. McConnell: It will attack them.

By the Court: I will sustain the objection.

By Mr. McConnell:

Q. You testified by deposition prior to this trial, did you not; a deposition was taken down in Puerto Rico?

A. You mean, sir, when your Mr. Cain, and your Mr. —the other gentleman over there came down and asked me questions?

Q. Yes.

A. Yes, sir; I did testify.

Q. I ask you if you were asked these questions and made these replies:—

By Mr. Lockley: What page, counsel?

By Mr. McConnell: Page 99.

By Mr. McConnell:

Q. "Question: Now, that was on the acquisitions, Mr. Lubben. Now you acquired those items and you resold them, did you not?

"Answer: Yes, sir.

"Question: It is not clear to me, because Miss Feld-
973 man, as well as Berku testified that the goods were invoiced to your customers for the full price. Can you tell me what is meant by 'full price'?"

By Mr. Lockley: I object, your Honor.

974 By the Court: He may answer.

By Mr. McConnell: I am laying a foundation by testimony which he made at the deposition.

By the Court: I said he may answer.

By the Witness:

A. Well, sir, I haven't had any—just to pick out one question and expect an answer is a little difficult, but I will try and answer it for you, sir.

By Mr. McConnell:

Q. Well, thank you very much.

A. Yes, sir. By full price I would mean—

Q. Wait a minute. I haven't read the whole question.

A. Pardon me, sir.

Q. Did you make this answer.

"The actual price we paid the manufacturer, plus our profit. By that I mean, his legitimate price, his black market price, and our profit."

Did you make that answer?

A. Yes, sir; that was the price we sold the merchandise to the customer.

975 Q. So that the price that you sold to your customers included the regular price and the black market price plus your profit, wasn't that right?

A. Yes, sir. And in many cases, sir, that would be ceiling price.

Q. Did you always do that by invoice?

A. I'd say the greatest percentage of the time, sir.

Q. Well, were there some exceptions?

A. Yes, sir; there were exceptions, sir, where we sold other merchandise for cash.

Q. Did you ever sell it for invoice plus cash?

A. Yes, sir; I have.

Q. And when you did that, that cash went back into that candy box, didn't it?

A. Which particular box, sir?

Q. The candy box.

By Mr. Lockley: I object, your Honor, unless he lays a better foundation. He hasn't said what transaction.

By the Court: He may answer.

By the Witness:

A. No, sir. Many times, sir—and I am sure, sir, if you will examine some records you will find that when we
976 sold the merchandise—for instance, we would sell a customer for one price, and we would get so much cash back, that the cash many times would be deposited in the bank—in our bank as a cash sale. And I am sure if you examine the books you will find many of those instances. I don't say all the time, but many times, sir.

977 By Mr. McConnell: Well, at this time I want to offer in evidence the documents which have been marked for identification Defendants' Exhibits 1-A to D, inclusive, which have been identified by the witness.

By Mr. Lockley: May I see them, counsel?

By Mr. McConnell: Pardon me.

(Documents handed to counsel.)

By Mr. Lockley: If your Honor please, the Government objects to the introduction of all of these with the

exception of Defendants' Exhibit 1-D, on the grounds that there is no foundation laid to show that they are in any way connected with the dealings of The Shotwell Manufacturing Company. We do not object to 1-D because there are entries on there which relate to Shotwell.

By Mr. McConnell: They are related to the corn box, your Honor.

978 By Mr. Lockley: The fact that it relates to a matter he testified to on cross examination doesn't make it admissible.

By Mr. McConnell: You brought it out on direct, about the corn box. That was the reason he gave for writing out the checks.

By Mr. Lockley: That doesn't make it material to the issues in the case.

By the Court: Well, I will receive it in evidence.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 1-A, 1-B, 1-C, and 1-D.)

By Mr. McConnell:

Q. Now, I call your attention to an item under date of June 5, entitled, "Shotwell to Wachtel," 3405, which is entitled, "Money received". That's money you received on goods that you got from Shotwell, isn't it?

By Mr. Lockley: Let him testify, counsel.

By Mr. McConnell: This is cross examination.

979 By Mr. Lockley: Well, you haven't shown him yet, and you are explaining it to him.

By the Witness: Yes, sir; I have told you—

By the Court: Speak up.

By the Witness:

A. I have told you, sir, that these papers here—if you will look at the dates, with the time—the very beginning of the partnership where Mr. Roth and Mr. Giglio insisted we change our method of bookkeeping by—that we sell a certain amount of merchandise for cash, and pay out—when we paid it out, mark it on a page over here. And that is what this is for, sir.

And this is where—we didn't do this before, sir. I objected to this type of bookkeeping, and it was changed. We went back to our regular type of bookkeeping. And later on, they went back to it again.

By Mr. McConnell: Now, will you read the question I asked him, and see if we can get an answer to it.

(Question read by the reporter.)

980 By Mr. McConnell:

Q. Can't you give me a yes or no answer?

A. Yes, sir. I would say that I received the money

Q. All right. That is all I asked you.

Now, as a matter of fact you had a cash box before the partnership, didn't you?

981 A. There may have been one, sir, but I don't think there was very much or—if anything, in it. I can't remember. But if there were, sir, whatever was in it was picked up on our books as sales, or purchases, or what not.

Q. In other words, your position is that your proprietorship books, sole proprietorship books, covered the cash account, is that right?

A. To the best of my knowledge, sir.

Q. Now, passing to another subject for a minute.

By the Court: It is very difficult to hear you, Mr. McConnell, when you put your head down. I am having trouble and I am sure the jury does, too.

By Mr. McConnell:

Q. I said: Passing to another subject for a moment now, this meeting down at your farm, or down at New Jersey—what is the name of that place again, Hillsdale?

A. Yes, sir. Well, the farm is really in—it is on a dividing line between Woodcliff Lake and Hillsdale.

Q. You finally moved your corporation over there to Hillsdale, did you not?

982 A. You mean General Confections?

Q. Yes.

A. Yes, sir.

Q. And you had a chicken farm of some kind over there, isn't that right?

A. You mean prior, sir, to moving the corporation over?

Q. Yes.

A. Yes, sir.

Q. Did you move your corporation at the same time you had your chicken farm?

A. I believe we did, sir. We had some poultry out on

the fields and on the range, sir,—yes, sir; I am sure we did.

Q. You moved the candy factory in with the chickens, is that it?

A. No, sir; there were no chickens when we made the candy.

Q. Did you move your machinery down there on the farm?

A. Yes, sir; I did. It was a big building, sir. It had fourteen thousand square feet of space.

Q. Now, you got into some trouble with that corporation down there, did you not?

983 By Mr. Lockley: I object, your Honor, to the general form of the question, and to the materiality. It is beyond the scope of the direct examination.

By Mr. McConnell: No, it isn't. It is leading to something.

By the Court: Well, he may answer.

By the Witness:

A. Do you mean zoning trouble, sir? I had zoning trouble, sir.

By Mr. McConnell:

Q. You had business troubles, too, didn't you?

A. Yes, sir.

Q. Do you remember a transaction with the Sterling Bank?

A. Yes, sir.

Q. When was that?

A. I believe it was in June of 1947.

Q. Was your company in financial difficulty at that time?

By Mr. Lockley: I object; immaterial.

By the Court: Yes, I will sustain the objection.

984 If you want to bring out that the General Confections went into bankruptcy, if that is a fact, receivership, that may be, I suppose—it may have some bearing, at least, I think he may answer. But we are certainly not going into the corporate history of General Confections in '47.

985 By Mr. McConnell: I have no intention of doing it, your Honor.

By the Court: Nor any transactions of that concern in 1947, except if you—

By Mr. McConnell: It is simply a foundation and background of something, a transaction that occurred between these defendants and this man.

By the Court: Oh, all right. Then you may proceed.

By Mr. McConnell:

Q. Was the company in some financial difficulty at that time?

A. It needed some money, sir.

Q. And that was in the fall of 1947?

A. I believe I said June, sir.

Q. June of 1947?

A. Yes, sir.

Q. You got in touch with Mr. Cain, didn't you?

A. Yes, sir. Or Mr. Huebner, or both.

Q. And you asked them for money, didn't you?

A. I asked them if they could arrange—for a loan.

Q. How much money did you want from them?

986 A. Sir, they examined my accounts—

Q. How much money did you want from them?

A. I didn't want any money from them.

Q. Did you ask them for some money?

A. No, they—Mr. Cain volunteered to come down and look over my statement, and give me some financial advice and help me.

Q. Let's see how the matter came up. First, did you call him or did he call you?

A. No, I think the way the matter came up, we were running behind in our legitimate payments to Shotwell. There was something on the books, if I recall correctly, we owed them some money, and I had to sell them some peanuts out of the warehouse, and I sold them some chocolates, that is, my—an equity I had in some chocolate. And then I sold them a peanut roaster—I mean a chocolate enrober, and I think this came about at the same time.

Q. In other words, you were behind about $47,000.00 on your open account with Shotwell?

A. Yes, sir, that's right, sir.

Q. At that time. That was the amount of money you were paying to Shotwell?

987 A. Yes, that was right, the Shotwell Manufacturing Company. That's right.

Q. Not the amount of money you were dividing in piles, the part you were paying directly to Shotwell?

A. Yes, sir. But it was ultimately paid, sir.
Q. Did I ask you that?
A. Pardon me, sir.
988 Q. Well, did you ask Mr. Cain to come down there, or did Mr. Huebner volunteer to come down; how did you get together, with reference to a transaction with the Sterling Bank?
A. Well, after they examined my financial statement, Byron Cain talked to me and said, "Dave, you will need some money in this business," and so forth, "and you can't—probably you can't pull through without it. But I think that with a little help that you can come out of it all right."
Q. Now, where was this conversation?
A. Probably in the Gotham Hotel, sir.
Q. Well, can't you remember any better than that?
A. Well, I believe Mr. Cain came up to our factory, too, sir, and went all over it, and he checked it thoroughly, Mr. Huebner did—I mean Mr. Heubner had. And I believe they had some experts from The Shotwell Manufacturing Company come about that time.
Q. Well, what occurred after that talk?
A. Well, sir, you want to know what Mr. Cain said?
Q. No, what did you do; did you get some money somewhere?
989 A. Yes, sir; Mr. Cain—
By the Court: Speak up, Mr. Lubben.
By the Witness:
A. Mr. Cain said that I would need about $125,000, but I might be able to pull through with seventy-five, and he'd loan me $75,000.00, and if I needed any additional money that he would give it to me, that he would loan me another $50,000.00 at a later date, but to try to get through with the seventy-five. But there was a condition on the loan, sir.
By Mr. McConnell:
Q. That money was borrowed on Mr. Cain's note at the Sterling Bank, was it not?
A. Well, sir, I don't know the mechanics of it, but I know Mr. Cain—
Q. Do you remember that you got the money?
A. Yes, sir.
Q. You got the $75,000.00?
A. Yes, I remember that, from the Sterling Bank.

Q. All right. What happened after that; was that paid?

A. You mean after I got the loan, sir?

Q. Yes.

990 A. Well, after we got the loan, sir, we proceeded to follow instructions, the conditions of the loan.

Q. Conditions of the loan?

A. Yes, sir.

Q. Well, one of them was that you were to give a mortgage, wasn't it?

A. That was one, sir, a mortgage, and a chattel mortgage, and a mortgage on my house, everything, all kinds of mortgages.

Q. As security for the money which you got?

A. Yes, sir.

Q. All right. Did you pay the notes?

A. Well, there was another condition, sir.

991 Q. What was the other condition?

A. The other condition, sir, is that we would follow the recommendation of Mr. Huebner and move the plant.

Q. From where to where?

A. To move it from New York City, where it was located, to Hillsdale, New Jersey, in where the chickens formerly were.

Q. Well, you did move it, didn't you?

A. I did, sir.

Q. Did you pay the notes?

A. I paid, sir, I believe down to about $67,000. That included five or six payments on the interest.

Q. Then you defaulted, didn't you?

A. Yes, sir.

Q. Then you had a transaction with Mr. Cain and Mr. Huebner which involved the Haberkorn Candy Company, didn't you?

A. I did, sir.

Q. Now, will you tell us what that transaction was?

A. Well, that transaction was, sir, that Mr. Cain—it seems that the Sterling Bank—

By the Court: Speak up.

992 By the Witness:

A. —the Sterling Bank gave the mortgage back to Mr. Cain, who now had the mortgage on my machinery,

my plant, my house, all of the chattels, and we were running into some financial trouble. And I went to Mr. Cain and I asked him—I felt that we had followed his instructions to move over there, and where the estimate of moving and setting up of machinery was only going to be about 12 to 15 thousand dollars—I don't have my records, but I believe it was fifty, sixty, seventy thousand dollars, because we had to fix the roof, and had to put in air conditioning, and everything else.

So the money that had been intended for additional operating capital went into fixed assets, and we didn't have too much to pay the bills.

By Mr. McConnell:

Q. Now, when was this?

A. When was what.

Q. This transaction when you—

A. That we moved?

Q. —were trying to adjust, and the defaulted
993 situation on the notes?

A. The default situation?

Q. Yes.

A. I think, sir, it was around November or December of 1947.

Q. That was when the notes were in default, or when the mortgage was put on?

A. No, we put the mortgage on, sir, if I remember correctly in June, 1947. I have testified to that, sir.

Q. Yes. And they went in default in 1947, in October?

A. We might have got the mortgage in May. But I didn't say October. I think it was November or December.

Q. Now, when was the Haberkorn Candy deal?

A. What do you mean, when was the Haberkorn Candy deal? That don't make any sense to me, sir. When was what?

Q. Do you know anything about the Haberkorn Candy Company?

A. Yes, sir; I do.

Q. Do you know about the sale of it?

A. Yes, sir.

Q. When did that take place?

994 A. I believe that took place some time, sir, in February, 1948.

Q. February of 1948?

A. Yes, sir.

Q. And when was it that you had this talk down in the Riviera?

A. At the following August, sir.

Q. August?

A. Yes, sir. The place was closed then. We closed in March.

Q. All right. Now, what happened in February of 1948?

A. What do you mean, specifically, what happened in February? Many things could happen.

Q. Well, with reference to the Haberkorn Candy deal. You know what I am talking about, don't you?

A. Well, sir, I want to be very specific. I want to be right on the point.

Q. That is just the way I want you to be.

A. That's the way you are going to get it, sir. What happened to the Haberkorn Candy Company, sir?

995 Q. The notes are in default.

A. Yes, sir.

Q. Now, what happened? You say the notes are paid off. Tell us how you paid off the notes.

A. Well, I have to tell you a little bit about Haberkorn Candy Company.

Q. All right. That's what I want to know. Tell us about Haberkorn Candy Company.

A. Well, sir, when Byron Cain had told me I was going to get—the seventy-five thousand he didn't think would be enough, but if I needed fifty thousand more he would give it to me, and when I went to get the fifty thousand dollars, sir, to borrow the other fifty thousand dollars—he had previously sent up some more experts to the farm, and they estimated my house, and went over my books, and everything else, and made cost systems, and so forth.

Q. When did you get the other fifty thousand dollars?

A. I am coming to that.

Q. When?

A. Let me answer.

Q. Just give me a date, please.

996 A. In November, sir, of—November or December of 1947. And I asked Mr. Cain for the other fifty thousand dollars. And he said before he could do that

he would have to send some experts and some—he wanted to look the plant over. And they did, sir. They came, and they stayed several days in the plant, made recommendations, and so forth, and they would have to report back to Mr. Cain. I think Mr. Graflund was one, sir.

And when they left, they'd let me know. And shortly thereafter,—these experts went back—I remember meeting Mr. Cain in the hotel—the Hotel Gotham, and Mr. Cain says he thought it best not to loan me any more money, and the best thing for me to do was to go broke and get out of the candy business.

Well, sir, I didn't agree with him, because I felt that now we had turned the corner, and we had all this plant and equipment that had been moved and set up, and everything was all set, that if I could get the $50,000, I would be able to stay in business.

Sir, he wouldn't loan it to me. So I asked him if
997 he had any objections if I got it elsewhere. And I told him—he says, no. So I went to some people who were factoring my accounts, budget factors. And so they came out and brought some man out to the place. And I think he was from the Bronx National Bank, if I remember correctly.

And they said the bank—the Haberkorn—the budget factors told me they would loan me the money if we would get Byron Cain to let this mortgage go before his. I believe the word is subordinate.

Q. All right. Did you take that up with Mr. Cain?

A. Yes, sir; I did. And we went to the hotel. And I took—I believe I took Mr. Cary and maybe Mr. Glassman—I am not sure of the budget factors—with me, and I told him about borrowing the money. And they wouldn't subordinate their mortgage. In other words, Mr. Cain wanted it first.

By the Court: A little louder.

By the Witness:

A. Mr. Cain wanted his money first, and he said he wouldn't do it.

998 So I said, well—he says no, he wouldn't do it. "Go broke."

About this time, sir, my sister had a fifty percent interest in Haberkorn Candy Company, sir. And my sister knew that I was in financial trouble. And about this time

somebody came to Haberkorn Candy Company and they were dickering around for it. And I believe the price was $125,000.

And so my sister told me—she said, "Dave, we can sell the candy company,"—talking about the deal—"and if you need the money, why, I will loan it to you.

I mean—so she said, "After all, we are brother and sister."

And so—

999 Q. She was your sister, that's true.

A. Beg pardon?

Q. Go ahead.

A. A very good one, too, sir.

And so there were some further negotiations, on the Haberkorn Candy Company, and I expected to get the $60,000 from that company. She was going to loan me the sixty thousand if it was sold for a hundred and twenty.

And about this time, sir, the deal went sour. In other words, the people changed their mind, or something else. But some new people came in.

I told this to Mr. Huebner and to Mr. Cain.

Q. You went out and sold some preferred stock, didn't you, in your company at that time?

A. No, sir, no. Wait a minute. You are asking me to explain about the Haberkorn Candy Company. Will you let me finish it, sir?

Q. Go ahead. Explain it.

A. And so the people who were going to pay
1000 $120,000, they didn't—decided not to go ahead with that deal, for one reason or another, I don't know.

But the sales manager of the Shotwell Manufacturing Company—I can't think of his name—came in at the time. And he then came into the picture over at Shotwell—over at Haberkorn, and he was going to buy it, for $80,000.

And so I didn't have enough money. So I believe Mr. Cain at that time—I don't think he was around—I think I talked to Mr. Huebner, and I think Mr. Cain was in Palm Springs. And so I asked Mr. Huebner—I said, "The sales manager is going to buy—of your own company—is going to buy it."

And he was quite amazed. I said, "Well, I am just telling you. We are going to get $80,000 of which we will get $40,000." And if we would have any—I mean, if he would take the $40,000.

He says, "I don't think they would take forty thousand for a sixty-seven thousand mortgage."

I said, "Ask Byron if he will take a note, or take a second mortgage on it."

1001 But—he asked him, because he called me back, and he said he would be willing to take the $40,000, and he would call the other $27,000 off the books, and it was—he was in a high tax bracket, and he would do it for me.

So we are proceeding with the sale of the Haberkorn Candy Company to the sales manager of the Shotwell Manufacturing Company, and they would put up a $10,000 deposit. And shortly after—just a few days after I had talked to him, the Haberkorn Sales Manager withdraws from the picture, and Shotwell Manufacturing Company entered the picture. And Shotwell Manufacturing Company bought the company for $60,000.

So my sister got $40,000—or they bought it for, maybe, seventy thousand—I don't remember the figure—but my sister got $40,000 for the company. I thought until—I thought they had got paid the $80,000, sir, but about two or three years ago, sir, I saw some records that refreshed my memory that they didn't pay the eighty thousand.

But, anyway, my sister got $40,000 for the company, for her part of it, which she loaned to me.

1002 And I spoke to Mr. Huebner, and I said, "Look. There is no reason to kick my brother-in-law out of a job. He didn't do anything to me. And he did a good job. And he worked very hard building the company up. And they have a mortgage on their home, and it may be some time before he gets a job, and I would like to give you $30,000 and take a $10,000 note."

And Mr.—he says,—well, I think he called out to Palm Springs, California, I believe—yes, it was Palm Springs, and they decided to take the $30,000, and which is what they got for the mortgage.

1003 Q. So that you ended up with the company, is that it?

A. So, sir, they loaned the thirty—the $30,000.00 was given to the attorney of Byron Cain in exchange for the mortgage, and which ultimately wound up with my sister. She had the mortgage on my property in Hillsdale.

Q. She paid it out of the money she had gotten from Shotwell?

A. Yes, sir.

Q. She got forty and they paid back thirty to Byron Cain for his note, is that right?

A. That's correct, sir.

Q. Did you talk to Mr. Cain about that transaction?

A. About what, sir?

Q. Making that deal.

A. I may have, sir. I think I did.

Q. Did you tell Mr. Huebner if he didn't make that transaction you were going to the Internal Revenue Department?

A. No, sir.

By Mr. Lockley: I object.

By the Witness:

A. I have never gone to the Internal Revenue.

1004 By Mr. McConnell:

Q. Did you tell him that? That is all I asked.

A. No, sir; I did not.

Q. Let's see if we can get the net of that transaction now. You got $75,000.00 on the original Cain loan?

A. Yes, sir.

Q. And you didn't pay the notes.

A. I didn't say I didn't pay them. I paid—

Q. Well, you defaulted on all except $67,000.00, isn't that right?

A. I think we paid $2800.00 a month. I think that was 2,000 on the principal. I don't know, sir. But it was principal and interest. We had paid a substantial amount. And the balance of the principal was around $67,000.00.

Q. Was that mortgage ever foreclosed, by the way?

A. The bank came off us?

Q. No, the mortgage that was on that farm, was it ever foreclosed?

A. No, sir.

Q. Didn't it end up with a man by the name of Edward Dane Bookman?

A. The mortgage?

1005 Q. Yes.

A. Oh, no, sir.

Q. Who is Edward Dane Bookman?

A. He is a friend of mine, sir.

Q. He is a chorus boy, isn't he?

By Mr. Lockley: I object, your Honor. I don't think it is material, what Mr. Bookman's occupation is.

By the Court: I see no materiality. I will sustain the objection.

By Mr. McConnell:

Q. Did he have anything to do with that transaction?

A. What transaction, sir?

Q. Of the Sterling Bank loan, and the mortgage that was given with reference to it?

A. No, sir.

Q. Now, when did your company go into receivership?

A. March 8, 1948.

Q. He did have something to do with that, didn't he?

A. The receivership?

Q. Yes. He bought the property, at the receivership sale.

1006 A. You mean when it was sold ultimately?

Q. Yes.

By Mr. Lockley: I object. I fail to see the materiality.

By the Court: Well, he may answer. I don't appreciate the materiality of it.

By Mr. McConnell: Well, the only materiality to it is that the man is posing here as a great beneficiary—

By Mr. Lockley: I object.

By Mr. McConnell: —and ends up—

By Mr. Lockley: I object. This is not the time for argument.

1007 By the Court: Is it wrong to buy property from a receiver? That is done every day. There is nothing improper about that.

By Mr. McConnell: I haven't been able to develop it. That's what I was going to develop, to show it wasn't proper, if the Court please.

By the Court: You will have to make it more clear to me that it is material.

By Mr. McConnell: Well, I am about to start on a longer line, and we are within two minutes of a recess.

By the Court: We will be in recess now until tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken in the above entitled cause until the following morning being Friday, September 18, 1953, at 10:00 o'clock a.m.)

1008 • • (Caption—No. 52 CR 143) • •

Chicago, Illinois,
Friday, September 18, 1953,
10:00 o'clock A.M.

Court met pursuant to adjournment.

Present:
Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And thereupon the following proceedings were had herein:—

By the Clerk: 52 CR 143, The United States of America vs. The Shotwell Manufacturing Company, et al, case on trial.

By the Court: You may proceed.

1009 DAVID G. LUBBEN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination (Ctd.) *by Mr. McConnell.*

Q. Mr. Lubben, yesterday you stated that you had no interest in the Haberkorn Company, is that right?

A. I personally had none, sir.

Q. And you testified that way on your deposition, too, did you not, that you personally had no interest in the Haberkorn Company?

A. I just didn't have any, so I—

By the Court: I don't hear you, Mr. Lubben.

By the Witness:

A. I didn't have any interest in the Haberkorn Candy Company, sir.

By Mr. McConnell:

Q. You never had any interest in the Company?

A. There was never any stock issued to me, sir. I never had any interest in it. Never had any interest in it.

1010 Q. Do you recall how that property was purchased?

By Mr. Lockley: I object, your Honor.

By the Court: Yes, I will sustain the objection.

By Mr. Lockley: I don't think it is material.

By Mr. McConnell: If the Court please, this is a matter of impeachment.

By the Court: It is impeachment on an immaterial issue.

By Mr. McConnell: I don't believe it is an immaterial issue. The man says he has no interest in the Haberkorn Company. I am going to connect the Haberkorn Company up with a transaction with the defendants, which is very material to this case, which involves a matter of extortion of money from the defendants.

By the Court: You mean the transaction you referred to yesterday where the Haberkorn Company was sold and from that sale he derived certain money that he paid Mr. Cain?

By Mr. McConnell: Yes.

By the Court: What difference does it make whether he had any interest in it, or he got it from his
1011 sister? What materiality does it have?

By Mr. McConnell: It makes a lot of difference. It makes this difference, that he had an interest in getting that property sold, and the reason he got it sold was because of transactions with these defendants.

It is very material to show his motive here as to the way this whole prosecution is going and why he is testifying the way he is. It has a very definite and direct relationship to it.

By the Court: I don't see any connection, as yet. Whether he got the money from his sister, or whether he got it because of some interest in the Haberkorn Company, he got $30,000.00. Whether he got it from John Jones or got it from his sister, I can't see that it makes any difference.

By Mr. McConnell: He got more than $30,000.00, he got over a hundred thousand dollars out of the transaction.

1012 By Mr. Lockley: I object to counsel testifying. If he wants to make an offer of proof, I suggest that the jury be withdrawn.

By Mr. McConnell: I certainly would like to argue out this point, because if I am going to cross examine

this witness I have got to be able to show where his interest is and what his motive is in testifying in this case.

By Mr. Lockley: If your Honor please, what he has been talking about occurred, as he has already brought out, in 1947 and 1948. I can't see that it has any relationship to the years at issue here.

By Mr. McConnell: It comes out of his relationship, of what has happened in the past. It goes to his motive as a witness in this case.

By the Court: Well, rather than hear any long argument on the point, go ahead. If it isn't material I will entertain a motion to strike.

By Mr. McConnell: Now, read the question to the 1013 witness, please.

(Question read.)

By the Witness:

A. I do, sir.

By Mr. McConnell:

Q. How was it purchased?

By the Court: Counsel, if you will remember my request—

By Mr. McConnell: I am sorry, your Honor. I am so used to rambling around the court room it is hard for me to stay in one place.

By the Court: You will have to get over that habit.

By Mr. McConnell: I guess I will.

By the Witness:

A. In 1946 I was in Chicago, and I went out to the Walgreen drug store chain, their general buying offices, in the company of Mr. Edward Urban.

1014 And while we were talking to a Mr. Dave Kupfer—he was the buyer of confections—he told us about a candy company here in Chicago that was for sale, that it seems that the owner had passed away and the property was going to be sold.

He asked me—so I asked him, or Mr. Urban—I don't recall which—how many pounds of chocolate there was in the quota, and how many pounds of sugar there were on a quota, and certain other items that were on an allotment basis that were very instrumental—which would be important in making the price. And he gave us the number of pounds of cocoa, and chocolate and corn syrup, and so forth. And he says that the estate wanted $35,000.00.

And I looked at Mr. Urban and he nodded. And I says, "We will take it." And I think—Eddie Urban says, "Dave, do you want to go fifty-fifty on it?" I said, "Sure, after all, you were here when the offer was made."

But then Kupfer says, "That isn't all. I want a $10,000.00 check and Mr. Paul Hershey of the Warfield Company wants $10,000.00."

I says, "What is that for?" He says, "It's mine. I told you about it. And Mr. Paul Hershey with the Warfield Chocolate Company, he wants that money so that he will continue the allotment of chocolate," because that was where the chocolate allotment was with.

So that made the cost of the company $55,000.00.

So we figured how many pounds of chocolate there were, and so forth, and corn syrup, and so on. And we told Mr. Kupfer, I believe that day, that we would buy it.

We returned to the—to Chicago here, and we bumped into Mr. Gertz. Mr. Gertz was familiar to both Mr. Urban and myself. And he wanted to know where we had been, and so forth. And we said, "We just bought a chocolate company that makes chocolate candy." And we told him the name. And he says, "Gee, I heard about that place and I was going to get it." He says, "Is there any chance of getting a piece of it?" He says, "I can use those chocolates in my business."

I don't know—and I think Urban and I stepped back. We talked a few minutes. And we went back and we says, "Yes, if you want a third of it we will sell you a third of it." And he said, "Okay," how much was it?

I don't know whether I told it to him, or Mr. Urban told it to him, but one of us told it to him. And I think we said $40,000.00 for the third. He says, "Okay, I will take it."

So all right—so I says, "Well, you work it out with Eddie Urban here. And I am going out to California." A man out there, I believe, at that time owed me a lot of money. And so I told Mr. Urban, I says that "I don't want this candy company as long as Sam Gertz is in it. And when it comes time to allocating any stock, you can give it to my sister. And if there is any additional money that is necessary for it that—on my part—I mean, on the part she was going to get, why, let me know."

So I went to California—or I think I went to Seattle first, and then to Portland, and then down to Los An-

geles. And while I was in Los Angeles, I remember Mr. Gertz coming out there with his wife and family for a vacation. And he said that he had been down to the Probate Court and he said he found out where the estate had only gotten $35,000 for the candy company.

I said, "That's correct." But I says, "What you don't know is that we had to give $10,000 to Mr. Kupfer, and $10,000 to Mr. Hershey of the Warfield Company, so that made it $55,000."

He says—I don't know whether it was thirty or forty thousand dollars he paid—he said, "I paid this much for a third."

Nobody ever told you a third of it—we were going to sell you a third of the place for what it was paid for. You wanted to buy an interest in it, and we told you what it was, and if you don't want it, you don't have to take it."

"No, no, no, no. I have already given my money to Eddie Urban and it's all right."

And he says, "But I want to make sure I get some of the production."

1018 I says, "Well, you will have to work that out with Eddie. And I am not interested in how much you get, or how much you don't get." That was immaterial to me, at the time.

So later on Mr. Gertz withdrew from the—he didn't want to be in as a third partner of the Haberkorn Candy Company. So his money was returned to him, that is, he got his money back, plus a very substantial profit in merchandise, out of the Haberkorn Candy Company. And I believe that I had to advance—there was a certain deficit there that I had to give him some merchandise from my factory, and Mr. Urban gave him some merchandise from his factory. And that was the end of it.

So then instead of Mr. Urban having one-third of it, Mr. Gertz having one-third of it, and Janet Moran having a third of it, they then—the stock was issued, I believe—I have never seen the stock, but I believe it was issued so that the Urbans had 50 percent, and Janet Moran had the other 50 percent.

By Mr. McConnell:

Q. Did you put up the $35,000 with which it was bought?

1019 By Mr. Lockley: I move to strike. I think counsel failed to show any materiality.

By the Court: It may stand.

1020 By the Witness:

A. Did I put up the $35,000.00?

By Mr. McConnell:

Q. Yes.

A. No, sir; I didn't.

Q. Paid in the Probate Court?

A. No, sir.

Q. Who put up that money?

A. I presume it was Mr. Urban, sir. Mr. Urban advanced the money for the deal, I believe.

Q. Well, did you enter into a contract with the executrix of the estate, Marie Haberkorn, to buy the property for $35,000.00, you and Mr. Urban?

A. I told you, sir, that the property—they were going to sell the property for $35,000.00. I don't recall any contract. I remember when I went to California Mr. Urban handled the transaction. I don't recall any transaction—I mean, I don't recall any contract.

Q. You don't recall that you entered into a contract about it?

A. No, sir.

1021 By Mr. McConnell: I ask the court reporter to mark these minutes Defendants' Exhibit 8 for identification, starting there (indicating) and numbering the pages consecutively, A, B, C, D, if you will, please.

(Said documents were marked Defendants' Exhibits 8-A, 8-B, 8-C, 8-D for identification.)

By Mr. McConnell:

Q. Now, Mr. Lubben, I show you a document which purports to be some minutes of the Haberkorn Candy Company and ask you if you can identify your signature?

A. Yes, sir, it is my signature.

Q. Is that Mr. Urban's signature, too?

A. It appears to be, yes, sir.

Q. And you approved these minutes?

By Mr. Lockley: I object, your Honor.

By the Witness: I don't recall what the minutes say, sir.

By the Court: He may answer.

By Mr. McConnell:

Q. Did you approve the minutes?

1022 A. I don't know—I don't ever recall reading any minutes.

Q. What is above your signature there?

A. It says, "Approved", sir.

By Mr. McConnell: I want to offer this document in evidence at this time as Defendants' Exhibits 8-A to 8-D, inclusive. I want to ask this witness some questions on it.

By Mr. Lockley: May I see it?

By Mr. McConnell: Yes, counsel, you may see it.

By Mr. Lockley: Thank you.

If your Honor please, the Government objects to the admission of Defendants' Exhibit 8 on the ground the witness' signature appears only on one page. There is nothing to establish the authenticity of the remaining pages. He hasn't identified them as being documents made in his handwriting, or in his presence at any time. The one page which does bear his signature is completely immaterial.

By the Court: Is that a certain portion of the 1023 minutes?

By Mr. Lockley: Yes. The minutes of that meeting which he has approved.

By the Court: All of them?

By Mr. McConnell: No, just the minutes of that meeting, starting at Defendants' Exhibits 8-A, B, C, and D.

By Mr. Lockley: We have no way of knowing when that page was inserted, or whether it was inserted in the proper place in the book. That page could have been put in after any of the minutes.

By Mr. McConnell: I object to the suggestion. I object to a suggestion of that kind. If there is any suggestion of an alteration, you can prove it by the witness.

1024 By Mr. Lockley: Now, the minutes of the Haberkorn Candy Company are completely immaterial to the issues.

By the Court: I will receive them in evidence.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 8-A, 8-B, 8-C, and 8-D.)

By Mr. McConnell:

Q. On your deposition prior to this trial, were you asked this question and did you make this answer:

By Mr. Lockley: What page, counsel?

By Mr. McConnell:

Q. At page 126, referring to Mrs. Moran, your sister.

"Q. Did she take title as your nominee?

"A. She was no nominee for me, sir."

Were you asked that question and did you make that answer?

A. I did, sir.

Q. On your deposition, were you asked this question at page 127—no, I don't believe I want to read that at
1025 the moment.

Now, in the minutes of the meeting, on page 8-C, the minutes of the meeting of the Haberkorn Candy Company at which it was stated as follows:

"The chairman further stated that subsequent to the date of said subscription agreement, Edward T. Urban and David G. Lubben had purchased the assets of Haberkorn Candy Company, unincorporated, from the estate of William P. Haberkorn, deceased, for the sum of $35,000.00 cash and in addition thereto had invested in said business or were about to invest therein, the additional total sum of eighteen thousand nine hundred eighty-five and 28/100ths ($18,985.28) for additional equipment and also for additional working capital, making a total capital investment in said business of fifty-three thousand nine hundred eighty-five and 28/100ths ($53,985.28) and that said Edward T. Urban and David G. Lubben were agreeable to the transfer of all of said assets of Haberkorn Candy Company, Inc., a corporation,
1026 in consideration of the issuance to them or to their nominees of three hundred shares of the stock of said corporation."

Did you certify to that as approved in those minutes?

A. Well, sir, I never bought—

Q. Can't you answer that question?

A. I don't recall reading those minutes.

Q. You don't recall ever reading them?

A. No, sir.

1027 Q. Well, look at these minutes. Are they in any different condition now than they were when you signed them?

A. I don't remember seeing them, sir. Do you mind if I read them? I would like to go over them.

Q. Go ahead. Take your time.

By Mr. Lockley: If your Honor please, this appears to be merely an attempt to impeach the witness on a collateral matter that has no bearing on the issues.

By the Court: Counsel said he is going to connect it up. I cannot advise on the materiality. If it isn't material, I will entertain a motion to strike.

By the Witness:

A. Yes, sir.

By Mr. McConnell:

Q. Are those the minutes you approved?

A. I don't remember. I cannot specifically remember approving those minutes.

Q. Well, your signature is there, isn't it?

A. Well, sir, I don't even remember reading it before.

Q. Is your signature there?

1028 A. It is, sir, but the way it happened, the way the Haberkorn Candy Company was purchased, was the way that I told you.

Q. And that is different from the way it is recited in these minutes, isn't it?

A. That is some legal gibberish in there, but I know I told you the way it was handled. I got the money. I went out to the Walgreen's drug store. You can bring in any witnesses and ask them about it.

Q. And you got the money? What money did you get?

A. I mean, I went out to the Walgreen drug store. The man told us about the factory.

Q. We know that. I am asking you now whether the minutes are true?

A. Well, sir, the minutes are not true because I didn't put up any money.

Q. Let me ask you this: Are the minutes in the same condition now as when you signed them?

A. Sir, I don't even remember ever seeing the book.

Q. You can't tell us whether they are in the same condition as when you signed it?

1029 A. I don't even know whether I signed those minutes, sir.

Q. Do you know your own signature?

A. I do know my own signature.

Q. And it is your signature there?

A. I told you how, sir, the money was paid into the Haberkorn Candy Company.

Q. Is that your signature?

A. It appears to be, yes, sir.

Q. Is there some doubt in your mind about it?

A. I don't know, sir. I would say it is my signature.

By Mr. McConnell: May I ask that this document be marked for identification Defendants' Exhibit 9.

(Said document was marked Defendants' Exhibit 9 for identification.)

By Mr. McConnell:

Q. Now, you had some talk with Mr. Cain, did you not, about the sale of the stock of the Haberkorn Company to the Shotwell people?

A. I am not familiar—as I stated yesterday, I believe not—whether I talked or didn't talk to Mr. Cain, I believe I did, but I am not sure.

1030 Q. Now, about when was that?

A. In January or February, somewhere around there, in 1948.

Q. That was about the time that you had that meeting down there where you were talking about those documents on your porch, wasn't it?

A. That was after, sir. I think it was after.

Q. It was after that?

A. Yes.

Q. Now, when did you have the meeting with Mr. Huebner on the porch when you had these documents?

A. Early in February of 1948.

1031 Q. You had a talk with Mr. Huebner about documents on the porch down there at your home in Hillsdale, is that right?

A. Yes, sir.

Q. And at that time you showed him these documents, these memoranda that you produced here in evidence, did you?

A. Yes, sir.

By Mr. McConnell: Let me have those documents, will you, counsel?

By Mr. Lockley: Will you tell me what documents you mean?

By Mr. McConnell: The ones he said he had on the porch down there in Hillsdale, a little memoranda.

By Mr. Lockley: Can you identify them?

By Mr. McConnell: Maybe we can. Maybe we can help you. Have you got the exhibits on those, anybody on my side of the table?

The numbers are 92, 93, 94, 95, 96, 97, 98, 100, 101, and 102.

By Mr. Lockley: Here is 94, 95, 96, 97, 98 and 100. May I have the balance of them again? What numbers are 1032 missing?

By the Court: Well, go ahead with those, and they can look for the balance later.

By Mr. McConnell:

Q. Now I show you documents which have been identified here as Government's Exhibits 94, 95, 96, 97, 98, and 100, which purport to be photostats of some documents. Are those photostats of the documents you were talking to Mr. Huebner about down on the porch at Hillsdale?

A. Yes, sir, they are.

By Mr. McConnell: Have you found the rest of them?

By Mr. Lockley: Not yet.

By Mr. McConnell:

Q. You don't know where the originals are?

A. No, sir; I do not.

Q. Are you sure about that?

A. I personally don't know where the originals are at, sir.

Q. Well, now, shortly after that meeting with Mr. Huebner, namely on the 24th day of February, 1948, there was a sale arranged of the stock of the Haberkorn Candy Company, wasn't there?

1033 A. You said, sir, namely after that meeting with Mr. Huebner on February 24th?

Q. I said after your meeting with Mr. Huebner—probably I should put a comma in—on February 24th, there was a sale arranged of the Haberkorn Candy stock to somebody at Shotwell, wasn't there?

A. You mean, sir—yes, it was around about that date.

Q. So that one thing follows the other, doesn't it?

A. Yes, sir.

Q. Now, do you recall if there was a written contract which had to do with that deal?

A. No, sir, I do not.

Q. I show you document marked for identification Defendants' Exhibit 9, and ask you if you can identify the signatures on that document?

A. Well, they appear to be—I can identify the signature of Edward Urban, the other Urban family, and the other one is Graflund, which is an officer, or associate or somebody—secretary it says here, that worked for Shot-

well Manufacturing Company.

1034 By Mr. McConnell: I offer this document in evidence. It is a contract of sale of capital stock of the Haberkorn Candy Company to Shotwell Manufacturing Company.

By the Court: I suppose counsel might like to look at it.

(Handing document to counsel.)

By Mr. Lockley: I question its materiality, your Honor, but I won't object to it.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Defendants' Exhibit 9.)

By Mr. McConnell:

Q. I call your attention to page 3 of this document in which it is stated:

"Buyer agrees to pay the seller the total sum of $65,000.00 in cash to be paid in the following manner: $10,000.00 in cash as earnest money upon execution of a memorandum agreement of the delivery of possession of said premises as of February 12, 1948, and

1035 $55,000.00 in cash upon the execution and delivery of this contract."

Are those the terms upon which that sale was made?

A. Sir, I don't know anything about the terms of the sale because neither I nor Janet Moran had anything to do with that sale. Her signature and mine do not appear. This is a contract between the Urbans and the Shotwell Manufacturing Company. On what basis they sold it, I don't know.

Q. You spent about ten minutes yesterday afternoon of our time telling us about all the details of the Haberkorn Candy deal from your own knowledge.

A. I don't recall spending that time speaking of the Haberkorn Candy Company, for ten minutes yesterday, sir.

Q. So you don't know anything about it, is that it?

A. I didn't say that, sir. If you want to know, I am trying to tell you.

Q. Well, I am asking you.

A. Asking me what, sir?

Q. Just wait until I ask it, please.

A. Yes, sir.

1036 Q. I am asking you, did you get $65,000.00?

A. I didn't—

Q. As a purchase price on Haberkorn Candy Company stock?

A. Does that contract say I got it?

Q. I am asking you did you get it.

A. No, sir, I didn't.

Q. Did you get any part of it?

A. No, sir. I got no part of it.

Q. You got no part of it?

A. Wait just a minute. Let me answer your question. I received no part of that particular contract, nor did my sister receive any part of that contract.

My sister sold her stock to the Urbans prior, long prior —maybe a week or ten days or two weeks prior to any contract. The Urbans bought the stock of Janet Moran, sir, and from the Urbans, my sister received $40,000.00.

1037 Q. When did she receive the $40,000.00, before or after this contract of sale?

A. The minute she transferred the stock to the Urbans.

Q. At that time before this contract was executed?

A. Yes, sir.

Q. Do you have any knowledge of the contract being made?

A. I did not, sir.

Q. At about that time?

A. I did not, sir.

Q. When did you first learn that the stock of this company had been sold, the Haberkorn Company, had been sold to the Urbans? When did you first learn of that?

A. Just a minute. When did I first learn what, sir?

By Mr. McConnell: Will you please read the question to the witness?

(Question read.)

By the Witness:

A. I knew about it when Shotwell agreed to buy the Haberkorn Candy Company, sir.

1038 By Mr. McConnell:

Q. And that was when?

A. Early in February, 1948. I don't know, maybe it was the 10th or the 12th or something like that.

Q. That was just about the time you had your meeting out on the porch, wasn't it?

A. I think it was shortly after, sir.

Q. That was when you learned about it, wasn't it?

A. Learned about what, sir?

Q. The prospective sale of the Haberkorn Candy Company to Shotwell, at your meeting out on the porch?

A. No. I think I learned about the sale going to Shotwell before that, sir.

Q. Now, these documents that you were showing to Mr. Huebner at that time, these were the documents you claimed you got out of your barn, weren't they?

A. Well, sir, not entirely from that barn. Many of them came from the files of the office.

Q. We are not talking about many. We are talking about documents 94, 95, 96, 97, 98 and 100. Just tell us about those. Where did they come from? Did they come out of the barn?

1039 A. I think they did, sir. I think, if I remember correctly—I know I looked in the files in the office. Whether I took any records from the file in the office, I don't know, but I remember going in the barn, sir, and I remember that I took Mr. Huebner back in the barn after I said, "Here are the documents," and he wanted to look at them himself. I remember that.

Q. You took him in the barn and you came out with the documents?

A. No, sir. They were already in the house.

Q. What did you go in the barn for?

A. Because Mr. Huebner wanted to go in the barn to check the file.

Q. Who got the documents out of the barn, you or Mr. Huebner?

A. No, sir. I got them out before because I was told to have them ready.

Q. Oh, you were told to have them ready. Who told you that?

A. I believe shortly before Mr. Huebner came out there was a meeting in the Gotham Hotel between myself —I don't know whether Mr. Cain was there. I am of the opinion he was there at this meeting.

1040 Q. Now, when was this meeting in the Gotham Hotel?

A. Yes, sir.

Q. When was it?

A. Early in February, 1948.

Q. All right. Now, who was there?

A. I think Mr. Huebner. I think Mr. Cain was there, sir. It might have been in the latter part of January, but somewhere about those days, Mr. Huebner was there and I remember speaking to Mr. Cain about it because he wanted to know if I had any documents on the place of how I handled the sales and how the discussion came up about it, sir, was the fact that—

Q. Just tell us what was said there at that meeting and who said it?

A. So I said, "We have recap sheets and so forth of how we paid the money and whatever information was necessary in keeping books in order to pay the money," I says, "We have copies of the bills of lading and unbilled shipments."

1041 Q. Is that the time you asked him for the $50,000?

A. I don't know whether it was—no, I don't think so.

Q. You first asked him for $75,000?

A. No, sir; I asked him in the beginning, sir—he came down and Mr. Cain volunteered to give me some help, and he sent the expert down, and he felt I needed $125,000, but they advanced me $75,000, and with the promise that if we needed any more money, he would see me through.

Q. You got the $75,000, and you asked him for the $50,000 at the time you are talking about the document?

A. No, sir; I don't say it happened at that time. I think that happened prior, sir. I think it happened in November.

Q. You think so?

A. Yes, sir.

Q. You didn't mention anything about wanting $50,000 more?

A. When, sir?

Q. At the meeting at the Gotham Hotel?

A. What meeting, sir?

1042 Q. You were just telling us about a meeting at the Gotham Hotel.

A. You have been jumping around from one meeting to another. Give me a specific meeting, and I will answer you, sir.

Q. We haven't jumped any further than the meeting in the Gotham Hotel between you and Mr. Cain.

By the Court: Counsel, you must remember that where

we want to try a law suit, we have got to comply with certain rules and regulations. Now, you stay at counsels' table.
By Mr. McConnell:

Q. The meeting at the Gotham Hotel between you and Mr. Cain. Now, I am asking you: Didn't you discuss at that meeting a payment of an additional $50,000?

A. Yes, sir; but I believe that meeting was in November, when I asked him for the additional $50,000. And he said at that particular time—he would send some expert down, and he would check over the books and records to see what progress we were making and so forth.

Q. Now, did you have a different meeting later on?

1043 A. Yes, sir.

Q. At the Gotham Hotel?

A. Yes, sir.

Q. In February?

A. I think there was another meeting in between there, sir.

Q. When?

A. I think it was in January, sir.

Q. In January?

A. Yes.

Q. And you discussed at that time getting a $50,000 advance from Shotwell, or from Cain, is that right?

A. No, sir. I don't know whether he did it by telephone, or whether it was at that meeting, but I know Mr. Cain told me, "Dave," he said, "they have checked over the books, and the best thing for you to do is to throw in the sponge and quit, and let it go bankrupt." And I didn't agree with him, sir.

Q. Well, now, did he tell you he wouldn't give you the $50,000; is that it?

A. Yes, sir; he did.

Q. Was that the meeting just before the meeting

1044 down on your porch?

A. I think it was, sir. But I think there was another meeting the next day.

Q. All right. Let's get to the meeting the next day.

A. Well, the meeting the next day, sir, was when I went to the people who were the factors for my company and told them that Mr. Cain had turned me down on the $50,000 loan. And so I talked to—if they could get a $50,000 loan.

1045 I think he brought somebody out to see me. And they could go along on the $50,000.00, providing I get

Mr. Cain to let their fifty thousand come before theirs. I remember taking Mr. Cary, and I think Mr. Glassman, down to the Gotham Hotel, and they asked them—we asked them to let his mortgage come first and Mr. Cain said no.

Q. Now, this is the transaction where you are trying to get his mortgage subordinated to a new mortgage, is that right?

A. I asked him, sir, yes.

Q. He first turned you down on $50,000.00, is that right?

A. He did.

Q. Then he refused to subordinate his mortgage?

A. Yes, sir.

Q. To a new mortgage?

A. Yes, sir.

Q. For $50,000.00?

A. Yes, sir.

Q. And then after that, within a few days after that, you had this meeting with Mr. Huebner down on the porch?

A. No, I don't recall—I don't think—it seems to
1046 me there was an interlude in between that meeting—those meetings and this meeting about Mr. Huebner—about coming in my porch.

Q. A little interlude of a few days?

A. I don't know if it was a few days or a month, but there was an interlude there.

Q. But, anyway, you had a meeting down on the porch, and you had this talk with Mr. Huebner, and you showed him the documents, and then we have the sale of the Haberkorn Candy Company; isn't that the sequence of events?

A. Yes, sir. But I was to give him—

Q. That is all I asked, whether that was the sequence of events.

A. Yes, sir. Shortly after that Haberkorn was sold.

Q. Now, figuring in that deal, however, was the mortgage which had been put up with the Sterling Trust Company of New York?

A. I don't know. I just call it the Sterling Bank, sir.

Q. The Sterling Bank. So that we get this transaction straight in your mind, the Sterling Bank had advanced you $75,000.00 on notes which had been guaranteed
1047 by Mr. Cain, isn't that correct?

A. That is correct, sir.

Q. And you had gotten in default on that mortgage after you had paid a few payments?

A. Well, sir, I don't think we ever went into default on the mortgage, but—at any time, but if I recall—

Q. You testified yesterday that you went in default, didn't you?

A. Sir, I can refresh my memory at night.

Q. Oh, yes, I have no doubt you can. But did you testify yesterday that it went in default?

A. Well, sir, if I did, I don't know whether it went in default or not, but I think the reason now is the fact that—was the fact that about this time we were asking our creditors to give us a plan of deferred payment whereby we could pay them all over a period of several years.

Q. Now, I didn't ask you anything about a deferred plan. I asked you whether or not your note went in default. You can answer that yes or no.

A. I don't think it did, sir.

Q. You had paid how much on it?

A. It was a balance of around $67,000.00.

1048 Q. Whether it went in default or not, you went to see Mr. Cain about it, didn't you, to see if he would take it out and pay the bank?

A. Oh, no, sir.

Q. You didn't?

A. No, sir.

Q. You had nothing to do with that?

A. No, sir.

Q. Did Mr. Cain pick up the note?

A. I never knew, until a little later, that he did, sir. And I remember the reason why it happened.

Q. I asked you whether he did or not. Did he pick up the note at the Sterling Bank, if you know?

A. Yes, sir; he did.

Q. And paid off the bank loan, did he?

A. I don't know whether he paid off the bank loan, sir. I have no way of knowing what he did, sir.

Q. You have no way of knowing whether the bank loan was paid?

A. No, sir, I don't know.

Q. Did the Sterling Bank ever attempt to collect from you, in the future after that transaction?

A. No, sir.

1049 Q. You know very well it was paid, don't you?

A. Sir, I don't know whether he still owes the bank for it or not. I don't know.

Q. Wait a minute. Have you testified here in this case that he did pay it?

A. I don't recall that he paid it, specifically paid it.

Q. I didn't ask you that. I said have you testified to that effect?

A. I don't recall the testimony, sir. Anyway, the bank didn't look to me, sir.

Q. You know that, don't you?

A. Yes, sir.

Q. And you know that you got the $75,000.00; you knew that much about it?

A. Oh, yes, sir.

Q. Are you a novice in these affairs with banks?

By Mr. Lockley: I object, your Honor.

By Mr. McConnell: No, he is trying to make it appear that he doesn't know how these transactions are handled.

By the Court: I didn't hear the question. State it again.

By Mr. McConnell: Read the question.

1050 (Question read.)

By the Court: He may answer. You may answer.

By the Witness:

A. I am not as smart as I should be, as probably you are, in some of these affairs with banks, but I am learning.

By Mr. McConnell: Well, thank you.

By Mr. McConnell:

Q. When did you just start to learn?

A. I learned—

By the Court: Let's not get into that.

By Mr. McConnell:

Q. Well, now, let me ask you this. Didn't you borrow over $12,000,000.00 during the period of time of the Eatsum proprietorship from banks or from banking establishments?

A. Yes, sir. But let me explain about the $12,000,000.00.

Q. Wait. You have answered my question. You did, didn't you?

A. But not at one time, sir.

Q. No, it was a lot of different transactions, wasn't it?

1051 A. I factored my accounts receivable.

Q. So this isn't the first banking transaction you have had, is it?

A. Factoring is a little bit different than going to the bank and getting any mortgages.

Q. Well, it is different, but this isn't the first time you have been to the bank and borrowed money on notes, is it?

A. I don't recall borrowing any money on notes from a bank, sir.

Q. You never did that?

A. I think—if I recall correctly, I factored my accounts receivable with the Manufacturers Trust, and then when the account got too big we moved over to General Commercial Acceptance. And it is true, sir, that of all the accounts receivable I borrowed was $12,000,000.00. And I also testified, sir, that it didn't mean I owed them $12,000,000.00. But if I got $10,000.00 today and paid it back the next day, and got 10 or 15 thousand the next day, that you added the two together it was a total amount. I got 80 per cent of my accounts receivable.

Q. And you kept factoring your accounts and putting up bills of lading, and invoices, and that, didn't

1052 you?

A. From the day I was in business.

Q. And that is a simpler transaction than borrowing money from the bank on a mortgage?

By the Court: You are arguing with the witness.

By Mr. McConnell: He is trying to tell us he doesn't know anything about business.

By Mr. Lockley: He hasn't said any such thing.

By Mr. McConnell: He is trying to give us that impression.

By Mr. McConnell:

Q. Now, this mortgage which the Sterling Bank had was assigned to Mr. Cain after he paid off the note, wasn't it?

A. Well, sir, I don't know how it was assigned to Mr. Cain, or whether — I have no specific knowledge whether Mr. Cain paid off the mortgage, or whether he paid it off, or whether he didn't pay it off. All I know is

Mr. Cain now had the mortgage on the property.

1053 Q. That's right. You knew that much about it?

A. That's right. Mr. Cain's reputation was such that maybe he didn't have to pay off the note. So that is why I don't know if he has paid off the mortgage. He is five times a millionnaire. He has told me that himself.

Q. So you think he got it for nothing?

A. No, but with a reputation like he has got, he could sign it on his own signature.

Q. Why are you telling us that he is five times a millionnaire? Do you want to prejudice this case?

By Mr. Lockley: Your Honor, he is continually arguing with the witness.

By Mr. McConnell: He is volunteering statements, telling the jury that the man is worth five million dollars. It is not an answer to any question.

By the Court: If the answer isn't proper, you could make a motion.

By Mr. McConnell: I move to strike it, and ask that the jury be instructed to disregard it.

By Mr. Lockley: I move to strike counsel's com-

1054 ments.

By the Court: Go on with the examination.

By Mr. McConnell:

Q. You know very well that he bought the note at the bank, don't you?

A. No, sir; I don't.

Q. You don't know that?

A. No, sir.

Q. You know he got the note?

A. Yes, sir.

Q. And you know the note was secured by a mortgage on your property, the farm, and the corporation, General Confections, don't you?

A. Yes, sir, and the machinery.

Q. And the machinery?

A. Yes, sir. And Saddle River Farms.

Q. And by the way, the machinery had an appraised value by the American Appraisal Company of how much?

A. I believe it was $75,000, or $80,000, maybe a hundred. I don't remember, sir.

Q. Wasn't it $128,000?

A. I don't remember, sir.

Q. What kind of machinery was it?

1055 A. It was revolving kettles, and pans, and so forth, and so on, and packing tables, and chairs, and scales.

Q. And you put $80,000 into improvements on the farm out of General Confections, didn't you?

A. I don't know, sir. If you can show me the books or—

Q. No, let's forget the books. Now, you know very well you spent money improving the farm down there, out of money of General Confections, didn't you?

A. I know I put some money from General Confections into the farm, sir, and I believe that it was charged to me.

1056 Q. On the books of General Confections?

A. Yes.

Q. And it amounted to $80,000.00, didn't it?

A. I don't know that, sir. If you have any papers that can substantiate these figures, sir, I would be glad to look at them.

Q. We will give you the papers.

A. Thank you, sir.

Q. Now, this note and mortgage secured that farm, and your company and all the property you had at that time, didn't it; it was secured by it?

A. You can put it down, sir, as the word "everything."

Q. Everything you had?

A. Yes, sir.

Q. That is, everything that you could see.

By Mr. Lockley: I object to that remark, your Honor.

By the Court: I will sustain the objection.

By Mr. McConnell:

Q. As a result of the transaction your sister ended up, in the Haberkorn transaction your sister ended up owning that mortgage, didn't she?

1057 A. She bought the mortgage, sir.

Q. She ended up owning it, didn't she?

A. Yes, she ended up owning it. Yes, sir.

Q. Yes. Had the mortgage ever been foreclosed?

A. No, sir; the property has been sold.

Q. Have you ever paid any interest on the mortgage?

A. To my sister?

Q. Yes.
A. No, sir.
By Mr. McConnell: Can we have our recess at this time?
By the Court: Yes, we can take the morning recess at this time.
By Mr. McConnell: I want to get some documents.
By the Court: We will take a recess now for ten minutes.
(Short recess.)
By Mr. McConnell: Where are the rest of these documents?
By Mr. Lockley: There were no more documents, counsel. We gave you all there were. You had the wrong number.
1058 92 and 93 are in evidence. 99 has not been offered nor identified. 101 and 102 are in evidence and they are original documents.
By Mr. McConnell: Where are the documents that you identified with the witness as being copies which he had on the porch?
By Mr. Lockley: You hold them in your hand.
By Mr. McConnell: All of them?
By Mr. Lockley: To the best of my knowledge, yes.
By Mr. McConnell:
Q. Now, Mr. Lubben, these documents that are marked here for identification Government's Exhibit 94 to 100—
By Mr. Lockley: Exclusive of 99.
By Mr. McConnell: 99 is not here?
By Mr. Lockley: It has not been offered nor identified.
By Mr. McConnell: All right.
By Mr. McConnell:
Q. —94 to 100, exclusive of 99. On Government's Exhibit 94, can you identify the handwriting on that
1059 document?
A. Yes, sir; I can, sir.
Q. Whose handwriting is it?
A. Mr. Hankermyer's and my own.
By the Court: A little louder, please.
By the Witness:
A. Mr. Hankermyer's and my own, sir.
By Mr. McConnell:
Q. Now, what part is your own; is that the writing on the bottom?

A. The bottom part, sir.

Q. And were those entries made contemporaneously with the transactions which they purport to record?

A. What do you mean, contemporaneously?

Q. You don't know what the word "contemporaneously" means?

By the Court: If he doesn't, there is no use in arguing about it.

By Mr. McConnell: I am just asking if he doesn't know.

By the Court: Apparently he doesn't.

By the Witness:

A. I have no—an idea, but I want to be specific when I answer a question.

1060 By Mr. McConnell:

Q. Well, were they made at the same time or directly after the time of the transaction which they are recording?

A. About the same time, sir, or shortly thereafter.

Q. Were they made at a time when your recollection was better than it is today in the courtroom?

A. My recollection about what, sir?

Q. The transaction.

A. Yes, sir.

Q. So your recollection at that time would be better than it would be when you are testifying here in the courtroom about the transaction?

A. Well, if something happened yesterday, or last week, I could certainly remember it better today than something that happened seven years ago.

1061 Q. I call your attention to an item of June 17th, which you say is in your handwriting?

A. Yes, sir.

Q. Would that entry be made about June 17th?

A. If it says June 17th, sir, that is when it was made.

Q. What year is this transaction?

A. 1946.

Q. The entry says, "In the later part of May we shipped to McDonald Candy Company of—"

By Mr. Lockley: Counsel, do you intend to introduce that in evidence? It has not yet been offered in evidence.

By Mr. McConnell: All right. I will offer it.

By Mr. Lockley: No objection.

By the Court: It may be received.

By Mr. McConnell: Wait a minute. I will offer in evidence the entry of June 17th.

By Mr. Lockley: I object, unless he offers the whole document in evidence.

By the Court: I don't suppose you object to the foundation of the document.

1062 By Mr. McConnell: I am only offering June 17th.

By the Court: I say, then you don't object because it is a photostat copy of another document?

By Mr. McConnell: No.

By the Court: Well, then, if he offers a certain portion of it, you can offer the rest, if you want to, Mr. Lockley. He can limit himself to certain portions of it, if he desires.

By Mr. Lockley: Very well, sir.

(Said portion of document was received in evidence by the Court as aforesaid.)

By Mr. McConnell:

Q. Calling your attention to the item of June 17, 1946, "In the later part of May we shipped to McDonald Candy Company of Eugene, Oregon, 199 cases No. 1 chocolate on an invoice. We also shipped early in June to William Barron Candy Company in Oakland, 70 cases on an invoice. We bought this merchandise for 100 per cent cash as Shotwell needed the money for a corn deal to get corn syrup. It was necessary for us to draw

1063 a check to cash as we sell all goods on an invoice. Check drawn for $27,322.67."

Did you make that entry?

A. Yes, sir; I did.

1064 Q. And that correctly records that transaction, does it?

A. Yes, sir.

Q. Now, were these documents the documents of the corporation, General Confections, the ones I have identified here as 94 to 100, exclusive of Exhibit 99?

A. Yes, sir; I say—I believe they are, sir. I am sure they are.

Q. And you had the originals of them in your possession?

A. Yes, sir.

Q. And at that time there was a receiver in possession, was there not?

A. Oh, no, sir. No, sir.

By the Court: At which time? You will have to be more definite.

By Mr. McConnell:

Q. Well, when was the receiver appointed?

A. March 8, 1948.

Q. In February you had these documents out at your barn?

A. February?

Q. Yes.

1065 A. Of what year, sir?

Q. Of '48?

A. Yes, sir; they were there then, sir.

Q. Is that where you kept the records of the company, in the barn?

A. Well, sir, we didn't have too much room in the office for records, for previous records—I mean, for a lot of the records that came from the General Confections' factory. It was much larger in New York. This was much smaller. And the barn was a good and dry barn. And it was upstairs in the top where it used to be for hay. And they were all in these trans-files, all labeled.

Q. Now, I believe you testified on your direct examination that as far as the partnership was concerned, you just put on your hat and walked out of the place, is that your testimony?

A. I don't recall testifying to that, sir, in my direct testimony. I can explain how I left the partnership, if you really want to know.

Q. All right. Suppose you do.

By the Court: You are now speaking of the Eatsum partnership?

1066 By Mr. McConnell: Eatsum Food Products Company.

By Mr. Lockley: At this time, your Honor, I wish to call your attention to the fact that counsel promised that he would connect up all of the Haberkorn deal, the $75,000 mortgage, the $50,000 loan, the sale of the mortgage, and so forth, with these defendants. I submit he has failed to do so. And I now make a motion that it be stricken. He is apparently going off on another subject at the present.

By Mr. McConnell: I would like to finish my cross examination before the Court entertains that motion.

By the Court: All right.

By Mr. McConnell:

Q. Will you proceed, Mr. Witness?

By the Court: I think he asked you, Mr. Lubben, to explain the circumstances under which you left the Eatsum Food Products Company when it was a partnership.

By the Witness:

A. In February, sir, of 1946, I began to consum-
1067 mate a plan that had been my desire from June of 1949. By that I mean I wished to get out of a partnership, and I went. And I asked my partner to split the thing down the middle, the way it was in the beginning, and I would go my way and he would go his way.

He told me, "What for?" He says, "We like you. You are a nice guy. You make a lot of money. No, stay in the place."

I said, "No, sir, I don't want to stay in."

And he said, "Well, we are not going to let you out on a 50-50 basis."

I said, "Look. I want to get out of here on any basis."

1068 So I went and I asked for advice to my friend Mr. Blumberg, who is an official of General Commercial Acceptance and who was always a very nice gentleman to me. And I asked him for advice, and I told him that I wanted to get out of there, and he said, "Dave, any price you pay will be a good price."

And I went back and I told him, "I want to get away from here."

By the Court: Speak up.

By the Witness:

A. "I want to get out of here." And the result is, sir, I left him the accounts receivable, I left them the money in the bank, I gave them all of the inventory—but mind you, sir, I was a fifty per cent partner in this thing—all of the inventory, and I gave them everything, with the exception of the desk I had when I came with them, plus the leasehold on the plant up in the Bronx, and the machinery that I had in the Bronx.

And then if that wasn't enough, they went through the files. So that is what they wanted. And I agreed to it.

In other words, the inventory was $375,000.00.
1069 Half of it was mine, because I was a fifty per cent partner in the company. And then Mr. Roth and

Mr. Giglio—Mr. Roth especially—went through the books and he found out that I had paid a $2.00 deposit to the McKesson Robbins, or somebody, for an oil drum, and he charged that back to me, and he charged me back $6.75 for something here, and $1,200.00 deposit on the electric light, and I think it was something on some raisins—I don't recall correctly—that had shrunk in the warehouse. Also the stock of the Blue Ribbon Trucking Company, which was owned by the partnership, the $17,500.00 worth of stock. And I had to pay for it over again. But I agreed, sir.

1070 And I got out. And I went up to the Bronx, and I didn't have any money—I believe, sir, if I recall correctly, I had very little money. But I had the farm over in Hillsdale, that wasn't completely paid for.

So I went to Mr. Blumberg before I went on this deal and I said—the inventory, if I remember correctly—and if I had records I could refresh my memory—was $375,000.00—oh, the condition was the inventory, that they took the inventory, but I had to buy the inventory back. So I was buying back my own property.

And so, sir, I went to Blumberg and Mr. Blumberg recommended me a firm of attorneys, a very high class firm—

By the Court: Perhaps you better shorten it, Mr. Lubben. I don't know as we need all the details.

By the Witness:

A. Anyway, sir, I borrowed the money from General Commercial Acceptance, and I paid my partner back for this inventory. And I paid them all back, sir. And when I paid so much back—I paid $2500.00 a week in notes; and then the balance of the money, I think, was

1071 $12,000.00 balance—oh, the condition of the sale, sir, was—and it was all legal, drawn by reputable attorneys, sir, that the—the condition of the sale was that the partnership was going to continue in existence after I left, which it did, and they would pay the income tax, as set forth on the books of the company, as drawn out by me.

And when the time to pay the income tax came around, sir, they wouldn't pay the income tax. And so I wrote them letters and asked them, and everything else, and they weren't interested in paying my income tax, sir.

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So it came time to file my report. I attached a copy of the dissolution agreement to my income tax form, also some copies to show the registered—where I sent letters "Return receipt requested" and I sent it to the income tax man. And I sent them in a partial payment.

And that is the money, sir, that I owe the government. And some day, with the grace of God, I hope to be able to pay it back.

I was also told, sir, at the time that if I ever opened my mouth about this—by Mr. Giglio—I would find myself in a cement box on the bottom of the Hudson
1072 River.

When he told it to me, sir, he had some people in his office whose character I found out since that have been—were very, very bad people.

And, sir, that is the reason I have asked Mr. Twohig to be with me, because you, sir, and these people here have been seen in direct contact with these people. I left them. I knew what they were.

But, sir, that is why I am worried and I have Mr. Twohig with me.

By Mr. McConnell:

Q. You say I have been in contact with some people. Who; what people are you talking about now?

A. Mr. Howard Lawn, sir, and Mr. Giglio. I don't say you have, sir, but there has been people at your defense counsel that have been in contact with these people. And, sir, you were in Hackensack talking to Howard Lawn and conferring with him when this case was on in Hackensack, sir, and you knew who he was.

1073 By Mr. McConnell: Will you mark this document Defendants' Exhibit 10 for identification?

(Said document was marked Defendants' Exhibit 10 for identification.)

By Mr. McConnell:

Q. I show you a document, or a photostatic copy of a document which purports to be an agreement under the 4th day of June, 1946, between Eatsum Food Products, William J. Giglio, General Confections, and David G. Lubben, and ask you to look at the signatures on that document, and state if you will, whether you can identify them?

A. Yes, sir, they are my signatures, sir.

Q. Who else?

A. And the signature above appears to be Mr. Giglio's, and the witness is Roy Hankermyer.

By Mr. McConnell: I will offer in evidence this document, Defendants' Exhibit 10 for identification, because I want to examine the witness on it. I offer in evidence Defendants' Exhibit 10.

By Mr. Lockley: I fail to see the materiality, your Honor, but if the defendant wants to offer it, I have
1074 no objection.

By the Court: Well, if you have no objection, it may be received.

(Said document was received in evidence by the Court and marked Defendants' Exhibit 10.)

By Mr. McConnell:

Q. Mr. Lubben, under this document which you have just identified, you agreed to purchase the inventory for $339,052.77, and you executed notes, you were to execute notes in the amount of $98,277.67.

What was the inventory? What did it consist of?

A. Cartons and boxes and cellophane, and printed with the Eatsum label on it; and some raw materials such as peanuts and raisins and dextrose, and things of that sort, sir.

Q. You already had at this itme, on the 4th day of June, 1946, acquired the machinery, had you not?

A. Well, sir, the reason that document is—

Q. Had you acquired the machinery at that time?

A. Had I acquired it?

Q. Yes.

1075 A. Yes, I had it, sir.

Q. Free of any claim of the partnership, is that right?

A. No, sir, it was—no, sir.

Q. Well, how had you acquired it?

A. Well sir, the understanding was that we were to part company on March 9th or March the 8th, somewhere around there, at that time, and then when it came time to sign the papers, Mr. Giglio wouldn't sign the papers, sir, and he had me over a barrel, and he wouldn't sign the papers until some time in June.

I believe he says until the fiscal year ended. And here,

I was doing a business in a plant under the name of General Confections, and I was paying my borrowed money from the factor to pay him on the inventory of something which I didn't even have a legal title to, and he wouldn't sign it until June, sir.

Q. He did sign in June, did he?

A. Yes, sir.

1076 By Mr. Lockley: If your Honor please, I am again going to object to this whole line of questioning on the ground it fails to show any materiality, any connection between the defendants in this case and the witness. If he has any purpose in going into this, I fail to see what it is up to this time. He has failed to connect it up.

By the Court: I don't appreciate the materiality at this time.

By Mr. McConnell: The materiality of it at this time is—

By Mr. Lockley: If you are going to make an offer of proof, Counsel, I suggest we do it outside the presence of the jury.

By Mr. McConnell: All right.

By the Court: We can do it out here. Miss Reporter, bring your book up here.

(Whereupon the following proceedings were had beyond the hearing of the jury:)

By Mr. McConnell: What I had in mind, your Honor, was this: When he was in partnership, so-called, with
1077 this fellow Giglio, he was running a cash box, two cash boxes in which he was putting amounts of money and was charged by Giglio of not accounting properly to the partnership for the use of that cash. There was that underlying dispute all the time. He had the highest motive in the world to falsify his records, in order to avoid this dispute he had with Giglio. His statements about it are completely false.

By the Court: Which records are you referring to, the proprietorship records?

By Mr. McConnell: No. The copartnership records.

By the Court: You haven't any of those records with you?

By Mr. McConnell: We have got memoranda of payments out on which he purports to falsify. I can show this was done and the payments were made.

By Mr. Lockley: Just keep your voice down.

By Mr. McConnell: Well, honestly, I can't talk in
1078 just a certain modulation of voice.

As to the motive, it will be shown that he was in this dispute with Giglio where large sums of cash were taken out. He was taking out and spending it on his own account and not accounting for it to the company. That was the underlying dispute. That showed up in the dissolution agreement and the rest of it.

By the Court: Can you connect it up?

By Mr. McConnell: It can be connected up, your Honor.

By the Court: If you don't connect it up any more than you have the Haberkorn matter, I can't see the materiality of that.

By Mr. McConnell: In the Haberkorn matter, I will have direct evidence that this was a blackmail demand.

By the Court: A what?

By Mr. McConnell: A blackmail demand.

By Mr. Lockley: Your Honor, will you admonish counsel to keep his voice down?

1079 By Mr. McConnell. A blackmail demand. The reason for all this Haberkorn deal, the documents he was threatening him with, we learn it is false.

By Mr. Lockley: Your Honor, this partnership—

By the Court: We have a law suit to try and I will try it, and I don't want to go off on a lot of tangents here that would indicate that we are trying something else, besides the Shotwell case.

By Mr. McConnell: I don't want to either. I want to try the Shotwell case, and nothing else but the Shotwell case. I have to try to show the motive of the witness. Here is a man who is trying to swear away the life of another man.

By the Court: You must remember that I have heard motions to suppress. I know the position the defendants have taken, and I appreciate this law suit has got to be tried. The Government has got to establish the guilt.

You cannot expect me to let you go astray as far as
1080 the motion for suppression is concerned. We have had exhibits here that have been admitted. There is evidence here, I take it, for the jury. I am not going to let you go astray here.

By Mr. McConnell: I am not attempting to lead you

astray. I certainly think the question of whether it is admitted or not, is a whole branch of argument. There are reasons why they did certain things, or didn't do certain things in those other proceedings. I wasn't in the case at that time. I have no responsibility for it. I am representing a corporation, and I am recognizing the validity of the evidence.

I think a large part is fake, and I think I can show it before we are through.

I think I have the right to lay the foundation for it, in the cross examination of the witness. Otherwise, I am precluded from making a defense.

By the Court: I don't want you to be precluded from making a defense. But, I don't want you trying other issues.

1081 By Mr. O'Brien: I assure you that the sole and specific items we will come down to—

By Mr. McConnell: We will tie up a foundation.

By Mr. O'Brien: The other transactions are more simple than these two. There are specific items upon which the credibility of the witness is tested.

By the Court: I will hear it and see how far we get. You may proceed.

(Whereupon the following proceedings were had and taken within the hearing of the jury.)

By Mr. McConnell: I believe there was a question pending.

(Whereupon the question was read as above recorded.)

By Mr. McConnell:

Q. When did you acquire it? When did you actually get possession of it, title of it, without any claim against it so far as Mr. Giglio was concerned?

1082 A. I had acquired it physically in March, March 8th or 9th of 1946. Legally, that is, so far as the legal papers were concerned, sir, some time in June, 1946.

1083 Q. Now, by this agreement which we have offered in evidence and received in evidence here as Defendants' Exhibit 10, you got merchandise and inventory on hand on March 9, 1946, and all merchandise thereafter purchased by the partnership at the prices of $308,-

273.92, that was the price shown on the books, was it not?

A. How much?

Q. $308,273.92.

A. But I paid him more than that. There was a lot of other things.

Q. I didn't ask you that. I asked you if that wasn't the price on the books.

A. Whatever was reflected on the books, sir, and we took an inventory that was—that was the price that I paid.

Q. You also got the stock of the Blue Ribbon Trucking Company, fifty per cent of the authorized stock. What was the Blue Ribbon Trucking Company?

A. It was a trucking company.

Q. What did it truck?

A. General merchandise.

Q. It trucked sugar, didn't it?

A. Yes, it did truck sugar and many other items.

1084 It was a common carrier, sir.

Q. It was a common carrier which carried your shipments of black marketing—

By Mr. Lockley: I object, your Honor. It seems to me we are getting far beyond the scope of this lawsuit.

By the Court: The objection is sustained and the question may be stricken.

By Mr. McConnell:

Q. Now was Mr. Carry in that Blue Ribbon Trucking Company?

A. Yes, sir.

Q. And what business was Mr. Carry in?

By Mr. Lockley: I object, your Honor. I have no desire to prevent counsel from bringing forth any defense, but it seems to me he is going far astray.

By the Court: He may answer.

By Mr. McConnell: Ordinarily counsel permits another counsel to ask a question without interposing an objection.

By the Court: He has a right to make an objection to protect the witness.

By Mr. McConnell: I don't think this witness needs

1085 any protection.

By the Court: He may answer.

He asked you, Mr. Lubben, who Mr. Carry was.

By the Witness:

A. He was in the trucking business at that time, sir.

By Mr. McConnell:

Q. Did he stay in the trucking business after you went in your sole proprietorship? I mean in the corporation, General Confections.

A. He was in the trucking business the first time I met him, sir, and continued it, to the best of my knowledge.

Q. He continued on in it all the time that you knew him?

A. Yes, sir.

1086 Q. Now, this corporation, I mean this copartnership that you say you walked off from and had to pay money to get back your own property, you didn't put any money into that partnership, did you?

A. Why, sure. I didn't put any money in but the sole proprietorship was mine at the start.

Q. Well, you were paid for that when you went into the partnership, weren't you?

A. Fifty per cent of it, sir, so therefore, I had 50 per cent, so that was mine.

Q. And you were paid all of the net worth, weren't you?

A. No, sir. You mean they paid me all and let me continue on as a 50 per cent partner?

Q. Isn't that what happened?

A. No, sir.

By Mr. McConnell: I ask that this document be marked Defendants' Exhibit 11 for identification and this be marked Defendants' Exhibit 12 for identification.

(Said documents were marked Defendants' Exhibits 11 and 12 for identification.)

1087 By Mr. McConnell:

Q. I show you a document which purports to be a letterhead of Bernard Bereu & Company, a balance sheet of the Eatsum Food Products Company under date April 30, 1945; and ask you if you can identify the signatures on that document?

A. I believe I identified my signature here yesterday, sir.

Q. Well, maybe you are doing it twice, but will you please identify it now?

A. Yes, sir. That is my signature.
Q. And Bernard Bercu's?
Q. Bercu?
Q. Yes, sir.
A. I am not familiar enough with his signature to know whether it is his signature or not, but it appears to be.

By Mr. McConnell: I offer this document in evidence.
By Mr. Lockley: What is the exhibit number?
By Mr. McConnell: Defendants' Exhibit 11.

By Mr. Lockley: I object to Defendants' Exhibit
1088 No. 11, your Honor, on the ground that no proper foundation has been laid for the introduction of the photostatic copy and that it is immaterial to the issues.

By the Court: Well, what is your position with respect to the objection, Mr. McConnell?

By Mr. McConnell: It is a photostat. He has identified the signatures on it.

By Mr. Lockley: Well, your Honor, he objected to our photostats under the same circumstances.

By Mr. McConnell: I can't account for the original with this witness.

By the Court: What is the purpose of the offer?

By Mr. McConnell: The purpose of the offer is to show that his statement that he didn't receive back the total net worth of the sole proprietorship at the time of the dissolution of the partnership is false.

By the Court: What has the relationship of that
1089 to do with the issues of this lawsuit?

By Mr. McConnell: It has to do with whether this witness is telling the truth.

By the Court: We are not interested in testing the witness's credibility on immaterial matters. We can spend months here in going through all these matters that aren't a part of this lawsuit.

By Mr. McConnell: I don't want to try another lawsuit at all, but that is the beginning of the co-partnership and it leads up to the matter I discussed with you.

By the Court: I will reserve the ruling on it. You can go forward with what you discussed with me and I will see if it has any relevancy.

1090 By Mr. McConnell:

Q. I show you document which is marked for identification Defendants' Exhibit 12, and ask you if you can identify the signatures on that document?

A. Yes, sir.

Q. Whose signatures are they?

A. David Lubben and William Giglio. The check is made out to the Eatsum Food Products Company, and it says, "New account".

Q. That means a new account of the co-partnership, doesn't it?

A. Yes, sir.

Q. That is a check drawn on that account?

A. It says, "For deposit, the account of Eatsum Food Products Company."

Q. That is the old company, isn't it?

A. No. I think it is the new company. We took it in to the new company.

Q. You think the new company drew a check to itself and deposited it the same day?

A. Sir, I am not an accountant, a certified public accountant.

By Mr. Lockley: I object to that, your Honor.

1091 By the Court: Speak up.

By the Witness: Sir, I had an accountant, and I was told at the time—and my bookkeeper can go into this thing here. I don't know the mechanics of it, but I know what my accountants told me: You have to take the money from one company and put it in the new company, and I got my pay from the new company, and I only got half of it, sir, and that's all I got.

B Mr. McConnell:

Q. That check is for $67,000?

By Mr. Lockley: If the Court please, that document is not in evidence. I have no idea what it is. I have not seen it.

By the Court: I will sustain the objection.

By Mr. McConnell: I offer this check in evidence.

By Mr. Lockley: No foundation has been laid for the absence of the original, your Honor. However, if counsel is willing—if counsel will stipulate, we can put in

1092 the photostats that we have, we will agree to the admission of the photostat of the defense.

By Mr. McConnell: I called on you to produce the original.

By the Court: I didn't hear you.

By Mr. McConnell: I called on him to produce the original. He has got the original of that check.

By Mr. Lockley: That is the original check that belonged to the partnership, your Honor, and we have had some discussion about the partnership records, outside of the presence of the jury. I think your Honor understands why they aren't here.

1093 By Mr. McConnell: There is a sufficient foundation, because the original records are not available.

By the Court: Well, did I understand then that both counsel recognize that the photostatic copies of all records of the Eatsum Food Products Company, a partnership, may be received without any further foundation? Is that the understanding?

By Mr. O'Brien: Yes.

By Mr. McConnell: That was the understanding, as I understood it when we were arguing it.

By the Court: Then there can be no objection to the foundation.

By Mr. Lockley: Very well, your Honor. I object to it on the materiality.

By the Court: Well, I will reserve my ruling until I have determined whether or not it has any materiality. You may proceed with your examination.

By Mr. McConnell:

1094 Q. Now on the balance sheet here which is Defendants' Exhibit 11 which purports to be a balance sheet of the Eatsum Food Products Company, the sole proprietorship, as of April 30, 1945, what is the net worth shown as of that date?

A. This is a net worth after taxes of $67,074.28.

By the Court: Didn't you go into that yesterday?

By Mr. Lockley: Yes, your Honor.

By the Witness: Yes, sir.

By Mr. McConnell:

Q. And what is the amount of this check?

A. $67,000.00.

Q. Now that check went into your own private bank account, didn't it?

A. No, sir, it didn't.

Q. It went into the Eatsum Food Products, the old account, didn't it?

A. I don't recall. I believe it went into the partnership account. When my accountant comes here you can ask him and you can ask Miss Feldman, my bookkeeper. My bookkeeper and my accountant will tell you what happened to the money.

By Mr. McConnell: I ask that this document be
1095 marked for identification Defendants' Exhibit 13.

(Said document was marked Defendants' Exhibit 13 for identification.)

By Mr. McConnell:

Q. Now the partnership wasn't in existence in January of 1945, was it?

A. The partnership was not in existence in January of 1945, sir.

Q. I show you a statement of Eatsum Food products Company, 1841 Broadway, New York 23, New York, at the Manufacturers Trust Company, and ask you if you can tell me whether that is a statement of the account of the old sole proprietorship, Eatsum Food Products Company?

A. Well, sir, it appears to be, but I think Miss Feldman could identify it much better than I could, sir. She is the one that took care of these records and I don't—

Q. Well, it doesn't appear to be a partnership bank account, does it?

A. No, sir. It says "January, 1945" over here (indicating).

Q. And the partnership wasn't in existence on that day, was it?

1096 A. No, sir.

Q. Now under date of June 15th of 1945, do you find a deposit—

By Mr. Lockley: I object, your Honor, unless he lays a foundation for the introduction of the photostatic copy in evidence. That is a photostat of something which occurred outside of the partnership, and he is reading from it to him without offering it in evidence.

By the Court: Offer the document in evidence before you read from it.

1097 By Mr. McConnell:

Q. Well, would you state whether or not that is a true and correct copy of your account with Manufacturers Trust Company?

A. Well, sir, they made a lot of mistakes. Many times when you went over there—once, I remember, sir, when we cashed one of these checks we came back with about $700.00 too much.

Whether this is a true and correct copy, sir, I wouldn't know. You would have to ask Miss Feldman.

Q. Well, you had an account at the Manufacturers Trust Company?

A. Yes, sir.

Q. After seeing that document, do you still tell this jury you didn't get $67,000.00?

By Mr. Lockley: I object, your Honor.

By the Court: He may answer.

By the Witness:

A. I am looking right directly at the jury and I am under oath and I, for my part of the partnership, never received $67,000.00 and I am under oath, sir, and I remember it.

By Mr. McConnell:

1098 Q. You never received it on June 15, 1945?

A. I said I, David Lubben, personally never received $67,000.00. There were some mechanics that you have to do. I am answering you, sir. There were some mechanics that you had to go through to make the partnership. I don't know. When Miss Feldman comes in and my certified public accountant comes in, ask them. They know how. I don't know how the story was, sir, but it was legal and correct.

By Mr. McConnell: I ask that these documents be marked for identification Defendants' Exhibits 14-A and 14-B.

(Said documents were marked Defendants' Exhibits 14-A and 14-B for identification.)

By the Witness:

A. Sir, I remember something else about that transaction.

By Mr. McConnell:

Q. I haven't asked you any question. Your counsel can ask you about anything that you want to explain.

A. I was just giving you some additional information, if you wanted it.

1099 Q. I will ask you what I want.

A. All right.

Q. I show you a document which has been marked for identification Defendants' Exhibit 14-A and 14-B and I ask you to examine that and state whether or not you can identify the handwriting on it?

A. Yes. Some of it, sir, appears to be mine.

By the Court: A little louder, please, Mr. Lubben.

By the Witness:

A. Some of it is mine, sir, and the other part is Mr. Hankermyer and it might have been or—sir, not Mr. Hankermyer. It appears to be Mr. Loperfido. I wouldn't swear to it, sir.

By Mr. McConnell: I offer in evidence Defendants' Exhibits 14-A and 14-B for identification. The signature has been identified on the documents. It is a photostat but it is a partnership photostat, if the Court please.

By the Court: Well, is there any objection?

By Mr. Lockley: Yes, your Honor. We object on the ground that it is immaterial.

1100 By Mr. McConnell: It has to do with these moneys in a cash box in the partnership.

By the Court: I think that this is one of the records of the partnership.

By Mr. McConnell: That is right.

By the Court: Shouldn't you establish some further foundation if you are going to offer the exhibit? He has identified the handwriting but it doesn't appear whether it is a record or what it is. It is just a paper, so far.

By Mr. McConnell:

Q. Well, what is this document, Mr. Lubben?

By the Court: Now, speak up, Mr. Lubben.

By the Witness:

A. It says at the top of it "Money taken in".

By Mr. Lockley: Don't read from it.

By the Court: You stand there, Mr. McConnell. The jury can't hear him. I am sorry, but you have to do it. All right, go ahead.

By the Witness:

A. It is a record of some moneys that came into

1101 the company, sir.

By Mr. McConnell:

Q. A record of the corn box, isn't it?

A. The other one is a record of money going out.

1102 By Mr. McConnell:

Q. A record—

By Mr. Lockley: I object to counsel testifying.

By the Court: He may answer.

By the Witness: Sir?

By Mr. McConnell:

Q. I asked you whether it wasn't a record of the ins and outs of the corn box?

A. Yes, sir. It says so right here (indicating).

By Mr. McConnell: I offer it in evidence.
By the Court: It may be received.

(Said document was received in evidence by the Court and marked Defendants' Exhibit 14-A and 14-B.)

By Mr. McConnell: He has identified the signature on this document as made in his handwriting.

Q. You were a partner at that time?
A. My signature, sir, is not on that document.
Q. Your handwriting is on the document, isn't it?
A. Well, that is different, sir.
Q. The entries are made in your handwriting, are
1103 they not, sir?
A. Some of them are.
Q. You were a partner at that time?
A. Yes, sir.
By the Court: It may be received.
By Mr. McConnell:
Q. The first item on this, "November 3 was taken over from Frankie", that is in your handwriting?
A. Yes, sir.
Q. Who was Frankie?
A. It was Mr. Loperfido, Giglio's cousin.
Q. Was he a partner in the outfit at that time?
A. He had something to do with Mr. Giglio. He was a limited partner for him.
Q. Now you kept this corn box in your own office, did you not, at that time?
A. No, sir, I didn't.
Q. Where did you keep it?
A. I believe the corn box at that time was in the possession of Mr. Giglio.
Q. You kept a record of how much went in it, and how much went out of it?
A. Well, yes, sir, I kept a record.
Q. Did you have access to that box?
1104 A. I would ask Mr. Giglio for monies I did want, and I would get it from Mr. Roth.
Q. Where did the money come from that went into this box?
A. From the sale of corn syrup and as reported on the other page.
Q. Corn syrup sold at over ceiling prices?
A. I wouldn't know. I wouldn't say it was over ceiling

prices. It didn't have to be sold that way. It could have been sold under an invoice, because we had a legal ceiling, sir.

Q. Well, you sold it part invoice, and part cash, didn't you?

A. That is correct, sir. I think we sold some cars for 100 percent invoice.

Q. And this 5½ which is noted on the document, that is the overage, that is the 5½ cents overage on the corn syrup?

A. I wouldn't know, sir. I would have to read the whole thing.

Q. Well, look at it.

A. Yes, sir, that is 5½ cents a pound overage.

Q. It is over the ceiling price, isn't it?

1105 A. I didn't say that, sir.

Q. Isn't it?

A. I didn't say that.

Q. Well, it is over the invoice price?

A. That is correct, sir.

Q. Now did you have some dispute with Mr. Giglio over the cash in that box?

A. What do you mean by a dispute, sir?

By Mr. Lockley: Fix a foundation, when and where.

By the Court: Well, he may answer.

By Mr. McConnell:

Q. Did you have any dispute with him about that box?

A. Yes, sir, we did.

Q. And when did you have that dispute?

A. Almost the day we started in business.

1106 Q. He wasn't satisfied to have you handle that cash, was he?

A. No. That was not the dispute, sir.

Q. Was he satisfied to have you handle the cash in the box?

A. That was not the dispute, sir.

Q. I didn't ask you whether that was the dispute or not. You can just answer my question.

A. Yes, sir. I would say he was very satisfied to have me handle the cash that was in the box.

Q. Did he take it away from you?

A. No, sir. I gave it away.

Q. You gave it and he took it, is that it?

A. I didn't give it to him, sir. The first time I gave it to Mr. Loperfido, who was his cousin.

Q. That is Frankie?
A. Yes, sir.
Q. Well, this entry says "November 30, taken over from Frankie."
A. I think at that time, sir, Frankie left the partnership. He had some trouble with Mr. Giglio, his cousin.
Q. And he left so you took it over from Frankie at that time, at the time Frankie left?
A. I don't know whether I took—no, I did not
1107 take over the box. I took over the keeping of the records, sir. There was some talking in the past and Mr. Roth would tell me that Frankie was taking money out of the box and couldn't account for it.
Q. You mean he was pinching?
A. I didn't say that, sir.
Q. You had a dispute about it as soon as you got in there, is that it?
A. Yes, sir, with Mr. Roth, sir, constant.
Q. I didn't ask you about Mr. Roth. I asked you about Mr. Giglio.
A. Well, Mr. Giglio—Mr. Roth spoke for Mr. Giglio.
Q. But as late as November 30th, after the partnership was formed, you were already making entries with reference to the corn syrup?
A. For a short space of time, sir. That is when Frankie walked out.
Q. Was the box kept in Mr. Giglio's office?
A. Yes, sir, it was.
Q. Now, what was that box that you talked about?
A. Later on, sir, the box was kept—once I went to Frankie and asked him for some money and the box was kept in Mr.—he said the box was in the safe in Mr.
1108 Giglio's home so when I would ask for some money, I couldn't get it that day; I would have to wait until the next day to get it when they brought it back.
Q. You withdrew money from that box from time to time, didn't you?
A. Yes, sir.
Q. How much money did you withdraw while you were a partner?
A. You mean me, personally?
Q. Yes, you personally.
A. From my personal account?
Q. How much money did you withdraw personally,

whether or not it was your account or not?

1109 By the Court: Are we going to go over the entire account he had with Mr. Giglio on the cash box?

By Mr. McConnell: No, we are not.

By the Court: You contend that this has a relationship to the Shotwell Company?

By Mr. McConnell: Yes, I do.

By the Court: I wish you would arrive at that point of your inquiry.

By Mr. McConnell: Can I have an answer to this question, if the Court please, that is now pending?

By the Court: You want to know now what money he drew out of the cash box?

By Mr. McConnell: Yes.

By the Court: Whether it was for his personal use, or for the business, or partnership. Obviously, that involved accounting—I just can't see it.

By Mr. McConnell: He took hundreds of thousands of dollars out.

By Mr. Lockley: I will object to that, your Honor.

By the Court: I will sustain it.

1110 By the Witness: I think you know that answer better than I do.

By Mr. McConnell: I ask that these documents be marked for identification Defendants' Exhibits 15-A, 15-B, 15-C, 15-D, 15-E, 15-F, 15-G, 15-H, 15-I, and 15-J.

(Said document were marked Defendants' Exhibits 15-A, 15-B, 15-C, 15-D, 15-E, 15-F, 15-G, 15-H, 15-I, and 15-J, for identification.)

By Mr. McConnell:

Q. I show you documents which have been marked for identification 15-A to 15-J, both inclusive, and ask you if you can identify the entries on those sheets as to who made them?

A. No, sir.

Q. You don't know in whose handwriting they are?

A. Some of it appears to be in the handwriting of Miss Feldman, sir, and others, is not hers, sir. I don't think it is, anyway. To me, it appears—

By the Court: A little louder, please.

By the Witness:

A. To me it appears there are four or five—

1111 several handwritings here, and then there is also some typewriting. I don't know who used the type-

writer. There is no signatures. So, sir, I don't know.
By Mr. McConnell:
Q. What do those records purport to be?
A. They appear to be, sir, a record of transactions in the business of corn syrup, of the partnership. It is a record, sir, that I requested to be kept.
Q. That you requested to be kept, is that it?
A. Yes, sir.
Q. Well, now, will you tell us about this dispute of yours with Mr. Giglio?
A. Well, sir, he just—
By Mr. Lockley: I object, your Honor. I thought we just went over that a moment ago.
By the Court: I thought so.
By Mr. McConnell: I don't think we ever got to it. I didn't think we got to it, Judge. He wanted to tell it.
By the Court: He went and gave you a long, long answer regarding his dispute with Mr. Giglio. That is my recollection.
1112 By Mr. McConnell: Well, let me ask the witness this—
By Mr. McConnell:
Q. Is there something about the dispute that you haven't already told us?
A. Well, sir, we had a continued dispute. I don't know whether there was something I haven't told you or not.
By the Court: From the looks of it, I would think it was covered.
By Mr. McConnell: If the Court please, there is one short inquiry I would like to make and it won't take long.
By the Court: I am sorry, I didn't hear you.
By Mr. McConnell: There is a short inquiry I would like to make.
By the Court: Ask him the question, and let him answer. You asked him the question: To relate the circumstances of his dispute with Mr. Giglio.
By Mr. McConnell:
Q. What dispute did you have with Mr. Giglio about the bookkeeping?
1113 A. The dispute—the constant dispute, sir, was the fact, that we didn't like the cash box, and I preferred to draw checks for cash and handle it that

way, and he didn't like it, and he wanted to sell, like, all of this corn syrup, sir, and there was absolutely no reason for this corn syrup to be sold for cash and invoice. We could have taken a legal ceiling from one of the biggest people in the east, and sold it that way, but that is the way they wanted it, and that is the way it was.

1114 Q. That was the way Mr. Giglio wanted the transaction?

A. Mr. Giglio and Mr. Roth wanted that money handled that way. He got so, sir, he didn't even want us to take the money out that was due Shotwell. That was why I couldn't get the money out any longer, out of the box, to pay Shotwell, and that is why I got the checks, because I knew I was going out and in addition to my walking out of the place I had to assume many thousands of dollars worth of debts, the debts of the partnership. One of them was the money I gave Mr. Huebner for the overages that were accrued by the partnership and not by the corporation.

Q. Let me get this straight.

A. Because if I didn't continue, sir, I couldn't have gotten any more merchandise.

Q. That was a nice speech, but I didn't ask you anything about it.

A. You asked me for an explanation, sir, and I gave it, to the best of my ability. I am sorry if it wasn't what you wanted.

Q. I asked you as to the dispute, as to the bookkkeping record. It was about whether or not you should

1115 keep records of the cash box, wasn't it?

A. I don't know, sir. Miss Feldman will tell you about that. They didn't—

Q. All right. Now, let me ask you about this: Whatever your dispute was, whether you had a dispute or didn't have a dispute, during the partnership time ,you didn't draw any checks to cash in making over-ceiling payments, but paid over-ceiling payments out of the cash box, isn't that true?

A. No, sir.

By Mr. Lockley: I object to counsel assuming something in his question.

By Mr. McConnell: I am cross examining.

By Mr. Lockley: That is not the evidence.

By the Court: I will sustain the objection.

By Mr. McConnell:

Q. These payments that you claim you made to Mr. Huebner during the time of the partnership, you got that money from the cash box, you say?

A. Not all the time, sir.

Q. Well, what time didn't you?

1116 A. Well, many times, sir, that I drew checks for cash.

Q. During the partnership period?

A. Yes, sir.

Q. But there were some that you didn't draw the checks to cash for, is that it?

A. That is correct, sir.

Q. So there was nothing in your dispute with Mr. Giglio which would prevent you from drawing checks to cash, was there?

A. Yes, sir. We had constant arguments about it, Mr. Roth and myself.

Q. Whether you had the arguments or not, you did draw the checks to cash, did you not?

A. I did, sir.

Q. Now leaving that subject for a moment, I want to go to this deal that you had with Mr. Cain at the Riviera Club.

By Mr. Lockley: Your Honor, I move to strike out the previous testimony on the ground that counsel has failed to maintain his promise that he would connect it up with his lawsuit.

By Mr. McConnell: I think I stated it to your

1117 Honor.

By the Court: How is that?

By Mr. McConnell: I think I stated it to your Honor.

By the Court: I don't hear.

By Mr. McConnell: I think I stated—

By the Court: You can strike it from there.

By Mr. McConnell: I think I stated to your Honor how I was going to connect it up.

By the Court: You are going to connect it up by other testimony?

By Mr. McConnell: Yes.

By the Court: All right. I will let it go in.

1118 By Mr. McConnell:

Q. Coming to the transaction at the club, the

Riviera Club which you told us about, when was that transaction?

A. In August, around August of 1948, sir.

Q. Had the ceiling, the black market ceiling gone off at that time?

A. I wouldn't know, sir. I was no longer in business.

Q. You were out of business at that time?

A. Yes, sir, since March 8, 1948.

Q. Anyway, you weren't engaged in any black marketing operations at that time, were you?

A. No, sir, I wasn't buying any more, sir.

Q. Now, you seem a little coy about this black market. You were in the black market, weren't you?

A. I have never denied I was in the black market. I have never denied it and I will never, never forget it and for which I am very, very sorry.

Q. I show you a document which purports to bear your signature—I will ask the Court Reporter to mark it Defendants' Exhibit 16 for identification.

(Said document was marked Defendants' Exhibit 16 for identification.)

1119 By Mr. McConnell:

Q. Will you look at this document and see if you can identify your signatures both on the affidavit part and on the body of the document? You don't have to read the document.

A. I am only, sir, looking at my initials on the page. Each one is an initial.

Q. All right.

A. That is my signature, sir.

Q. Now, who was present at this meeting again at the Riviera? What was it, a tavern or roadhouse or what?

A. No, sir. It is a very high class night club.

Q. Had you been there before?

A. I think I had twice, sir.

Q. Was it near your place?

A. It is about half way between my house and the Gotham Hotel.

Q. On the Jersey side?

A. Yes, sir.

Q. Had you taken Mr. Cain there before?

A. No, sir.

Q. What time of the day was this meeting at the Riviera?

1120 A. It wasn't daytime, sir. It was nighttime.

Q. Well, what time of the night?

A. Oh, I would say it probably was around 11:00 or 11:30 when I arrived there.

Q. And Mr. Davidson was with you?

A. Yes, sir.

Q. What time did you get this call to come to this meeting?

A. About 10:00 or 10:30, sir, in the evening.

Q. And Mr. Davidson just happened to be there, did he?

A. Sir, Mr. Davidson lived in Hillsdale, sir, and very frequently came over to watch television with his wife and—

Q. You just were sitting and watching television with Mr. Davidson, your lawyer?

A. Well, sir, I think back in 1948, sir, television was very popular and I stayed at the television pretty much then, sir. I enjoyed the programs, so I would stay. I don't remember what we were doing, but I assume we were watching television.

By the Court: I think it is recess time. We will be in recess until 2:00 o'clock this afternoon.

1121 And Thereupon the following proceedings were had herein, in Chambers, out of the presence and hearing of the jury:-

By Mr. O'Brien: I was just saying that I have some concern as to just what was said during the colloquy before the bench, in the discussion on the materiality of certain evidence, between Mr. Lockley, Mr. McConnell and the Court to which I joined later.

The Court made an observation about the disclosure hearing, the fact that the Court had participated in that and that the Court took cognizance of the admissions. The precise statement wasn't too clear to me, and what troubled me particularly was the admission part and I want to be sure that the Court had in mind what I thought, that a distinction is made as to the record there and the record here in the sense that that record, or very little, if any, part of it up to date is in any way

before the jury which is trying the facts in the
1122 case and that therefore, it should not, in itself, be in any way a bar so that we are relegated to the rules of evidence.

1123 By the Court: Certainly not. I told Mr. McConnell the burden of proof rests on the Government to establish the guilt of the defendants beyond a reasonable doubt. Of course, that is true regardless of what may have taken place in the disclosure. My remark is aside from that. After all, I didn't want to be led over a lot of irrelevant field by way of a cross examination that is going to take us into a lot of collateral matters. That is what I directed my remarks to.

By Mr. O'Brien: Well, I thought quite sure that was it. I wanted to inquire directly of the Court.

The second matter of concern—there are really two things I wanted to mention. One is on the rulings on the exhibits, whatever they may be, and whether they are proper, when exhibits are presented to a witness during his cross examination, it is foreign to our practice to offer the documents in evidence at that time.

By the Court: How is that again?

1124 By Mr. O'Brien: I say, it is foreign to our practice, or strange to us, to have a document offered in evidence during the course of the plaintiff's case, offered by the defendant, or received in evidence at that time.

By the Court: Well, you don't need to offer it if you don't want to, do you?

By Mr. O'Brien: True. Neither do we understand that that is a condition on which to interrogate the witness on the document to lay a foundation for its offer when we do get around to our case and offer it.

By the Court: You can ask all pertinent questions regarding foundation, but in asking questions regarding foundation, you can't go through the back door and get in contents of the exhibit.

By Mr. O'Brien: No.

By the Court: That is elementary.

By Mr. O'Brien: I agree.

By the Court: I can't conceive that your practice here is any different than any other Federal Court
1125 in the United States. That is the law. You could lay a foundation for a document by asking him, of

course, whether or not this is a true and correct record of the Shotwell Company, or of the Eatsum Food Products, and all pertinent questions that pertain to the foundation, but you can't say, "Well, didn't you say such and such a thing in that document."

By Mr. O'Brien: I agree.

By the Court: Is that clear? I can't conceive of any different practice. It must be new in whatever courts it is in.

The only observation I made—I trust I made it to Mr. Lockley as well as to Mr. McConnell—that is, if he was trying to get into the record part of a document outside of an appropriate foundation questioning, he would have to wait until the document was received in evidence.

By Mr. O'Brien: There is just one further matter, Judge, that I would like to cover.

1126 By the Court: Of course I may say this to you gentlemen here: Here you have a jury and some of the members of the jury I know are going to feel very much irked with what has been prevailing in this case for a long period of time. If we are going to try a lot of collateral questions and explore a lot of irrelevant matters, it certainly isn't going to go to the good will of the jury. You men know that as well as I do. I am perfectly willing to sit here. It makes no difference to me on my time, but while I have in mind what Mr. McConnell was driving at with reference to the Haberkorn Company and with reference to the so-called Eatsum partnership, I think we went into a lot of added material that can't possibly throw any light on the ultimate objective that he has.

Now this man admits he is in the black market and concededly so. Well, we needn't go into all the details of his black market operations. That certainly isn't competent cross examination. It is competent to show

1127 he was in black market operations. It is a relevant inquiry because it may have some bearing on his credibility. But how he operated and all the different details of his black market operations seem to me wholly irrelevant.

By Mr. O'Brien: Judge, on the black market, the corn black market, the question in this case on both sides—

By Mr. Lockley: I don't believe it at all, Mr. O'Brien. Proceed now.

By Mr. O'Brien: What I mean by that is this: This, I can vouch will be connected up as we get around to it. I mean, as we get into our case it will develop, but time has some importance here and several of the items that were last put in evidence by the Government—I am sure your Honor remembers; you took notes—had to do with the corn syrup transactions.

Your Honor will remember the delivery of the money to Graflund, and all that. Now you also remember that there was an overage of seven cents a pound on that
1128 syrup over and above that six cents invoice price.

The relevancy of the corn market and the corn market price at the time the witness is talking about here in that respect, is to show what the going overage was at that time. He has described it as five and a half cents. The truth is, as we have shown with respect to December, 1946, there weren't any overages being paid on corn syrup. Now we don't want to be charged with that overage, any overage on corn syrup. A large amount of this at that stage of the game was brought in for the purpose of their case. We have a mild interest in the corn syrup.

1129 We have a great degree of interest in the corn syrup in our case to the extent that payments were made, if they were made, during a time when the corn syrup market was short. It is necessary to show payments of money in order to offset any receipts the jury may sense came in.

Speaking generally, however, I don't suppose there is any different view between the Court and ourselves upon the rules of evidence. So far, I would be in agreement with what the Court has said.

The one remaining general thing that bothers me somewhat is the apparent requirement that we state to the Court the materiality of a matter on which we are pursuing a line of cross examination, at a moment even that the inquiry is at an early stage, at the very inception of the quest along that line. Now, the rule, as I understand it is one from your Circuit Court, Judge, and the opinion is by Judge Sandburn passing on a Supreme Court decision where he states that a full
1130 cross of the witness upon the subject of his examination in chief is an absolute right and so on, but

when it comes to the Supreme Court opinion which he quotes and on which he relies, the Supreme Court says:

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross. For that reason it is necessarily exploratory and the rule that the examiner must indicate the purpose of his inquiry does not in general apply. It is the essence of a fair trial that reasonable latitude be given the cross examiner even though he is unable to state to the court what facts reasonable cross examination might develop."

Again, that is a principle that must be reconciled with a balancing one.

By the Court: I have no quarrel with that statement. I suppose in general it is true. I think considerable latitude should be allowed and I think I have allowed considerable latitude to the defendants in their cross
1131 examination of Lubben.

We have gone into the Haberkorn matter with a great deal of detail. We have gone into the Giglio matter with a great deal of detail and I gather otherwise that what you are interested in is the transaction involved in the so-called cash box.

Well, there are a lot of matters we have gone into that I can't say have any possible relevancy to the ultimate end that you are seeking to direct the cross examination, but be that as it may, I appreciate there are times when there are questions of an exploratory nature, that at times you may not be entirely clear on what the objective is, but that doesn't mean that counsel can run far afield in collateral matters and try issues that are other than ones we are trying here.

We have a long lawsuit. I take it we are interested in knowing whether Lubben paid premium payments to
1132 the Shotwell Company which they did not report in their tax returns for 1945 and 1946. That is our question, isn't it?

1133 Mr. O'Brien: Substantially. I would say so.

By the Court: Substantially.

By Mr. O'Brien: I add this—

By the Court: You have a right, of course, to attack his credibility as a witness with reference to the payments that he contends he made to Shotwell Manufacturing Company.

Now, these dealings with Giglio, whether he has double crossed Giglio or whether Giglio double crossed him, or what may have transpired there, whether or not he says he got $60,000.00 from Giglio and the fact that he got $150,000.00, it doesn't have the slightest relevancy on the ultimate issue we are trying.

You say, "Well, we are testing his credibility."

Of course you have a right to test his credibility when he has made a statement that is not true, but you only have a right to test his credibility on material things and not immaterial things. Whether he double crossed
1134 Giglio is an immaterial thing in this lawsuit. It is perfectly immaterial except in so far is it refers to the money he contends went into the Shotwell coffers.

Now, you men are well experienced lawyers and I want to give you every opportunity and every opportunity for these defendants to have every defense they are entitled to under the law. I don't want to circumscribe you at all, but I am not prepared to have you wander into a lot of irrelevant fields that will merely becloud the issues we are going to try.

By Mr. O'Brien: I wanted to be sure that your Honor had no such impression.

By the Court: Now our issues are fairly simple. While they may be complicated in the sense that it involves accounting, ultimately, that is what we are trying to find out, whether or not Lubben did pay this money he contends he did.

By Mr. O'Brien: I will say very shortly on that, yes, but as I say, before saying that is right, I think I
1135 would put it this way: The issue is whether Lubben paid the amount or the kind of money that he says he did and whether the company owes a tax on that money.

By the Court: That is true. I appreciate we may also have an issue here as to whether or not in law there was any tax due on this money because you contend that any overages you have received, you had to pay your suppliers, and you are going to take the position, I take it, that one washed out the other and you really had no tax due. I haven't crossed that bridge yet. That is a matter you, I assume, will want to establish, if you can, in your defense but I am saying now that in so far as the Government's case is concerned the issues I have outlined or have tried to outline for you are the only ones before the Court.

By Mr. O'Brien: Right.

By the Court: Obviously you are not going to establish, the Government, or at least Lubben, what money you had to supply.

1136 The issue before the Court so far as Lubben is concerned is whether or not he is telling the truth as to these overages and the amount he contends came—

By Mr. McConnell: If the Court please, I don't think I made myself clear in our talk before the bench, but my point is this: After all, there is a certain amount of this money that was received. There isn't any question about that, as your Honor has already pointed out, but a certain amount of money was spent—

By the Court: I want you to understand that was a mere aside from a judge to a lawyer. I said merely—you have got to bear in mind ultimately if we get into the defense of that lawsuit, you are going to admit you received some of this money.

By Mr. McConnell: Yes.

By the Court: You have already admitted it. Even so I am not so naive that I don't know what makes the wheels go around and around, you should recognize I was justified in keeping you somewhere on the reservation

1137 and not permitting you to wander too far afield.

1138 By Mr. McConnell: The point I want to make is this: After all, while the question of fact is simple, after all credibility is important here. We are dealing with these transactions. We are not dealing with documents. True, we are drawing documents to get the fact, but primarily we are dealing with the simple question of whether or not the witness is telling the truth, as against a witness who will deny in certain respects the receipt of this money. On that basis, if there ever was a situation where counsel should have some latitude to test the credibility of a witness, it seems to me it should be that. I can't test the credibility of the witness if I have to go just on one issue. I have got to have some leeway to move around with this witness, to test his credibility. At least I should think I have to.

It seems to me it is more important in this case than in the others.

I don't want to try a lot of collateral issues, and I am not trying to becloud any issues. I am trying

1139 to get at the fundamental issue of this case, whether or not this witness is telling the truth.

True, a lot of the statements which he has made can be shown to be false, and perhaps are not material in the sense they have to do with the payment of the money, but they are material in the sense they show the man on a matter of substance, doesn't tell the truth.

By the Court: I will just carry that a step further. Supposing Lubben now down in Puerto Rico engaged in some business transactions. You mean we should explore those in order to determine if a man has truth and veracity?

By Mr. McConnell: No. I am talking about transactions in his regular dealings in this whole situation.

By the Court: You are attempting, however, to explore his transactions with Giglio, not in so far as they pertain to whether or not he is telling the truth as to the
1140 money he contends came out of Eatsum into the coffers of Shotwell, or these three defendants, but you want to try him on whether or not when he sold out to Giglio he got the exact sum of money he contended he got.

Well, we have gone into it. I let you go into it. The relevancy and materiality of this law suit doesn't have to do with that. It is a collateral matter. If you want to explore all the activities of Lubben's business in order to determine whether or not he told the truth on every business dealing he has had, while he has been alive, we would be here until next spring.

By Mr. O'Brien: We don't want to do that.

By the Court: I don't think we are going to have any great difficulty, gentlemen. I haven't any objection to having you come in and talk to me this way. It is perfectly all right. I know lawyers' problems, and if you
1141 feel that you would like to come in and talk to me when the United States Attorney is present, about something you think I have been too short with you on, come right in. I will talk it over with you.

By Mr. O'Brien: Thank you.

By Mr. McConnell: Thank you, your Honor.

(Whereupon a recess was taken in the above entitled cause until 2:00 o'clock of the same day, being Friday, September 18, 1953.)

1142

• • (Caption—No. 52 CR 143) • •

Chicago, Illinois,
Friday, September 18, 1953,
8:00 o'clock P. M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley;

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And thereupon the following proceedings were had herein:

By the Court: You may proceed.

1143 DAVID G. LUBBEN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination (Ctd.) by Mr. McConnell.

Q. Now, Mr. Lubben, on the evening of this meeting in the Riviera Night Club you say you were just sitting there with Mr. Davidson listening to television, is that right?

A. Yes, sir.

Q. You hadn't any indication prior to that time that there was going to be a meeting?

A. No, sir; I did not.

Q. Didn't you tell the Government in your statement that Mr. Kramer had arranged that meeting in advance?

A. No, I didn't say that to anybody.

Q. You didn't tell that to the Government?

A. No, sir.

Q. In your statement?

A. No, sir.

Q. Well, now, at this meeting at the Riviera Night Club who was there again?

A. Mr. Byron Cain, Mr.—

1144 By the Court: Speak up, Mr. Lubben.

By the Witness:

A. Byron Cain, Pat Grace, Samuel Davidson, and myself.

By Mr. McConnell:

Q. As I recall your testimony, it concerned the purchase of all of your property, is that it, for $75,000.00?

A. Yes, sir; it concerned the forming of a syndicate.

Q. Who were to be the members of that syndicate?

A. Mr. Byron Cain, Mr. Edward Urban—or the Urbans—and Mr. Morley Kramer.

Q. Well, did they offer $75,000.00 for your property, or did you put that price on your property?

A. No, sir; Mr. Cain said he figured that is what the property was worth.

Q. And that is what he offered?

A. Yes, sir.

Q. Did you say anything about what you thought the value of the property was?

A. I thought it was worth more money, sir.

Q. How much more did you think it was worth?

A. At least $25,000.00 more.

1145 Q. Did you fix a figure of $135,000.00 for the value of the property?

A. No, sir; I did not.

Q. That figure doesn't ring any bell with you?

A. No, sir; it does not.

Q. But, anyway, you didn't think what they offered was enough for the value of your property, is that it?

A. No, I didn't think it was enough, sir. And Mr. Cain told me—

Q. Well, now, that is all I asked you.

A. Pardon me.

Q. I asked you whether you thought it was enough. And you told him you wouldn't take it, didn't you?

A. No, sir; I did not.

Q. You refused to take it?

A. I didn't refuse to take the money, sir.

Q. You didn't agree to take it?

A. I didn't refuse to take it, sir.

Q. Well, you didn't agree to take it, either.

A. No, sir; I did not.

Q. Now, you spoke about a passport. As a result of that conversation, did you get a passport?

A. I did, sir.

Q. Now, when did you get the passport?

1146 A. Shortly thereafter.

Q. So that you had a talk and you had refused to sell your property for $75,000.00, and, as I understood you in your direct testimony, you had told them that you weren't going to leave the country.

A. Sir, I believe my direct testimony was a little different than that, sir.

Q. Well, Mr. Davidson told you, as I recall what you said, that you didn't have to leave the country.

A. That's correct, sir. He told me, and he told Mr. Sullivan and Mr. Grace.

Q. But after the meeting you went out and got a passport, is that it?

A. Yes, sir.

Q. And where was the passport for?

A. South America.

Q. And when was it issued?

A. I'd say probably a week or two weeks afterwards, sir.

Q. Have you got the passport?

A. I have, sir.

1147 Q. Have you got it here?

A. No, sir; I do not.

Q. Have you ever used it?

A. No, sir, I have not. It has never been used.

Q. Now, let me get this straight. You left this meeting at the Riviera after having told them you wouldn't sell your property for $75,000, and still you went out and got a passport, is that it?

A. They told me if it brought more than $75,000 he would send it to me after they deducted the $75,000. And that was my testimony, I believe, sir.

Q. So you were going to get more than $75,000 for your property?

A. No, sir. I told them that I thought the property was certainly worth more than $75,000. And they said, "I think that is all it is worth. We will form a syndicate, and if it brings more than $75,000, we will send it to you, after we deduct our $75,000."

Q. Did you agree to that?
A. I didn't agree to anything, sir.
Q. But you were getting yourself in shape to accept by getting a passport, is that it?
1148 By Mr. Lockley: I object to the conclusion.
By Mr. McConenll: This is cross examination.
By the Court: He may answer.
By the Witness: I beg your pardon, sir?
By Mr. McConnell: Read the question to the witness.
(Question read by the reporter.)
By the Witness: A. Well, I wasn't looking for any law suits, or any trouble with the Government.
By Mr. McConnell:
Q. You were getting yourself ready to go out of the country, is that it?
A. Well, sir, I didn't want to testify against Byron—these gentlemen here.
Q. And that is the reason you got the passport?
A. That is correct, sir.
Q. It wasn't because anybody paid you any money?
A. I didn't get a five cent piece, sir.
Q. You were doing that on your own, then, getting the passport?
A. Correct, sir.
1149 Q. Well, did you go into Pat Grace's office after that meeting?
A. I did, sir.
Q. And who was there?
A. Mr. Grace, sir. There were some other people in his office. I don't recall who they were. I think his brother had an office there at that time. I don't recall it.
But the discussion was in Mr. Grace's office.
Q. Had you gotten the passport at that time?
A. I think I had applied for it, sir.
Q. Did you tell Mr. Grace you had a passport?
A. I think I told him I had applied for a passport, sir.
Q. Did you tell him you wanted more than $75,000 for your property?
A. I did not, sir.
Q. Did you tell him you wanted any sum of money for the property?
A. I didn't tell him anything, sir.

Q. Did you discuss the property at that time?

A. No, sir, there was no discussion of the property at all, sir. The purpose of the meeting was, sir—

1150 Q. I didn't ask you a question.

I will ask the questions.

A. Pardon me. I am sorry.

Q. Now, you said in your statement to the Government that Mr. Cain didn't seem anxious to have you leave the country, didn't you?

A. I don't recall saying that—anything in my statement about Mr. Cain not seeming anxious for me to leave the country. What statement are you talking about?

Q. Did you say that?

A. I don't recall saying that, sir.

Q. Well, was it the fact that he wasn't anxious to have you leave the country at that time?

A. When, sir?

Q. At that meeting in Mr. Grace's office?

A. Mr. Cain wasn't in Mr. Grace's office.

1151 Q. He wasn't there?

A. No, sir. I told you it was only Mr. Grace, Mr. Davidson and myself.

Q. So that if you had that in your statement to the Government, it wasn't true?

A. I don't think you will find that in my statement for the government.

Q. It wasn't true that he was there. Will you go that far with me?

A. I didn't say he was there.

Q. You didn't say it in the government statement?

A. I don't think you can show me a government statement where it shows Mr. Cain was there, sir.

Q. You don't recall whether you said it or not?

A. Well, sir, I couldn't have said it, because it wasn't true.

Q. It wasn't true?

A. Sir?

Q. It wasn't true?

A. I can't see that you can show me a statement where I told the government Mr. Cain was in Mr. Grace's office.

Q. Well, was there any discussion at that time about whether or not Mr. Cain was anxious for you to leave

1152 the country?

A. No, sir; there was no discussion about that whatsoever, sir.

Q. Was the subject even mentioned?
A. No, sir, it was entirely different, sir.
Q. You don't recall any discussion of that topic?
A. No, sir.
Q. And yet you told him—told Mr. Grace you had gotten a passport?
A. I didn't say I had gotten it.
Q. You told him you had applied for it?
A. That's right.
Q. What was the occasion of telling him that?
A. Because the last time, sir, that I had met Mr. Cain and Mr. Grace at the Riviera night club, both of them, sir, were very insistent that I leave the country, and not stay around here to embarrass my friends by being in a position to put the finger on them. And also that I was up to my neck in trouble with the government, as far as the Eatsum Food Products was concerned, for paying black market overages, and so forth.
Q. All right. Now, because of that you told Mr. Grace that you had gone out and gotten a passport, is that
1153 right?
A. Yes, sir. They told me to think it over, sir. I think my testimony states that the last words of Mr. Grace at that time was to think it over—or Mr. Cain may have said it—was to think it over, and don't be too hasty in saying no, and to get in touch with Mr. Grace at a later date, and he was going to find out some more information from the government office downtown.
Q. And you thought it over and got the passport?
By the Court: He said he applied for it.
By Mr. McConnell:
Q. I mean, applied for the passport.
A. Yes, sir; I did.
Q. Well, did Mr. Grace offer you any money?
A. No, sir; Mr. Grace did not offer me any money, sir.
Q. And you never raised any purchase price, did you, of the farm and of the other property?
A. Well, sir, it was not a purchase price.
1154 Q. Well, did he raise the offer then? Let's put it that way.
A. There was no discussion about raising the offer, sir.

Q. Then he didn't.

A. Sir?

Q. Then he didn't raise it, did he?

A. If he didn't discuss it, he didn't raise it or he didn't lower it.

Q. Was there any discussion there of a disclosure by the Shotwell Company?

A. Yes, sir; there was.

Q. And what was your comment on that, if you remember?

A. Well, he said that The Shotwell Manufacturing Company had decided to make a voluntary disclosure covering the money that I had given them. And my comment, sir, was, "Where does The Shotwell Manufacturing Company come into this? I gave the money to Mr. Huebner, and Mr. Cain, and Mr. Sullivan." And he says, "Well, I don't know about that." But that's all. And goodbye, and so forth, and so on.

Q. And that was the end of that, was it?

1155 A. Yes, sir. I was very happy they had made the voluntary disclosure, sir.

Q. Now, after that you went up to Boston and saw Mr. Morley Kramer, didn't you?

A. I don't think it was after that, sir. I think it was prior to that, sir.

Q. Well, will you go along with me this far, that you did go up to Boston to see a Mr. Morley Kramer?

A. I have gone up to Boston many times.

Q. Well, just about this time.

A. I think shortly between the time, sir,—and as I stated in my testimony to the Government, I think shortly between the time Mr. Kramer—the meeting in the Riviera and the meeting in Mr. Grace's office, I had gone to Boston.

Q. And who was with you at that time?

A. I think Mr. Cary was, sir.

Q. Mr. Cary is the fellow with the Blue Ribbon Trucking Company?

A. He was a factor at that time. I don't know if he was interested in the Blue Ribbon any more or not.

Q. Well, he was a trucker.

1156 A. I didn't say he was a trucker at that time.

Q. I think you said so this morning, that he was a trucker, or in the trucking business.

A. He was in the trucking business, sir.

Q. Well, anyway, he went up with you. And who else went with you?

A. On that trip, sir, I only think it was Mr. Cary, sir.

Q. How about Mr. Davidson, didn't he go?

A. I think another time Mr. Davidson went, sir.

Q. You don't recall him being there this time?

A. At this time, no. It's one time or the other, but I can't specifically place Mr. Davidson. I know he went with me one time, but whether it was this time or another time, I don't recall.

Q. At this time you went to Mr. Kramer and you asked him—

By Mr. Lockley: I object. I don't see that there is any relevancy to this whole line of questioning.

By the Court: You haven't let him complete his question, yet. Go ahead.

By Mr. McConnell:

Q. At this conference with Mr. Morley Kramer
1157 in Boston you asked him for money, didn't you?

A. No, sir; I did not.

Q. Didn't you ask him to buy your business for $135,000.00?

A. No, sir; I did not.

Q. Did you discuss the sale of your business at all at that time?

A. Sir, if I remember correctly, that what I discussed up there was a message—what Byron Cain had told me at the Riviera, was to go up and have Mr. Morley Kramer contact him, and to go into further discussion of forming a syndicate. And I went up there and I told him, sir, that the Government had taken the Shotwell Company's records, and that—about the meeting in the Riviera, and there was going to be a syndicate formed, and I was going to leave the country, or to leave the country to not be in a position to testify, because if I was not there there would be no case, or words of that effect, sir.

Q. Well, now, did you ask him to participate in the syndicate in any way?

A. I didn't ask him, sir. I just told him the discussion, what Mr. Kramer—what Mr. Byron Cain had told me. I told him to contact him.

1158 Q. Did you tell him what the syndicate was to pay for your property?

A. I did tell him, sir, that Mr. Cain had said that they were to put up $75,000.

And they weren't going to give me all of that money right away, sir. They were going to pay my income tax, because there was some discussion—"They can bring you back if you don't pay your income tax." And they were going to pay my income tax. I am speaking of the '46 tax, that I mentioned this morning.

And they were going to pay the balance on the First Federal Savings and Loan. And then out of this syndicate they were not going to charge me anything for any sale of the property. They were going to take back their money, $75,000, and if the property brought more than that they would send me the money. And if it brought less than that, they would absorb the loss.

Q. Now, you told that to Mr. Kramer, did you?

A. That's exactly the way I heard it from Mr. Cain.

Q. And you wanted him to participate in the syndicate, is that it?

1159 A. Sir?

Q. Did you ask him to participate in the syndicate?

A. I told him the syndicate was being formed, sir. And at that time I felt that it would certainly be better for all concerned if I wasn't here to testify.

Q. And did you ask him to participate in the syndicate?

A. I believe I asked him—I know I asked him to call Mr. Byron Cain in Chicago. And I am almost sure—I think he did at that time.

Q. He did call Mr. Cain in your presence, did he?

A. I don't recall whether it was in my presence, but I think he did, sir.

I can't say for true. But I think he just called Mr. Cain to see what the story was.

Q. Didn't he tell you he wouldn't put any money in any syndicate, or wouldn't pay you any money?

A. No, sir; he didn't.

Q. Didn't he tell you he didn't he tell you he didn't have any money?

A. No, sir; he didn't tell me that.

1160 Q. He had already paid you $15,000.00, hadn't he?

A. He never paid me any $15,000.00, sir.

Q. Well, some company of yours, was it?
A. Mr. Kramer never gave me any $15,000.00, sir.
Q. Did he give one of your companies $15,000.00?
A. Mr. Kramer never gave me any $15,000.00.
By Mr. Lockley: I object. I fail to see the relevance of what Mr. Kramer did with Mr. Lubben.
By the Court: He has answered it.
By Mr. McConnell: All right.
By Mr. McConnell:
Q. He called Mr. Cain, did he, in your presence?
A. I didn't say it, sir. I think he did. I can't specifically say he did or didn't. I am of the opinion he did. But I don't know whether it was in my presence or not. I told him to call in my presence. I had no reason to tell him not to call.
Q. Well, after he called, you didn't get any money, did you?
A. I didn't go for any money, sir.
Q. Well, you didn't get any sale of your property, either, did you?
A. I didn't go to sell my property, sir.
1161 Q. Did you get a sale of your property?
A. From whom, sir?
Q. From anybody.
A. When?
Q. Mr. Cain, or the syndicate that you are talking about.
A. I didn't sell my property, sir, till sometime in 1951. I believe it was '51.
Q. Well, the syndicate didn't offer you any proposition after that for your property, did it?
A. After that, sir?
Q. Yes. After your talk with Mr. Kramer?
A. Oh, no, sir.
Q. Now, at the time you talked with Mr. Kramer had you gotten the passport, or applied for the passport?
A. I wouldn't know, sir. I think it was applied for, sir.
Q. And you didn't sell the property to the syndicate, did you?
A. No, sir.
Q. And you didn't go to South America, either, did you?
A. No, sir.

Q. And you never used the passport?

1162 A. No, sir. I am very thankful I didn't, too, sir.

Q. Now, you talked about some investigation of income tax of Mr. Giglio at that conference. Was there some?

By Mr. Lockley: I object, your Honor. I fail to see what Mr. Giglio's income taxes have to do with this issue.

By the Court: You don't identify the time or place.

By Mr. McConnell: Well, he went into it on the conference in the Riviera, about Mr. Giglio.

By the Court: Dickey?

By Mr. McConnell: Giglio, his partner. He said he was in income tax trouble. That was his direct examination. I want to cross examine him on it.

By the Court: Frame your question again, please.

By Mr. McConnell:

Q. At the meeting at the Riviera was there some talk about Mr. Giglio's income tax problem?

By the Court: He may answer.

1163 By the Witness:

A. I don't think it concerned his income tax problem, sir.

By Mr. McConnell:

Q. Didn't you say on your direct examination that Giglio was in difficulty over income tax?

A. Well, sir, I don't recall saying that in those words. But would you like to know what was said?

Q. No. I didn't ask you that. I asked you if you didn't say that on your direct examination.

A. No, sir. I think that the conversation came from Mr. Cain, who told me about Mr. Giglio being in a lot of hot water, and a lot of trouble. and I was in hot water up to my neck on account of Giglio's black market activities.

Q. Did you know anything about Mr. Giglio being in trouble about income taxes?

A. I think, sir, that I had heard the government was working on the case.

Q. And that involved the transactions of the Eatsum partnership, didn't it?

A. Not necessarily, sir.

Q. You don't know whether it did or not?

A. Well, it seems that—no, sir; I don't know.
1164 It certainly could have involved Eatsum Food Products.

Q. Didn't the government call you in to go over books and records of Eatsum in an income tax investigation of Mr. Giglio?

A. When, sir?

Q. At any time.

A. What has that got to do with the meeting in the Riviera in 1948, at any time?

Q. I didn't ask you that.

A. You did, sir.

Q. I asked you whether or not you weren't called in.

A. When, sir?

Q. At any time.

By Mr. Lockley: I object, your Honor.

By the Witness:

A. I would like the date, sir.

By the Court: You may answer that either yes or no.

By the Witness:

A. Well, sir, the question before was in regard to the Riviera.

By the Court: He has left the Riviera. Now he has asked you a general question.

1165 By the Witness:

A. Yes, sir; the government has had me into their offices and they have been asking me questions, sir, about my connection with Mr. Giglio, on the Giglio records, and so on and so forth, what I had done, and what-not, and if I had the records.

By Mr. McConnell:

Q. And they were asking you about transactions with Mr. Giglio, when you were a partner with Mr. Giglio, were they not?

A. The government?

Q. Yes.

A. Oh, yes, sir. But this is much later than after the meeting at the Riviera, sir.

1166 Q. Mr. Giglio got indicted, didn't he?

A. I read that in the newspaper.

By Mr. Lockley: I object, your Honor. I fail to see what relevance Mr. Giglio's indictment has to the case.

By the Court: Yes, I will sustain the objection.

By Mr. McConnell:

Q. After that conference that you had down in Boston with Mr. Morley Kramer, did that end the syndicate deal, the so-called syndicate deal?

A. I believe it did, sir. I don't know whether I came out to Chicago, sir, to see the Urbans—whether I was asked to or whether I was not. I believe, sir, that Byron Cain told me that he would see the Urbans when they got back. That is my recollection. But on that particular phase, sir, I could be wrong. I don't know whether I came out or whether I didn't come out.

Q. For all intents and purposes that deal ended there?

A. It was never consummated, sir.

By Mr. McConnell: That is all the questions I
1167 have to ask. Mr. Kirby has some questions.

By Mr. Kirby: I am sure we will move a little faster if I could have the indulgence of the Court for about a five-minute recess to put my papers in order. It will save much more than five minutes, your Honor.

By the Court: All right.

By Mr. Kirby: Thank you.

By the Court: We will take a five-minute recess.

(Short recess.)

By the Court: I wonder if we might just clarify my own records, and perhaps for the information of the jury as well.

Now, Mr. McConnell, in his examination of the witness, has been examining the witness on behalf of—

By Mr. McConnell: Shotwell Manufacturing Company.

By the Court: Shotwell Manufacturing Company.

By Mr. Kirby: My name is Kirby and I represent Harold Sullivan.

1168 By the Court: There has been a little confusion in my mind because some of the motions heretofore haven't been entirely clear.

You are now examining the witness on behalf of Harold Sullivan?

By Mr. Kirby: Yes, and my name is Kirby.

Cross Examination By Mr. Kirby.

Q. Mr. Lubben, am I correct in believing that at least one of the earlier transactions that you had with Shotwell related to your procuring some chocolate for them, sir?

A. Yes, sir. I sold them some chocolate, sir.

Q. All right. And am I reading correctly from your transcript, at page 421, where you say:

"I told Mr. Huebner that I can buy this chocolate and I can sell it to somebody else and I can make a profit, and it would probably be ten cents a pound and maybe a little more, but I will sell it to you for as near my cost as possible, or my cost, if you can arrange that I get the Shotwell line."

1169 Now, I don't read the whole quotation, but you remember that testimony in substance, do you, sir?

A. I do, sir.

1170 Q. And, Mr. Lubben, was chocolate a short item at that time?

A. Yes, sir; it was.

Q. And I think it is true that it remained short under the whole period under discussion—or at least to the '45 and '46 era, didn't it?

A. Yes, sir; it did.

Q. But in any event, this was a transaction where you were going to make some chocolate available at your cost to Shotwell?

A. Well, no, sir, the thought was that I could either do two things: I could sell them the chocolate, I could go and buy some chocolate and sell it to them and make a profit; or I could sell it to them and get the Shotwell line. And the Shotwell line is what I wanted to sell.

Q. And it was agreeable to them and it was agreeable to you that you not make a profit on the chocolate, but that you do get at least some candy?

A. Sir, I believe we made a couple of pennies on it. But—and that is only a guess, sir.

Q. Yes. Well, I don't mean to argue about pennies.

1171 A. But I wasn't to get any candy. I was to receive an allotment of candy, which I could sell to the trade in New York City.

1172 Q. But you were not to be charged any—above ceiling price for it?

A. No, this was never sold to me, sir. This was sold directly to the customers who were the customers of The Shotwell Manufacturing Company. I took the order and received a commission, or a bonus—I mean a commission of five per cent.

Q. And nothing other than that?

A. No, sir. Those transactions were all perfect.

Q. And nothing was paid to Shotwell for that candy other than the regular invoice price?

A. That is correct, sir.

Q. So Shotwell got the candy and—or Shotwell got the chocolate and you were able to sell the candy, and that was a perfectly legitimate transaction, is that right?

A. I was made the Shotwell broker in the New York territory, New York City.

Q. But that transaction did not involve overage?

A. No, sir; it did not.

Q. Now, when you denied—when Mr. Cain told you he was trying to adjust his taxes, and he wanted to know if there hadn't been some trade deals, you
1173 didn't deny that that had been a trade deal to him, did you?

A. Well, that wasn't a trade deal, sir. That was an outright sale.

Q. Well, there was no overage involved in it?

A. No, sir; there wasn't. He knew it, and I knew it, and I told it to him.

Q. You didn't deny it when he asked you to tell the truth to the Government men. There had never been any dispute about that?

A. What?

Q. About the transaction I recounted about the chocolate.

A. Mr. Cain didn't tell me to tell the truth to the Government.

Q. I am happy to have you say that.

A. You said Mr. Cain told me to tell the truth to the Government men and Cain didn't tell me to say that.

Q. He asked you about this transaction.

A. He told me there were going to be two Government men come to see me and I should tell them we had loans and exchanges. And I said, "Mr. Cain what do you mean by loans and exchanges, or exchanges and so forth?" And he said, "Well, whereby you
1174 would give us merchandise—or you would give us raw materials and we would ship you candy."

1175 Q. Excuse me. This is an instance of raw material chocolate, isn't it?

A. Yes, sir; that's raw material.

Q. And they shipped you candy, didn't they; Shotwell did; isn't that true?

A. For that particular one?

Q. Yes, sir. I will only take these one at a time, sir.

A. Well, sir, they didn't ship me any candy for that chocolate, sir. That was shipped to the customers and I received an allotment of 10,000 boxes of Hi-Mac bars, which they sold to their customers at 68 cents, and one carload of marshmallows every month. Sometime they would give me an extra carload of marshmallows.

Q. Now, in the light of your last answer, I read to you your testimony on page 422, that you sold—well, I won't read that part of it, because that just gives the poundage of the chocolate, 50,000 pounds, which would be a carload, and maybe two or three other shipments, 30 or 20 thousand pounds. You remember that you sent that chocolate to Shotwell?

A. I remember that; yes, sir.

1176 Q. With no overage on either the marshmallows or the Hi-Mac bars?

A. No, sir.

Q. All right.

A. And I was never billed for it, sir, in any way, shape or form.

By the Court: Speak up, Mr. Lubben.

By the Witness:

A. And I say I was never billed for the Hi-Mac bars or marshmallows in any way, shape or form. It was sold directly to the customers.

By Mr. Kirby:

Q. And completely proper transactions, I assume, of course?

A. Yes, sir; perfect.

1177 Q. Yes. Now, then. You have testified that there was a time when you did pay overages, is that correct?

By the Court: To whom? Your question is too general.

By Mr. Kirby:

Q. To Shotwell?

A. Yes, sir; there was a time.

Q. And you also testified about the Eatsum proprietorship, how they kept records with respect to that, is that true?

A. Well, records with respect to what, sir?

Q. Your overages?
A. Overages to whom?
Q. That you were paying on the Shotwell products?
A. Yes, sir.
Q. And you testified about what your bookkeeper would do with respect to keeping track of it, is that right?
A. This is during the sole proprietorship?
Q. Yes.
A. Yes, sir.
Q. And it is from the records that you have testified here, in the last few days, is it?
1178 A. Yes, it is from records. Yes, sir.
Q. Now, do you recall your testimony at page 428 and 429 as follows:

"Never mind—"

This is Mr. Lockley.

"Never mind what you instructed your bookkeeper to do. What was done?

"Answer: On the face of the invoice we would add in pencil the amount of the per pound of the overage, and as far as I was concerned that was the cost of the merchandise."

Do you remember that question and that answer?
A. Yes, sir; I do.
Q. And then do you remember Mr. Lockley asking you further, at page 480:

"Question: Generally what was your practice?

"Answer: When we got the invoice from The Shotwell Manufacturing Company it was entered in the book as a purchase and on the face of the invoice—that is during the sole proprietorship—we would enter the amount of the overage."

Do you recall that that question was asked of
1179 you, and you gave that answer?
A. Is this in regard to the sole proprietorship, sir?
1180 Q. Yes, sir.
A. Yes, sir; we added the 10 cents—the overage on the face of the invoice, and would draw a line, and as far as I was concerned, that was what I paid for the merchandise.
Q. Now, did that practice, Mr. Lubben—I will withdraw that question.

Do you recall that on the deposition that you earlier gave in these proceedings you were asked this question and you made this answer, at page 98:

"But actually Miss Feldman said that at page 84 of the transcript. She said: 'The amount of the overage would be added to each individual bill and entered in the accounts payable ledger.' Is that the record you mean?

"A. Words to that effect. Could I read that now?

"Q. I am telling you.

"A. I don't know if you are reading the right words.

"Q. Let me amplify that."

Then reading again from what Miss Feldman had said:

"'If the invoice for candy called for 10 cents
1181 a pound, and we were paying 10 cents overage or premium for it, the amount of the invoice would be entered as 20 cents a pound, except of 10 cents a pound.'

"A. That's correct, sir."

One word "except" appears to be mistaken, but do you remember being asked those questions and making those answers?

A. You just got through saying Miss Feldman said that, sir.

1182 Q. You were having your deposition taken and these questions, which incorporated things Miss Feldman had said, were read to you. And did you make the answers to these questions on your deposition which I have read?

A. Well, sir, you have the deposition. If I have answered it, then it is my answer. There may have been a bookkeeping procedure that maybe I have answered wrong, but I am not familiar with bookkeeping. But all I know—

By Mr. Kirby: I would like to have the volunteered response of the witness stricken and the jury instructed that it should be disregarded.

By the Court: The answer may be stricken. There was no question to the witness.

By the Witness: I am sorry, sir.

By Mr. Kirby:

Q. Now, is that the policy that you followed in the business called the proprietorship and the business called General Confections?

A. What policy, sir?

Q. Of marking up the invoices?

A. Well, sir, to the best of my knowledge, during
1183 the proprietorship the amount of the overage was added on the face of the invoice. During the—

Q. Was the same thing done in the period of General Confections?

A. No, sir; I don't think it was.

Q. What, if any, notation was made in that time?

A. Well, the notations were where we had some— during the period of the partnership, where we had some cards, or some sheets of paper, but I think it was cards, whereby we would put the invoice number, and the amount of the candy, and the amount of the overage, and the total. And I don't think it appeared, sir, on the face of the invoice.

Q. During the period of General Confections?

A. That's correct, sir. It may have, though, sir, but I don't think so.

By Mr. Kirby: Do you have that statement the government gave us that Miss Feldman made up about how she kept the books? I think it is right there.

Here it is.

By Mr. Kirby:

Q. Would Miss Feldman be in a position to know, Mr. Lubben, better than yourself as to whether the
1184 invoices were marked up in the period of the General Confections just as they had been in the sole proprietorship, or don't you—

A. I don't know whether she would know any better than I, sir. I don't know that. Miss Feldman was the office manager in charge of keeping the books. She could know more about books than I would, or methods of bookkeeping.

Q. Was she the one, if anybody, that marked that up on the face of the invoice?

A. What face of what invoice, sir?

Q. Well, you say that you marked it up on the face of the invoice during the proprietorship. That we are plain on, is that true?

A. Well, sir, maybe I marked it up sometimes and maybe Miss Feldman marked it up sometimes. But it was no secret in our office, sir.

Q. Did that practice of marking up on the face of

the invoice continue during the period of General Confections?

Now, I asked you that question before, and I don't mean to prolong it. Do I understand your answer is that you are not sure, but that you don't think it was, or that it was?

1185 A. Well, sir, if I remember correctly, we had some cards—there was a little bit of a card box on Miss Feldman's desk, and there used to be some cards there, and she would take the invoice and mark the number down. I am saying—this is during the time that Miss Feldman—you know, Miss Feldman didn't come with me right away. She came with me in August. She stayed with the old partnership, but during the time that Miss Strum was in charge of the books there for several months, I don't know what procedure she had, other than making it on some pieces of paper. I have seen notations around there, and perhaps it was marked on, perhaps it wasn't. I don't know.

But I know during the time Miss Feldman was there, there were some cards on her desk. Whether she had additional records beyond that, sir, I don't know.

Q. But the invoices were the documents which were posted to your books; am I correct in that?

A. What about them?

Q. Am I correct in that?

A. Correct in what, sir?

Q. Did you post to the books of your proprietor-
1186 ship, and did you post to the books of your General Confections, the invoices you received from Shotwell?

A. We did whatever the accountants—or whatever was the accepted bookkeeper practice. Whether I use the word "post"—maybe I don't know what I am talking about, but whatever was good bookkeeping, that's what we did. Whatever the accountant told us. If I use the word "post" wrong—if you mean post, write it down, it was written. But it was there.

1187 Q. Neither one of us could agree on the use of terms. I would hardly know what you would think was good bookkeeping practice. I am trying to keep myself specific, sir. I am asking you about the invoices from Shotwell.

Now, when you got an invoice from Shotwell, did you post it in a book somehow, enter it in a book?

A. I would assume so. We had—it had to be posted some place.

Q. Do you know whether you did or didn't?

A. Well, we had to write it in some book, sir. You had to write it in a couple pages where you took it in and paid it out.

Q. And when you entered it in the book, how much did you enter in the book, if there was an overage involved on the item?

A. Well, I wouldn't know about the mechanics of putting it on the books. All I know is this, if I paid 12 cents on an invoice, and I paid 10 cents in cash, that was 22 cents, and as far as I was concerned, the merchandise cost 22 cents.

Q. Thank you.

A. And the mechanics of making books, I don't
1188 know.

Q. Excuse me, sir. I am inquiring about what might exist to substantiate the story that you have told, and I don't mean to be rude to you. I am only inquiring whether we could find some place in a book these things posted, these invoices, plus the overage. Now, do you know where I could go and look for Shotwell invoices posted to the higher amount or to the lower amount; could you help me either way?

A. Why don't you ask the Government men here, sir? They have got the books.

Q. Excuse me, sir.

By Mr. Lockley: I object. The books are not yet in evidence.

By the Court: Well, I think counsel has a right to interrogate him as to what bookkeeping system was followed. That is what he is attempting to do.

By Mr. Kirby:

Q. I don't mean to abuse you, nor to bore the jury, or the Court. And we can drop the subject, Mr. Lubben, if I may just have an expression from you as to whether you can tell me—maybe others can, but can you,
1189 sir, tell me, how these Shotwell overage transactions that you have testified to, can be located in the books—the bound books of the company? Can they be?

A. Well, I wouldn't know, sir.

By Mr. Kirby: All right.

Now, if the Government would be good enough to let me see the original invoices that were sent down to Mr. Lubben from Shotwell on which they contend there were overages—these are some photostats you let us have.

By Mr. Krane: Specifically, which ones do you want?

By Mr. Kirby: I would like to see every single one of them that is marked up.

These are the General Confections ones.

If he doesn't know, then without being offensive to him, I will—

By the Court: I am sorry, I didn't follow you.

By Mr. Kirby: The objection made by Mr. Lockley was that this witness had already said he didn't
1190 know whether the invoices of the General Confections were marked up. And I said that in the absence of the witness knowing, the next thing to do was to show the witness that the invoice—show it to him, so we would clear up that point, and move to something else.

By Mr. Kirby:

Q. While they are looking for the originals, Mr. Lubben, would you just thumb through that little packet of General Confection invoices from Shotwell, and tell me if any place you see an overage marked up on them?

By Mr. Kirby: While he is looking at those, George, do you have those affidavits of M. Lubben that the Government was required to give us by the Court order?

(Document handed to counsel.)

By Mr. Kirby: Do I have the invoices?

By Mr. Lockley: They are not in evidence, Mr. Kirby. So far as we know you have photostatic copies of them.

1191 By Mr. Kirby: I will proceed then. I had hoped the Government would be courteous enough to let me have the originals.

By Mr. Lockley: You can have them, Mr. Kirby. It is not a matter of courtesy.

By Mr. Kirby: Should I couch my request in some more formal language, sir? I would like to have the original invoices.

By Mr. Krane: Of what?

By Mr. Kirby: Of General Confections from Shotwell Manufacturing Company, on which you contend the overages were paid.

By Mr. Lockley: May I approach the bench, your Honor.

By the Court: Yes.

(Whereupon the following discussion was had beyond the hearing of the jury:)

By Mr. Lockley: We have no objection to giving them the originals, but they have the photostatic copies which are the same thing—

By the Court: You have no objection to having them use the photostats.

By Mr. Kirby: All right.

1192 (Whereupon the following proceedings were had within the hearing of the jury:)

By the Court: Counsel has no objetcion that you may use the photostats.

By Mr. Kirby: All right. Then I will go right along. Thank you, Mr. Lockley.

By Mr. Lockley: I might explain, your Honor, that the only reason the Government doesn't want to tear the originals out is that the Government has them organized for an orderly presentation of its case and it would require a considerable length of time to put them back together again. We are perfectly agreeable to him using the photostats.

By the Court: All right.

Apparently the witness has looked through the group of papers.

By Mr. Kirby:

Q. Have you looked through the group of all of the invoices from Shotwell to General Confections, and have you found any one of them upon which an overage is marked up?

1193 A. No, sir; but I never said they were on it.

Q. Thank you. During the period of the partnership was there an accountant by the name of Roth that had something to do with the papers?

A. What papers, sir?

Q. The papers of the partnership.

A. What do you mean by papers, sir?

Q. I will withdraw the question. Do you know a man by the name of Roth?

A. Yes, sir; I do.

Q. He is an accountant?

A. Well, that is what he called himself, sir.

Q. Did he attend to any of the paper work, or the auditing of any of the paper work of the Eatsum partnership?

A. Not for me he didn't, sir.

Q. He did for somebody else?

A. For Giglio.

Q. Was he also a partner?

A. Yes, sir.

Q. Mr. Roth, I think you testified, didn't want to have the black market transactions entered in the books, is that right?

A. No, I didn't think I said that, sir.

1194 Q. You said that one of the items of dispute during the period of the partnership was that they wanted to handle things through a cash box rather than putting it on the books, is that correct?

A. I don't think it was all those words, sir.

1195 Q. No, but such a dispute eixsted, did it?

A. Well, I would like to explain in my own words the dispute, so there can be no misinterpretation of the jury what the dispute was about, sir, because you are not exactly relating it correctly.

Q. Well, in any event, after you had General Confections, you had no problem with respect to Roth. He didn't have anything to do with the business, did he?

A. I had a problem, sir, but he had nothing to do with it.

Q. And the question of the marking up of the invoices during General Confections was not being in any way affected by Mr. Roth?

A. No, sir.

Q. Now, the invoices were not marked up while Roth was there, were they?

A. Well, sir, you would know that better than me.

Q. Excuse me. If you are unable to answer it, I would be happy to have such a statement. Do you know if they were marked up or not, during the period Roth was connected with Giglio? Do you know, sir?

A. I don't know that, sir.

1196 Q. In any event, however, you do know now that they were not marked up during the period of General Confections, isn't that true?

A. I think I testified to that already here in court, sir.

Q. Well, sometimes we might argue about that by re-

ferring to the testimony, but I don't think the proper thing is for you and I to argue it. If you will excuse me.

Now, then, when you were to pay out money for overages in respect to candy, am I correct in believing that you, at least, in the proprietorship period, would draw a check payable in the amount of the invoice, and then a check to cash in the amount of the overage?

A. This is during the sole proprietorship?

Q. Yes, sir.

A. Yes, sir; I'd say that was true.

Q. And am I correct in thinking that during the period of the partnership when Giglio and Roth were concerned, that that practice was dropped?

A. No, you are wrong in assuming that, sir.

Q. Let me ask you if the practice of drawing a check for the invoice and a check for the overage payable
1197 to cash continued in your General Confections?

A. In many—most cases, yes, sir.

By Mr. Kirby: I wonder if I could have the checks which the Government claims—were delivered—or cashed in overages, in the General Confections period.

By Mr. Krane: You will have to give me the exhibit.

By Mr. Kirby: Do you want me again to refer to my own photostats?

By Mr. Lockley: If you had given us a little notice on this, we could have had them ready for you. You catch us somewhat unawares.

1198 By Mr. Kirby: I apologize to the Court and to the jury, and state that I don't mean to delay it at all. Have you our photostats of the checks?

By the Court: Do you mean the exhibits introduced in evidence?

By Mr. Kirby: Yes.

By the Court: I take it that Mr. Lockley will make those available.

By Mr. Lockley: Certainly we will make those available.

By Mr. Kirby: I don't like to be bawled out for the—

By Mr. Lockley: I am merely apologizing because we don't have them ready, because we have not previously been given any notice. And there are a lot of papers. You just want them for the General Confections period, Mr. Kirby?

By Mr. Kirby: That is the one as to which he just replied, and as to which I would like to test his answer.

(Documents handed to counsel.)

By Mr. Kirby: These two are reserved.

1199 Excuse me while I try to get these in some order, Judge.

By Mr. Lockley: I would like to explain, your Honor, that our next witness is going to be an accountant, or a bookkeeper, and that we had these—

By Mr. Kirby: He will be a great improvement on me, I will tell you that.

How about that $14,000 check to cash that he said he paid?

By Mr. Lockley: Do you know which exhibit? If you can give us the exhibit number it will facilitate it somewhat.

(Document handed to counsel.)

By Mr. Kirby:

Q. For example, now, the top one of the ones they hand me, is Exhibit 153, which is a check in the amount of $27,000, even. Now, on the books of the corporation, I suppose that that check is somehow shown as having been cashed against the account, sir?

A. What account, sir?

Q. The account of General Confections?

A. Yes, sir.

1200 Q. Now, can you tell me what invoice for overage from Shotwell that check represents?

A. Sir, yesterday we had some other papers here. Just to stand here and say what invoice, or what overage—I mean, I believe this, sir, pertained to something about a car of chocolate.

Q. Now, I will show you one which is marked Exhibit 122, for $12,235, endorsed by yourself, and Ed Urban, and does that relate to a specific invoice?

A. I wouldn't say it relates to a specific invoice, sir. I think it relates to a specific payoff.

Q. I show you a check marked Government Exhibit 126, and ask if that check, endorsed by yourself, and Eddie Urban, relates to a specific invoice?

A. Well, sir, I had my records here yesterday, and—

Q. I appreciate you did. But you said a few minutes ago that the practice was, at General Confections, to issue a check for the invoice, and then a check for the overage, and that it keyed to an invoice in most cases.

A. I don't know—I didn't say any such thing like that,

sir. And if you read what you said back here, if I
1201 said it—I didn't say keyed to any invoice. I have told you—

Q. The word may have been "related".

A. Well, sir, just be specific. But I have told this Court, sir, that the method we paid The Shotwell Manufacturing Company was to take a recap of the sheets, and sometimes we paid two or three invoices, and sometimes we paid two or three invoices, legitimate invoices, on one check.

Then I also have testified here, sir, for days that the practice was to list each invoice, and the number of pounds of candy, the amount of pounds, and so forth, down on the sheet, and that came to a certain figure. And that was the sheet I compared with Mr. Huebner.

Now, it is possible, sir, that there has been a few individual checks that were paid in individual shipments, billed or unbilled, to The Shotwell Manufacturing Company. That's what I said, sir.

Q. Well, I know what you said. But what I was trying to get at, and I don't mean to offend you—

A. Thank you.

1202 Q. —is whether we could go to some books where we could tie it on those books to an invoice, where you said there was an overage.

I know what you said. Now, you said that the invoices weren't marked up, so that wouldn't show on the books.

Now, I want to know when you paid it out, is there any place that is marked on the books, keyed to an invoice?

1203 A. You mean is there any place where this is marked with the money that was paid out?

Q. Is related to any invoice of Shotwell's, and that you can show me that on your books, any place on your books.

A. Well, sir, I don't know anything about any books.

Q. Can you show me—

A. Well, do you see any books up here, sir? I know one place where it is written, sir.

Q. Excuse me. Can you show me any books—

A. Well, sir—

Q. —where that is keyed to any invoice of Shotwell?

A. Sir, I don't want to be flippant, but where do you see any books here?

By Mr. Lockley: I object. The witness has already answered the question.

By the Court: He wants to know if he is aware of any books that will reflect the contents of the—

By the Witness: I had certified public accountants. We kept the books—

By Mr. Kirby: I call the Court's attention to the
1204 fact that he is being just as rude to you as he is to me.

By the Witness: I am not being rude. Sorry, sir. I apologize to both, if I have been rude.

By the Court: I don't know that anybody has been rude.

By Mr. Kirby: I thought he interrupted you.

By the Court: I am interrupted by lawyers every day.

By Mr. Kirby: Well, I will say I am not surprised that he gets the appellation.

By the Witness: I don't know what he just said to me then, sir.

By the Court: Let's go ahead.

Q. Mr. Lubben, let me now ask you further with respect to what records there might be we can check about when you would sell the goods you bought from Shotwell. And let me read what you said at page 415 about your business.

"Q. You manufactured some, and you sold some,
1205 more or less as a broker, is that the idea?

"A. No, sir; we bought and sold the candy. We would pay for it, and then turn around and sell it on an invoice.

"Q. You were a jobber, then?

"A. Yes, sir.

"Q. What was the nature of the business of General Confections; did that change any?

"A. No, very much the same, sir."

Now, did you make those responses to those questions?

A. I did, sir.

By Mr. Kirby: I wonder if I could have Government's Exhibits 95, 96, 97 and 98.

By the Court: They haven't been offered in evidence, if that is of any concern. 95, 96, 97, 98 are not in evidence.

By Mr. Kirby: Thank you.

By Mr. Lockley: 95, 96, 97, 98.

(Documents handed to counsel.)

By Mr. Kirby:

Q. Would you look at Exhibits for identification Nos.

95, 96, 97 and 98, and tell me, sir, whether you now
1206 will concede that it is true that Shotwell candy that you bought you sold to others on an invoice plus an overage of cash not on the invoice?

A. Well, sir, I think I testified to the fact that I did do that, sir, during General Confections. If you read all the books, sir, I think you will find that. I have never denied that, I have shown—you have seen testimony here where Mr. Heitmann has gone to Youngstown, Ohio, to pick up money from the Imperial Candy Company. It is written right—

Q. I asked you a very simple question, and I read from your own testimony. You appreciate that I didn't say those words, I only read them from you.

A. You are tying this up to what?

Q. My question—

A. Read all the questions back again, a couple of lines before, sir. I think the man was talking—Mr. Lockley was talking about General Confections, and so forth—I mean the sole proprietorship.

By the Court: Well, just the last question. That is the only question before you now.

(Question read.)

1207 By the Witness:

A. Sir, I think if you will go along further in the testimony—

By Mr. Kirby:

Q. Excuse me. Is that correct, Mr. Lubben, please?

1208 A. Where I will concede it?

By the Court: He just asked you whether or not that is correct.

By the Witness:

A. That I sold merchandise for—Shotwell merchandise during the period of General Confections for invoice and cash?

By Mr. Kirby:

Q. Yes, sir.

A. Yes, sir; that is correct.

Q. Thank you very much. So that the cash overage from Shotwell you cannot point out—excuse me. I will withdraw that question and frame it correctly.

The cash overage which you say Shotwell charged you, you cannot locate for me on an invoice in either the proprietorship—excuse me, in either the partnership or the General Confections period, is that true?

A. Well, sir, taking the partnership, you would be in a better position to answer it than me.

By the Court: Answer the question.

By Mr. Kirby:

Q. Excuse me. Let's just take the General Confections.

1209 A. Yes, sir.

Q. I showed those to you, and are we in agreement, Mr. Lubben, that you can't point to any mark up or any overage on the invoices?

A. I didn't say there was any in—

Q. Whether you did under other circumstances will be a question of remaining proof. Now, then, I asked you whether you could show me on books of General Confections, or the others, for that matter, where that overage is posted in the book, and I think you said no, isn't that right?

A. I didn't say no, sir. I don't see any books.

By Mr. Kirby: By the way, have you got a book, Mr. Mammel, that you could let him take that he could point to that?

By Mr. Mammel: The purchase record, the accounts payable records are all gone. We have never seen them. That is where the original would be.

By Mr. Kirby: The answer then is that you cannot give him a book?

By Mr. Mammel: No, sir.

By Mr. Kirby: And he is free to run as far and as fast as he can.

1210 I will ask the jury to disregard that remark. It was improper of me. I apologize to the witness. Excuse me.

By Mr. Kirby:

Q. Now, then, I wonder if we can also agree, Mr. Lubben, that when you sold this candy that you got from Shotwell that you got—at least on some of it—some cash which did not go on the invoice to your customer, is that true?

A. Yes, sir; that's true.

Q. Am I correct in thinking that these memoranda that you had here when you were first testifying are the only pieces of paper of any kind that we can look at with respect to these invoices from Shotwell?

A. You mean do I have anything else?

Q. Yes, sir.

A. I haven't got anything, sir.

Q. And those are the memoranda which you discussed with Mr. Huebner on the sun porch, and then photostated, is that right?

A. There were some memoranda; yes, sir.

Q. There had been a receivership and the receiver had taken the books, but he didn't get those?

A. Well, now, sir, when the reeciver came to me,
1211 and he gave me a court order, he took all of the books and the records that were on the premises, sir, and he posted the sign on the door.

Q. But these pieces of paper the receiver did not get?

A. Well, no, sir, because this transaction took place in February and the receiver came in March.

Q. Yes, sir. However the papers were the papers the existence of which and the disposition of which you discussed with Mr. Huebner on your sun porch, is that true?

A. What papers are you talking about?

Q. These papers that, when we come down to it, are the only papers about these overages?

A. Oh, no, sir. There is other—there was copies of bills of lading, sir, and your office over there got copies, sir.

1212 Q. I showed you invoices—

A. The railroad has copies. You can pull it off your track, sir. It was on your siding.

Q. Yes, that's right. I am talking about the overages, sir. Are these the papers, sir, that you discussed with Mr. Huebner on that sun porch?

A. These papers we are just—yes, those are the papers we discussed about.

By Mr. Kirby: Let me have those memoranda, will you please?

By Mr. Krane: Which ones?

By Mr. Kirby: The ones that are supposedly the recap sheets.

Do you have them, Jack?

These are photostats that you supplied us in advance. Why don't you just put the exhibits here some place where I can get at them? What I really want are those recap sheets.

By Mr. Lockley: For any period in particular?

By Mr. Kirby: Well, I would like to have all that you have. Give me all you have.

By the Court: Well, why don't you make available
1213 to counsel all of the exhibits that have been received?

Those photostats, I told you once, have not been received in evidence.

By Mr. Krane: Here are all the exhibits.

By Mr. Lockley: That is everything that has been received?

By Mr. Krane: Just check them and see.

By the Court: I think it might be convenient for counsel to arrange for a table here where the Clerk may have—at least during the court sessions—access to the exhibits, so that the plaintiff's exhibits will be in one place, and kept chronologically, and the defendants' exhibits in another place.

It will expedite matters if that practice can be followed.

By Mr. Lockley: That would be satisfactory to the Government, your Honor.

1214 By Mr. Kirby: I am going to hand back to the government all of these Manufacturers Trust Company photostats, because I think we stipulated that they all went on the books. Nobody owes a dime of tax or anything on that. That was all all right.

(Documents handed to counsel.)

By Mr. Kirby:

Q. Mr. Lubben, do I understand you correctly that a Miss Feldman worked for you keeping books through much of the period in question?

A. You mean, sir, 1945, '46, '44?

Q. Yes, sir. Well, yes, '45 and '46 particularly.

A. Yes, sir, she did much of it.

Q. And your testimony was that she made up certain memoranda which you identified on the stand, is that correct?

A. The papers that I believe Miss Feldman made up I identified, and which was not made up by Miss Feldman I didn't identify that she made it up.

Q. Well, who did make up the memoranda?

A. For what period of time, sir?

By the Court: You will have to refer the witness to certain memoranda.

1215 By Mr. Kirby: I think you are right. Of course, you are right, Judge.

By Mr. Kirby:

Q. This one of 63-A, did Miss Feldman make that up?

A. Well, this was under the time Miss Feldman was in charge of the office and—whether she specifically typed it, or whether or not, I couldn't say, but it was made up under her direction.

Q. How about 55-B?

A. No, I don't think she made this one up, sir.

Q. Who did?

A. I believe this particular one, sir, was made by Miss Strum.

Q. How about 55-A?

A. No, sir; I believe this one was made up by Miss Strum, too, sir.

Q. How about 14-C?

A. February 6, 1946, sir. This would be made up by Miss Feldman, sir.

Q. How about 102?

A. Well, this was made up, sir, during the time Miss Feldman was—let's see now. No, I think this was made up by Miss Strum, sir.

1216 Q. How about 27-A?

A. I would say this is Miss Feldman's sir, made under her direction.

Q. I forgot your answer on 63-A, Mr. Lubben.

A. The answer on 63-A, sir, this was dated 11-27-45, during the period of the partnership, Miss Feldman was the office manager, sir, and—

Q. You think she made that up?

A. If she didn't type it, it was made when she was the office manager, sir, under her direction.

Q. Then am I correct in believing that the only memorandums that you have produced which are recapitulations, at least prepared by Miss Feldman, or under her supervision, are 14-C—

By Mr. Lockley: I object, your Honor.

By Mr. Kirby:

Q. —27-A, and 63-A, is that correct?

A. Well, sir, I don't know what the Government has produced, or anything else, sir. I just know that is what the papers are.

Q. And these are the only three produced by her?

By Mr. Lockley: It is not a question of production.

1217 By Mr. Kirby: Miss Feldman produced under her supervision, or by her.

By the Court: You mean made up, not produced.

By Mr. Kirby: Yes.

By Mr. Lockley: It is not a question of production. It is all that he has had offered to him for identification.

By the Witness: That is correct, sir.

By the Court: I don't know, Mr. Kirby, whether there have been other exhibits, of similar import.

By Mr. Kirby: Well, I most certainly don't think so, and if I am in error, I think they should tell me I am in error I don't want to mislead the witness.

By Mr. Lockley: Then I will tell you you are in error.

By Mr. Kirby: Then you be good enough to show me, Mr. Lockley, which ones I have overlooked. I did ask for them from your table, and I thought you gave them all to me.

By Mr. Lockley: So far as I know, I have given
1218 them all to you. But my point was that this is all the witness has identified. It is not all that he has produced. The Government has additional ones, and has additional witnesses who will identify and produce those.

By Mr. Kirby: Other summary memoranda like this?

By Mr. Lockley: Correct.

By Mr. Kirby: Originals?

By Mr. Lockley: I think so. I am not sure.

By Mr. Kirby: This is a criminal trial. You want to do some terrible things to some fine people, and I know—

By the Court: Wait a minute, Mr. Kirby. That remark—

By Mr. Kirby: Well, I will apologize.

By the Court: That remark was entirely uncalled for. The Government can try their case in their own way. And I assume they have other witnesses. If they have other witnesses that can identify other documents, they have that right. You know that.

1219 By Mr. Kirby: Well, excuse me, sir. When I was—

By the Court: Proceed now with your examination.

By Mr. Kirby:

Q. Mr. Lubben, sir, of the papers that you and I have just looked at there now, the three, 27-A, 14-C and 63-A are the ones prepared under the supervision of Miss Feldman, is that correct?

A. Whatever I stated to the Government, sir, is true. I don't know anything about these numbers.

By Mr. Kirby: May that answer be stricken as not responsive.

By the Court: Very well, it may be stricken.

By the Witness: Let me go over and see the papers. You are talking numbers. I don't associate papers with numbers.

By Mr. Kirby: All right. I hand them to you.

By the Court: I think he said some were prepared by Miss Strum, and some by Miss Feldman, or under her supervision.

By the Witness:

1220 A. I have identified all these, and told you who made them, to you and to the counsel yesterday. But I do know another place where this is written, about these cash payments.

By Mr. Kirby: If the Court please, may that answer be stricken.

By the Court: Yes.

By Mr. Kirby: As not responsive.

By the Court: It may be stricken as not responsive.

By Mr. Kirby:

Q. The question, sir, is: Are those three the only three you and I have looked at just now that were prepared under Miss Feldman's supervision?

1221 A. I wouldn't say that. You have shuffled a lot of papers around here and I don't know what you hand me.

By the Court: Those are the three that you exhibited to him and that he identified. Now, that is fairly clear.

By Mr. Kirby:

Q. And for how long a period was Miss Feldman with you?

A. Oh, sir, from the very early—I think it was early in '44, during '44, rather, and all '45, and until I left the partnership, and at my request she remained for several months, and then when she finished there she came and joined me.

Q. So of the period covered by the indictment, 1945 and 1946, she was with you in charge of the office continuously except for a few months in 1946, is that true?

A. Yes, sir.

Q. Is it correct that the two memoranda, Nos. 101 and No. 22-E are in your own handwriting?

A. This one is dated December 19, 1944. Sir, that is in my own handwriting. And the other one covers a period from March 25 until May 6 for shipments received from Shotwell.

1222 By Mr. Kirby: I ask the Court to strike the answer on the ground that it is not responsive. I merely asked if they are in his handwriting.

By the Witness: And they are in my handwriting. I like to know what is in my handwriting.

By Mr. Kirby:

Q. I show you Exhibits 102, which I think you said was prepared by Miss Strum. Am I correct in that?

A. Yes, sir; I believe that is my—it is either by Miss Strum or under her direction.

Q. And it is true that Exhibit 101, which is in your handwriting, is the same as Exhibit 102, which Miss Strum typed, except for the addition of some material with reference to payment at the bottom?

A. No, sir; I don't think you will find that is correct. I think that is another shipment on the one over there that is typed.

Q. I notice that the total to the right on the one you wrote up is 19,518, sub total, plus another sub total of 14,049, and I notice 19,518 on the one that is No. 102,

1223 and 14,049 as the other total. Now, at least they agree to that extent?

A. Yes, sir, they do.

Q. All right. Now, was 55-A made by Miss Strum, and 55-B by Miss Strum? I think we agreed on that before.

By the Court: If you have already asked him that, why go over that again?

1224 By the Witness: I have already answered this, sir.

By Mr. Kirby:

Q. Thank you. Now, then, those are the only two pieces of paper by Miss Strum that we have seen here, other than the one which was a copy of the one you wrote, isn't that true?

A. Well, I don't know—seen when, sir?

Q. Just now.

A. I don't count them, sir. If you will lay them out I will count them and I will tell you. But I didn't see

your—you were fooling with papers, sir. You have one over there. You say those are the only two, and here is one over here, so that makes three.

Q. You hand me the one I didn't show you, sir, will you, please?

A. That you didn't show me.

Q. Yes.

A. Yes. This one right here, sir (Indicating).

Q. And is that the one where the sub-total on the right-hand side is $19,518.00?

A. Yes, sir.

Q. And is the next one $14,049.00?

1225 A. Yes, sir.

Q. And is that the same one as in your hand-writing, $19,518.00 and $14,049.00, about which you and I talked a minute ago?

A. The totals; yes, sir. The totals are the same.

Q. All right. Then having shown it to you, and you having looked to see if I am lying to you, I will now pose the question again to you. Are there any memoranda that Miss Strum prepared other than these two, and other than that one which is a copy of what you wrote?

A. Well, sir, I wouldn't know that.

Q. Have you seen here any more than these two?

A. I don't—I have to go back and look at these, sir.

1226 Q. You look and see if I have mistaken any of them?

A. No, sir. I think these others were prepared by or under the direction of Miss Feldman. She was the one that has written in longhand, by me, or the two.

Q. So we have two by Miss Feldman, two by you and two by Miss Strum, is that right?

A. Yes, sir. I don't know what you call—

Q. Did you, in the whole period of the indictment—do we have more in front of us, as your testimony nears its conclusion?

A. I don't know, sir.

Q. Do we have more in front of us now?

A. I don't know. Ask the men over there if they have more.

By the Court: Mr. Kirby—

By Mr. Kirby: Yes, sir.

By the Court: Apparently those are the only ones he has identified.

By Mr. Kirby: That is right, that is right.

By Mr. Kirby:

Q. I hand all of them to you and ask you to tell
1227 me whether there is any advance payments to Shotwell shown on them?

A. Yes, sir. Here is one (indicating).

Q. Give the exhibit number, in each case, will you, please?

A. Thank you, sir.

This is number—Government's Exhibit 55-A, as an advance of $20,000. Government's Exhibit No. 55-B is the—well, 55-A, is more complete, sir. 55-B, there was other shipments added on to it.

No. 55-B only calls for a short—shows for an advance, but later is picked up on 55-A. During the period of the partnership, there was an advance of $30,000.

Q. What is the number on that?

A. That, sir, is Government's Exhibit 63-A, and Government's Exhibit 27-A, January the 19th, during a period of the sole proprietorship calls for an $8,000 advance, and this No. 102, sir. I wouldn't know how to call that, an advance, or payment on account, sir.

Q. What is the amount?

A. Well, sir, the total is $25,388.00, and it is paid
1228 several ways, sir. Like, for instance, paid to Frank on the way to farm, $1,488.00.

Q. Was that an advance or was that a payment of—

A. Well, it could be tied up with a specific invoice, sir. He may have gotten the invoice before the merchandise was shipped.

Q. Is it denominated as an advance, Mr. Lubben?

A. No, sir. It doesn't say advance. I remember this one, though, sir, very well. (Indicating.)

Q. Well, on this Exhibit 63-A, after allowing for the advance of $30,000, you say you still owed $36,000, is that right?

A. Yes, sir, if that is what it says there. If that is what is there, that is what it says.

Q. And then on this 27-A, after allowing for the advance of $8,000, you still owed $6,253.00, is that right?

A. If that is what it says on that paper.

1229 Q. 55-B, however, that purports to show a genuine advance, that is $11,267.00, is that right?

A. Well, sir, they were all genuine advances.

Q. Well, I didn't choose my word with nicety. What I mean, Mr. Lubben, is: After allowing credit for the advance, you were still ahead, is that right?

A. No, sir, I wasn't ahead. Shotwell was ahead. You see, they overpaid on the black market and I had a credit.

Q. Excuse me.

By Mr. Kirby: If your Honor please, may that be stricken? We are talking about books, pure and simple entries.

By the Court: Perhaps he didn't understand. That may be stricken.

By Mr. Kirby;

Q. On these first two, 27-A and 63-A, Mr. Lubben, there is a balance due from you to Shotwell, is that true?

A. That is true, sir.

Q. But on this other one, Mr. Lubben, 55-B, that $11,267.00, who owes that to whom?

A. Well, sir, excuse me. 55-A, we would pick it up and I told you that.

1230 Q. Well, at the moment of 55-B, who owes what to whom?

A. On the face of this invoice, at the moment, Shotwell—I had a black market credit. They had the money for the black market premiums and they owed me $11,267.00.

Q. Now they owed that to you. You didn't owe that to them, is that correct?

A. They didn't owe that to me, sir. They owed it to the company.

Q. All right. Did you ever take $11,267.00 out of the cash box at about that time and say that you were using it to pay what you owed Shotwell, in the amount of $11,267.00? Did you or didn't you?

A. Sir, I couldn't have said it because it is not true.

Q. That is what is known in philosophy as a non Sequitor, sir.

A. A non who, sir?

Q. May I inquire, Mr. Lubben, if at any time you had advanced to Shotwell and were ahead of Shotwell by as much as $83,000.00?

A. Well, sir, I know where you are getting your 1231 story, sir, but you ought to—

Q. Excuse me.

By the Court: Just answer the question.
By the Witness:
A. No, sir.
By Mr. Kirby:
Q. The answer is no?
A. That is correct, sir.
Q. Thank you, sir. That is a matter you have had knowledge of in connection with your own income tax transactions, sir?
By Mr. Lockley: I object.
By the Witness:
A. No, sir, but now it proves one thing, that you know where the books of the partnership are because you have been talking to the people, the ones who know it and nobody else knew it, and now you know it and you knew it.
I am as anxious to have the books of the partnership come up here as anyone else is.
By Mr. Kirby: If the Court please, I don't think my conduct has been one designed to hide evidence. I ask that that statement of the witness be stricken and
1232 the jury be instructed to disregard it.
By the Court: It may be stricken and the jury is instructed to disregard it.
By Mr. Kirby:
Q. Now Mr. Lubben, is it true that these payments that you say were made to Huebner were always cash for the overages?
A. Yes, sir, for the overages. That was all he ever got, was cash.
Q. Is it true that the cash in every case was in your hands, in your pocket at least for a time?
A. No, sir, not in every case, but the greatest percentage of it, sir.
Q. You may have me there. I don't know in a case where somebody else—
A. Oh, I testified and you were in court, sir. You heard when I said Mr. Heitmann brought money, you heard me mention Mr. Moran brought money and Mr. Hankermyer brought money. I testified, sir, that the greatest percentage of the time I brought the cash and I had it in my pocket, in my suitcase, or wherever I had it, whatever was necessary, and I gave it to Mr. Huebner.

I am not denying that.

1233 Q. Yes, sir. Now, were the checks to cash which you cashed and have identified here the only checks to cash you cashed and put in your pocket, at least momentarily, during the indictment years of 1945 and 1946?

A. No, no, sir.

Q. And could you be good enough to tell us how many checks to cash you cashed and had in your pocket during the indictment years of 1945 and 1946, either in numbers or in dollar amounts?

By Mr. Lockley: Objection.

By the Court: Well, if he knows, he may answer.

By the Witness: A. No, sir, but—I don't know the number and I don't know the dollars, but I don't deny that I had checks that I cashed and had money in my pocket.

By Mr. Kirby:

Q. Well—

By Mr. Kirby: I ask that those checks be supplied. I ask that the Government supply us with those checks to cash. Do we have them?

1234 By Mr. Lockley: You asked us to give you 486 checks at 3:30 yesterday afternoon. He had seven special agents of the Bureau of Internal Revenue working over them last night, and we have come up with—how many, Mr. Krane?

By Mr. Kirby: Well, that is pretty good, seven agents.

By Mr. Lockley: 148 of them have been turned over, and we have been unable to locate the balance. We have not had them in our possession and do not know where they are at the moment.

By Mr. Kirby: Well, would it be something then that I could take up Monday, Mr. Lockley, to save time?

By Mr. Lockley: You have all that we have, Mr. Kirby.

By Mr. Kirby: Oh! Did you run a total on them by any chance?

By Mr. Lockley: No, we didn't, Mr. Kirby.

By Mr. Kirby: Are these exclusive of the checks charged to Shotwell, Mr. Lockley?

By Mr. Lockley: I don't know what you mean by 1235 that statement.

By Mr. Kirby: Well, they are exclusive of the ones already in evidence?

By Mr. Lockley: Whatever checks are in evidence which you asked for, we have also included. If they are not in there, they are on the table.

By Mr. Kirby:

Q. I show you Check No. 3664. Did you get that cash of $4,420.00?

A. Well, sir, if you will show me some—did I get the cash?

Q. Yes.

A. Well, it cleared the bank sir.

Q. Did you get the cash? Did you get the cash of Check 3667 for $3,642.00?

By Mr. Lockley: I object, your Honor. It is immaterial as to whether he got the cash or not. He has already testified that he did.

By Mr. Kirby: Well, I think it is material in the highest and if I were to denominate its purpose, I think it would be improper.

1236 The Court sees what I am driving at.

By the Court: Well, he may answer.

By Mr. Kirby:

Q. Did you answer me, sir, on that last check?

A. I have answered you on everything, sir.

Q. On 3736, did you get that cash of $4,788.00?

A. Do you mean I personally ended up with it?

Q. Well, that would be a long argument. No.

A. No, it wouldn't be a long argument, sir.

Q. You would say no.

A. I am under oath.

Q. Did you handle it?

A. Sir, if you will give me the copies of my cash disbursement slips, I will identify each one of these checks, who got the money, how the money was gotten, and where it went.

Q. Excuse me, sir. Did you handle that $4,788.00?

A. This one, I wouldn't remember whether I did or not, sir. It is signed by Miss Feldman.

Q. How about this May 9th one for $4,922.00? Did you get that cashed?

A. Well, I cashed it and paid it out to somebody.

Q. Did you get this cash of 3736, for $1,923.00?

A. No. This check says, "Cashed by Miss Feldman." I may have gotten the money, but it was paid

1237 out to somebody in overages, or—

Q. This thirty dollar check we don't need to go into.

This one, 3751, for $1,050.00, did you get that cash?

Well, this particular check is endorsed by Miss Feldman, but, sir, if you will show me the cash disbursement slip, I will tell you if I got the money and where the money went. Without that, I can't identify what the story is, sir.

1238 Q. Would we have that same answer with respect to all these checks to cash, Mr. Lubben?

A. That is the only answer I can give you, sir.

Q. Let me see if there are any of those bigger ones here that you might recall.

A. I think the biggest one, Shotwell got that, sir.

Q. Well, I am sure that is your story.

A. No, sir. I am being very—

By the Court: Don't argue with the witness.

By the Witness: He is getting sarcastic with me and I am trying to be polite.

By Mr. Kirby:

Q. You refer us, Mr. Lubben, to these cash authorization sheets in order to learn who got the cash, is that right?

A. Well, sir—

Q. Is that what you told me I should get for you?

A. Sir, I will tell you what you can get for me, sir.

Q. Wait a minute, now. Did you tell me that I should get the cash authorizations or am I mistaken?

A. If you will just stop long enough to let me
1239 answer a question and stop interrupting me, sir, I will answer you.

Q. I would like you to answer that question, sir.

A. That isn't specific. You keep interrupting me, sir. Sir, let me say this: A cash authorization slip was drawn for the cash and it is on the books of the company. The books of the company will tell where the money went to and the cash authorization slip will tell it and it will have my initial on there. There is no mystery about those cash checks. They can be explained to you perfectly, sir.

By Mr. Kirby: George, will you give me a study of the unexplained cash checks? It is in these work sheets here.

By Mr. Kirby:

Q. Do you mean that at the time those checks to cash were made out that there were cash authorization slips

made up in each case telling just exactly who got the money?

A. Or what the money was for. To the best of my knowledge, sir, there was one for each one. It was the bookkeeping procedure, sir, that our accountant
1240 wanted.

Q. And who was your accountant?

A. During what period of time, sir? You handed me a batch of checks there and—

By the Court: Just answer the question.

By the Witness: I am sorry.

By the Court: You asked him during what period of time. That was a fair response to your question. You should indicate what period of time you refer to.

By the Witness: He hasn't told me what period of time, sir.

By the Court: Mr. Kirby, he asked you what period of time you refer to.

By Mr. Kirby: Yes; I was going to look at some records than try to answer you from memory.

By Mr. Kirby:

Q. In the period from March 1, 1946, to June 30, 1946, were there checks to cash drawn by your company in the total of $323,663.23?

By Mr. Lockley: I object, your Honor.

By the Court: Wait a minute.

By Mr. Kirby:

1241 Q. Or approximately that amount?

A. Sir, if they were reflected on the books of the company I have no knowledge of the amount, but we did a substantial business.

Q. And were they reflected on the books of the company as to what the cash went for at the time they were made up?

A. Well, to the best of my knowledge, sir, they were charged to certain accounts or they went for the payment of certain merchandise of certain things. I don't know, sir.

Q. At the time they were made out, my sir?

A. No, I think, sir—

Q. Later?

A. Now wait a minute. Don't be putting words in my mouth.

Q. When?

A. Sir, there were times that we may have had a check for cash and had drawn it out the next day or two and told where it went the next day or two but not very long after, sir. I mean, I didn't specifically—

Q. Not weeks, anyway?

A. There may have been one or two times in that, sir. I don't know.

1242 Q. Not months, surely?

A. Sooner or later, sir.

Q. Sooner or later? Just how long?

A. Just when the accountant would come around for his monthly audit and he would have to know where his money went.

1243 Q. Isn't it true, sir, that from the period of March 1, 1946, to the period of June 30, 1946, that there were cash checks in the amount of $323,663.23 and there was no explanation when the accountant came as to what had happened to the $150,599.13? Isn't that true?

A. That is the very first I heard of it, sir.

Q. May I inquire of the following period, from July 1, 1946, to October 31, 1946, were there checks to cash in the amount of $286,506.13 issued?

A. Well, sir, I wouldn't know. I don't have the books in front of me.

Q. If they were issued, was an explanation of who got the money put in the books or was it available in the books?

A. To the best of my knowledge, it would be, sir.

Q. And would you say that it is not true that there was in that period $84,620.00 in checks to cash as to which you had no explanation? Is that true? Is that true or false?

A. Sir, I have never heard of that before.

Q. You have never heard of that before?

A. No.

Q. Were the accountants at the time Sproul & Scholz?

1244 A. At what time?

Q. The time I asked you about, March 1, 1946, through June 30th, 1946, and the second period was July 1, 1946, to October 31, 1946.

A. I think Mr. Bercu was the accountant at the beginning, sir, of January.

Q. When did Sproul & Scholz become the accountants?

A. I don't have the specific sheets in front of me.

Q. Do you deny they did the work sheets and checked the cash checks in the period I am talking about or do you say you don't know?

A. No, sir. I hired them at the suggestion of Mr. Morley Kramer of the Gum Products.

Q. Well, were they your accountants during the period of November 1, 1946, to February 28, 1947?

A. I believe so, sir.

Q. And in that period there was $145,875.91 in checks to cash. Do you know that?

A. I don't know, sir. I haven't got any statement and I don't know anything about the books.

Q. There were some half of those checks, $71,725.77 unexplained on the books?

A. Sir, I have never heard of any of that until 1245 just at this moment.

Q. Having in mind, sir, that the proof does go to the question of your handling cash and accepting for the moment your statement that you never heard of it, is it true that there were those unexplained totals of checks in those periods? Is it true or false?

A. Well, sir, I have never heard of it and I don't know anything about it.

Q. It could be true?

A. Well, sir, no, sir, it could not be true or it couldn't be true. I don't know. We would have to—the people rendered me a statement and at no time in any of those statements I received from Sproul & Scholz do I remember seeing where there was unexplained checks in the amount of any dollars.

Q. Would I be given to understand then that you deny that in the period I have outlined there were in excess of $200,000.00 in checks to cash which when the accountants came were unexplained? Do you deny that, sir?

A. Sir, I have never heard of it. I will say this, I have never seen a statement from these people that ever said that there was any checks unaccounted for be-
1246 cause they were—Mr. Sproul—Mr. Scholz would come up there and he would send his people up there and I know, sir, if there was anything unaccounted for.

before he left he would run it down.

1247 Q. Mr. Lubben, is it true that in your operation you did handle as we have just covered, a large amount of cash?

A. Yes, sir, I did.

Q. And is it true, as you have testified before the Kefauver Committee at page 1069, that one of things that you had to do was to go out and pay cash to buy dextrose?

A. Oh, yes, sir.

Q. And is it true that you would take some cash and go out and buy for cash sugar rationing certificates?

By Mr. Lockley: I object.

By Mr. Kirby.

Q. (Continuing) —in connection with your business?

By Mr. Lockley: Your Honor, what Mr. Lubben's business practice was is entirely beside the point.

By the Court: Wait until Mr. Lockley states his objection.

By Mr. Lockley: It is immaterial to the case at issue. It has no relationship to the issues.

1248 By the Court: He may answer.

By the Witness: Will you read the question, please.

(Whereupon the question was read as above recorded.)

By the Court: I think you refer to a certain period.

By Mr. Kirby: I refer to during the indictment period of 1945 and 1946. While this questioning of cash going to them or who is immaterial to the dispute—

By the Court: He may answer.

By the Witness:

A. No, sir. I never took any cash and went out and bought dextrose and those things, sir.

By Mr. Kirby:

Q. The question was whether you ever bought sugar certificates for cash?

A. Whether I ever went out and bought sugar certificates?

Q. Yes.

A. I think, sir, I never went out and bought any certificates, no, sir.

Q. Did you ever pay for any that were brought in to you?

A. I think once, sir.

1249 Q. Well, this exhibit here, which is Defendants' Exhibit 1-D, only covers a short period but I see here that—

By Mr. Lockley: What number?

By Mr. Kirby: It is Defendants' Exhibit 1-D but I see here an item on June 6th, certificate for 500 bags, $2,500.00 cash.

By Mr. Kirby:

Q. You paid that out. Do you remember that?

A. Yes, sir, I remember. I didn't deny it.

Q. This is in your handwriting?

A. Yes. I didn't deny it.

Q. Well, you said you did it once. That is once.

A. I may have done it several times, sir, but specifically, I can't give you the exact number.

Q. Let me call to your attention at least a second time from the limited papers that I have. On June 18th, did you buy a certificate for a thousand bags for $4,500.00?

A. Oh, I wouldn't know whether I did, sir. You are reading a paper. I don't see it. I don't see where you saw that, sir. Could you tell me?

Q. June 6th and June 18th.

A. Oh, money paid out. Yes, sir, on June 6th,
1250 sir, I bought a certificate for 2,500 bags, and on June 18th, there was a certificate for 4,000 bags.

Q. And how much a bag were you paying for the certificates?

A. Well, let's see. At five hundred—at $2,500.00, that would be $5.00 a bag.

Q. That is for the certificate, I take it, and not for the sugar?

A. Yes, sir. That was for the certificate. And for June 18th, I got it a little cheaper, sir.

Q. Am I correct in believing, Mr. Lubben, that that purchasing of sugar certificates was the subject of OPA inquiry about which you testified before the Kefauver Committee?

By Mr. Lockley: I object, your Honor. I fail to see the materiality.

By the Court: Yes. I will sustain the objection.

1251 By Mr. Kirby:

Q. Another product that you paid cash to get in the

raw material field was cocoa. Wasn't that right, sir?

A. Oh, on occasion, sir, I bought some cocoa, I believe. Yes, sir, I did.

Q. And you have got a man on there whose name is Brogan, who is in Chicago, and you bought cocoa from him for cash, didn't you?

A. That is what it says.

Q. There is a man on there whose name is Ed Urban. He is from Chicago and you bought from him for cash raw materials?

A. I don't see where it says Ed Urban. I don't want to just jump to conclusions.

Q. Is that the same Ed Urban you say endorsed checks that went to Shotwell?

A. Yes, sir. They did go to Shotwell.

Q. Do you find Mr. Urban's name there in your handwriting?

A. So far, I haven't. Oh, yes, sir, I see on June 20th Ed Urban's name, here (Indicating).

Q. Thank you. Is it also true you were most extensively engaged in the use of cash in the indict-
1252 ment years of 1945 and 1946 for the purchase of corn? Isn't that true?

By Mr. Lockley: I object, your Honor. I don't see that that has any materiality to the issues here.

By the Court: He may answer.

By the Witness:

A. I forget the question.

(Question read.)

By the Witness:

A. Yes, sir, that is true.

By Mr. Kirby:

Q. Did you answers these questions by Rudolph Halley at page 1108 and give these answers:

"Mr. Halley: You sold it at the ceiling price of corn syrup and got an invoice for that?

"Mr. Lubben: It could have been sold as a blend and gotten the cash price and the invoice price put together. You could have put it together and sold it as a blend of syrup and you would have been perfectly all right and legal in doing it.

1253 "Mr. Halley: But you wouldn't have gotten the large sums of cash that you could put in the cash box, isn't that right?

"Mr. Lubben: The cash that you had to have, you had in turn to pay out to the people that got you the corn."

Did Mr. Halley ask you that and did you say that?

A. Yes, sir, he did, and that is my answer.

By Mr. Kirby: Can we have those corn box sheets? I guess I have them here.

By Mr. Kirby:

Q. The government gave us some copies of corn box sheets and may I inquire of you, sir, whether your transactions in corn would run as much in one month as $307,169.97 cash?

By Mr. Lockley: I object, your Honor. I believe I am right in stating that that is not in evidence.

By Mr. Kirby: Well, I am asking this witness whether he knows if he handled that much in cash in the corn market.

By the Court: He may answer.

1254 By the Witness:

A. I don't recall, sir.

By Mr. Kirby:

Q. Any month in which you handled $182,334.00 in cash?

A. No, sir.

Q. Was there any month in which you handled $272,768.18 in cash?

A. No, but those records, sir, were kept at my request.

Q. Well, the problem we have is whether you handled that much cash in the corn market in some of those months, Mr. Lubben.

A. Who? I personally?

Q. Well, your company, sir.

A. The company?

Q. Yes.

A. Yes, the company handled it, sir.

1255 Q. Now, do you know a fellow by the name of Red Bowman from Minneapolis?

A. I know him, sir.

Q. Do you know a fellow by the name of Major Harris?

A. Yes, sir.

Q. Did you ever pay, and specifically in October of 1945, cash to Red Bowman of Minneapolis in the amount of $79,000.00 or thereabouts?

A. Well, sir—

By Mr. Lockley: I object, your Honor, to individual transactions unless they have some bearing.

By the Court: He may answer.

By the Witness:

A. Sir, if it is on those records, it was paid to him.

By Mr. Kirby:

Q. May I inquire if you ever paid to Major Harris, Lieutenant Harris, or whatever it was—I may be in error about his rank—$53,000.00 in cash on that same day?

A. I personally?

Q. Was it paid by you personally?

1256 A. No, not by me personally.

Q. Was it paid for these cash corn transactions?

A. Well, if he was paid that much money, it would appear on those records which I requested be kept. Who paid it or how it was paid or if it was paid in cash, I don't know who paid it.

Q. But if it says that Red Bowman got $59,000.00 and Harris got $53,000.00, they did get it, is that your position?

A. Well, sir, if it is on the books, it is true.

Q. It is precisely as to the test of the books that we make the inquiry.

A. Thank you, sir.

Q. Now, did you have some fellows out buying corn and sending it to Shotwell?

By the Court: How was that again?

By Mr. Kirby: I asked if he had some fellows out buying corn and sending it to the credit, I should say, at the refineries of Shotwell.

By the Witness:

A. No, sir.

By Mr. Kirby:

Q. Can you tell me the names of the persons who

1257 were working for the partnership in the securing of corn in either 1945 or 1946 in addition to Bowman and Harris?

A. Well, sir, they weren't working for the partnership. They were just people that you paid them money to get the corn released. They weren't working for us. They were just people that paid them the money.

Q. Well, were you engaged in paying other persons that you can name to secure corn for you for cash?

A. No, sir. At the moment, I can't, sir.

Q. May I ask you, sir, whether one of the companies to which you sent corn was the Hubbinger Refinery of Keokuk, Iowa?

A. Oh, yes, sir, certainly it was.

Q. May I ask whether you supplied to the Hubbinger Refinery in Keokuk, Iowa, a total, to March 11, 1946, of 136,873 bushels of corn?

A. Yes, sir, and that ended in a lawsuit.

Q. And am I correct in believing that with your agreement with Hubbinger, that would have entitled you to get roughly two million pounds of corn syrup at ceiling price?

A. I don't recall the number of pounds, sir. The
1258 total number of pounds I don't recall, but I know very well I had to sue Hubbinger later on to get some money back from him because they didn't go through the deal. They went through partly and then tried to put a halo on their head.

Q. We wouldn't want anybody to do that now.

A. I realize that.

Q. At least they were still shipping you corn syrup in 1946 and the early part of 1947, weren't they?

A. I don't recall in 1947, sir, and I only recall four cars in 1946, sir.

1259 Q. Do you remember they shipped you a car on August 8, 1946, of 95,080 pounds of corn syrup? Do you remember that?

A. That is an ordinary tank car, sir.

Q. Do you recall you got it from them?

A. I had to go up there, sir, because that was one of the—

Q. Did you get it from them?

A. Well, do you have a record that says I got it? I am sitting here, and—

Q. I am under the impression this record is reliable. I would like to have your confirmation.

A. Sir, I am sitting here and trying to remember eight years later whether on August 25th I received a car of corn syrup.

Q. Well, in the fall of 1946, then?

A. Let me see the record and I will tell you.

Q. Independently of the record, could you tell me?

A. I said, sir, I believe in 1946 we received about

four cars of corn syrup from the Hubbinger Company.

Q. Did you receive any in 1947?

1260 A. I don't recall, sir.

By the Court: What was it that was in 1947?

By Mr. Kirby: It is quite an interesting question, Judge.

By the Witness: I think I had to pay $8,000 a carload, or something like that. I had to pay a lot of money out for those four cars.

By Mr. Kirby:

Q. Excuse me.

By Mr. Kirby: Your Honor, I want to call to the Court's attention so that you may appreciate I am not being light about it, but there is a question as to whether in the fall of 1946—

By Mr. Lockley: I object, your Honor.

By Mr. Kirby: (Continuing) —this man paid a premium.

By the Court: I let you go into these transactions. I don't think we will go into the delivery of corn made in 1947.

By Mr. Kirby: May I ask a further question on that?

1261 By the Court: No. We are going to adjourn now.

By Mr. Kirby: This will only take me a second.

By the Court: We will adjourn now. We will be in recess now, ladies and gentlemen of the jury, until ten o'clock Monday morning.

I trust you will bear in mind the admonition I have heretofore given you regarding the fact that you shouldn't talk with anybody about this case, or permit anyone to talk to you about it. In the event anyone should talk to you about it, you should tell that you are a juror in case, and are not permitted to talk about it. If anyone persists in talking to you about it, I want you to refer the matter to the Court.

I trust you will all have a pleasant week end.

(Whereupon an adjournment was taken in the above entitled cause until Monday, September 21, 1953, at 10:00 o'clock a.m.)

1262

* * (Caption—No. 52 CR 143) * *

Chicago, Illinois
Monday, September 21, 1953
10:00 o'clock a.m.

Court met pursuant to adjournment.

Present:
Mr. Edward J. Calihan, Jr.
Mr. John Lockley,
Mr. Vincent O'Brien
Mr. Thomas C. McConnell,
Mr. William T. Kirby,

And Thereupon the following further proceedings were had herein, in the presence and hearing of the jury:—

By the Clerk: 52 CR 143, United States of America versus Shotwell Manufacturing Company, et al. Case on trial.

By the Court: I may say to the jury that I
1263 regret to report that Mr. Schmitt, one of the alternate jurors, is ill, and unable to report today. But we will proceed with the twelve jurors and the one alternate.

You may proceed.

DAVID G. LUBBEN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and testified further as follows:

Cross Examination (Continued) by Mr. Kirby.

Q. Mr. Lubben, do you recall testifying with respect to a check to cash in the amount of $20,000, which is Government Exhibit 55, and which I now hand you?

A. Yes, sir; I do.

Q. And in connection with that check, did you also refer to Exhibit 55-A, and call the attention of the Court and jury to the shipment of Cardinals which is at the top of that memorandum?

A. What do you mean, call the attention to the shipment of Cardinals, sir?

Q. Well, are the two connected in any way, the check, 55, and the exhibit, 55-A, with reference to the ship-
1264 ment of Cardinals?

A. Well, 55 is the check, and 55-A, is a recap sheet, sir, showing Cardinal chocolates, spice buttons, gum drops, and special citrus drops, for a total premium of $24,111.00 and advance of $20,000, and balance due $4,111, and another shipment dated June 28 of spice buttons, of $14,130—14130 pounds, came to $1,413.

Q. And the $20,000, that Exhibit 55, was an advance?

A. Yes, sir.

Q. And do you recall testifying at page 569 in these proceedings, with respect to this $20,000 advance and saying:

"All right. This time, sir, Mr. Huebner called me on the telephone, and he told me, 'Dave, I can get you some Cardinal chocolates.'

"Now, I don't have my records, sir, but I believe this was one of the first shipments of Cardinal chocolates which was a very good item to get to sell, and he told me if I could get him a substantial payment, a big amount of money as an advance, that I could
1265 get a lot of candy, and I asked him how much, and he said, '$20,000', and I drew the check and got it, and he got the money."

Do you remember answering in that fashion in these proceedings?

A. I don't know if it has anything to do with this exhibit, sir.

1266 Q. Excuse me, sir. Do you remember answering in that fashion in these proceedings?

A. Yes, sir; but I don't recall—

By the Court: Just answer the question, Mr. Lubben.

By the Witness:

A. I answered that way sir. Yes, sir.

By Mr. Kirby:

Q. I will back up then and read a little more, Mr. Lubben, at page 567—I will go back to 566:

"Q. All right. I show you Government's Exhibit 55 and ask you if that is the $20,000.00 advance payment?

"A. I would like to correct my last answer. It was the amount—it was the advance I gave to Mr. Huebner.

"Q. All right.—"

This, incidentally, is the questioning by Mr. Lockley.

"Is that the check which you have in your hand, a $20,000.00 one?

"A. Yes, sir; it was.

"Q. Who endorsed the check?

"A. Freda Seider.

1267 "Q. Did she give the money to you?

"A. Yes, sir.

"Q. What did you do with it?

"A. Paid it to Mr. Huebner.

"Q. Do you know where?

"A. I don't remember correctly whether it was in New York or Chicago, sir.

"Q. It was one or the other?

"A. Yes, sir. If it was in New York, he received the money May 25th. If it was in Chicago, it was a day or two later.

"Q. Do you have any specific knowledge of that particular transaction at the moment?

"A. I think, if I recall, sir, to the best of my ability, it was one of the first advances that I had given Shotwell. Mr. Huebner called me on the phone—

"Q. When?

"A. Oh, probably that recap sheet would tell me.

"Q. Is that Exhibit 55-B? 55-A?

"A. Well, sir, the first shipment of Cardinal chocolates on this for $32,400.00 was on May 25th, and

1268 this check was drawn on May 25th and I remember a number of times, but specificallly this one, I remember."

Then is the answer which I read to you before, and I will read it to you again:

"All right. This time, sir, Mr. Huebner called me on the telephone and he told me, 'Dave, I can get you some Cardinal chocolates.'

"Now, I don't have my records, sir, but I believe this was one of the first shipments of Cardinal chocolates, which was a very good item to get to sell, and he told me if I could get him a substantial payment, a big amount of money as an advance, that I could get a lot of candy and I asked him how much, and he said, '$20,000.00,' and I drew the check and got it and he got the money."

Now, did you make those answers to those questions on your direct examination?

A. I did, sir.

1269 Q. Would you be kind enough, Mr. Lubben, to tell me whether or not it is true that before what you say was this payment in order to induce the shipment of Cardinal chocolates, a good item to get to sell, isn't that true, Mr. Lubben, that in that period prior to that you had already had more than 60 tons of Cardinal chocolates from the Shotwell Company to sell; isn't that true?

A. I don't know that that is true.

Q. Well, would you be courteous enough to look at an invoice for 5400 gross weight pounds of Cardinal chocolates shipped to you on April 5th, 1945, and gross weight of 20,282 pounds of chocolates and citrus drops—4728 being the chocolates—on April 6th, 1945, 1824—

By the Court: You can ask him a question about it, if that isn't true, but I don't think you should just read it into the record. That is a matter we brought up the other day. We had some little misunderstanding about it. I think you have a right to ask him whether that is correct, and whether or not that doesn't properly reflect what took place.

1270 By Mr. Kirby: Thank you.

By Mr. Kirby:

Q. Let me ask you with respect to the invoices I have already handed you, don't those correctly represent shipments of chocolates to you, sir?

A. Yes, sir; but not both of them. One was called Kraft, and I think that was their own—the name of their own box. But, however, sir, I don't believe—

Q. Excuse me. The question is—the question that was put to you was whether those shipments were made to you; and were they, sir?

A. But you asked me—

Q. Excuse me.

By the Court: Just answer the question.

By the Witness:

A. I never received 60 tons of chocolates during this period.

By Mr. Kirby:

Q. Do you now recall that on April 7th, 1945, you received another shipment of 1824 pounds of Cardinal chocolates?

A. Well, sir, if you add them all up I don't think
1271 you are going to get 120,000 pounds. And you said 60 tons.

Q. I will tell you what let's do. I may be mistaken. I will give you an adding machine tape, and these invoices, and you just run down that tape and see whether they total 120,744 pounds. And wherever mistakes exist we will agree with you.

1272 A. Yes, sir. It appears to be correct.

Q. And is the total 120,744 pounds?

A. Yes, sir.

Q. All shipped prior to the fifth of May—

A. This was a sole—

Q. —1945, is that true?

A. During the sole proprietorship, yes, sir.

By Mr. O'Brien: 1946?

By Mr. Kirby:

Q. Mr. Lubben, you testified that there was a man with the Warfield Chocolate Company that received $10,000.00 in connection with the Haberkorn purchase. Do you recall that?

A. I do, sir.

Q. What was his name?

A. Paul Hershey.

Q. And what was the quantity of chocolate being secured, do you recall?

By Mr. Lockley: I object.

By Mr. Kirby:

Q. Having in mind you said you checked into the chocolate candy of Haberkorn, what was it, do you remember?

By Mr. Lockley: I object, your Honor.

1273 There is no materiality to what the chocolate candy of the Haberkorn Candy Company was and counsel has yet to connect it up. The Haberkorn candy deal has yet to be connected up with any of the issues on trial here.

By the Court: Well, he may answer.

By the Witness:

A. I don't recall what the quantity was, sir, at the moment. I remember being with Mr. Urban when Mr.— when Mr. Kupfer of Walgreen told us the number of pounds of chocolate that was in the quota and the number of pounds of sugar.

By Mr. Kirby:

Q. But you don't recall the amount?

A. No, sir, I don't.

Q. Do you know a chocolate refining company called the United Chocolate Refiners?

A. Yes, sir, I do.

Q. Are they located in Massachusetts?

A. Yes, sir, they are.

Q. And is a man by the name of Horton president of the company?

A. I wouldn't know that, sir.

Q. Do you know Mr. Horton?

A. I believe I met a Mr. Horton when I met somebody else from that company, sir.

Q. And the man you met other than Horton, his name is August Nelson?

A. Yes, sir. Mr. Nelson.

Q. Was August Nelson the sales manager of that company in 1945?

A. Well, I wouldn't know that, sir.

Q. Do you know whether August Nelson was connected in any way with the United Chocolate Refiners in the early part of 1945?

By Mr. Lockley: I object, your Honor, to this line of questioning. It is immaterial. It is beyond the scope of the direct examination.

By the Court: I suppose it is preliminary. I am not advised of what the materiality may be, but I assume the question is preliminary to something counsel expects to connect up.

By the Witness:

A. I believe he was some official. Whether he was an official—whether he was a sales manager or assistant sales manager or what office he had, I don't know, but I know he worked there.

By Mr. Kirby:

Q. Did he have any authority or control over the persons to whom chocolate might be shipped by that company in early 1945?

A. Well, sir, whether he had the absolute control, I don't know, but he was an official of the company, whether it was his final say or whether it was somebody else's. I wouldn't know that, sir.

Q. He had some part, at least, in the administration of their chocolate shipment policy, is that generally true?

A. Yes, sir, that is true.

Q. Did you so advise Mr. Cain and Mr. Huebner, that is to say that Mr. Nelson at the United Chocolate Refinery might have some influence in getting, possibly getting chocolate shipped to Shotwell Manufacturing Company in early 1945?

By Mr. Lockley: I object, your Honor. I still fail to see the materiality.

By the Court: Well, I think it is preliminary and I must give counsel a certain latitude in asking questions that may lead to something material.

1276 By the Witness:

A. It is very possible I did, sir.

By Mr. Kurby:

Q. Did you, as a matter of fact, meet with Mr. Cain and Mr. Huebner in Boston in early 1945 so that you might introduce them to Mr. August Nelson of the United Chocolate Refiners?

A. I believe I did, sir.

1277 Q. As a result of that meeting you know it to be a fact, sir, don't you, that United Chocolate Refiners shipped two carloads of chocolate to Shotwell in April, or in March and April of 1945?

A. I don't know that, sir. I know that I talked to Mr. Nelson and Mr. Cain was present. I don't recall Mr. Huebner, but if you say he was there, I will go along with that.

Q. Well, excuse me now. We want to be courteous to one another, but we don't want to lump each other's testimony together. You say what you remember, and that is what you have to give the jury. You shouldn't mix it up with me, sir.

A. I cannot specifically remember Mr. Huebner being there, but I can remember Mr. Cain being there.

Q. Yes, with you when you talked to Nelson?

A. Yes, sir.

Q. Now, then, don't you know, as your memory goes back to the event now, that the United Chocolate Refiners had never shipped chocolate to Shotwell Manufacturing Company? Do you remember that?

By Mr. Lockley: I object to that, unless he has 1278 some knowledge. It is hearsay. It is beyond the scope of the direct examination.

By the Court: He may answer.

By the Witness:

A. If I recall the conversation—do you want to hear the conversation?

By Mr. Kirby:

Q. There is a pending question, and I would be so happy if you would answer it.

Miss Reporter, will you please read the question to the witness?

(Whereupon the question was read as above recorded.)

By the Witness:

A. I don't know whether they had never, or had, or anything else.

By Mr. Kirby:

Q. Do you know that in March of 1945, the United Chocolate Refiners did ship a carload, 55,000 pounds roughly, of chocolate to Shotwell, and then again in the two weeks later, shipped another carload totaling 55,000 pounds directly? Do you know that, Mr. Lubben?

1279 A. No, sir, I don't know that.

Q. Now immediately after that shipment from the United Chocolate Refiners, Mr. Lubben, I notice that the shipment of chocolate candy that I have just questioned you about, that 60 tons started. Do you connect the two events, your interceding to get chocolate, and their shipping you chocolate candy, or is there no connection?

A. Well, I can't see any connection as to the chocolate. All I can see on the face of those invoices there, you get 18 3/4 premium. That is the only connection I see.

Q. Will you please listen to the question?

By Mr. Kirby: Would the reporter read the question again?

(Whereupon the question was read as above recorded.)

By Mr. Kirby: Will the Court be good enough to strike the answer as not responsive?

By the Court: Yes, it is not responsive. Read the question.

(Whereupon the question was reread as above recorded.)

1280 By the Witness:

A. Sir, there is no connection.

By Mr. Kirby:

Q. Thank you. Do you recall testifying, to stick to the question of chocolates for the minute, although this is not too important a matter, this particular inquiry, I admit—you remember you testified this $319.50 check which is Government Exhibit 124 was issued in November of 1946, again as a premium on chocolates? Do you remember that?

A. I don't recall saying this specific check was a premium on chocolates, sir.

Q. Well, do you deny that it was?

A. Well, sir, if you have some other recap sheets, sir, it tells where the money went for.

1281 Q. Well, by recap sheet, do you mean this cash authorization which is Government's Exhibit 142-A?

A. Yes, sir.

Q. May I have the check?

A. Yes, sir.

Q. Now, is that the type of an authorization slip that would be issued, as I understand it, concurrently with the issuance of the check to cash?

A. What do you mean by concurrently, sir?

Q. Well, was it issued concurrently?

A. I asked you, what do you mean by concurrently, sir?

Q. At about the same time.

A. Thank you. Yes, sir, I would say it was about the same time.

Q. And this check in the amount of $319.50 and that check-authorization which is Exhibit 142-A are connected together?

A. Well, it says "$319.50" and it says "Cash for Shotwell" and I can't read this writing here (Indicating). It says—I think it says, "We had already paid $2,004.00 and there was a $319.50 balance." And it says, "P77-13" I think that is some kind of a bookkeeping number.

1282 Q. When does it show you paid the $319.50 balance.

A. About 11-23, sir.

Q. That is November 23, 1946?

A. It says "Paid 11/7/46, $2,004.00, and 11/23/46, $319.50."

Q. And does it give the check number?

A. I can't read it very well, sir.

Q. Now, this check that you identified in evidence is dated November 8th, 1946, Mr. Lubben, could you, I suppose, give us a ready explanation for why they don't jibe?

A. What do you mean, why they don't jibe, sir?

Q. The cash authorization slip says you paid it on the 23rd. You are producing a check showing you paid it on the 8th.

A. Well, sir, the figures down here are not in my handwriting, sir. They appear to be in the handwriting of Miss Feldman.

Q. Thank you.

A. If I cashed the check, they got the money, sir.

Q. That is the net of it. When we have to fall away from the documents, we fall back on your statement that they got the money.

By Mr. Lockley: I object, your Honor.

1283 By the Court: Well, you are arguing with the witness now.

By Mr. Kirby: I think that is true.

By Mr. Lockley: Yes.

By Mr. Kirby:

Q. Mr. Lubben, do you recall that you also testified that in the fall of 1946, in the late fall of 1946 you paid an overage on some Cardinal chocolates by cash—there is no check here to look at. Do you remember that?

A. Well, sir, I paid the Shotwell—

Q. Excuse me, now. I am asking about a particular payment.

By the Court: Can you direct his attention more specifically to the matter which you have in mind?

By Mr. Kirby: Well, it was never specifically—

By the Court: Isn't there some testimony about it, perhaps?

By Mr. Kirby: All right. I don't have the reference to the testimony on that $9,882.00. Do you have that, Jack?

By the Court: Well, if he can remember, good and

1284 well. I was under the impression, apparently, that he didn't have it in mind and I thought you could make it more specific.

By Mr. Kirby: Well, for some reason which is surprising to me, I don't have the notation here but I did intend to read the witness his words each time. The invoice was

No. C213233. You might get the exhibit number off of that.

By the Court: Well, perhaps you can proceed with something else.

1285 By Mr. Kirby: I will see if he has any memory of it at all. I am embarrassed that I didn't make a note on that. I read it and then I forgot to write the page number down.

By Mr. Kirby:

Q. But, having in mind it was your testimony, Mr. Lubben, do you remember testifying that there was a payment which you said you made in cash in the amount of $9,882.00 in connection with the shipment in November of 1946 of Cardinal chocolates? Do you remember that, sir?

A. Sir, I had so many payments to Shotwell, sir, I can't just come out without you giving me anything to substantiate what you are talking about, sir.

I would like to have you refresh my memory with some of the evidence that has been introduced, sir.

Q. All right. Now let me go ahead, though, for a minute, and ask you whether it is true that at this time, that is to say in November of 1946 when you say you were paying an overage on a chocolate product to Shotwell, is it not true that in September and October of 1946

1286 you in your business, had purchased 581 tons of chocolate and cocoa beans and you had that quantity at the time you say you were paying an overage to Shotwell to get chocolate? Now, isn't that true about that?

A. Now, sir—

By Mr. Lockley: I object, your Honor. Counsel is continuously assuming in his questions facts which are not in evidence.

By the Court: Yes, I think the objection is well taken.

By Mr. Kirby:

Q. Can you tell me, Mr. Lubben, how much chocolate and cocoa bean you had purchased from outside sources in September and October of 1946?

A. Whatever is on the books of my company, sir, because—

Q. Does 581 tons sound right?

By Mr. Lockley: I object.

By the Witness:

A. Yes, but I purchased box chocolates from Shotwell and not chocolate—just bulk bar chocolate. I purchased a finished product from them, sir, box chocolates, and
1287 what is more, sir that—

Q. Excuse me, now.

By Mr. Kirby: Will the Court be good enough to instruct the witness he has answered the question?

By the Witness: Pardon me. He is trying to confuse the people with the chocolate, sir. It is—

By Mr. Kirby: Would the Court be good enough to instruct the witness the answer is not responsive.

By the Court: It may be stricken as not responsive.

By Mr. Kirby:

Q. Mr. Lubben, do you recall this testimony that you gave at page 588 with respect to an alleged payment of $30,000.00 cash:

"Q. Do you know where you got the $30,000.00?

"A. Yes, sir, I do.

"Q. Where?

"A. I got it out of the box in our office that was called the corn box. This was during the partnership. I remember this instance specifically, sir, be-
1288 cause we were selling corn syrup for an invoice.

Do you recall being asked those questions and giving those answers?

A. I do, sir.

Q. Would you be good enough to look at these sheets which purport to be summaries of the corn box or some of the transactions of the corn box and tell me whether you can find any $30,000.00 taken out of these by you to pay Huebner.

By Mr. Lockley: Pardon me, Mr. Kirby. Are those in evidence, and if so, what exhibit number are they?
1289 By Mr. Kirby: Exhibit 15-A, John, Exhibit 15-B, 15-C, 15-D, 15-E, 15-F, G, H, I, and J.

By Mr. Lockley: They are not in evidence.

By the Court: You are referring to it as if it is in evidence. I am sure you can ask some questions about it that will go to the foundation. The document is not in evidence, and you shouldn't refer to it as if it is.

If you want to lay further foundation, you have that right.

By Mr. Kirby: I am in error. I thought this particular document was admitted. I guess I am mistaken.

By the Court: Apparently so.

By Mr. Kirby: All right.

1290 By Mr. Kirby:

Q. Mr. Lubben, I show you some sheets which have been marked for identification with the numbers in the 15 series that I have already given and I will ask you whether you have ever seen those sheets before?

A. Yes, sir; I believe I did, sir. In fact, I know I did. I gave these sheets—it is the best of my recollection—to the government.

Q. Now, then, I am not asking you to read from them, but could you point to me some place on them where this thirty thousand payment out of the corn box is shown?

A. I wouldn't know where to look for it, sir, where to find—where to look for that, what kind of sheets these purport to be.

Q. All right. Thank you.

A. But I remember the incident.

By the Court: You have answered the question.

By Mr. Kirby: I ask that the remark about remembering the incident be stricken.

By the Court: Well, he just said, "I remember." I suppose there is no particular purpose in striking it

1291 out.

By Mr. Kirby:

Q. Mr. Lubben, I would like to ask you some questions now about your testimony in connection with the time when you were getting ready to leave the partnership, and ask you whether you recall these questions and these answers at 598:

"Q. And what was the conversation at that time?

"A. I told Mr. Huebner that we owed him fourteen thousand—by me, I mean the partnership, the Eatsum Food partnership—owed him $41,682.10, and that was overages that we owed him, and I told him I was getting ready to leave the partnership, and I could no longer have any access to the cash box to take money out to pay them. I also told him I was forbidden to draw any checks to cash for Shotwell, or for anybody else, for that matter, and that I had to pay these people, and I said these—"

Do you recall that that question was asked and that you made that answer?

1292 A. Yes, sir.

Q. And do you recall also saying this, at page 600:

"A. Yes, sir. To m[illegible]ledge, Byron Cain was there."

That was changed later on, but we will stick to that.

"And I explained that I was getting ready to leave the partnership, and I had to pay this bill, and I had no way of paying the money, and it was the only way I could pay the money, and so forth."

Do you recall that?

A. Yes, sir.

1293 Q. Now, then, the next day when you testified you talked about making some payments in advance to Shotwell; do you recall that?

A. I made a number of advance payments, sir.

Q. Speaking specifically now of an invoice on Cardinal chocolates, which is Exhibit 147, do you recall being asked about when you paid for that and saying, at 799:

"Q. And when?

"A. Almost about the same time as I paid for the other merchandise. I would say it was early in March. I mean, somewhere right in that neighborhood.

"Q. How did you pay it?

"A. In cash, sir."

Do you remember that statement?

A. Well, I would like to refresh—if it is in the book, I no doubt said it. But let we see some papers, or something, sir, some of the Government exhibits and we will be glad to answer specifically for you.

Q. Thank you. Early in March—when did the partnership start?

A. Start?

1294 Q. Yes.

A. The partnership started?

Q. Yes, when.

A. In June of 1945.

Q. And you have said—as I read to you a little earlier—that in February you told Huebner that you couldn't get at the cash box in the partnership.

A. That was the February following the June, 1946.

Q. That you didn't have that money?

A. I didn't say I didn't have the money.

1295 Q. Couldn't get at it?

A. I just said, sir, that was the way—the business—the best way to pay it.

Q. Well, what I am wondering about is—am I mistaken about the time when this cash was supposedly paid for these Cardinal chocolates; wasn't that about the time you were leaving the partnership?

A. What Cardinal chocolates?

Q. That shipment you are talking about at 799, which was Exhibit 147?

A. Sir, I don't know anything about exhibit numbers. I can't say Exhibit 799. Let me see the invoice.

By Mr. Kirby: That's right. You should look at it.

By Mr. Kirby:

Q. 147 is a bill of lading on March 5, 1946. And is that about when you were getting ready to leave the partnership?

A. Yes, sir; it is.

Q. And was it at about the time you were going to leave the partnership that you said you couldn't get the cash?

A. Yes, sir; I believe it was the latter part of
1296 February, some time in February there, sir.

Q. And then it was at that time that you testified, at page 799, you did get the cash, and paid it to Huebner for this merchandise that you have in your hand, is that right?

A. He got paid for it, sir. Yes, sir. I believe at this time there was something—we also—he sold me about ninety thousand pounds of these spice buttons, a bulk candy item, in addition to this, which went out previously, I believe, before the chocolate went out.

Q. And you paid nineteen thousand for that, I guess?

A. It was nineteen thousand or nineteen thousand some figures. But he got paid for it.

Q. That was about the time you were leaving the partnership, too, wasn't it?

A. Yes, sir.

Q. And couldn't get at the cash?

A. Well, sir, I told you where I got the money for the nineteen thousand. It is in the record. Why don't you read it, sir?

Q. The nineteen thousand you said you borrowed, and you couldn't remember—at least at that time—or did you tell from whom you borrowed it?

1297 A. I don't think I said I didn't remember. I think you will find I said that money was borrowed from Mr. Urban.

Q. Eddie Urban?

A. Yes.

Q. Is that the fellow whose name is endorsed on some of this money that went to Shotwell?

A. I said the money went to Shotwell. It did go, and that man admitted it last December, Mr. Byron Cain admitted he got all the money.

By the Court: You just answer the question.

By Mr. Kirby: I ask that that may be stricken and the jury instructed to disregard it.

By the Court: Yes.

By Mr. Kirby: I wouldn't quite know how to advise a jury, if I were a judge, about outbursts like that on the part of a witness, but I can't help but feel it has an effect which I, as counsel, must ask the Court to be quite rigorous with this witness and make it quite plain to the jury that those types of things are not evidence, and that they

1298 must not be—

By the Court: The jury will understand that when I strike testimony the jury are to disregard it.

By the Witness: I am sorry, sir.

By the Court: The answer was not responsive to any question and the jury will erase from their minds any inferences or any deductions from the statement just made by the witness.

By Mr. Kirby: And not to press the point unduly, but isn't it a fact that it is improper for a witness to so make voluntary statements?

By the Witness: I apologize to you.

By the Court: Yes, it was improper for Mr. Lubben to make the statement and the jury will disregard it. And you just answer the questions, Mr. Lubben.

1299 By the Witness: Yes, sir.

By the Court: And nothing more when you are being examined by counsel.

By Mr. Kirby:

Q. Now, Mr. Lubben, the point at which we were last calmly engaged was you said that you got nineteen thous-

and from this Eddie Urban. And I asked you if that is the Eddie Urban, the same Eddie Urban whose name is on some of these cash checks that we have had in evidence here. And is it the same one?

A. Yes, sir.

Q. Mr. Lubben, we have had a good deal of testimony from you about how you kept a record of these transactions. And, of course, we won't go over every single one of them, but certain of them I do want to ask you about because they are, shall I say, a little more plain than others. And I want to read this part of your transcript at page 542 and 543.

Mr. Lockely had handed you Government's Exhibit 40-D, which is a check in the amount of $22,124.13, and as you were sitting in the jury box with that in your hand Mr. Lockley asked you these questions:

1300 "And what did you do with it after you signed it?

"A. After I signed it Miss Freda Seider took it to the bank and cashed it and brought the cash back.

"Q. What did you do with the cash?

"A. I gave it to Mr. Huebner.

"Q. Now, I call you attention to the fact that those checks both bear date of May 3, 1946. Do you have any recollection as to why two checks were drawn at that time?"

The second check referred to being Government's Exhibit 43, dated May 3rd, in the amount of $2,403.00. And you answered:

"Yes, sir. My recollection is that we had already prepared the recap which showed the $22,124.13 and that another shipment came along and I went ahead and paid the overcharge on that, as long as I was going to pay the other one and I got even Stephen, I got evened up."

Do you remember being asked those questions and giving those answers?

A. Well, sir, that was the—that is the best of my

1301 recollection, sir. And I believe that is what happened.

Q. Now, to take your answer in its two parts, "we had already prepared the recap which showed the $22,-124.13 • • •"

Now, do you have a recap in the amount of $22,124.13?

A. I don't have it in my hand, sir.

By Mr. Kirby: Do you know the number of one, counsel, for the Government? I want to know if there is such a recap for $22,124.13.

By Mr. Lockley: It is not in evidence, if there is one. I don't know if there is.

By Mr. Kirby: I will accept Mr. Lockley's statement that it is not in evidence.

Wasn't that your statement?

By Mr. Lockley: Yes.

By Mr. Kirby: Is there any in existence?

By Mr. Lockley: At least I have no recollection of it.

By Mr. Kirby:

Q. Well, let me ask you, Mr. Lubben—we will take Mr. Lockley's statement that he has none—do you
1302 have any knowledge, independently of Mr. Lockley or the Government group here, of any such recap as you testified to, in the amount of $22,124.13?

A. Well, sir, if it is not a recap it is a cash authorization showing what the money was for, sir.

Q. Well, a recap and a cash authorization are two different things, aren't they?

A. They pertain very much to the same thing, sir.

Q. But no recap, that you know of, is that true?

A. I don't remember, sir, at the moment.

(Document handed to counsel.)

By Mr. Lockley: It is not in evidence yet.

1303 By Mr. Kirby: Mr. Lockley has handed me 40-E, which is a yellow sheet which,—has it been even identified?

By Mr. Lockley: No, sir.

By Mr. Kirby: —not heretofore produce or identified.

By Mr. Lockley: Correct.

By Mr. Kirby: Well, of course, with that type of material I must wait at least until they get somebody to identify it.

By Mr. Lockley: You asked for it, and I am trying to accommodate you.

By Mr. Kirby: Thank you.

By Mr. Kirby:

Q. Mr. Lubben, and then the second part of your answer is, "another shipment came along and I went ahead and paid the overcharge on that, as long as I was going to pay the other one, and I got even Steven, I got evened up."

Now, I don't suppose we have any particular shipment that you can identify for us that that relates to?

A. Well, sir, this is what happened, and that is the very best of my recollection.

1304 Q. Well, do you remember what the shipment was at all, Mr. Lubben?

A. Well, it would be candy. But what kind, I couldn't tell you.

Q. Now, does the Government have any next shipment that came along about May 3rd, upon which an overage would total the total of that exhibit—$2403?

A. Yes, sir; $2,403.00.

By Mr. Kirby: $2,403.00.

By Mr. Lockley: If counsel wants me to testify, I am glad to. That is the amount on two invoices, No. C72933, and C81505, which are Exhibits 41-A and 42-A, original invoices which are not yet in evidence.

By Mr. Kirby: Let me see those, will you?

By Mr. Lockley: Here is 41-A and 42-A.

(Documents handed to counsel.)

By Mr. Kirby: Mr. Lockley has handed me two not yet identified—

By Mr. Lockley: Correct. I have no objection if you want to introduce them.

By Mr. Kirby: Well, they aren't in evidence at
1305 this time, and it is not an appropriate time, as I conceive it, for me to introduce them.

1306 By the Court: Then you shouldn't ask for them, Counsel.

By Mr. Kirby: I want to identify these matters in the record. It is not pointless.

By the Court: They aren't in evidence yet.

By Mr. Kirby: I would like to identify what they have tendered me.

By the Court: That's all right.

By Mr. Kirby: The first is invoice C—

By the Court: You mean to identify it for what, to have the witness identify it?

By Mr. Kirby: No.

By the Court: It isn't in evidence yet. If you want to lay a foundation by this witness, you may. Otherwise there is no purpose in reading it into the record.

By Mr. Kirby: Just the numbers of the invoice.

By the Court: Oh, all right.

By Mr. Kirby: The first one is numbered—

By the Court: Can't you give the exhibit number?

1307 By Mr. Kirby: -C72993 and the second one is C81505, being respectively Exhibits 41-A and 42-A. The number C81505 bears an added number of 72994A. Have I covered those?

By Mr. Lockley: Yes. We have no objection if you want to introduce them in evidence.

By Mr. Kirby:

Q. Mr. Lubben, there was a discussion during the course of your testimony about some unbilled shipments. Do you recall that?

A. Yes, sir.

Q. And one of them was a shipment which is identified as Exhibit 154. Do you remember that?

By Mr. Kirby: Have you got the page number at which there was reference to that?

This is Exhibit 154. Do you have the testimony page of that?

By Mr. O'Brien: Around 845.

By Mr. Kirby: If the Court please, I indeed want three page references to this, and it will take us a couple of

1308 minutes to get it, and it may be an appropriate time to take our morning recess, because I do need three references and it will take us a couple of minutes to get them.

Or I will go right ahead, if you will bear with me.

1309 By the Court: I would prefer to let you go forward with something else. Let's go on for about fifteen minutes yet.

By Mr. Kirby: All right. I will withdraw the question with respect to the unbilled shipments, and during the recess I will find those page references because, indeed, it is much more courteous to call the witness' attention to his testimony before I interrogate him about it.

By Mr. Kirby:

Q. Now, I want to talk to you about the corn syrup deal that you testified to, with Shotwell.

Do you remember some testimony about that?

A. Yes, sir.

Q. And that was in September and October of 1946, is that right?

A. If I remember correctly, sir, it was around September, October, 1946.

Q. Do you recall testifying to that same effect at page 776 of the record, as follows:

"Question: Now, did you have a conversation
1310 with any of the defendants prior to entering into this transaction of corn syrup?

"Answer: Yes, sir, Mr. Huebner.

"Question: Do you know when that was?

"Answer: I believe it was around September or October, sir, of 1946.

"Question: And was that in person, by telephone, or how?

"Answer: No, sir, it was on one of my trips to Chicago, I believe.

"Question: What was said at that time?

"Answer: He said he had a lot of corn syrup on hand."

Do you recall being asked those questions and making those answers?

A. Yes, sir.

1311 Q. Now, these first three checks, 157-A, 157-B and 157-C, those are the ones which I think you testified went directly on the invoice.

By Mr. Kirby: Isn't that right, Mr. Lockley? So we don't need to inquire about those.

By Mr. Kirby:

Q. But am I correct in believing that you identified a check as 158 and a check as 158-A as having been cashed by you?

A. Yes, sir; they were—this is written by me, sir, and whether I specifically went to the bank and got the money, I don't remember, but I am very sure I did, sir, on this one here.

By the Court: Speak up, Mr. Lubben.

By the Witness:

A. This check for $25,929.00, sir—yes, sir, I am sure I went to the bank and got that money.

By Mr. Kirby:

Q. How about that other check?

A. October 12th. Yes, sir. Yes, sir; I was at the bank when this was cashed.

Q. And you got that money?

A. Yes, sir.

1312 Q. Now, then, another check, 160, for $13,146.70; did you cash that check and get that money?

A. Yes, sir; the check was cashed and I got the money, sir.

Q. And that is the money, the total of those three checks, which you testified you gave to Stanley Graflund?

A. Well, sir, I remember on several occasions that I—

Q. Excuse me, sir. Are these the three checks that you have heretofore testified you cashed, went out there, and at Huebner's instructions gave the money to Stanley Graflund; is that what you testified about these checks?

A. I don't think you can find that, where I testified that, sir. I said when I paid out there with the corn syrup money I remember Mr. Huebner told me to take the money down to Stanley Graflund for the corn syrup and to keep my mouth shut about the candy and just give him the corn syrup money.

Q. And is this the money that we are talking about, this Exhibit 160, and this Exhibit 158 and this Exhibit 158-A?

A. I would say it was, sir.

1313 Q. Now, on your cross examinatioin by me at the conclusion of our last session here, do you recall these questions and these answers, at page 1257:

"Q. May I ask whether you supplied to the Hubbinger Refinery in Keokuk, Iowa, a total, to March 11, 1946, of 136,873 bushels of corn?

1314 "A. Yes, sir, and that ended in a lawsuit."

Then at page 1259, still asking about shipments that you received from Hubbinger of corn syrup, I asked you this question:

"Q. Independently of the record, could you tell me?

"A. I said, sir, I believe in 1946 we received about four cars of corn syrup from the Hubbinger Company.

"Q. Did you receive any in 1947?

"A. I don't recall, sir."

Now, you remember those questions being asked and those answers being given?

A. Yes, sir.

Q. Now, in addition to the Hubbinger Company as a supplier of corn syrup, am I correct in believing that a supplier of corn syrup to you in the fall of 1946, at about the time this corn syrup was purchased from Shotwell, was Penick & Ford?

By Mr. Lockley: I object, your Honor, on the grounds that he is assuming facts in the question which are not in evidence. It is beyond the scope of the direct examination.

1315 By the Court: He may answer.

By Mr. Lockley: Immaterial.

By the Court: You may answer.

By the Witness:

A. I don't know whether it is the latter part of 1946, sir, but there was some time in 1946 I think General Confections did get some corn syrup from Penick & Ford. We got it from Penick & Ford—or Reserve Trading Company got it.

By Mr. Kirby:

Q. I will ask you whether in the months of August and September you were purchasing corn syrup from Penick & Ford for a price of four and two—or three-tenths cents a pound?

By Mr. Lockley: I object, your Honor, to counsel's continuously testifying during the course of his examination. There is nothing of that sort in evidence.

By the Court: Well, he is cross examining the witness.

By Mr. Lockley: He is assuming facts which are not in evidence.

By the Court: No, he is asking him a question whether or not he didn't do that. That is a perfectly fair question.

1316 A. Well, sir, I wouldn't know what the exact price was. Whatever it showed on their invoice.

By Mr. Kirby:

Q. Yes, sir, but your testimony with respect to Shotwell is that you paid Shotwell six cents on an invoice, and seven cents on an overage, or a total of 13 cents. Is that right?

A. That is true, and it is correct.

Q. And I will show you some invoices from—well, let me first ask you, Mr. Lubben, isn't it true that in August and September of 1946, you purchased from Penick and Ford alone for 4.295 cents a pound, 2,360,388 pounds of corn syrup. Now, isn't that true, or approximately true?

A. Whatever is reflected on the books of my company is correct. If that is the figure, it is correct.

Q. I will ask you to refresh your memory by looking

at a series of invoices from Penick and Ford to you in August and September, and I have appended an adding machine tape thereto, and ask you now whether it isn't a fact that you got 2,360,388 pounds of corn syrup from them for a little over four cents in the two months prior
1317 to the time you said you paid Shotwell 13 cents? Isn't that true?

A. Sir, the inference—you say—I did pay Shotwell, sir.

By Mr. Kirby: We have got to have freedom of the Court to bring in these matters.

By the Court: Will you please answer the question?

By the Witness: This figure here on the top of these invoices—it says, "Corn barter deal"—

By Mr. Kirby:

Q. I am asking you about the figure, sir.

A. The figure, sir,—I am not going to check them all down. I assume it is correct.

Q. Thank you.

By Mr. Lockley: Your Honor, I object to the material that the witness is holding in his hand at the present time. There has been no foundation laid for them and it is not in evidence. If there is some discrepancy—

By the Court: He is attempting to show it to him.
1318 It is perfectly proper for him to show the witness the document, and ask him if it isn't correct.

By Mr. Kirby:

Q. Now, Mr. Lubben in October of 1946, when you say you paid this money—

By the Court: Paid what money?

By Mr. Kirby: The 13 cents a pound for this corn syrup from Shotwell when he was buying corn syrup from these other people before—

By Mr. Kirby:

Q. Weren't you having financial trouble? Weren't you having trouble raising money at all?

A. In 1946, sir?

Q. Yes, the fall of 1946.

A. Sir, we didn't have any trouble with corn syrup.

Q. Well, I will ask you a question, or rather, I will read to you a part of your testimony from your direct examination, at page 756. You had volunteered that you wanted to correct some testimony and after some state-

ment that you had made that you had given some
1319 thought to the matters, we got to this question and this answer:

"Question: Has anything transpired since you were on the stand yesterday that more nearly refreshes your recollection as to what the time of those meetings was?

"Answer: Yes, sir. To the best of my recollection, it was some time around September or October of 1946, and I believe—I remember, sir, that it was—there was a time when we were having a little difficulty getting up the payment, the cash payments in time, and that is the time, to the best of my recollection that I talked to Mr. Huebner and Mr. Sullivan."

Do you remember being asked that question, and making that answer?

A. I do, sir.

By the Court: I think we will take our morning recess now. We will suspend for ten minutes, ladies and gentlemen of the jury.

(Whereupon a short recess was taken during which

1320 By the Court: All right.

By Mr. Lockley: You may proceed. I don't know where Mr. Calihan is.

By Mr. O'Brien: If the Court please, based upon Mr. Lubben's statement in the presence of the jury that these payments were admitted last December, or whatever the precise context is, we make a motion for a mistrial.

By Mr. McConnell: I join in that motion.

By the Court: I deny your motion.

Of course, if counsel have in mind that there is anything further that I should say to the jury with reference to that volunteered statement in addition to what I have done, I will be glad to do so.

My own thought was that if I emphasized it too much, it would be more detrimental than helpful. But, if counsel have in mind that there is anything in addition I should say with reference to that volunteered statement so that the jury will understand that it must not be—that it
1321 must be disregarded by them, I will be happy to do so.

By Mr. McConnell: May I say for the record that time the following proceedings were had in Chambers outside the presence and hearing of the jury, to-wit:—)

I think the statement is so prejudicial that there is nothing that can be said by the Court to remedy it. It is prejudicial, the whole length of it.

By Mr. O'Brien: For that reason, we make this motion for a mistrial.

By Mr. Lockley: I think with respect to the Government, it may have been an improper statement. I doubt that it was prejudicial in any way whatsoever, but if by way of explanation, if not perhaps in defense of Mr. Lubben, it should be borne in mind that he has been on the stand for four days and at least half of that time he has been under considerable amount of pressure under two very experienced cross examiners.

The outburst was not because of a desire on his part to do damage. It was just more of a reaction, I think, to the stress that he has been under than anything else.

By the Court: Be that as it may. May I say to
1322 counsel now, while you are here that I have reflected somewhat upon the statement that I made to Mr. O'Brien last Friday with reference to the scope of cross examination as to exhibits not in evidence, and I have been somewhat concerned over the week end that either I didn't understand Mr. O'Brien or I did not express myself too clearly, and of course, you have got to have, on cross examination, a right to cross examine on exhibits not in evidence for the purpose of laying grounds for impeachment, for the purpose of interrogating the witness to ascertain whether or not the statement contained in the piece of paper isn't true.

If I have left an impression, and I am afraid I did when I responded to you that that wasn't proper cross examination, I hasten to correct it. Just as took place this morning when Mr. Kirby assumed to read something from a piece of paper without asking the witness a question about it, that was improper, but he had a right to
1323 ask the witness whether or not the statement contained in the paper wasn't true. He can do that for the purpose of laying a foundation for impeachment or he can ask that question in so far as it can lay the foundation for its ultimate reception. He is not obliged to offer it at the time he is asking those questions. As I say, I reflected upon the statements I made here Friday noon and I was quite worried that I left the wrong impression and I now make this statement so that anything that I may have said to the contrary will be mollified.

By Mr. O'Brien: Off the record.

(Off the record.)

1324 By Mr. McConnell: If your Honor please, while we are here speaking on this, in my cross examination of Mr. Lubben, the government objected to a whole branch of the cross examination which was sustained on the ground that it was not material.

Before the witness leaves the stand, I want to say this: That there was a line of cross examination which was tendered to show or which does show by documents that the witness Lubben received moneys at the inception of this Eatsum business which was not reflected on the books and with which he purchased from Mr. Burry, the business which he later sold to the partnership.

Now, I was trying to examine the witness on the income tax and not with the idea of trying to show the income tax wasn't paid or that it was false, but I was trying to lay a foundation for admission of just what assets the man had at the inception of the matter and showing by later documents what assets he must have had to have paid

1325 George Burry $163,000.00 for the business, none of which could have been on the books because everything shown on there was what he received. The materiality of that is: Here is a witness, Judge, who is charged with large sums of cash and he is assigning it here and he is assigning a lot of it to the Shotwell people and the question ultimately to be resolved by this jury, it seems to me, is whether or not these three individuals got this money or whether Mr. Lubben got the money.

It seems to me that that whole line of cross examination was very relevant and very material to the question of whether Mr. Lubben did get it.

By Mr. Lockley: The question as to whether he got the money is a practical matter, if not a legal one.

In the second place I would like to point out, if your Honor please, the transactions which Mr. McConnell refers to occurred back in the early part of 1944, if I understand him correctly, because Mr. Lubben purchased

1326 the Eatsum Food Products Company from Burry in either 1943 or 1944, I am not sure. What he did back in those days has absolutely no bearing whatsoever on what his connection with the Shotwell Manufacturing Company and their people was in 1946 and 1945.

Where Mr. Lubben got the money from to buy out the business has no bearing on what he subsequently did. He could have stolen the money. He could have inherited it. We don't know how he got it.

By the Court: Off the record.

(Discussion off the record.)

1327 By the Court: If these were any exhibits you wanted to examine Mr. Lubben about and if my rulings were contrary to the statements I made this morning, of course I would permit the offer of such testimony.

By Mr. McConnell: I would like to do that.

By the Court: We heard a lot of testimony on cross examination about the Haberkorn matter. I thought a lot of it was wholly irrelevant. Of course, I understand what you had in mind. You contended there were certain alleged blackmail threats made by Lubben when the Haberkorn Company ultimately was sold, but there is another matter. The question as to how much money he had there and in some of his early dealings are wholly irrelevant.

By Mr. O'Brien: I think the materiality—speaking not of the specific items, but generally, there is about a million and a half dollars of cash checks, that are involved in the three periods. That all represents cash taken out of those companies going to Lubben, which he says he spent in
1328 certain ways, including this part to Shotwell.

Our position is we never got the amount of cash he talked about.

What is relevant on that and material, is the question as to whether he had other moneys to deal with. If he laid off all of these moneys as he says and he had such and such income and none other and at the same time he was spending the kind of money which we intend to show he was spending, then it is pertinent on the question as to whether some of that money stayed in his hands or whether it went out as he says. That is all it has to do with, really.

By the Court: All right.

(Whereupon the following proceedings were had and taken in open court, in the presence and hearing of the jury:)

By Mr. Kirby: Sam, where is Exhibit 154? I had it out earlier and the witness looked at it. It was an invoice.

There it is. Thank you.

By Mr. Kirby:

1329 Q. Mr. Lubben, you hold in your hand document which has been marked Government's Exhibit 154. Isn't that true?

A. Yes, sir.

Q. And you asked me to locate what you had said about it and I have it and I read it to you from page 827:

"Mr. Lubben, I offer you Government's Exhibit 154 and ask you to determine that document."

This is Mr. Lockley asking you these questions. And you say:

"A. Yes, sir. This is a uniform straight bill of lading. It is dated on August 9; 1946, at Chicago, Illinois. It is consigned to McDonald Candy Company, Medford, Oregon."

And you say it is box chocolates, and you say it originated at The Shotwell Manufacturing Company and then this question starts at page 828:

"Q. Did you get an invoice for it?

"A. No, sir, I didn't."

1330 Now, that is one of the so-called unbilled shipments, is it, sir?

A. Not so-called, sir. It is one of the unbilled shipments.

Q. By that you mean you received, as you earlier testified, no invoice in connection with that shipment at all?

A. No, sir.

Q. And by that you mean, do you, that you paid for that in cash in its entirety, and that you also paid an overage in cash, is that right?

A. That is right, sir.

Q. Do you recall with respect to that shipment being asked these questions and making these answers:

"Q. And did you pay for that shipment?

"A. Yes, sir; I did.

"Q. How?

"A. In cash, sir.

"Q. You mean currency, is that it?

"A. Yes, sir.

"Q. And to whom?

"A. Well, this shipment, sir, if I recall correctly, was paid not in one lump. I mean, we didn't have the

1331 money, and if —"

But, in any event, you testified it was all paid, is that right?

A. Yes, sir. If that is the testimony that pertains to the car, sir, and you are reading it. I don't know whether you are referring to this exhibit. I remember saying that, but whether you are tying my conversation to this exhibit, sir, I have no way of knowing."

1332 Q. Let us stop worrying for the minute about whether you can believe me and how about that shipment—did you pay for that shipment in cash, and I am only asking you.

A. Did I pay for this shipment in cash?

Q. Yes, sir.

A. If I recall correctly, sir, I paid part of it and employees of mine paid the rest of it.

Q. And you were not given a bill for that shipment by Shotwell?

A. That is true, sir.

Q. And you did not pay to Shotwell's bookkeeping department for that shipment, is that true?

A. What do you mean paid on an invoice?

Q. Yes.

A. I don't ever recall seeing an invoice on this shipment, sir.

Q. Or any part of it?

A. On any part of it?

Q. Or any part of it?

A. No, sir.

Q. Would you take a look at these invoices to you—General Confections, that is, the accounting copy, the shipping ticket, and a memorandum of the shipment which

1333 I will ask the Reporter to mark Defendants' Exhibit 17-A, B and C.

(Said documents were marked Defendants' Exhibits 17-A, B and C for identification.)

By Mr. Kirby:

Q. Now, you have seen those invoices?

A. I haven't seen those, sir.

Q. I hand them up to you now.

Now that you see those, do you still persist in your answer that those chocolates were not, nor was any part of them, invoiced to your company?

A. Sir, we never saw an invoice from the Shotwell

Manufacturing Company for this—for this particular shipment and these papers here, sir, to my knowledge, sir, do not pertain to it.

These things appear to be records of the Shotwell Manufacturing Company but we never received it.

Q. Look at the records which you say are the records of the Shotwell Manufacturing Company. I read a shipping number, No. A189561 and ask you whether that number appears on the document which you hold in your hand?

1334 A. Yes, sir, it does.

Q. Looking at the documents which you say represent the Shotwell invoices, does the shipment date appear to be August 9, 1946?

A. Yes, sir.

Q. And looking at the government's exhibit which you have in your hand, is the car number and the railroad over which it was shipped apparent?

A. The car number?

Q. Yes.

A. Why—yes, sir, it is.

Q. Do you recall in connection with that document, while you hold it in your hand, that you were asked this question and you made this response—this is at page 838:

"Sir, I know this came from the Shotwell Manufacturing Company because it says the route, Chicago, Milwaukee, St. Paul & Pacific, and the Shotwell factory in Chicago is on the Chicago, Milwaukee & St. Paul tracks."

Do you recall making that response?

A. Yes, sir, I do.

Q. And looking at the Shotwell papers, it looks

1335 like this went out over the Chicago, Milwaukee & St. Paul Railroad and is that the same thing it shows on that exhibit?

A. Yes, sir, it does.

Q. Looking at the Shotwell papers I see the car number is WFEX 67722?

A. Yes, sir.

Q. Does that number appear on that document?

A. Yes, sir, it does.

Q. Looking at the Shotwell papers, I see it is for a part or for less than the entire shipment but it is for 935 cases of Cardinal chocolates. Now, is Cardinal chocolate

what is involved in the invoice which you hold, or the bill of lading which you hold in your hand?

A. Yes, sir.

Q. Now, I show you the government's Exhibit 200 and ask you whether that is not the statement of your account on the books of Shotwell Manufacturing Company?

A. Well, sir, I haven't—I don't believe I have seen this before or I wouldn't know whether it is my statement or not.

Q. All right. That is in evidence and I will ask
1336 you to take a look and see whether there is a charge on the 9th of August, 1946, against you or against your company of $8,377.60?

A. Where would I find all this, sir?

Q. I have turned to a page which in my opinion gives the August charges and I will repeat the question. Does it show a charge on the books against your company of $8,377.60?

A. Yes, sir, it does.

Q. Now, I believe your testimony was that the amounts that you owed on the books of the Shotwell Company, you paid them and you paid them by check to their order, is that true?

A. Yes, sir, I did, toward the end there I did give them some machinery and some peanuts and I believe—I believe a chocolate quota which they invoiced them for, sir.

1337 Q. Mr. Lubben, I would like to go to another so-called unbilled shipment and ask you whether you didn't tell the Government that you had paid in cash, plus overage, for a shipment of Cardinal chocolates to the Cambridge Supply Company, in Cambridge, Massachusetts.

A. I don't recall saying that specifically in regard to the Cambridge Supply Company, sir, that it was an unbilled shipment, sir.

Q. Do you deny giving an affidavit to the Government that there was an unbilled shipment of Cardinal chocolates to the Cambridge Supply Company?

A. No, I don't recall giving the affidavit. It might be in it, but since then I have had time to refresh my memory and the shipment to the Cambridge Supply Company, if I recall correctly, was not an unbilled shipment, sir.

Q. And indeed the shipment to the Cambridge Supply

Company is represented by documents which I will show you as soon as the young lady has marked them Defendants' Exhibit 18-A and 18-B.

(Said documents were marked Defendants' Exhibits 18-A and 18-B for identification.)

1338 Q. Do those documents, Mr. Lubben, represent a shipment of Cardinal chocolates to the Cambridge Supply Company, as you now recall the matter?

A. Well, no, sir, it doesn't say Cambridge Supply any place.

Q. My question is do you recall that those were chocolates which were shipped by you to the Cambridge Supply Company?

A. Well, sir, I would only be able—I would look at the routing here and the final routing says, "New York Central B & A" and that would be up in the Boston area which was the Albany Railroad, so I am only making a guess, but to me this would appear to be the car of chocolates that did go to the Cambridge Supply.

Q. And isn't it true that when you gave the affidavit to the Government, you said that that car or shipment was unbilled, uninvoiced, and that you paid for it entirely by cash? Isn't that what you said?

A. Yes, but since then—

Q. Wait a minute now. My dear sir, is that what you told the Government in an affidavit?

A. And I also told them—

1339 Q. Wait a minute. Did you tell them that?

A. I did, sir, to the best of my recollection at that time that is what I said, sir, and I also corrected it.

Q. Mr. Lubben, at the time that you were engaged in business, in the indictment years of 1945 and 1946, I think you have said you were in the black market and there is not much question about that, is there?

A. Whose indictment, sir?

Q. In the indictment years of 1945 and 1946, which is now on trial.

By the Court: He is referring to this indictment.

By the Witness:

A. Oh, okay.

By Mr. Kirby:

Q. I think you have said that you were in the black market, is that true?

A. In 1945 and 1946?

Q. Yes, sir.

A. Yes, sir. I certainly was, and I am not very proud of it, sir.

Q. And Mr. Lubben, the black market and the pos-
1340 sible prosecution or penalties that could flow from having been in it was one of the things which you discussed with Mr. Cain at the Riviera meeting, is that true?

A. The black market?

Q. Yes, sir.

A. No, we didn't discuss the black market, sir. You have my testimony, sir, and what I testified there. I would be glad to repeat it for you.

Q. And you say that you did not discuss the black market or the possible penalty for having been in it at that Riviera meeting?

A. I certainly didn't discuss the possible penalties for having been in it, sir.

I was told, sir,—I told you what the conversation was. and it is on the record and I would be glad to repeat my conversation at the Riviera if you so want it.

Q. The black market, however, was discussed, and it is a fairly simple question. It was discussed at that meeting. Am I correct in that?

A. I can't say. You mean, the furture of the black market? You mean the present of the black market?

Q. The possible penalty or prosecution for having
1341 been in the black market.

A. I think the specific reference to the black market, sir, was on that Riviera—it was at the Gotham Hotel when Byron Cain came and said, "I am not sure about this, Dave." He says—

Q. Excuse me.

A. Well, I am telling you about the black market.

Q. I am not asking you to recount the whole long conversation. I am asking you if the subject came up and that, surely you can answer me.

A. Well, sir, we discussed—you have the conversation. It is on the record and I would be glad to repeat the question.

By the Court: The question is whether or not it was discussed at the Riviera meeting.

1342 By the Witness:

A. When you come up and say the word "Black market" and say it was mentioned, your Honor, I can't specifically say that, sir, but we talked about the visits and I told you what Mr. Grace had said. I told you about the trip to South America and I told you about those things, sir.

It would appear to be an aftermath of the black market, sir.

By Mr. Kirby:

Q. And there were, I am sure you will concede, both civil and criminal penalties under the OPA, isn't that right?

A. By "civil" you mean what, sir?

Q. I mean, under the OPA law, a person who was in the black market could have been sued for triple damages or he could have been and that would be a civil liability or he could have been prosecuted criminally. Isn't that true?

A. Yes, sir, but I don't think that applied in 1948, sir.

Q. But wasn't it true that during the time of the indictment years, 1945 and 1946 that was the fact?

1343 A. Well, sir, they had a lot of OPA laws. Whether it was in or out of that particular time, I wouldn't know.

Q. You mean you don't know whether there was any penalty?

A. Oh, yes.

Q. In 1945 and 1946, Mr. Lubben?

A. But I can't specifically say whether it was absolutely in 1946. It went out sometime in there. I know there was a penalty at that time if you sold over the ceiling price or something and you got triple damages, or the government got triple damages.

Q. And certainly that period, Mr. Lubben, included 1945 and 1946, isn't that true?

A. Well, I don't know whether it included all of 1946, sir. I mean, if you can refresh my recollection, sir, as to when the law went out—I don't know—but in 1945 I would say definitely. But when it expired, or if it expired in 1946, I don't recollect the specific month.

Q. It went out on corn on June 30, 1946, but it stayed on everything else.

A. Thank you, sir.

Q. Does that seem to jibe with your memory of
1344 it, Mr. Lubben, that is to say, that the ceiling and penalties last through 1945 and 1946 except for corn in the last half of 1946? Is that about it?

A. I wouldn't know. As you say, except for corn, I wouldn't know, sir.

By the Court: Well, you have answered now.

By the Witness: Yes, sir.

By Mr. Kirby:

Q. Now, by 1948, however, am I correct in believing that you say that you think that the PAO penalties both for triple damages and criminally had expired?

A. Well, I don't think they were in effect at that time, sir. I said I believe they expired sometime in 1946.

Q. And in early 1948, I think you testified that the Shotwell people had made a disclosure to the tax authorities of their black market dealings? Isn't that what you said?

A. Oh, no, sir, I didn't say that.

By Mr. Lockley: I object, your Honor. He didn't so testify.

By the Witness: I said no such thing as that, sir. You know I didn't.

1345 By the Court: Well, you have answered it.

By Mr. Kirby:

Q. Well, was it at the Riviera meeting in August of 1948 that you first learned of the disclosure or was it in Attorney Grace's office in the fall of 1948 that you first learned of the disclosure?

A. It was in Attorney Grace's office in something—a week or two weeks sometime—it was after the meeting in the Riviera.

Q. But in 1948, Mr. Lubben?

A. Yes, sir, in 1948.

Q. After the OPA penalties and things like that were dead?

A. Well, I don't know whether they were dead or not, sir.

Q. Now, you, Mr. Lubben, had had the income tax people in to your barn as early, I think you testied, as May of 1946, isn't that correct?

By Mr. Lockley: I object, your Honor. He didn't say that he had had the income tax people in at any time.

By Mr. Kirby: Well, I didn't mean that he had invited them particularly.

1346 By Mr. Lockley: Well, that was the inference in your question, Counsel.

By the Court: Well, I don't remember—

By Mr. Lockley: The statement was incorrect.

By the Court: —the state to which counsel refers.

By Mr. Kirby:

Q. Does the witness have memory on the matter?

A. Yes, sir. Whether it was in 1948 or 1949—but I know they went to my barn and I know that the income tax people—

Q. I will read you your testimony at page 626—oh, the specific date it appears on—it appears on page 627 and 628.

1347 "Question: When were you and the agents looking for these checks?

"Answer: As I say—"

Your answer is: "As I say, I don't know whether we were looking for the checks. I know they were looking for papers and things.

"Question: Whatever it was that you were looking for, when was it?

"Answer: I think it was May, 1948.

"Question: And you were looking in the barn?

"Answer: Yes, looking through those same records that you are going to get."

Now, do you recall that the income tax people were there in your place in May of 1948?

A. Yes, sir, but it was not in my barn at that time. They came in May and they came to my house. It was at a later date, sir, that we went in the barn.

Q. Did you make, on your prior testimony, the responses that I have read to you to the questions that were put to you then?

1348 A. I did, and I am correcting it now, sir.

Q. Mr. Lubben, do you recall these questions being put to you, and these answers being made on my cross examination of you at page 1222:

"Question: Now, Mr. Lubben, is it true that these payments that you say were made to Huebner were always cash for the overages?

"Answer: Yes, sir, for the overages. That was all he ever got was cash.

"Question: Is it true that the cash in every case was in your hands, in your pocket at least for a time?

"Answer: No, sir, not in every case, but the greatest percentage of it, sir."

Now, did you make those responses to those questions?

A. I did, and that is true.

Q. Mr. Lubben, I would like to now ask you about cash that you handled and I ask you if it is correct that you and I have already discussed some checks to cash which I secured from the Government. Do you recall my having some checks to cash in here?

1349 A. You showed me a few checks, sir.

Q. Do you know that a list of those cash disbursements which we submitted to the Government showing checks to cash was for the period involved in the list, $608,166.07, in checks to cash?

By the Court: It is not clear to me what you are referring to.

By Mr. Kirby: We had some discussion back and forth here where we had given the Government a list of some checks to cash and asked that they produce such as they could find.

By the Court: During what period?

By Mr. Kirby: During the period—the list was during the period 1944 when he said he first started to deal with the Shotwell people in overages, and that particular list was to the end of May, 1945, those being the proprietorship years, Judge.

By the Court: You mean that covered all of the cash checks?

By Mr. Kirby: Yes.

By the Court: Not necessarily proceeds which went to Shotwell?

1350 By Mr. Kirby: Indeed not. I want to illustrate—I would like to inquire as to how much cash he had to account for.

By the Court: All right.

By Mr. Lockley: I object, your Honor, on the ground that the evidence is not in that there was any such amount of checks.

By the Court: I don't remember what the testimony was.

By Mr. Lockley: There was no testimony. There were a few checks handed to Mr. Lubben and he was asked whether or not he would testify as to the balance of them, the same as he testified to the few. There was no testimony as to the total amount of those checks. I don't know how much it was. Mr. Kirby asked me if I had run a tape on them, and I told him that I had not.

By Mr. Kirby: Well, the checks total that, Judge.

By Mr. Lockley: Well, are we to take his word for that? It is not in evidence, is it, Mr. Kirby?

By Mr. Kirby: My mother would tell you and you don't have to take my word. But maybe you won't
1351 accept my mother's word for it.

By Mr. Lockley: I am not your mother.

By Mr. Kirby:

Q. Let me inquire of this witness whether he would say quite frankly to us that during that proprietorship period, there were approximately $600,000 in checks to cash.

A. But what do you mean by proprietorship, sir? What period?

Q. The particular list was from April, 1944 through May 31, 1945.

By Mr. Lockley: Now, your Honor, I object to anything with respect to the period from 1944 until the first of January, 1945, in any event.

By the Court: Yes, I think so. The objection is sustained.

By Mr. Lockley: I object to the balance of it, on the ground it is immaterial, and it is beyond the scope of the direct examination. No foundation has been laid for it.

By the Court: Let us find out the period in question here.

1352 By Mr. Kirby: I have in mind, your Honor, that in the Government's direct case—

By the Court: Yes, I understand.

By Mr. Kirby: (Continuing)—they ask leave to go into the 1944 dealings to show a pattern.

By the Court: Yes.

By Mr. Kirby: And I have precisely the same object in view, the pattern of this man's handling of the cash.

By the Court: You are going back to 1945 or 1946.

1353 By Mr. Kirby: Thank you.

By Mr. Kirby:

Q. In any event, do you recall this exchange of conversation back and forth between Mr. Lockley and myself at page 1234:

"By Mr. Lockley: You asked us to give you 480—"

By the Court: Mr. Kirby, I am wondering if we are not—you can ask him what his recollection is as to the amount of cash checks that he may have cashed during the period of 1945 and 1946, during the proprietorship. Is that what you had in mind?

Reading from colloquy between you and Mr. Lockley, I don't think is going to be very helpful.

By Mr. Kirby: If your Honor please, Mr. Lockley indicated the number of checks to cash which were missing and I wanted to inquire about it.

By Mr. Lockley: Mr. Lockley was testifying entirely from hearsay. I had not counted them. I took the 1354 word of the agents.

By the Court: Ask him what he knows about it.

By Mr. Kirby:

Q. Mr. Lubben, do you know that there were checks to cash in the period of the proprietorship, limiting it now to 1945, which you cashed?

A. Oh, yes, sir, there were checks.

Q. Could you give me the amount?

A. No. I would think it would be substantial though, sir.

Q. Well, would it be as much as $300,000.00, sir?

A. I wouldn't want to hazard a guess, sir, but it would be on the books and the records when—when we gave any cash, we would say who got the money, sir.

Q. Would the amount as to which we would need to figure out as to who got the money be about $300,000.00 for that 1945 proprietorship?

A. Sir, I said—now you are talking about from January 1st to June—May 31, 1945?

Q. Yes.

A. I wouldn't want to hazard a guess, sir, but I would say it was substantial.

1355 Q. Perhaps as substantial as I have indicated or perhaps a thousand up or down?

A. I wouldn't answer that question, sir. You are trying to put the answer in my mouth.

Q. And you recall, sir, that Mr. Lockley indicated that of the 486 checks we had asked him for—some of them I conceded because we asked for a long list—they could only find—

By Mr. Lockley: I object.

By Mr. Kirby:

Q. (Continuing)—that they could only find 148. Do you know where the 338 checks to cash, the missing checks, are?

A. Well, sir, I think you might have them.

Q. Mr. Lubben, would you be good enough to tell me with respect to the proprietorship period, do you know where the missing checks to cash in the proprietorship period are?

A. I didn't know there was any missing, sir.

Q. Mr. Lubben, sir, in the General Confections period would you be good enough to tell me, if you can, where the missing checks to cash are?

A. I would think you have them, sir.

Q. In the General Confections period.

1356 A. Yes, sir. You were working with the accountants, sir, do you remember, sir, Mr. Sproul and Scholz?

1357 Q. Yes, sir. Now, Sproul & Scholz gave me some figures and not the checks, if that will allay your mind at all, sir

A. It doesn ., sir.

Q. Well, then, I will address myself to the figures in the period of the Sproul & Scholz audit of General Confections, from 3-1-46 to 6-1-46. They tell me, as you have indicated they have, that there were checks to cash totaling $323,663.23. Does that sound like about the amount of cash that you got from that source in that period, sir?

By Mr. Lockley: Now I object on the ground that what Sproul & Scholz told Mr. Kirby is not evidence.

By the Court: Yes.

By Mr. Lockley: Furthermore, this is immaterial. You went over it completely the other day, as I recollect, and we are just going back over the same ground and it is immaterial. It is beyond the scope of the direct examination.

By Mr. Kirby:

Q. I will ask you from your own memory whether in the period from 3-1-46 to 6-1-46 you did or did not
1358 cash checks totaling roughly $323,000.00?

A. Well, sir, you would have to change it from 3-1-46 down to about—

By Mr. Lockley: I object.

By the Witness: (Continuing)—3-9-46. That was when General Confections started.

By Mr. Kirby:

Q. I will accept your amendment. What is your response?

A. When did it stop, sir?

Q. The first of June, 1946.

A. You say from 3-1-46 to June 1, 1946?

Q. Yes.

A. I wouldn't know, sir, but whatever was reflected on my books was the amount of cash that we drew out of the business.

Q. Now, does that $323,000.00 in cash checks for that three-month period, does that seem to be about the amount that it was, as nearly as you recall?

A. Sir, I don't have any papers or any books or anything else. Why should I guess the figure you are giving me, sir?

Q. I will ask you about the period to the end
1359 of the year in 1946 and did you then cash checks to cash in the amount of approximately $286,506.00?

A. Well, sir, whatever is reflected on my books is the amount we cashed.

Q. And if that amount is reflected on your books, it would about jibe with your present memory?

A. That amount, whatever amount the books say, that is the amount.

Q. Now in the period of the partnership, can you tell us from your own memory how much in checks to cash were issued and handled by you, do you know?

A. No, sir, I don't.

Q. In the period when you were handling currency in a cash box, after the so-called corn box or the so-called candy box, how much currency did you handle?

A. I don't recall the amount, sir.

Q. Well, would a figure of around $400,000.00 in cash

in those transactions seem to be about right, according to your present memory?

A. Well, sir, if I remember correctly—and when I testified before the Kefauver Committee, sir, I was proud to testify before the Kefauver Committee—

Q. Excuse me. The question of your pride in
1360 testifying will be the subject of argument, but I would like to have you answer my question and I would like the Court to strike the portion of the answer he already gave.

By the Court: I will strike it as not responsive.

Pay attention to the question now and answer it.

By the Witness:

A. Did I recall, sir, how much was handled by me, specifically?

Q. From these boxes?

A. That I actually had my hands on?

Q. Yes.

A. I can't recall, sir.

Q. Would it be as much as $400,000.00?

A. No, I don't think so, sir.

Q. Well, how much would it be?

A. I wouldn't want to make a guess, sir. I don't know.

Q. Now, in Reserve Trading, that was a wholly owned subsidiary of General Confections, was it?

A. Yes, sir.

Q. And were the checks to cash that you handled
1361 in Reserve Trading—did they total as much as a hundred thousand dollars?

A. Sir, whatever is reflected on my books, that is the amount of cash I handled and that is the amount I handled or gave to somebody and that is the amount that is on the books, sir.

1362 Q. You are referring me to the books. Summarizing what I have gone through with you, I have a total of one million—

By Mr. Lockley: I am not interested in your totals.

By the Court: He said he doesn't know. It is idle to talk about a total.

By Mr. Kirby: Let me inquire of this witness then:

Q. Is it true or is it false that in the period of 1945 and 1946, you handled cash in an amount of approximately $1,700,000? Is that true or false?

A. Well, sir, I wouldn't know, but I believe of that amount, about $450,000 went to Shotwell.

By Mr. Krby: Would the Court be good enough to strike that?

By the Court: The latter portion may be stricken.

By Mr. Kirby: And I ask that the jury be instructed to disregard it.

By the Court: The jury may disregard the amount he claimed was paid to Shotwell.

By Mr. Kirby: Does the answer now stand that he doesn't know?

1363 By the Court: I think so.

By Mr. Kirby:

Q. Mr. Lubben, do you recall giving this testimony on your cross examination, speaking of the time of the wind up of the partnership,—

By Mr. Lockley: What page, counsel?

By Mr. Kirby: Page 1007,—page 1071.

"—the condition of the sale was that the partnership was going to continue in existence after I left, which it did, and they would pay the income tax, as set forth on the books of the company, as drawn out by me.

"And when the time to pay the income tax came around, sir, they wouldn't pay the income tax, and so I wrote them letters and asked them, and everything else, and they weren't interested in paying my income tax, sir.

"So it came time to file my report. I attached a copy of the dissolution agreement to my income tax form, also some copies to show the registered—where I sent letters 'Return Receipt Requestd,' and I sent it to the income tax man. And I sent them in a

1364 partial payment.

"And that is the money, sir, that I owe the Government. And some day, with the grace of God, I hope to be able to pay it back."

Do you recall stating that in your examination in this case?

A. I do, sir.

Q. And the income tax that you were talking about was an income tax return for the year of 1946, which included—

By Mr. Lockley: I object, your Honor, to any discussion of Mr. Lubben's income tax return for the year 1946. It is beyond the scope of the direct examination, and it is immaterial to the issues. Mr. Lubben is not on trial for income tax evasion. He is here as a witness, doing his duty.

By the Court: Well, he may answer. Don't make any statements which preclude him from answering. Ask him about the fact.

1365 By Mr. Kirby:

Q. Yes. I will rephrase the question.

Isn't it a fact, Mr. Lubben, that the income tax return which you were referring to reported your income from June of 1945 through to the end of 1946, insofar as you had the figures; isn't that the period covered?

A. I don't know what the period covered, sir. The accountant prepared the papers for me, and that is all I know about it, sir. I signed it.

Q. Well, the partnership started about June of '45?

A. Yes, sir.

Q. And it ended its fiscal year in '46, didn't it?

A. I think so. I don't know whether the fiscal year ended there or not, but the accountant can explain all those things, sir.

Q. And isn't it a fact that the return, the '46 return, included from June of '45 until the end of '46 because of the fact that the partnership didn't end its fiscal year until in '46; isn't that the truth?

A. I wouldn't know that, sir.

Whatever my accountant prepared. I had a certi-
1366 fied public accountant, and he prepared it, and that is what he was getting paid for, sir.

By Mr. Kirby: Would you mark these Defendants' Exhibits serially?

(Said documents were marked Defendants' Exhibits 19 and 20-A, 20-B, 20-C and 20-D for identification.)

By Mr. Kirby:

Q. Mr. Lubben, in your income tax report—

By Mr. Lockley: Just a minute, Mr. Kirby. If you are going to read from it, may I ask that it be identified so that I may make proper objection to it.

By Mr. Kirby: I was going to ask him a question in-

dependently of it, and I will not state an amount in the question.

By Mr. Lockley: Thank you, sir.

By Mr. Kirby:

Q. Mr. Lubben, sir, could you tell me how much income you reported to the Government from General Confections for 1946?

By Mr. Lockley: I object, your Honor. It is immaterial what Mr. Lubben reported.

By the Court: Well, what is the materiality of it?

By Mr. Kirby: The witness had in his hands an enormous amount of cash.

By Mr. Lockley: I object to the argument at this time, your Honor.

Please, Mr. Kirby.

By Mr. Kirby: He said we must accept his word.

By Mr. Lockley: Please, let's not make an argument.

By the Court: He is answering my question.

By Mr. Lockley: I am sorry, your Honor. Go ahead, Mr. Kirby, if it is proper to do so.

By Mr. Kirby: I think we would have a right to show whether there was any motivation in the witness for saying the cash went to us, rather than, for example, to himself. And the motivation, I think, will appear as we progress with this inquiry.

1368 By Mr. Lockley: Well, the witness has stated that he had a large amount of cash in his hands, to be sure. But he also paid out large amounts of cash. What his net income tax return shows is not going to prove anything one way or the other, your Honor. This is entirely immaterial.

He has also testified that he doesn't know what his income for 1946 was because he didn't get to see the partnership records. The partnership didn't end until—

By Mr. Kirby: I am asking about General Confections.

By the Court: I will hear you on it. It is about adjournment time.

We will be in recess until 2:00 o'clock this afternoon.

(Whereupon the following proceedings were had outside the hearing and presence of the jury:)

By the Court: I can hear you now.

You may amplify your statement now, Mr. Kirby, as

to your position with reference to the materiality of
1369 this proffered testimony.
1370 By Mr. Kirby: One of the questions in the case, of course, is the credibility of Lubben. While it is always true that the principal witness is a person whose credibility is important, you will recall that the Government has urged upon you in earlier hearings that without his testimony as to what he did with the cash, they felt that their case was perilous, and they couldn't go ahead.

And I said to the Court that it is what he did with the cash that is the key—

By the Court: I understand that.

By Mr. Kirby: —as to whether he is to be believed or not.

Now, the question, of course, of what he did with the cash, I don't—and I am sure the Court doesn't—feel should be allowed to rest on no test other than merely his statement. We would have the right to go into whatever might throw light upon whether he could be believed.

By the Court: Get to the question before me.

1371 By Mr. Kirby: Now then, in the General Confections period it is alleged under the indictment that he gave us—

What is the total in General Confections, Jack? I will get it.

—roughly, if you include its subsidiary Reserve Trading, $350,000.

And Mr. Lubben said that he did handle these large amounts of cash. Not only that that he says went to Shotwell but a lot of other cash, far more than just three hundred thousand in cash.

But he reports his total income from General Confections at $10,500. That is all he got. He didn't keep a dime of the money, other than $10,500, from General Confections.

There isn't any doubt, no argument about: Did somebody also have the books, or didn't they? That has nothing to do with the partnership. That return shows that he flatly states that his income in 1946 from General Confections was $10,500.

And I suggest to the Court that it does—quote—
1372 quite materially go to the question of whether the man is telling the truth when he says that out of the

hundreds and hundreds of thousands of dollars that he handled, he kept not one penny of it. Not a penny of it. He got supposedly nothing but salary. Not a penny of the cash.

He said, "All the cash I am chargeable for on the books"—and he is chargeable for it—he said went to somebody else; "I didn't keep it."

Now, then, for the partnership period he does say that he doesn't have all of the information that he needs. But the return states it was prepared by his accountants from the bank records of the Manufacturers Trust Company, showing the receipt of monies by him.

1373 And he says that the total amount of money that he got from the partnership—we supposedly got some $150,000, roughly, from the partnership; I may be in error about the figure, but it is a large figure; in that period they handled hundreds and hundreds of thousands of dollars in cash—and he said the total he received and kept for himself was $37,000.

In the indictment two years, exclusively of the first five months, in the indictment two years, he says, as we stand here now, that he didn't keep a penny of this money for himself. In the General Confections period he turned it all over to these people.

By the Court: How does this throw any light on whether or not he is telling the truth when he says he turned this cash money over to the Shotwell people?

By Mr. Kirby: Well, it points out that he would have a good reason for saying that; that is to say, if he were not to say that he gave the money to Shotwell, he would certainly be subject to prosecution himself.

1374 By the Court: Well, it may have gone to others besides Shotwell, I suppose.

By Mr. Kirby: Well, the pattern, I think would be much the same with them. The same feelings would impel him.

By the Court: Well, you presume to argue that there is some inconsistency between his statement that he turned over this amount of cash to Shotwell as premium payments during the time he was the head of General Confections, when he makes an income tax statement that he only received from General Confections $10,500, is that it?

By Mr. Kirby: Well, I don't know that I would urge

the word "inconsistency" your Honor. I would say that it makes the story he gave it all to Shotwell unbelievable.

By the Court: Why?

By Mr. Kirby: Well, considering the man, the nature of the man—

By the Court: Well, I don't know that we get anywhere simply arguing about such matters. I have a question here before me as to whether or not this 1375 is relevant evidence.

By Mr. Kirby: Well, you have in mind, Judge, that the quantum of the payments to Shotwell is a key question in the case because we have credits against it.

By the Court: I understand it. You needn't emphasize that. I am fully aware of that.

By Mr. Kirby: Yes, sir. And therefore, it could be entirely possible that an acquittal would be required here if the jury believed that payments were made, but that Lubben is exaggerating the payments that were made. And we would like to show that he had every good reason to exaggerate the payments that were made. And this is one of the reasons. The motivation of a witness is of the highest order of cross examination evidence.

1376 By the Court: Yes, if you can indicate that the motivation is based upon a sound premise. I am running through my mind now just what support there is for your claim of some motivation.

Your position is that a man who handled this amount of cash in alleged premium payments, because he reflected an income of $10,500—well, put it this way. Supposing he reflected an income of a hundred thousand dollars from General Confections? What would you say then?

By Mr. Kirby: It would weaken our position, but it wouldn't wipe it out.

By the Court: Well, $300,000.

By Mr. Kirby: Well, if there was $300,000 in checks to cash, and he says he got it, and he put it on his income tax return, we wouldn't even have the question.

By the Court: Then I gather you feel that the $10,500 is such a low figure that one must be suspiicous of it, is that it?

By Mr. Kirby: That is one thing. There is another point.

1377 By the Court: Maybe he didn't earn more than $10,500. Maybe he wasn't entitled to more than $10,500.

By Mr. Kirby: Let me go a little further. You will recall the testimony of the Gotham Hotel meeting at which Mr. Cain said—according to the witness—that there were questions of entries on Lubben's books, and that he wanted to know from Lubben, and he wanted Lubben to talk with the Internal Revenue agents about the nature of the transactions and loans, and exchanges back and forth between them, and Lubben says, "There are no such things as loans and exchanges. None of that. Whatever I have said you got to bear—"

I am arguing it now. He didn't say it exactly that way. But the question of whether he was laying all of this off and at the time of the investigation when being asked to be frank about some of these transactions, and refused to do so, that adds even greater materiality to this situation of a man who says, "I got the money, but I

1378 didn't keep it. And you got it."

He has got a good reason to say that and to persist in it. It was a question of his being indicted, or our being indicted.

1379 By the Court: Well, merely because he reflected $10,500.00 in his income tax statement as the total receipts from General Confections, standing alone, doesn't seem to me to give rise to any ground for suspicion or inconsistency, or the argument that he must have earned more, and the money that he says went to Shotwell Company instead went into his own pocket, and therefore he is reflecting a very low income.

By Mr. Lockley: Your Honor, may I make one statement that may tend to establish the complete invalidity of the defendants' position in this case.

What he reported on his personal income tax return for 1946, as income from the General Confections Corporation, was merely his salary from that corporation. The corporation was a separate taxable entity. It filed a separate income tax return.

By Mr. Kirby: I made that point myself. He said he got a salary and salary only and no cash.

1380 By Mr. Lockley: All right. So—

By Mr. Kirby: That is the point.

By Mr. Lockley: So the corporation doesn't have a distribution of dividends during that period.

By Mr. Kirby: He said he had it.

By Mr. Lockley: He owned the corporation. It doesn't mean he received any income from the corporation other than the salary that he had.

By Mr. O'Brien: It isn't the size of the amount, your Honor, that we are talking about, that it is ten thousand rather than a hundred thousand. It is its nature. The ten thousand is from salary.

Now, if it should appear—or if the Government or someone else should believe that Lubben had income aside from salary, such as these cash withdrawals, which surely were not salary, his motive for taking the position which he takes here, to the extent to which he takes it, would be very clear.

The point of the income tax return is that the income

1381 is solely from salary.

By the Court: Well, if there was evidence here to establish that the ten thousand five hundred is grossly inadequate that, in fact, he received—

By Mr. O'Brien: I don't mean that.

By the Court: I think, standing alone, that $10,500.00, as far as the evidence shows, may be a very complete salary for the president of General Confections.

By Mr. O'Brien: That's right.

By the Court: Federal judges didn't get more than $10,000.00 a year until a few years ago.

By Mr. O'Brien: That isn't my point about it.

By the Court: What is the ground for suspicion?

By Mr. O'Brien: The basis is this, that if Lubben—on the basis of this return, if Lubben retained any of the proceeds of these cash checks drawn on the company, he would have a false return and would be subject to indictment.

1382 This return reflects no such receipts. Therefore his motivation is in question in the giving of this testimony and that is established by the—

By the Court: I will sustain the objection. I don't see that it has any relevancy.

By Mr. O'Brien: There is one further basis, your Honor, which would be connected, I am sure, through the evidence. And that is the man's expenditures during the period.

This is not the only link of evidence. We started in with the man as a $125.00 a week clerk or salesman. We offered his return for the year '43, and I think '44. And those were identified in part—your Honor reserved a ruling—but starting with the $125.00 a week, and with the income from these various sources, as against the expenditures which we have in mind, we think that it is competent for the jury to know of these amounts in order to help them in determining whether he did or did not retain part of this money.

1383 In other words—

By the Court: You mean his individual return?

By Mr. O'Brien: Yes, certainly.

By Mr. Lockley: Well, may I make a statement, your Honor? This is cross examination on an immaterial issue for the purpose of attacking his credibilty, in the first place.

Secondly, whatever is the accuracy of that income tax return will have no connection whatsoever with the amounts of over premium payments and over premium receipts which were paid and received by the General Confections.

Now, counsel is constantly confusing what the General Confections Corporation did in paying, in buying merchandise and in selling merchandise, and what Mr. Lubben did, as the president and employe of General Confections. He only received a salary. All the rest of the transactions were carried on in the corporate name by the

1384 corporate entity. They should be properly shown on the corporate income tax return. And the fact that he may have gotten ten thousand, or any other amount, of money is entirely immaterial. Even the corporate return wouldn't be conclusive in that regard because if we are to believe what defense counsel says, that there had to be payments made in order to get such merchandise, then certainly Mr. Lubben and the General Confections is entitled to the same inference that he had to make such payments, too.

So that the amount, the net amount of taxes paid, in the final analysis, isn't going to be at all dispositive of the situation.

By the Court: I don't see any relevancy at this time.

(Whereupon a recess was taken to 2:00 o'clock P. M. of the same day, being Monday, September 21, 1953.)

1385

* * (Caption No. 52 CR 143) * *

Before Nordbye, J. and J.

Monday, September 21, 1953,
Chicago, Illinois,
2:00 o'clock P. M.

Court met pursuant to recess.

Present:
Mr. Edward J. Calihan, Jr.
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following proceedings were had herein:

DAVID G. LUBBEN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and testified further as follows:

1386 By Mr. Kirby:

Q. Mr. Lubben, you testified that Mr. Cain talked to you in the Gotham Hotel in 1951, is that correct?

A. Yes, sir. You mean the time I met him at the airport?

Q. Yes. And then you went over and had lunch at the Gotham Hotel?

A. Yes, sir.

Q. Mr. Davidson was with you?

A. Yes, sir.

Q. And Mr. Cain, amongst other things, mentioned that Mr. Mammel, who sits at the table, and Mr. Krane, who sits at the table, were going to come down to New York in connection with income tax matters. He said other things, but he did say that, didn't he?

A. They were going to come down and talk to me.

Q. Yes. And do you recall that you testified to this at page 867 and 868 of this record here:

"He says, 'These fellows are going to come up and ask you questions, and you are going to be here next
1387 week.' He said, 'You are going to be asked questions about loans and exchanges.'

"I said, 'What do you mean by loans and exchanges, Mr. Krane—I mean Mr. Cain?'

"He says, 'By that I mean where you gave us merchandise and we exchanged merchandise for you, or where you paid money to people to ship merchandise to us which was used in our factory and which we gave you merchandise.'

"I said, 'Mr. Cain, we didn't have any of those loans and exchanges.'

"And he says, 'Well, what difference does it make, Dave? I am trying to settle this case. I am pushing it. I am trying to get it over with.'

"He said, 'I want to get it settled.' He says, 'It is—it doesn't mean anything to you.' He said, 'You are liable.' He says, 'It just reduces my tax liability.'

"So I said, 'Mr. Cain, we didn't have any. I mean, if we did, I would tell you.' I said, 'I can't remember of any loans or exchanges.'"

1388 Did you so testify in these proceedings?

A. I did, sir.

By Mr. Kirby: Do you have the check for $36,148.35?

By Mr. Lockley: Thirty-six how much?

By Mr. Kirby: $36,148.35.

By Mr. Lockley: Here is the ledger sheet on which that check appears. We do not have the check.

(Document handed to counsel.)

By Mr. Kirby:

Q. Mr. Lubben, do you recall in your testimony that you identified on a bank statement, which was given the number of Government Exhibit 63, a check cashed in the amount of $36,148.35, which appears to be clearing the bank on November 27, 1945?

A. Yes, sir.

Q. And am I correct in believing that you said that you cashed that check and you got that money and then you gave it to Huebner?

A. Yes, sir.

By Mr. Kirby: Would the Reporter mark these sheets?

1389 (Said documents were marked Defendants' Exhibits 21-A, 21-B, 21-C, 21-D and 21-E for identification.)

By Mr. Kirby:

Q. Now, there was such a thing in your company in

November of 1945, as a loans and exchanges account, wasn't there?

A. I don't think there was, sir. I wouldn't know whether there was or wasn't.

1390 Q. I show you a document marked 21-A and ask, after you have looked at that, whether you now recall that there was such an account audited by Bernard Berku & Company.

A. Well, I don't know whose figures these are, sir, and I don't know what the figures pertain to.

Q. The question is: Now that you have looked at that sheet can you tell us whether there was a loans and exchanges account in your company?

A. Among, who, sir, the employes?

Q. Was there a loans and exchanges account of any kind in your company, sir?

A. Well, I couldn't answer that, sir.

Q. Even after looking at that document?

A. No, sir; I don't know whose figures these are, sir. And I don't know—they are certainly not mine, and they are not Miss Feldman's, sir, and I wouldn't know whose figures these are.

Q. Do you notice down there in November—

By Mr. Lockley: I object, your Honor. He has stated that he doesn't know what is on the document.

By the Court: He doesn't know anything about it.

1391 If you can't lay any further identification, you can't, of course, read from the document. You may proceed further, if you want, to lay a foundation.

By Mr. Kirby:

Q. May I inquire whether the $36,148.35 item, now that you have looked at that document, you are not aware was charged to loans and exchanges?

By Mr. Lockley: I object, your Honor. He has stated he doesn't even know what the document is.

By the Court: Well, if anything refreshes his recollection, from looking at that piece of paper, he may answer.

By the Witness:

A. No, sir; I don't know anything about any loans and exchanges.

By Mr. Kirby:

Q. I now show you a document—let me ask you, do you notice that this $36,148.35 item appears on that sheet which is 21-A?

By Mr. Lockley: I object, your Honor. There has been no foundation laid for the introduction of that.

1392 By the Court: He may answer.

By the Witness:

A. I don't see it anywhere here, sir, yet.

By Mr. Kirby:

Q. Look at 11-27, November 27.

A. Yes, sir; there is $36,148.35.

1393 Q. On November 27, 1945?

By Mr. Lockley: I object. That document is not in evidence, and he is reading from it.

By the Court: He is trying to lay a foundation for it. I suppose he has a right to ask such questions as may be pertinent to that purpose.

By Mr. Kirby: What is the pending question?

(Whereupon the record was read.)

By Mr. Kirby:

Q. And does that appear in a group of four entries in succession following your name?

By Mr. Lockley: The same objection.

By the Court: Yes. I will sustain the objection. You are now not simply asking him to testify to the contents of a document that he can't identify.

By Mr. Kirby:

Q. After having looked at it, Mr. Lubben, do you recall that that item of $36,148.38 was charged on the loans and exchanges and charged against you personally?

1394 A. Well, sir, I don't know whether that is true or not. All I know, sir, is that the money went to Mr. Huebner.

By Mr. Kirby: May the answer beyond where he says, "I do not know whether that is true or not" be stricken?

By the Court: Very well. The balance may be stricken.

By Mr. Kirby:

Q. I now show you a document marked 21-B for identification, and ask you if you know in whose handwriting that document is?

A. No, sir; I don't.

Q. Does that document refresh your memory at all about the fact that there was a loans and exchange account at your company?

A. No, It does not.

Q. Does that document again—does it in any way refresh your recollection that $36,148.35 was charged on that account on November 27, 1945, or do you still not recall it?

By Mr. Lockley: I object, your Honor, to counsel testifying.

By the Court: I will sustain the objection.

1395 By Mr. Lockley: He has already stated he has no recollection.

By Mr. Kirby:

Q. I now show you a document which is marked Exhibit 21-C, and a document which is marked 21-D, and ask you if you can tell me in whose handwriting those two documents appear?

A. I don't know whose writing it is, sir.

Q. Do you recall, or does that document, if you will examine it carefully, in any way help you to recall that on the loans and exchanges account of your company in November of 1945, there was charged against you, $65,570.49 in total, of which one of the items was a check of November 27, 1945, in the amount of $36,148.35; do you now recall that?

A. No, sir; I don't see all that you are telling me on this piece of paper, either.

Q. Would you be good enough to look on the first piece of paper where it gives the amount of your account?

By Mr. Lockley: I object, your Honor. He hasn't yet identified the sheet of paper. He said he doesn't know whose handwriting it is.

1396 By the Court: You are saying "your account". There is no testimony that it is his account.

1397 By Mr. Kirby: If you will excuse me, he said he didn't see anything I was referring to and I was trying to help him.

By the Court: But you refer to his account. I say there is no testimony it is his account.

By Mr. Kirby: I think you are correct. It is Eatsum Food Products which at that time—

By Mr. Lockley: There is no testimony of that, even.

By the Court: You reframe your question.

By Mr. Kirby: All right.

By Mr. Kirby:

Q. Mr. Lubben, to assist you in locating the item I would like you to pay attention to, please, would you look on the first one of those two and see whether there is a total charge against you of $65,570.49; do you see that?

By Mr. Lockley: I object again to counsel reading from these documents.

By the Court: Yes. I sustain that objection. I don't think that is proper cross examination.

By Mr. Kirby:

1398 Q. Mr. Lubben, if I can help you find what I would like you to refer to, would you note that on the second page of the documents there is a breakdown of that larger figure, or purports to be a breakdown.

By Mr. Lockley: I am sorry. I have to object again, your Honor. There has been no foundation laid.

By the Court: He can direct his attention to any parts of that paper. He can't incorporate his own conclusions of what the paper discloses.

1399 By the Court: Is there a question before the witness now?

By Mr. Kirby: I thought there was. I may have been daydreaming.

By the Court: Perhaps you better reframe it.

By Mr. Kirby: All right. I will.

By Mr. Kirby:

Q. I was directing your attention, Mr. Lubben, to the breakdown on the second one of those two sheets of the D. G. L., David G. Lubben account. Do you notice that there is such a breakdown, just expressing it generally?

A. Well, I see something here which says "D. G. L."

Q. Now, my inquiry, sir, is: Now that you have looked at that is it not the fact that this $36,148.35 which you identified on Government's Exhibit 63 likewise appears in the general breakdown of charges against you on the second one of those two documents?

By Mr. Lockley: I object, your Honor. He hasn't identified it as yet.

By the Court: Yes. I will sustain the objection. I don't think that that is the proper way to lay a

1400 foundation for an exhibit, if that is what you are trying to do, or to ask him whether or not it refreshed his recollection on that. I don't think that you are putting it properly.

By Mr. Kirby:

Q. Mr. Lubben, do you recall the testimony which I read to you and which was read from pages 867 and 868 in which Mr. Cain said in part:

"You are going to be asked questions about loans and exchanges."

And you said:

"What do you mean by loans and exchanges?"

And then later:

"I can't remember any loans and exchanges."

Do you remember that testimony, sir?

A. Yes, sir, I do.

Q. Well, now, now that you have looked at these papers, aren't you ready to concede that that $36,148.35 item was in a loans and exchanges account, Eatsum?

1401 A. Sir, if you will read a little further in the testimony that I—

By the Court: Just answer the question.

By the Witness:

A. Well, he wasn't talking about any loans and exchanges. He was talking about loans—

By Mr. Kirby:

Q. Excuse me. Is it in a loans and exchanges account?

A. Is it in it?

Q. Yes, sir.

A. I don't know these papers.

Q. You don't know whether any such item was charged against you?

A. I don't know who wrote them, what they are.

Q. How about this $36,148.35 item? Was that ever charged against you?

A. I wouldn't know why it would be because I didn't get it.

Q. The question was, was it ever charged against you?

A. Sir, I wouldn't know why it would be.

Q. Do you know if it ever was charged against you on a loans and exchanges account?

1402 A. I wouldn't even know that there was such a thing as a loans and exchanges account.

Q. And did you take the same attitude, sir, with respect to the loans and exchanges account when Mr. Cain was discussing the matter with you at the Gotham Hotel?

A. What attitude was that, sir?

1403 Q. The attitude that you now take that you know nothing of it?

A. Well, sir, we were talking about a lot of exchanges between Shotwell and the Eatsum Food Products, or General Confections whereby we had gone into that further, sir, where I was to give him boxes of this, and he was to give me finished products, or I was supposed to go and

pay X dollars to some supplier of his who was shipping merchandise, and we had none of that, sir.

Q. I will show you another document which has been marked 21-E, and ask you if you know whose handwriting appears on that analysis?

A. No, sir, I don't know.

Q. Now that you have looked at that document, do you recall that as late as March, 1946, the $36,148.35 was still charged against you personally?

By Mr. Lockley: I object.

By Mr. Kirby:

Q. (Continuing) —on the loans and exchanges account?

By Mr. Lockley: I object, your Honor. He has stated that he doesn't know what the document is. There has
1404 been no proper foundation laid. He is trying to refresh his recollection. He is going about it the wrong way.

By the Court: He may answer.

By the Witness:

A. Sir, I don't know anything about—I have never seen the paper before, and I don't know anything about loans or exchanges, or whose paper this was—whose paper this would supposedly be, sir.

By Mr. Kirby:

Q. And am I correct in believing that when you told this story about the Gotham Hotel meeting to the Government Agent Krane under oath, you added another thing that you had said at that meeting, and that was that in connection with your personal income tax at that time, you were being put through the third degree. Do you recall telling him that?

A. Well, sir, I had been—

Q. Excuse me. Do you recall telling him that?

A. I may have used the words "third degree", but I—

Q. Now, sir, was one of the questions—

By the Court: Counsel, will you stand back?

1405 By Mr. Kirby: I beg your pardon.

Q. Was one of the questions that was being posed to you by Mr. Mammel and Mr. Krane, or whoever else was investigating your matters, whether you did get this $36,148.35 from the loans and exchanges account—do you ever remember that being asked you?

By Mr. Lockley: I object, your Honor.

By the Court: He may answer.

By the Witness:

A. I don't ever recall ever—I don't ever recall the Government or anybody else asking me anything about loans and exchanges on these pieces of paper, or anything about the thirty-six thousand dollars.

By Mr. Kirby:

Q. But did I read to you your question and your answer correctly when at the Gotham Hotel Mr. Cain was asking you to check some of these items so that the income tax liability could be ascertained, you said: "No," I said, "Mr. Cain, we didn't have any. I mean, if we did, I would tell you." I said, "I can't remember of any loans and exchanges."

1406 A. Well, sir—

Q. Did you say that?

A. Well, sir, the conversation was between—any loans and exchanges like I stated, was between the Shotwell Manaufacturing Company and myself, or the companies that I was connected with, and the line of merchandise—and certainly had nothing to do with any money.

By Mr. Kirby: Will you please mark this Defendants' Exhibit 22 for identification.

(Said document was marked Defendants' Exhibit 22 for identification.)

By Mr. Kirby:

Q. Mr. Lubben, do you recall—

By the Court: If the reporter would announce the exhibits when she marks them, I could keep track of them in my record.

By the Reporter: Defendants' Exhibit No. 22.

By Mr. Kirby:

Q. Mr. Lubben, do you recall that on your cross examination you discussed such advances by you to Huebner for some over invoice, or unbilled items. Do you recall generally that we talked about that?

1407 A. Yes, sir, we did.

Q. Do you recall my asking you this question on page 1230:

"Question: May I inquire, Mr. Lubben, if at any time you had advanced to Shotwell and were ahead of Shotwell by as much as $83,000.00?"

And your response:

"Answer: Well, sir, I know where you are getting your story, sir, but you ought to—"

And then I said, "Excuse me."
And the Court said, "Just answer the question."
And you answered: "No, sir."
And then I said: "The answer is no?"
And you said, "That is correct, sir."
Do you remember my asking you about that?
A. Yes, sir.
Q. And you made those answers?
A. Yes, sir.

1408 Q. Would you now look at this exhibit which is identified as Defendant's Exhibit 22 for identification and I will ask you if you know in whose handwriting that is?

A. No, sir, I don't know.

Q. Do you know in whose handwriting the reference to advances on the righthand side appears to be in?

A. No, sir, I don't know.

Q. And as you now look at that, is your memory at all refreshed that your books, or at least some of your memorandum did claim that you had advanced over $83,000.00 to Shotwell? Have you no memory of it?

By Mr. Lockley: I object, if your Honor please.

By the Witness: You know, sir, I think—

By Mr. Kirby:

Q. Excuse me. The question is—

By Mr. Lockley: I object.

By the Court: He may answer.

By the Witness:

A. I have never seen this sheet before, sir.

By Mr. Kirby:

Q. All right. Thank you.

1409 A. I think it is in the handwriting—I know now.

Q. You know in whose handwriting it is?

A. I have a very good guess, sir.

Q. What is your best thought as to the name of the person?

A. Mr. Roth.

Q. Thank you. These other exhibits, 21-A, which appear to be on the stationery of Bernard Bercu & Company, certified public accountants, do you know which of the Bercu people—

By Mr. Lockley: I object, your Honor.

By Mr. Kirby:

Q. Do you know whose handwriting that is?

By the Court: He may answer.
By Mr. Lockley: That is not in evidence.
By the Court: He may answer.
By the Witness:
A. No, sir, I don't know whose handwriting this is.
By Mr. Kirby:
Q. That is number what for identification?
A. 21-A.
1410 By Mr. Kirby: These are the only questions I have of this witness.
By Mr. O'Brien: If your Honor will excuse me, I will get out my books.

Cross Examination by Mr. O'Brien.

Q. Mr. Lubben, on October 24, 1951—
By the Court: I think, Mr. O'Brien, if I might remind you sometimes your voice drops and if you will bear in mind that fact, so the jury won't have any difficulty in following your questions—
By Mr. O'Brien: All right.
By Mr. O'Brien:
Q. On October 24, 1951, you gave an affidavit to the government concerning the subject-matter of your testimony in this case.
A. I don't recall if that is the date, sir, but somewhere thereabouts.
Q. And do you recall substantially the scope and context of that affidavit?
A. Pretty much, yes, sir.
Q. And it is true, is it not, that your testimony
1411 here has been substantially the same as what you had told the government at that time?
A. Well, it would be—I just told them the truth, sir, as best I can remember.
Q. And was that substantially the same according to your best recollection?
A. I would say the sum and substance, yes, sir.
Q. And then the day before or on October 23, 1951, you gave a separate affidavit to the government, did you not?
A. Yes, sir.
Q. At the time of that statement on October 23, 1951, did you state—I better put on my glasses—that the first

overage was about five or ten cents a pound? Do you recall stating that?

A. You mean, the amount per pound on the merchandise?

Q. Yes, sir.

A. Yes, sir, to the best of my recollection at the time that is what it was.

1412 Q. Did you say that they would sell you one hundred thousand pounds at a clip and two hundred thousand at a clip and they raised the price I believe from five to eight cents a pound?

A. Yes, but I—in checking the records, sir, I found that that was an error. I did buy merchandise at one hundred thousand pounds at a clip and I do think, sir, somewhere on the invoice price there was an increase in the cost of the merchandise as I originally bought it and later on they raised the price a little bit.

Q. Well, did you say that it was raised from five to eight cents?

A. If that is my statement, sir—I mean, I signed it. That is what I said. However, in refreshing myself, I have clarified that, as later on when I saw the records.

Q. Well, is it fact, regardless of what you say that there was at one time a five-cent overage applicable to some items?

A. I though there was, sir, but I was in error.

Q. Is it your recollection that such overages as were applicable remained constant and unchanged?

1413 A. Well, sir, such overages? Yes, sir.

By the Court: Speak up a little louder.

By the Witness:

A. Yes, sir. The overages were the same, sir.

By Mr. O'Brien:

Q. Who is Miss Feldman?

A. She was my office manager, sir, and accountant. I mean, she was the office manager and head bookkeeper.

Q. Did she have some familiarity with the overage rate?

A. Yes, sir. I would say she did, sir.

Q. And if Miss Feldman testified on her deposition in this case that the overages were changed from time to time, would you say that she was mistaken?

A. Well, if she said that sir, she might have re-

ferred that the overages changed with the item, I mean, there was different overages.

Q. I mean as to the same items.

A. Well, if she said it pertaining to the same items, sir, I am sure Miss Feldman was in error.

Q. All right. Now in your conversation with the agents of October 23, 1951, did you say that a record of
1414 the transactions during the proprietorship was kept on cards?

A. Yes, sir, but I was in error. It was kept in 1946.

Q. I notice in the same statement of October 31, 1951, that you said that you had a conversation with Stanley Graflund and that he told you that there were only a few corn syrup shipments and that you told him that this had been going on for years and it was candy.

By the Court: It was what?

By Mr. O'Brien:

Q. And it was candy and Graflund said he was very surprised.

Do you recall making that statement to the agents?

A. Yes, sir, I do.

Q. Was that statement incorrect?

A. No, sir. It was—

By the Court: Speak up, Mr. Lubben.

By the Witness:

A. No, sir. In February of 1948, Stanley Graflund—I was at the plant, I believe, at that time, and he said, "What is all the—what is all this talk about over-
1415 ages here and all the excitement about?"

I says, "I don't know."

He says, "After all, it is only a few of these corn syrup shipments." And I said, "What do you mean a few corn syrup shipments?"

He says, "Well, those few shipments where you gave me the money." I said, "Stanley, that is not so. This goes almost to the very beginning of the business I did with Shotwell."

He says to me, "Oh," he says, "you are kidding."

I says, "No; this goes back. I don't think I had very many clean deals with them." And he says, "Son of a—so and so." He says, "Now I understand it. Now I understand why everybody was out of town when it came time to sign the income tax statement."

He says, "Huh. I had an idea." He says, "Now," he says, "I know it."

1416 Q. So Graflund told you that he knew nothing up until that time, except that there were these corn syrup items late in 1946?

A. Yes, sir, referring to the few times that I gave him the money.

Q. And did you in the conversations with Graflund in February of 1948 intimate to him or state in any way to him that you had thought he was receiving part of the money?

A. No, sir. I—

Q. You don't remember that?

A. No, sir, I don't.

Q. Or any such conversation?

A. No. He asked me, sir, to call him at his home that evening and that I did, sir, and we went over very much in substance what we talked about—

Q. I just wanted to know if you recall.

A. I don't sir.

Q. I just want to know if you recall saying that to him or he saying that to you?

A. No, sir.

Q. That he received part of the money?

A. Well, he referred to, sir,—the money he referred to was, "What is this all about?"

1417 Q. No. I mean the money you say was split up among these individuals.

A. No, sir. He never said he got it.

Q. Did you tell him at that time that the money was split up among these individuals?

A. I believe I did, sir.

Q. And did you not suggest to him that part had been given to him?

A. No, sir.

Q. Still speaking of your statement of October 23, 1951, did you tell the agent at that time that on several occasions you had attempted to pay the overages with checks, divide it equally in three payments, but that they wouldn't take them?

A. Well, sir, I don't recall the word "several". It could have been several. I did, sir.

Q. Several occasions are the words.

A. No, sir. It should have been one occasion, sir.

Q. There were not several occasions?

A. Only one, sir.

Q. At the time you were talking to the agents, two years ago, could you recall more than one?

A. No, sir. But several—

1418 Q. Did you tell them several?

A. Well, sir, I spoke to several individuals. I believe I spoke to Mr. Huebner and I think when he brought the money back I again tried to do it, so if the word "several" was used there, it was an error there.

Q. Well, let me read you the sentence, for the record:

"This happened several times when we would try to take them into it."

A. "Take them," well, sir, I think you will find, sir, on the original copy there were some corrections that I made.

Q. I don't see any correction on this, Mr. Lubben.

A. Well, it was only one time that I can very specifically remember.

Q. All right. You do claim you have a good memory, do you not?

A. No, sir, not as good as it should be.

Q. Wouldn't you say that you had an exceptional memory?

A. No, sir.

Q. I took your deposition in this case, did I not?

A. Yes, sir.

1419 Q. At Puerto Rico?

A. Yes, sir.

Q. And at page 100 of that deposition did you not by your answer to a propounded question state:

"I have a good memory, sir. You bet your life. A wonderful memory."

A. Well, sir—

Q. Did you say that?

A. If it is in that, sir, I said it, but you just make a play on words.

Q. I am not making a play on words. I am just reading you what you said.

A. I also stated, sir—

Q. You were under oath at that time?

A. Yes, sir, and I am under oath now too. But I also stated that my memory is not as good as it should be.

Q. Still speaking of the statement of October 23, 1951, did you tell the agents on that occasion that Cain told you that a man named Tobias had been in to see Cain and had told him about the investigations?

A. Yes, sir, he did.

Q. And that Cain seemed to think that Tobias and
1420 you were working together and that you said no, he was just your auditor and so forth and you didn't know what he was doing. Did you make that statement?

A. Yes, sir. I made additional—I made more conversation on that. Now that you refer my memory to it, I know all about Mr. Tobias.

1421 Q. Now, you didn't tell us about that conversation in your direct testimony, that part of it, did you?

A. I don't remember whether I did or not, sir. It has been several days ago, and I have had a lot of conversations. I don't think I did, sir.

Q. And does the fact that that statement is omitted from your statement of Otcober 24th, indicate that it was in any way in error?

By Mr. Lockley: Objection, your Honor. It is immaterial.

By the Witness: No, sir. But—

By Mr. O'Brien:

Q. Well, then, is the statement true?

A. Yes, sir. We did have a conversation about Mr. Tobias.

Q. All right. That is all I want to know.

You had a participation of some sort in four different companies which are involved here, did you not, the proprietorship, Eatsum Food Products, the partnership of the same name, General Confections, Inc., a corporation, and Reserve Trading Company, is that right?

A. Yes, sir.

Q. During the proprietorship period, you were
1422 the sole owner of that company, were you not?

A. Yes, sir.

Q. And you had a secretary named Norman?

A. Yes, sir.

Q. Miss Norman?

A. Yes, sir.

Q. Whose first name I have forgotten.

A. Abigail.

Q. That is right. And your bookkeeper and office manager was Beatrice Feldman?

A. Yes, sir.

Q. And she continued as such during—down until the time that the partnership was formed? She continued so to function for the proprietorship?

A. Who, sir?

Q. Miss Feldman?

A. She continued to function.

Q. Until the partnership came into being?

A. As the office manager.

Q. As the office manager?

A. Yes, sir, and my bookkeeper.

Q. And the bookkeeper?

A. Yes, sir.

Q. And she had an assistant named Frieda Seider?

1423 A. Yes, sir, or Strum.

Q. Whose present name, or married name is Strum?

A. I think it is the reverse, sir. You are right, sir; it is Strum.

Q. She was the direct assistant of Miss Feldman? I mean, she was her lieutenant, or directly under her?

A. Well, Miss Feldman was the boss in the office, and I would say she worked for Miss Feldman, under Miss Feldman, yes.

Q. Now during the proprietorship era, you had only one firm of accountants, did you not?

A. The same firm, sir, Mr. Bernard Bercu, but we also had Mr. Louie Roth.

Q. I am speaking of the proprietorship.

A. Oh, you said a partnership, sir, I think.

Q. I am sorry. If I said it, I didn't mean it.

1424 Q. Now, during the proprietorship era you had only one firm of accountants, did you not?

A. The same firm, sir, Mr. Bernard Bercu. But we also had Mr. Louis Roth.

Q. I am speaking of the proprietorship.

A. Oh. You said the partnership, sir, I think.

Q. I am sorry. I didn't mean it. And Mr. Bercu's firm rendered a full auditing service?

A. During the proprietorship?

Q. Yes, sir.

A. Yes, sir.

Q. And that included the usual things that outside accountants do, and ending up in the preparation and rendition of the annual report, and balance sheet, and all of that, right?

A. Yes, sir.

Q. Mr. Bercu was thoroughly familiar with the books which the proprietorship maintained, and with the records, and the way of maintaining them, was he not?

A. Well, sir, I would say he would have to be. He made the statements.

Q. Well, I wasn't arguing, Mr. Lubben.

A. I didn't mean to.

1425 Q. I mean that you, yourself, would not have the intimate familiarity with the details of the bookkeeping itself that Mr. Bercu would?

A. That is correct, sir.

Q. And then when the partnership was set up, Mr. Bercu, or his firm—when I say Mr. Bercu I mean his firm, too—he continued the auditing work right down to the time of the dissolution of the partnership. In that case, or in that era, there were also auditors who worked on the books, were there not?

A. Yes. But to correct you in your question, I think Bercu didn't stay all the way through the partnership. I think he quit about one month or so before I did. I think it was around January, sir, perhaps that he quit.

Q. There might have been a gap, although I don't recall his telling me that. But if there was he immediately resumed with you when you set up General Confections, did he not?

A. And I am not too right on that point, sir.

Q. I just want your best recollection.

A. No, sir, I don't for the moment say whether he did or didn't. I think he did and then again I think

1426 he didn't.

Q. Well, at the time of your deposition your recollection on that was better. I think you said that Mr. Bercu continued for General Confections for some three months, approximately, down to the time at which you hired Sproul & Scholz?

A. That's the way I figure it, sir. That's the way I think it happened.

1427 Q. And there were some—I don't know that it is material—for some reason or another, Mr. Bercu

left after the first few months of the General Confections operation and you retained Sproul and Scholz who continued as your accountants with that company, all the way through the year 1946, at least; is that right?

A. Yes, sir. And I think part of '47.

Q. Right.

A. But, sir—

Q. We are not interested in the '47 part here.

A. Sir, you asked me one question, and before I had a chance to answer you asked me another. And you asked me during the period of the partnership—I think it says here—whether any other firms of accountants—

Q. I am just coming to that.

A. You asked it already, and I didn't get a chance to answer you.

Q. Yes. There was an accountant named Roth, was there not, during the partnership era?

A. Well, sir, he called himself an accountant.

Q. Well, I won't quarrel with you about that. But you understood him to be an accountant; you don't 1428 think that he was misrepresenting that he had a license, do you?

A. Yes, sir; he certainly did.

Q. Was he working for you?

A. He never worked for me a day in his life.

Q. But he did have access to the books?

A. Yes, sir.

Q. And that was by authority of whom?

A. Mr. Giglio.

Q. And Mr. Roth had an assistant, a fellow accountant, who worked for him, did he not?

A. I think he had several people, sir.

Q. Undoubtedly. But do you remember this one in particular, Mr. Hausman?

A. Yes, sir. Mr. Hausman. I remember him.

Q. And Mr. Hausman was on the premises from time to time?

A. Yes, sir.

Q. And the Government, did you know, has submitted us sheets here, many sheets, prepared by Mr. Hausman from the books and records of the company?

A. I do now, sir. I didn't know it before.

Q. Did you know it for the first time when I told you,

or did you know it before that?

1429 A. Just now, sir. I don't even know what the Government has given you.

Q. All right. But you do know Mr. Hausman?

A. Yes, sir; I do.

Q. And at the instance of Mr. Giglio, both those gentlemen, Roth and Hausman, had the authority to examine the books and to check the accounts; isn't that so?

A. Yes, sir; they could look anywhere they wanted. I had no objection.

1430 Q. And they were there to check the books, records, accounts of the partnership, from the standpoint of your major partner, Giglio?

A. Well, the real reason they were there, sir—I mean—

Q. What were they doing?

A. Roth was always trying to get me to fire Mr. Bercu.

By Mr. O'Brien: I move to strike it.

By the Witness: That's what he was there doing.

By Mr. O'Brien: It is immaterial.

By the Court: It is not even responsive to the question. It may be stricken.

By Mr. O'Brien:

Q. I just want to know if they were doing this from the standpoint of the Giglio partner.

A. Well, sir, they weren't doing it for me.

Q. Bercu was doing it for you?

A. He was doing it for the company, Eatsum Food Products Company.

Q. That's right.

A. And we paid him a bill for it and we paid him his fee. Eatsum Food Products Company, to my knowl-

1431 edge, never paid Louis Roth a dime, although several times he tried to make me pay him money and I wouldn't do it.

Q. I didn't ask you that, Mr. Lubben.

A. Pardon me. I am sorry.

Q. All I want to know you answered me, that he had access to the books.

A. Yes, sir.

Q. From that source?

A. Yes.

Q. And so did Mr. Hausman.

A. Yes, sir.

Q. Now, was there anyone else that you can think of who had to do with the books and records of the proprietorship, partnership, or General Confections?

A. What do you mean, sir, who had to do with them?

Q. Who worked on the books?

A. I can't think of any, sir. There might be some men—

By the Court: A little louder, Mr. Lubben.

By the Witness:

A. I don't think of any, sir. There might be some men who worked for Mr. Bercu. I don't remember their names.

1432 By Mr. O'Brien:

Q. Of course, out of the accounting firm, or firms, the field auditors and the men would come, but that all stemmed back to Mr. Bercu?

A. Yes.

Q. And is included in his employment?

A. O. K.

Q. The same with Sproul & Scholz. He had other men, too, did he not?

A. Yes, sir.

Q. And was one of those men Myer; do you remember Myer?

A. I think it was Winert.

Q. Winert was Bercu's partner, was he not?

A. Yes, sir, he worked for Mr. Bercu.

1433 Q. And working with Sproul & Scholz was Joseph Myer?

A. The only ones I can ever remember, sir, that worked for Sproul & Scholz was, I think, some redheaded fellow. I can't remember his name.

Q. Now, in the proprietorship—

Withdraw that.

In the partnership you said that there were two cash boxes maintained, box No. 1 and box No. 2, is that right?

A. Yes, sir.

Q. Now, did you have a cash box in the proprietorship?

A. Yes, sir; in the—now, to take the proprietorship, there was a period, sir—well, Eatsum Food Products, the partnership was not formed until June 1, I believe, 1945. That is when they signed the papers. They had nego-

tiated with me some time in April, and the papers always was being stalled off. They were going to go ahead with the papers tomorrow. So by the time June 1st came around, sir, we had already made, I believe, about five or six weeks profit under the sole ownership. So, in reality, sir, I was paid back with my own money.

1434 Q. Well, it is not quite that complicated, Mr. Lubben. I just want to know if the proprietorship did maintain a cash box.

A. Now, during that time, sir, from April, when Mr. Roth came in, he wanted us to stop the issuing of cash checks and to sell some merchandise for cash and buy it for cash.

1435 Q. You are ahead of me.

A. Well, that was in the—you see—

Q. I just want to know if you kept the box.

A. Yes, but you see, it was a sole proprietorship, sir, but it wasn't the sole proprietorship, if I can explain. As I stated before, we talked, I believe, in the middle of April, and they promised they were going ahead and buy 50 per cent of the company, as per the books. But then they kept stalling off as to the day they were going to pay it, and it really wasn't paid until June. And yet when we got paid in June they picked up that portion of the profits, or something, that were—I don't know—the accountant can tell you, but, sir, I got gypped.

By Mr. O'Brien: I move to strike it.

By the Witness:

A. Well, sir, there was something there was wrong. I don't know what it was.

By the Court: That portion may be stricken as not responsive.

By Mr. O'Brien:

Q. Did the proprietorship maintain a box?

A. Well, during that period of time, sir, I remember.

1436 Q. What was that period of time?

A. To the best of my recollection, sir, it was around—it was in April till about—to June, April to June, somewhere in that period, when we were going to become partners. I can't recall.

Q. Now, outside of that, going back before that time, April to June, did the proprietorship maintain a box?

A. Sir, I was asked that.

Q. Do you know?

A. I can't think of any, sir. There might have been some money in an envelope, but I can't remember any box.

1437 Q. Do you recall who made or maintained the record on the cash box that was kept at the proprietorship?

A. Well, now, when I said the proprietorship, sir, it is the period, sir, I believe, from around April until June.

Q. Whatever it was?

A. Yes.

Q. Before the partnership started to function?

A. That was a partnership then, sir, because they took the profits and put it back, so it was a partnership, even though the papers were signed several months later.

Q. I want to know who maintained the record.

A. I think I did, sir, some of them. And some, I think were in the handwriting of Mr. Loperfido. I am not sure, or Hankermyer. But I kept some track of it, sir.

Q. You are not mixing this up now, with the boxes which were kept after the partnership started?

A. No, sir; I think—I don't know—I have seen so many papers, but I think you will find some papers somewhere, sir, where I kept track of some stuff.

1438 Q. Well, the reason I say that, Mr. Lubben, on your deposition you testified—moving to the partnership now—that you had custody of the cash box in the partnership for a few days, and you kept the account of the ins and outs that was maintained on that box, and that then you passed the box to Loperfido, who thereafter kept the account, and kept custody of the box. Isn't that true?

A. Well, sir,—

Q. Do you remember telling me that?

A. Yes. But, sir, I think we were talking about the corn box. That pertained to the corn box, sir.

Q. All right, the corn box.

A. And I think at that particular time, that the candy box didn't amount to too much. I mean, we were never able to sell, sir, enough candy to—

Q. I am interested—

A. Pardon me, sir.

Q. —interested at the moment in the corn box of the partnership, and in your recollection as to the truth of what you told me.

A. Yes, sir.

1439 Q. You said that you maintained the box and kept the record for a very short time after the partnership started to operate and then that work was done by Loperfido, to whom you passed the box, is that true?

A. Well, sir, the box that I was referring to at that particular time, sir, was the corn box.

Q. That's right.

A. Yes, sir.

Q. All right.

A. And the corn box didn't come into being, I don't think, until sometime around August of 1945. Maybe I was wrong in the date.

Q. But I am correctly stating what you told me on the deposition in speaking of the corn box, that you maintained it only for a short time and then passed it on to Loperfido?

A. Yes, sir; but I got it back again.

Q. You didn't tell me that on the deposition, did you?

A. I don't think you asked me.

Q. Oh, yes, I did.

A. Well, I think there was a time there when Loperfido quit, sir, and that the box came back to me, or

1440 the records came back to me. The box never came back to me, but the records came back to me for a short space of time.

Q. Is that shown by the exhibit in evidence as Defendants' 14-B?

A. Yes, sir; this is the paper, sir, that I was referring to.

Q. That is the corn box, isn't it?

A. It says corn box at the top, sir.

Q. Yes. And you took it over from Frankie, as you call him?

A. That was Frank Loperfido, sir.

Q. I see. And then you made the entries and maintained it from there on, as far as this record shows?

A. Till around January 1st, I think it says there, sir.

By the Court: I think we will take our afternoon recess.

Mr. Marshal, I think for the convenience of the jury, the jury should be permitted to pass out first before the audience does. They don't have much time to recess.
1441 If you tell the audience to remain seated until the jury have time to get out in the hall that will cause less confusion.

By the Marshal: Yes, your Honor.

By the Court: We will take a recess for ten minutes.

(Short recess.)

By Mr. O'Brien:

Q. Still speaking of the corn box, Mr. Lubben, did you go to Cuba along in December and get back about January 1st?

A. I think, sir, it was in—I think it was after Christmas that I went to Cuba. You are talking about the year 1946. January—

Q. No. When was it that the partnership terminated?

A. In March, sir.

Q. Of '46?

A. Yes, sir. And I had been to Cuba prior.

Q. Was it while you were away that you gave the box to Loperfido?

A. No, sir. Oh, many, many months before that. But I said in December, sir—I said I didn't have custody of the box, I kept some records in December.

1442 Q. Well, let's take the records. Did you turn any of the records over to Loperfido when you went to Cuba?

A. I think he was gone, sir.

Q. He was gone?

A. I think he went sometime around the latter part of November, early in December.

Q. But you ceased keeping the records about January 1st.

A. I personally?

By Mr. Lockley: What year?

By Mr. Lockley: What year?

By Mr. O'Brien: Yes, 1946.

By the Witness:

A. No, you mean 1945. I ceased keeping records around—I think there was a period of about one month in there, sir, where I kept records of a corn box and that would be in 1945. Then Mr. Hankermyer kept track of the records, sir, I believe, in 1946.

By Mr. O'Brien:

Q. When did you turn it over to Hankermyer?

A. Oh, I think the latter part of December or shortly before I went to Cuba. I think I went to Cuba, sir, if I am not incorrect, I think about the 28th day of December. I went down to Cuba to buy some Cuban candy.

1443 Q. I forgot one of the accountants, Mr. Lubben. Was there another accountant associated with Roth whose name was Starr?

A. Well, I said he had two fellows there, sir. Mr. Hausman was a good man, and I don't know much about Starr, but I know Roth was a loss.

Q. You do remember there was such a person?

A. I don't know what his name was, sir.

Q. There were two and Hausman was one of the two?

A. Yes, sir. Mr. Roth, sir, was indicted eleven times after that.

By the Court: Well, that is not responsive to any question, Mr. Lubben. It may be stricken.

By the Witness: Okay, sir.

By Mr. O'Brien: Of course, it will be stricken, your Honor, but I don't see that the—

By the Witness: I am sorry sir.

By Mr. O'Brien: —that the admonitions pay off.

By the Court: You just answer the questions, Mr. Lubben. Don't volunteer anything.

1444 By the Witness: All right, sir.

By Mr. O'Brien:

Q. Are you familiar with Mr. Starr's handwriting?

A No, sir.

Q. Would you know it, if you saw it?

A. No, sir.

Q. Now, coming back to the proprietorship, and the method of keeping track of the overages, as I understand it, when proprietorship received an invoice, or a bill, you, or someone working under you, would add the dollar amount of the overage to that invoice as the first step, is that correct?

A. Well, sir, I think we added the amount per pound and the dollar amount at the same time.

Q. Well, it is true that the dollar amount was added?

A. Yes, sir.

Q. I didn't say that was everything that was added

necessarily, but you did add the dollar amount. Did you do that by striking out the typed amount and putting the total in instead?

A. No, sir.

Q. How was it done?

A. Well, to the best of my recollection, sir, the
1445 invoice would come from the Shotwell Manufacturing Company calling for a certain number of pounds of candy at a certain amount per pound, total. Then below that I believe we used to take—we used to put the premium per pound and then take the total number of pounds and multiply it by the premium and add that below. And I believe a line was drawn, getting the total. I also believe—I am sure, sir, that somewhere in those figures we took the two per cent off the invoice price, the actual amount of money we paid on the invoice.

1446 Q. But when you got through you had a piece of paper called an invoice on which the amount had been changed?

A. You mean the Shotwell's amount?

Q. Well, whoever it was.

A. I don't think we ever disturbed their figures, sir. We just added something more on the bottom.

Q. You didn't draw a line through the figure and substitute a new figure?

A. I don't ever remember saying that, sir.

Q. I just want to know—

A. Yes.

Q. —what you recall about it.

A. That's right.

Q. And then would you afterwards pay to the supplier, by check, the amount of the invoice as rendered?

A. We would pay the supplier the amount that he had on the invoice, by check; yes, sir.

Q. And then before that payment could there be any entry or posting of the invoice to any account?

A. Before, sir?

Q. Yes, sir.

A. Well, when the—I don't know whether you
1447 posted it before or after, but I know we posted it some place.

Q. Well, if Mr. Bercu said that it would be entered as a total amount in the accounts payable record, would you agree with that?

A. Well, I wouldn't know enough to agree or disagree.

Q. You just don't know about that, is that it?

A. That's correct. I don't know what mechanical procedure was necessary for putting it on the books.

Q. And when you would draw the check for the amount of the invoice as originally rendered where would you make or post the transaction showing the drawing of that check?

A. I wouldn't know where they put it in the books.

Q. You are not familiar with what was done on that?

A. No, sir.

Q. And do you know whether during the proprietorship in any situation in which an average was involved whether there would be drawn right at the same time a check to cash for the amount of the overage; was that a practice?

A. You better read that one to me again, sir. I
1448 don't seem to digest it very well.

By Mr. O'Brien: Will you read it?

(Question read.)

By Mr. O'Brien:

Q. That's a rather cumbersome question. Let me say it this way, Mr. Lubben. Mr. Berch testified that another check, in addition to the one for the original amount in the invoice, another check would be drawn simultaneously, as he puts it, to cash, for the balance of the invoice, as raised, and it would be posted to accounts payable. Do you have any knowledge or recollection of that?

A. Well, sir, it may have been drawn simultaneously.

1449 Q. I know it might have been, but, I mean, do you know?

A. I don't know that, sir.

Q. Do you know what was done about it; do you claim personally to know just how that was handled?

A. Well, the only thing I know, sir, is that at certain periods we would take a—

Q. I am not asking all the things you know.

A. I don't know, sir.

Q. I just want to know about that.

A. I don't know, sir.

Q. Or we would be here too long.

A. Thank you, sir.

Q. Do you know of your own knowledge, as a matter of fact, whether there were or were not such simultaneous checks drawn to cash in respect of certain suppliers of goods to the proprietorship which were entered in just the way that Mr. Bercu stated?

By Mr. Lockley: Are you referring to Shotwell?

By Mr. O'Brien: I made no reference to Shotwell.

By Mr. Lockley: Well. I object, your Honor, unless
1450 he rephrases his question to indicate the Shotwell Company, specifying exactly—

By the Court: Referring to Bercu, he hasn't given any testimony. I think it is confusing when you include reference to a document that is not before the witness.

By Mr. O'Brien:

Q. All right: Forget Mr. Bercu, Mr. Lubben. From your knowledge, or your examination of the records of the proprietorship, are you able to say whether there were instances in which overages were involved in which there was a check for cash for the precise amount of the overage on a given invoice that was posted to the books to the debit of the account payable?

A. No, sir; I don't know anything about that.

By the Court: Raise your voice, Mr. Lubben.

By the Witness:

A. No, sir; I don't know anything about that.

By Mr. O'Brien:

Q. You don't know one way or the other whether that is so or not, sir?

1451 A. Well, sir, all I know, it is possible.

Q. I mean, on that subject, do you know or don't you?

A. You get me mixed up on the subject, now, sir. I don't know. I don't know, sir.

Q. Maybe I can state it a little more clearly. Suppose an invoice came in for a thousand dollars to the Eatsum proprietorship on which there was an overage of ten cents, amounting, also to a thousand dollars. As I understand it, you, in some way, increased the amount of that invoice to $2,000.00, is that right?

A. Well, no, we didn't increase the amount of the invoice to $2,000.00. We just took the amount of the invoice and added the overage and drew the line.

Q. All right. Then you put the two together that gave a full invoice price that included what had been orig-

inally stated and what was figured for the overage, right?

A. To me, sir, it gave me the cost of the merchandise.

Q. But, as a matter of bookkeeping, it was intended to put the invoice in that form into the books and

1452 records of the company, was it not?

A. Well, I don't know what they did with it after that.

1453 Q. You don't know that?

A. No, sir.

Q. You would pay the thousand dollars by check, correct?

A. You are talking about this hypothetical invoice for a thousand dollars?

Q. Yes, sir.

A. We would pay it by check; yes, sir.

Q. Now, my question was: Do you know of any instances in which right at this point you would write a separate check for cash for a thousand dollars?

A. At that very moment that we wrote one?

Q. Well, about the same time.

A. You mean we would write one check for the invoice and then the very next check, or within a few minutes write a check for cash?

Q. Right.

A. That's possible. It could have happened sometime, sir. But specifically I can't remember it, sir.

1454 Q. And then both of those checks would be posted to the book record at the appropriate places where they occurred?

A. Well, sir, I paid the accountant to keep them books, and what he did, sir—

Q. Well. I am not interested in demanding that, you know, Mr. Lubben.

I just want you to tell me what you do know. Do you know if it had occurred or not?

A. I don't know. I don't know what occurred, sir.

Q. Not only what he did, but you haven't examined into the books and records enough to be able to tell us what really happened, is that it?

A. Well, sir, I am not very good on books. In fact, I know very little.

Q. You haven't done it, and you can't tell us what happened, so we have to look at the books.

A. That is right, sir.

Q. Now, why did you terminate the partnership?

By Mr. Lockley: I think that is objectionable, your Honor, why he terminated the partnership. Why he terminated it is immaterial here. It is beyond the scope
1455 of the direct examination.

By the Court: Well, tell us briefly.

By Mr. O'Brien:

Q. Go ahead and answer.

A. Why did I terminate it, sir?

Q. Yes.

A. I just wanted to get out, sir, from almost the day I got in.

Q. Well, I just want to know why. I think you have made it clear that you wanted to get out, but I want the reason. I am not so sure I understand the reason.

A. Well, sir, for one reason, Mr. Roth wanted to—he wanted this cash box kept, and he got other ideas, sir, of taking books, and doing—of keeping books his own way, and then I found out who the people really were, and I just wanted to get away from them, sir, and I did.

Q. Well, I think you said before that there was a long standing dispute?

A. Yes, sir.

Q. With Roth and with Giglio?

A. Yes, sir.

1456 Q. As to the mode of handling these overage items, isn't that true?

A. Yes, sir.

Q. And Mr. Bercu thought it ought to be done in the way that was described a while ago, in the proprietorship, and they thought it ought to be done by maintaining a cash box, clearing only the original invoice price through the books, and handling the rest of the transaction through that box separately audited, is that right?

A. Sir, you are going to have to break that up a little smaller for me, sir. You are stating too many questions at one time for me.

Q. Well, Roth and Giglio did not agree with you and Mr. Bercu, that the overages could be handled in the way that you say they were handled during the proprietorship?

A. No. They wanted to keep some crooked books.

Q. Were they crooked because the posting did not go

through to the books, but were reflected only in the separate cash box?

A. No. They had—they had visions of a big empire where they were going to be in this business and that business, and this business and that business, and
1457 they were going to form a lot of corporations and take the money from those corporations and put it in that corporation, and put it in this corporation, and put it in that corporation, and they were going to gyp the Government.

1458 Q. Well, as far as these transactions are concerned, if I understood your direct testimony, the difference was that they had a box and all they put through their books was the original invoice amount, and the overages were handled through the box without being reflected on the books in any way?

A. Well, sir, I don't know whether Mr. Bercu ever picked that up or not. For instance, let me give you an example: Where I would take an overage out of the box for Shotwell—

Q. I didn't ask you for an explanation.

A. I am trying to tell you—

Q. I didn't ask you for examples, Mr. Lubben. I am just trying to see if that wasn't the subject matter of your dispute?

A. Well, sir, I don't know what you are talking about.

Q. You don't have to go into great detail. You wanted to get out. You didn't like the way they were handling overages. You had a long-standing disagreeemnt between yourself and Bercu on the one hand, and Roth and Giglio on the other, is that right?

1459 A. Yes, sir, because we never had to keep that corn box, for one thing.

Q. All right. And I think you said that Blumberg recommended that you get out?

A. No, sir. I didn't say that, but—

Q. Well, that you get out at any price?

A. Well, I went to Mr. Blumberg for advice.

Q. Well, did he advise you to get out?

A. No. I told him I wanted to get out and they wouldn't split the thing down, 50-50.

Q. Did he agree you should get out?

A. Oh, he agreed I shouldn't have gone in.

Q. But you did get out? You did get out?

A. Yes, sir.

Q. And you started General Confections, Inc.?
A. Yes, sir.
Q. You had no partners in that?
A. No, sir.
Q. I meant to ask you a question, that I forgot. While you were in that partnership with Giglio and the others, who ran the affairs of the partnership? Who carried on the business, you or Giglio?
A. Well, sir, I looked after the candy business,
1460 and I would say I ran the affairs, but anything that had to be cleared with Mr. Giglio—I mean, anything that was major, or that we wanted to do something, I would check with Mr. Giglio or Mr. Roth, and Mr. Roth would be in my office very often, sir, but if it was something that required—something I thought important, I would go talk to Mr. Giglio about it.
Q. Well, you had full responsibility for the conduct of the business, didn't you, in the partnership?
A. Well, within limitations, that a partnership imposed.
Q. I mean, Giglio wasn't even around there very much, was he?
A. Oh, yes, sir.
Q. If you wanted to draw checks for cash, you would draw them for cash; you didn't have to ask him about it?
A. Well, no. We continued the same way we had before, but when Louis Roth would pick up these cash checks, he would come in and start yelling at me for drawing them, and Mr. Giglio said I should do what Mr. Roth said about not drawing these cash checks.
1461 It wasn't very happy, sir.
Q. But you still drew them? I mean, you had the power to do it, and you did it, did you?
A. I did, sir.
Q. And you also were the one who carried on the candy and the corn syrup operations, weren't you?
A. Well, sir, the corn syrup operation, yes, sir. I looked after the corn syrup, but they brought some friends of theirs there, this Mr. Bowman who was mentioned the other day.
Q. Well, yes, once in a while they would have somebody of that kind, but in general, you had the contacts, and you carried on the operations?

A. Well, they would tell me—like once they told me not to sell to Mike Cohen. In fact, a number of times they told me not to sell to Mike Cohen, and I had to sell to Ewald like they told me.

Finally, I said, "What is the sense of selling to Ewald when he is just adding it on, and selling it to Cohen, and so you might as well sell Mike Cohen."

Q. Yes, but you did sell to Mike Cohen?

A. Yes, sir. He is a very fine man.

1462 Q. I was just going through your transcript, Mr. Lubben, and I wanted to get it clear just what your connection was down there.

You testified in the Southern District of New York in the case of College Town Candy versus Bettencourt, didn't you?

By Mr. Lockley: I object to that, your Honor. There is no materiality.

By Mr. O'Brien: That remains to be seen.

By Mr. Lockley: There was nothing said about College Town Candy.

By the Court: I didn't hear it. I am sorry.

By Mr. Lockley: I am sorry, your Honor. This is beyond the scope of the direct examination.

By the Court: You say it is immaterial? It might be. I don't know what the questions are that counsel is going to propound to the witness, or what the answers will be. Until I hear the questions, I can't determine whether or not they are material.

By Mr. Lockley: Well, sir,—

1463 By Mr. O'Brien: All right.

By Mr. O'Brien:

Q. I just asked you if you testified there?

A. Yes, sir, I did.

Q. And were you asked this question:

"Now, about Eatsum Food Products Company, do you know what your partners did in that particular business?"

And did you make this answer:

"To help you along a little, if there was anything wrong with Eatsum, I did it. I offered yesterday to tell you how I ran Eatsum."

By the Court: A little louder, please.

By Mr. O'Brien: I am sorry, sir.

"If there was anything wrong with Eatsum, I did it. I offered to tell you yesterday how I ran Eatsum Food Products. Mr. Giglio did stick his nose in too much, but I was the guy running it, sir, distinctly."

Did you say that?

A. Yes, sir, but that referred to corn syrup transactions, because here I was defending myself in a case,
1464 sir, that only when I am on the stand the third day I realize that it happened after I left the partnership.

1465 Q. I am not trying to pin you down to any particular transaction, Mr. Lubben, but I just want it to be reasonably clear to the Court and the jury that you are not exactly a retiring violet even among those partners. You were running the show. Isn't that right?

A. No, that isn't right.

Q. You ran it on corn syrup.

A. On these transactions of corn syrup I wanted to expedite the situation because here was the deal, a court case where I am in there, subpoenaed in there defending myself and only after several days did I see an invoice that is presented to me and hear the transaction involved happened in June and I left in March and I had been subpoenaed down there to defend myself and Mr Giglio and everybody walked out and I had to pay the lawyer.

Q. And you did say that you had the responsibility for the operation of the business?

A. I have never denied it here.

Q. It wasn't just a question of the item, just that item?

A. No, sir.

1466 Q. The corn transactions were the one in connection with this big cash box which was maintained, were they not?

A. That is correct, sir.

Q. Now coming to General Confections which you organized promptly upon your withdrawing from the partnership—I was observing you had no partners; you ran that alone except in the corporate form, is that right?

A. Yes, sir. I had some stockholders.

Q. Now General Confections engaged either directly or through its wholly owned subsidiary, Reserve Trading Corporation, in the same type of black market operations, did it not?

A. No, sir. Their—I think you will find in the Reserve Trading Company, sir, that we billed the corn syrup.

Q. Well, but you were dealing in corn, corn syrup, dextrose and other materials in short supply?

A. Well, I think I bought that dextrose—the dextrose which I bought was on the black market and I think you will find I bought sugar in the black market, sir, but that was used in the manufacture of candy which we sold to our customers.

1467 Q. But you had a great deal which was not used in your own operation but was bought and sold in the black market, did you not?

A. Sir, we sold corn syrup, sir, but I don't think you can say it was sold on the black market—

Q. Well—

A. See, it was sold on an invoice, sir, to the best of my recollection.

Q. Well, if it was sold over ceiling, whatever the purchase here may show that to have been, if it was sold over the ceiling, it was in the black market, wasn't it?

A. But I don't think it was over the ceiling, sir.

Q. Well, time will tell on that. But, you did have a cash box in General Confections, didn't you?

A. Yes, sir.

Q. And those transactions were handled, those and certain other transactions were handled through that cash box?

A. Well, I would like you to be specific about those transactions, sir. Which transactions?

Q. In corn syrup.

A. No, sir. I don't think you will find anything 1468 like that in the corn syrup whatsoever. I may be wrong, sir, but I can't recall. You have some records? I would like to have you refresh my memory.

Q. When you first started to operate the General Confections, as I understand it, Miss Feldman was not with you?

A. That is correct, sir.

Q. She remained with the partnership to help them with the liquidation or for some purpose?

A. Well, I asked her to stay there, sir.

Q. But she did remain for a while?

A. Yes, sir.

Q. And she didn't come over or back to General Confections until when?

A. I believe it was in August, sir, in 1946.

Q. Now during the time that she was away with the partnership, who took care of your bookkeeping and your office at General Confections?

A. Well, I believe Miss Strum did, sir, and—

Q. That is Freda Seider?

A. That is right, and I think that Mr. Hausman did some work for us for a while.

Q. Now, as a matter of fact, you hired Mr. Haus-
1469 man and put him on the payroll of General Confections, did you not?

A. Yes, sir, I did.

Q. Up to that time, he had been working for and he had been paid by Louis Roth?

A. Yes, sir.

Q. And I notice—well, never mind that. You said during your prior testimony here that if there was a cash box maintained by General Confections that the profit from that box was carried into the books and records of General Confections so that it would be reflected in some way in its tax return, did you not?

A. Yes, sir. I can remember several instances where I would have some money left over and I would give that to the bookkeeper to make deposits.

1470 Q. Well, you say the profit was carried in—I think you said it was carried in as cash sales?

A. Well, sir, if we sold some merchandise and we had certain payments to be taken out, we would deduct the payments and so forth and what was left, sir, that was profit and we put that in the company.

Q. Yes. What did you put it into, cash sales?

A. I'd just say, "Put it in the bank." Where it went, I don't know.

Q. That was the bookkeeper's problem, where to put it?

A. Well, I imagine she put it in the bank, first.

Q. During Mr. Hausman's regime, you would tell him that, would you not?

A. Well, I can only remember, sir, of two or three occasions or four occasions where—

Q. Well, did you tell Mr. Hausman to do that?

A. Just to keep the books, that was all, sir.

Q. And would you have him report to you the profit from the box so that you could tell him to get it on the books?

A. I can't remember, sir.

Q. He did audit the box, did he not?

A. Whether he specifically did or Miss Strum or
1471 who did it, it didn't make any difference. It was certainly no secret in the office.

Q. I don't mean that it was a secret.

A. I don't know whether he audited it or what he did with it.

Q. He kept track of the ins and outs of the box, didn't he?

A. All I can remember, sir, was I got a book and I wrote in it certain things, in the book that—what happened to certain sales that Mr. Hankermyer did the same thing. Now, whether Mr. Hausman audited it or checked it, I can't say whether he did or didn't, but he was certainly paid to do something, sir.

Q. Well, I just wanted your best recollection of it. I didn't want to dwell on it particularly because Mr. Hausman is here under subpoena.

You were shown a group of invoices from Shotwell to General Confections and you were asked to state whether those invoices had been marked up and you testified they had not been. They are in evidence here. I am not sure they are in evidence. They were exhibited to you.

Do you remember looking at them during Mr. Kir-
1472 by's examination?

A. Well, sir, I recall looking at two batches of invoices.

Q. They were black photostats?

A. Yes, sir. One bunch of photostats had 18¾ cents and one didn't have it. Which is which, I don't recall.

Q. Well, you said that you looked at them and they were not marked up.

A. Well, sir, if that is what I said—

Q. Yes. The record will tell.

A. Yes.

Q. Why was it that you did not resume at General Confections, the practice you say had been in effect in the proprietorship, of marking up these invoices where there was an overage?

A. Well, I wouldn't know why we didn't, sir.
Q. Did you tell Mr. Hausman not to mark them up?
A. No, sir. I don't know whether I did or not but I will tell you something, sir.
Q. I just want to know whether you told him that or not?
A. I can't recall whether I did or whether I didn't.
Q. Well, did you tell Miss Feldman when she re-
1473 turned in August of 1946 not to mark them up?
A. I don't ever recall such a conversation, sir.
Q. Well, do you think that you could produce here any invoice to General Confections from any of the suppliers which would show that they were in fact marked up?
A. From who, sir?
Q. I don't understand.
A. From any supplier?
Q. Yes.
A. I don't know, sir, but if I recall, the reason the practice was dropped—
Q. Yes.
A. Well, I don't know this for a fact. It is only something that I—this happened many years ago but I think the reason the practice was dropped of not putting the amount of the overage on the invoice was that if the OPA man would come around there, he would look at the invoice and he would actually see in a moment that there was a black market payment to someone. I can think of no other reason, sir.
1474 Q. Wasn't that equally true during the time that you and Mr. Bercu on the one hand, and Mr. Roth and Mr. Giglio on the other, were having this dispute?
A. No. I don't think it was about putting it on the face of the invoice, or anything like that. I think it was the method of not drawing checks, sir. I can't remember.
Q. Well, Mr. Lubben, if you marked up the invoice in General Confections, I think you drew the simultaneous checks, one for the original amount of the invoice, and one for the amount of the overage, and you posted those on the books, that would be a permanent record of the transaction, would it not?
A. You are talking of what time, sir?
Q. Any time.
A. You just got through—

Q. 1945 and 1946?

A. You just got through saying General Confections, sir.

Q. Yes. You didn't do this in General Confections, did you?

A. Sir, I don't know what they did.

1475 Q. You just don't know what they did?

A. All I know, sir—look—

Q. Mr. Lubben, didn't you run General Confections just exactly the same way, as far as the books and records are concerned, as you did the partnership?

A. Well, I don't know whether we did or not, sir. Whatever—

Q. You just don't know that?

A. No, sir.

Q. But you got out because of this basic disagreement, and you didn't take the trouble to find out if that had anything to do with it or not?

A. That was one disagreement, sir, and I told you before that I found out who these people were, and I wanted no part of them.

Q. You found out who they were—I don't know what you mean by that. They were your partners. You had these claimed dealings with Shotwell, didn't you?

A. I had what?

Q. You had these transactions with Shotwell that you testified to, whatever they are, and they had them with you, didn't they?

1476 A. Prior to becoming a partner, yes, sir.

Q. Yes, prior to becoming a partner, and after becoming a partner?

A. During the partnership, yes, sir.

Q. Giglio was your associate, wasn't he?

A. He was, but I left him.

Q. All right. You left him, and you picked up with him, and you left him.

Now, when you did leave him, it didn't do anything to change this practice which was one of the things you had been complaining about, did you?

A. I don't know whether it changed or—

Q. All right.

A. —or whether it didn't, sir.

Q. All right. You just don't know that. But, do you know whether you told Mr. Hausman or Miss Feldman

positively to do nothing to change it; whether you told them not to go back to the old practice of the proprietorship, do you remember that?

A. Sir, I cannot remember that conversation.

1477 Q. Well, all right. I just want to know. Now, many of your invoices on the resale of goods and many of your inventory transactions were factored through General Commercial Acceptance Corporation, were they not?

A. Well, sir, I wouldn't say many of my invoice transactions. I would say about ninety-nine per cent of my invoice transactions were factored through the General Commercial Acceptance.

Q. Well, I am glad to have your estimate, Mr. Lubben, although it isn't particularly material to me.

A. Well, sir, it was practically everything.

Q. I have, for your information, a list of unassigned accounts which is not substantial.

A. Well, sir—

Q. But I am not interested. You did have a great many transactions. Make it ninety-nine per cent if you will, which were factored through that company?

A. Yes, sir.

Q. Now that was the company—that is the company with which Mr. Milton Blumberg is connected?

A. Yes, sir.

1478 Q. And originally in the early days you had handled your financing on such items through the Manufacturers Trust Company, had you not?

A. Yes, sir.

Q. But after a short time, you sold to Mr. Blumberg's company and from there on they did the factoring down to some time in 1947 or 1948 when Budget Factors took it over, as you have said?

A. Yes.

Q. And while I am on names, Budget Factors, were you introduced to them by the accountants Kaplan and Glassman?

By Mr. Lockley: I object. Did I understand counsel to say that this was something that happened in 1947 and 1948?

By the Court: What has that to do in connection with this period with which we are concerned?

By Mr. O'Brien: I am aware of this period, your Honor, but anything that happened with respect to these books and records or the memorandum and sheets that we have here which are not part of those books and records and anything that happened at the time they were claimed
1479 to be made, right down to date, is going to be of interest to me.

By the Court: Well, not who introduced him to the factoring company.

By Mr. O'Brien: I don't care to argue it at this time.

By Mr. O'Brien:

Q. Going back to Mr. Blumberg's company, items such as those sold to your companies by Shotwell would come under the category of inventory loans, would they not, in your dealings with Mr. Blumberg?

A. Well, sir, you have to be more specific on certain shipments because—

Q. I don't mean any particular shipment.

A. The only thing I know of inventory loans is when I would buy a large amount of almonds, I would have to go and put up twenty per cent so I would have an equity and Mr. Blumberg would pay the eighty per cent.

Q. He would pay the supplier?

A. The supplier, yes, and he would have the papers. He would ascertain I wanted to get some almonds. I would have to go and pay Mr. Blumberg.

Q. Sure. Would he sometimes give the money to
1480 you so that you could pay the supplier?

A. I don't recall. I think he gave that money to me, sir.

Q. And sometimes he paid the money direct, I mean his company did?

A. I don't remember the mechanics, sir, but that is how it was.

Q. You had to put up twenty per cent and he was lending eighty per cent?

A. Yes, sir.

1481 Q. Well, in determining the amount during, let us say, the General Confections period, in determining the amount against which he would lend 80 per cent, did he do it on the basis of the original invoice price or did he do it on the basis of the raised price or full price as you call it?

A. Well, sir, I can only remember, and that is vaguely—I can't really put my finger on a specific instance where he would do—take any inventory on Shotwell merchandise. I think on one or two occasions—and this is only a guess—that I got property loans when I wanted to give money to Shotwell and I didn't have it.

Q. Well, now, have you finished?

A. No, sir.

Q. Go ahead.

A. I don't have those records and I am sure Mr. Blumberg kept records.

Q. We don't have the records, Mr. Lubben, but we may not have you back for cross. You will be through and I just want to find out while you are on here what you remember about it. I have got the records.

A. Thank you, sir.

Q. And there is a great volume of them. Now, do
1482 you remember that when you did borrow the money to factor these items, you would turn in the papers to Mr. Blumberg and then get them back and a trust receipt?

A. Well, sir, if you have the papers and everything, couldn't I just look at them?

Q. I just want to know what you remember. I am not interested in proving the facts at this moment.

A. Sir, I don't remember the mechanics of a loan to Shotwell, sir, but if you have the papers, sir, I would like to refresh my memory, sir. It has been a number of years.

Q. I would like to know what you can tell me about it without doing that and I want to know if you are able to tell me whether Blumberg was lending you the money at 80 per cent, let us say, or whatever the percentage was, against the full price or against the original invoice or invoice prices?

A. Well, sir, when we would ship, we would invoice a car of chocolates and we would take this 37⅓ against the 18¾ and we would get so much a dozen and I added the profit. We would invoice that to the customer.

I would take that full complete invoice of the
1483 customer to Miltie Blumberg and we would go through the regular manner as on the other shipments and he would loan us 80 per cent and withhold shipment. That is the way I recall, sir.

Q. If you were borrowing on some goods that were coming in, some goods coming in from Shotwell or goods going from Shotwell to you and Blumberg wanted the value in determining the 80 per cent, did he take the Shotwell invoice price or did he take your full price?

A. Well, sir, I wouldn't know. I mean—

Q. All right. Now, going back just for one question, to that corn box in the partnership, or rather, in the proprietorship, the currency box—

Will you look at this instrument which I ask to be marked Defendants' Exhibit 23 for identification—

(Said document was marked Defendants' Exhibit 23 for identification.)

Tell me if you recognize the handwriting. Do you know that handwriting?

A. No, sir, I don't know the handwriting, sir.

Q. Do you recognize or do you know Mr. Hausman's handwriting? Do you or don't you?

1484 A. No, sir, I don't.

Q. After you had made some arrangement with Giglio and others about starting up the partnership during these months that you were waiting for those to be fulfilled and carried out, during that period, I understand that the proprietorship maintained a cash box?

A. Well, sir, as I stated before, it was a proprietorship but it wasn't a proprietorship.

1485 Q. Well, call it what you will, but as far as the proprietorship is concerned, the only cash box that you know about is the one that was set up while the matter was pending, until the partnership could be fully organized and put into operation?

A. Yes, but I testified. I believe, prior to that there was an envelope that we had some money in, and I can't remember any box.

Q. But do you remember that when you started this practice, this temporary practice that you are talking of, which was made necessary because the partnership thing hadn't been carried out yet, when you started that practice you had a balance in the cash box in the proprietorship, didn't you?

A. Well, I wouldn't know, sir, whether we had—

Q. You just don't know?

A. No. If we did, sir,—I mean, the accountants or bookkeepers would know about it.

Q. Now, going to the books and records, the proprietorship books and records at or after the time of the formation of the partnership, what was done with them? Where were they kept?

A. What do you mean, sir?

Q. Well, you had a proprietorship and it had
1486 these books and records that Miss Feldman and Mr. Bercu told us about on the deposition—you told us about?

A. Yes, sir.

Q. When the partnership got under way, what did you do with the books and records of the proprietorship?

A. Well, some time later, sir, I don't recall when, I took the books and record of the proprietorship down to a firm of accountants called Sproul and Scholz.

Q. And did you leave them there?

A. Yes, sir, I did.

Q. And then in September of 1948, did you and Mr. Davidson go up there to get them, to get them back?

A. In September of 1948?

Q. Yes, sir.

A. I think I went up there once, sir. I don't know who went with me to get the books, but I owed the man $1200.

Q. And you didn't get them that time?

A. No, sir.

Q. And then did you come back with one or more
1487 of the agents of the Bureau of Internal Revenue to get them?

A. Well, sir, I think there was a lapse of time, and I believe the Government asked me, well, where are the books and records for the partnership, and I said, "They are at the firm of Sproul and Scholz."

By the Court: The proprietorship or the partnership?

By the Witness: Proprietorship, sir. And the firm of Sproul and Scholz—he said, "Go and get them."

I said, "I can't get them. I owe the man twelve hundred dollars and he won't give them to me."

By Mr. O'Brien:

Q. I am not interested in the dispute, Mr. Lubben, but I just want to find out where the books are. Did the agent go and get them, to your knowledge?

A. Yes, sir. They went to get the books, sir.

Q. And since that time, as far as you know, the Government has had the custody of the proprietorship books and records?

A. Well, the Government took them, sir, and what they have done with them, I don't know.

1488 Q. Well, it is fair to say, isn't it, Mr. Lubben, that since that time off and on you have worked over at the office of the Bureau in New York and in the office of the Department of Justice in New York and some here and on those occasions you have seen the proprietorship records there, haven't you?

A. No, sir. I saw books there but I don't know whose books they were. They had a lot of books. Well, sir—

Q. Well, all right.

A. Well—

Q. But then, I take it the last thing you know about is that they took the records, and that is it?

A. Yes, sir. I have seen papers since then but no books that I can remember about.

Q. Now on the records of the partnership, were those records turned over to Giglio at or about the time of the dissolution of the partnership?

A. Sir, they weren't turned over to him. They were just left there, right in his possession. They never left his possession.

1489 Q. I see. So that as far as you are concerned, while there may have been an official or legal dissolution of the partnership, you were in effect withdrawing from it and you left the books and records with Giglio and others who, as I understand it, continued to carry on the partnership business?

A. Well, sir, I don't know what they intended to do with the business. I got out and I left the books and records in the office at 19—

Q. Didn't you testify that Miss Feldman stayed over there and that they did function for some time after the time that you got out?

A. Yes, sir. I asked her to stay.

Q. And the books and records were not taken by you but were left with them?

A. That is true, sir.

Q. All right. Now on General Confections, that was a corporation and it was doing business over there in

New Jersey during the year 1946 and thereafter until March of 1948, was it not?

A. Yes, sir.

Q. And in March of 1948, a receiver was appointed?

1490 A. Yes, sir.

Q. And the receiver, I take it, came to the premises and took possession and among other things, took whatever books and records you had there in the office?

A. Well, sir, it wasn't the receiver. It was two accountants for the receiver.

Q. All right. Well, the receiver or the receiver's representatives. Do you remember who the accountants were?

A. No. I think one of them had his name—I think one of them, his name was Maclusky. I am not sure. It was Mac something.

Q. All right. Now do you know whether there was turned over to that receiver the books which Mr. Mammel said were missing? I am looking for the term here. Well, it is, I think, the cash disbursement book and the purchase book. You mentioned here the other day—somebody asked Mr. Mammel if he had them.

By Mr. Mammel: They—

By Mr. O'Brien: Sir?

By the Witness:

A. Sir, the accountants for the receiver came

1491 and they told me they wanted the books and records of General Confections. They went back in the candy factory. They stayed about an hour or an hour and a half and they took this book and that book. I don't know what books they took, but they took a lot of books, sir, and then they went away.

Q. Did you personally inventory the books as they were turned over to them?

A. No, sir.

By the Court: We will be in recess, members of the jury, until ten o'clock tomorrow morning.

By the Marshal: Will the audience remain standing until the jury files out?

This honorable court will recess until ten o'clock tomorrow morning.

(Whereupon an adjournment was had in the above-entitled cause to Tuesday, September 22, 1953, at 10:00 o'clock A. M.)

1492

(Caption—No. 52 CR 143)

Chicago, Illinois,
Tuesday, September 2, 1953,
10:00 o'clock A. M.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein:—

By the Clerk: 52 CR 143, United States of America vs. Shotwell Manufacturing Company, et al, case on trial.

1493 DAVID G. LUBBEN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and testified further as follows:

Cross Examination (Ctd.) by Mr. O'Brien.

Q. Mr. Lubben, do you recall that at the time of the deposition you were of the impression that the method of handling the overages on the books of the partnership and of General Confections was the same as had been used during the proprietorship; do you recall that?

A. No, sir; I don't.

Q. And whether such a statement was made in the depositions of Bercu and Feldman you do not know?

A. No, sir.

Q. Now, I think that you identified Government's Exhibit 63-B—if I can find that here—

By Mr. O'Brien: It is the same as the photostat, Judge, but this is in evidence.

By Mr. O'Brien:

Q. As I understand you, Mr. Lubben, 63-B is an instrument which was left with you, or left at a hotel room, or some place, by Mr. Huebner?

A. Yes, sir; that's correct.

1494 Q. Did you say that that was a recap sheet which Huebner had with him at the time?

A. Well, sir, Mr. Huebner always had a sheet of paper on which—

Q. I didn't ask you that.

A. All right.

Q. I just asked you if you said that this was a recap sheet?

A. Well, I don't recall whether this particular recap sheet pertained to that certain transaction but I know that when Mr.—when we left the room—

Q. Mr. Lubben, all I want to know is: Did you say that this sheet which you hold in your hand was a recap sheet of the same kind as those you were talking of before?

A. Well, we had one, and, sir, Mr. Huebner had one, and this is one that he had.

Q. I know this is one that he had, but did you say that it was a recap sheet of the kind which he ordinarily brought, let's put it that way.

A. Well, he would bring a sheet of paper.

Q. I want to know if this is of the same kind, that is all.

A. This same size paper?

1495 Q. No, this same type of data, and information?

A. Very similar, yes. He would show the shipments, and so forth, and the dates and so on.

Q. And in whose handwriting is it?

A. I don't know, sir.

Q. Is it the same handwriting as the others you saw?

A. I never paid that much attention, so I could tell whether it was or wasn't, sir.

Q. Were there any other sheets which Mr. Huebner left on the occasion of these visits that you have described?

A. No, sir; there were not.

Q. I meant to add, that you took the sheet, made the pencil endorsement which appears on it, and gave it to Miss Feldman?

A. Yes, sir.

Q. When you got back to the office?

A. I don't know whether I specifically handed it to

her, or else I just put it in the basket that she picked up during the day.

Q. Yes.

Now speaking of the unbilled shipments, do you recall during your deposition at Puerto Rico, being 1496 asked:

"Did you ever make out and give to Shotwell bills of lading directed to David G. Lubben and Associates?"

And answering: "I don't remember."

By Mr. Lockley: What page, counsel?

By Mr. O'Brien: Page 113.

By the Witness: I don't ever recall such a situation, sir.

By Mr. O'Brien:

Q. Well, I am not asking you about a situation, but were you asked that question, and did you make that answer?

A. Well, sir, if it is in the book, I must have been asked it.

Q. All right. And were you asked, in the same connection:

"Or to David G. Lubben and Company?"

And did you answer:

"I don't remember that."

A. That's right. That's true, sir.

Q. And were you asked:

"Did you ever prepare bills of lading so directed?"

1497 And you answered:

"I don't remember, sir. I don't ever remember, sir. I don't remember giving any bills of lading."

Do you recall that?

A. That's true. Yes, sir. I gave some shipping instructions, though, sir.

Q. I will ask you about those.

Now, what is your present recollection as to who made out the bills of lading which are in evidence here?

A. Well, in that 90,000 pounds of baby spice drops, or that candy that went to various people in New England, to the best of my recollection, sir, I gave Mr. Huebner a piece of paper on which I said, "Send so many cases to this man, and so many cases to this person, and that person."

On the chocolates, sir, that were shipped to William Barron, and places like that, I gave him—gave them shipping instructions to ship it, otherwise they couldn't ship it direct to our trade. I don't recall any bill of lading.

1498 Q. I see.

A. On that corn syrup, sir, that I bought from Shotwell—

Q. That's much later, is it not?

A. Well, it's a shipment. But there was something, sir, that went to the V. Seng warehouse—if I recall correctly, by the name of Seng—and I gave the man shipping instructions, where to ship the different lots to.

Q. Yes, but I am interested now in the unbilled shipments. You understand that. Were your conversations always with Huebner?

By the Court: Well, regarding what?

By Mr. O'Brien:

Q. About the unbilled shipments and the shipping insfructions, anything else relating to them.

A. Yes, sir. I said they were always with Mr. Huebner.

Q. Did you have any conversations with Mr. Erickson?

By the Court: Mr. who?

By Mr. O'Brien: Erickson.

By the Witness:

A. I don't recall, sir.

By Mr. O'Brien:

1499 Q. You can't remember whether you did or not?

A. The only time—I passed the time of day with him a number of times, and the only time I can remember any big conversation with Mr. Erickson is when he came to New York.

Q. Did you, at the Shotwell plant, have some conversations with him?

A. Conversations about what, sir?

Q. About these unbilled shipments, their routing, preparation of the bills of lading, and any other details that you could think of?

A. I can't recall Mr. Erickson, sir, having—I can't recall having any conversations with Mr. Erickson about it.

Q. Do you know whether he prepared the bills of lading?

A. No, sir; I don't.

Q. Do you know whether it was he who received the shipping instructions from you?

A. To the best of my recollection, sir, I wrote the shipping instructions on paper and gave it to Mr. Huebner. That's the best of my—

Q. Didn't you visit with Erickson at the plant about these matters of the unbilled shipments?

1500 A. I don't recall any specific incidents where I discussed unbilled shipments with Erickson. I believe at one time I discussed a shipment of merchandise where they were using one trucking company and it took too long to get there and I recommended somebody else, to give us better service.

Q. Now, this exhibit, 63-B, as a matter of fact, didn't you procure that from Mr. Erickson during one of your visits to the plant?

A. No, sir.

Q. All right. You don't know whether it is in Mr. Erickson's handwriting?

A. I don't know whose handwriting it is, sir.

Q. You didn't see him make it out?

A. No, sir.

Q. Don't you remember visiting the plant and inquiring of Erickson as to what items you had coming on this lot of candy?

A. No, sir.

Q. And don't you remember Erickson preparing this memorandum at the time for your information?

A. No, sir.

1501 Q. Now, you say Erickson was down to New York to see you?

A. Yes, sir.

Q. When was that?

A. Well, I believe it was—I think it was around the winter of 1945, sir, or it might have been 1946. I don't remember. He came with his wife.

Q. Did he come on business?

A. No, sir. He came on a vacation.

Q. And did you visit with him?

A. Yes, sir. I was told, sir, to take him around and show him a good time.

Q. Did you do that?

A. To the best of my ability, sir.

Q. You didn't have any conversation at that time about unbilled shipments?

A. No, sir. I was told to take Mr. Erickson—

Q. I didn't ask you what you were told to do. I just asked you about your talks with him.

A. Yes, sir.

Q. You understand, Mr. Lubben, don't you, by this time that you are simply to answer the question that is asked? You understand as a witness that you are to answer only the question which is asked, do you

1502 not?

A. Yes, sir.

Q. Well, do you have some partisan interest in the matter which causes you to volunteer—

By Mr. Lockley: I object, your Honor.

By Mr. O'Brien:

Q. (Continuing) —these statements at different times?

By Mr. Lockley: I object, your Honor.

By Mr. O'Brien: I just want to know his interest.

By the Court: The objection is sustained.

By Mr. O'Brien: I take an exception to that, if the Court please, because the Court has admonished—

By the Court: I am sorry. I didn't hear that.

By Mr. O'Brien: I say, I take an exception to that because the Court has admonished the witness, but he constantly does it.

By the Court: You are arguing with the witness rather than asking him questions now.

By Mr. O'Brien:

1503 Q. Now, I understand you to say, Mr. Lubben, that the books of the proprietorship were taken from Sproul & Scholz' office in September of 1948?

A. I don't think I said September, sir.

Q. Well, when did you say it was?

A. Well, I think sometime in the fall of 1948. I don't remember exactly the date.

Q. That is close enough.

A. That is only a guess, sir.

Q. When did the government first start to investigate you or your companies?

By Mr. Lockley: I object, your Honor. I doubt if that is something within the knowledge of the witness.
By Mr. O'Brien:
Q. I mean as far as you know, of course.
By Mr. Lockley: That is a conclusion on his part. He doesn't know what the government was doing.
By the Court: Well, he may answer.
By the Witness:
A. I think that the first time that the government ever came to see me, sir, would be in April or May of 1948, shortly after the candy factory closed.
1504 By Mr. O'Brien:
Q. Was it an agent who came to see you?
A. It was Mr. Twohig and a man, a very high man in the organization. I think his name was Cordes.
Q. Cordez?
A. Cordes or something, C-o-r-d-e-s.
Q. And Mr. Twohig is the gentleman facing you at the end of the table?
A. Yes, sir, that is true.
By Mr. O'Brien: Will you please mark these sheets Defendants' Exhibits 24 and 24-A for identification.
(Said documents were marked Defendants' Exhibits 24 and 24-A for identification.)
By Mr. O'Brien:
Q. Will you look at the instruments just marked, Mr. Lubben? Try looking at Defendants' Exhibit 24-B. Do you recognize the handwriting?
By the Court: 24-B?
By Mr. O'Brien: I am sorry. It is 24-A.
By the Witness:
A. No, sir. I do not recognize the handwriting.
1505 By Mr. O'Brien:
Q. Now, the proprietorship books and records were kept by Mr. Beren and I think that you said that you are not familiar with the pattern in which they were kept. You just don't know, is that correct?
A. Well, sir, I don't know any of the different types of books. He was an accountant and I—he kept them in the approved manner, or the recognized manner. That's all I know.
1506 Q. Well, now, you testified during the time that these various exhibits were being identified and

offered, almost in each instance, that the entries were true and correct, and that they are all part of the books and records of the company, didn't you?

A. Well, the canceled checks were a part of the records of the company. A cash disbursement slip is a part of the records of the company. Each individual pieces of paper, sir—

Q. Yes, sir. Now, that is your opinion, is that right? In your opinion, those are part of the books and records of the company?

By Mr. Lockley: I object, your Honor.

By Mr. O'Brien: He said so, and I just want to know his opinion.

By the Court: He may answer.

By the Witness: I know, sir, that you are supposed to keep your records, and keep files, and that is records of the company.

By Mr. O'Brien:

Q. But you know that these are part of the records, but you can't tell us anything about the books and the sheets, the entry sheets themselves?

1507 A. How—where you post this person and that person, I don't know, sir. I don't know a cash book from any other kind of a book.

Q. And neither do you know, I take it, whether the books and records themselves were kept according to sound accounting principles and practice?

A. Would you repeat that, sir?

By Mr. O'Brien: Will you please read the question to the witness?

(Whereupon the question was read as above recorded.)

By the Witness:

A. What books are you talking about, sir?

By Mr. O'Brien:

Q. Any of them, so far as proprietorship, General Confections, partnership?

A. Sir, Mr. Bercu was a very reputable accountant.

Q. I know all about that. But do you know yourself whether the books and records of each of those entries were kept according to sound accounting principles and practice?

A. Well, I had the accountant, sir.

By Mr. Lockley: I object, your Honor. He is ask-
1508 ing for an expert opinion, and the witness doesn't know anything about books and records. How can he express an expert opinion?

By the Court: Well, I think he has answered the question.

By Mr. O'Brien: All right.

By Mr. O'Brien:

Q. During the proprietorship era, Mr. Lubben, do you recall that you had some transactions with Two Star Confections, Two Star Confectionary?

A. Yes, sir.

Q. And is it your recollection that there were overages on those transactions?

By Mr. Lockley: Well, your Honor, I object on the ground that it is irrelevant and immaterial, what he did with the Two Star Confections.

By the Court: He may answer.

By the Witness: Would you repeat the question?

(Whereupon the question was read as above recorded.)

By the Witness:

A. Yes, it is.

1509 By Mr. O'Brien:

Q. Were those overages paid in cash?

A. Yes, sir. I paid them overages in cash, sir.

Q. And did you pay them the amount of the invoices as rendered, by check?

A. Yes, sir.

Q. Do you also recall some transactions between the proprietorship and Joseph Eiger?

A. Yes, sir. I believe I remember, sir.

Q. And with National Process Foods?

A. Yes, sir.

Q. And with Michael Cohen?

A. Yes, sir.

Q. And with each of those, were there likewise—

A. During the proprietorship, sir?

Q. Yes.

A. I don't recall at the moment with Eiger. I think there may have been, sir. I think he sold me raisins and dextrose. With Michael Cohen, I remember there were some overages, yes, sir.

Q. How about—have you finished?
A. No, sir, I haven't.
Q. Go ahead.
A. And National Process Foods, I think during
1510 the proprietorship they sold us something, some sort of a sugar with flour in it, and I think there was overages on that, too, sir.
Q. All right. How about Gertz Distributing Company?
By Mr. Lockley: Your Honor, I wish to state another objection. I still fail to see the relevancy or materiality of what Mr. Lubben's businesses were with other companies.
1511 By Mr. O'Brien: I am not going to delve into them. It is pertinent, I can assure.
By the Witnes:
A. I don't recall in 1945 during the proprietorship with Gertz Distributing Company, but it is very possible, sir. I know I had cash dealings with them, where I gave them overages, sir.
By Mr. O'Brien:
Q. Now would you say that the mode of handling those items on the records of the company, that is, the payment of the invoice by check and the drawing of a check to cash to cover the overage, was the practice which was followed in each of those instances that I have mentioned?
A. Well, sir, I wouldn't want to say in each of them, but—
Q. Well, was there any exception?
A. No, but I don't know whether it was each or whether there was an exception, so I couldn't very well pin it down either way.
Q. Do you recall any kind of an exception which may have existed?
A. You are talking about who, sir?
Q. I am talking about those I mentioned, Two-
1512 Star, Eiger, National Process Foods, Michael Cohen and Gertz Distributing Company.
A. Well, I think, sir, I don't know whether it was the single proprietorship or whether it was the—
Q. I am talking about in the proprietorship.
A. Well, I am trying to answer, sir, if you will just let me, sir.

Q. I am sorry. Go ahead.

A. Well, I think that there was some time that I had some with Morley Kramer. That was Gum Products and Two-Star, which are the same thing, the same companies, and he has another one, Cocklan Cough Drops and one or two other ones.

I think there was times, sir, where I would get dextrose or sugar or something in New York and send it up to Mr. Kramer in Boston, and I would apply that on my overage account, sir.

I can remember some instances but the exact years I cannot, unless I refresh myself with some records. But I would say in the rest of them that we did draw checks for cash in the greatest percentage of the instances, in the times you mention.

Q. Well, I will agree with that too, Mr. Lubben,
1513 that you drew checks for cash. Now, did you pay them in cash?

A. Well, if I drew a check for a man for cash, well, either he got the money or his agent.

Q. And you didn't put the money into your cash box, did you, the proceeds of those cash checks?

A. You mean for just—to draw the money out and not give the man the money?

Q. That is right.

A. No, sir, we didn't do that. I mean, if the man had some money coming to him, he insisted that he got the money.

Q. That's all I want to know. So you drew checks for the invoices, you drew checks for cash, the girls cashed the checks in the regular way at the Manufacturers Trust, brought the money back to you and you paid these people the overages?

A. Not always the girls cashed the checks.

Q. I don't care who did. It was procured from the bank and given to you?

A. Yes, sir.

Q. And you didn't take the cash and put it in the cash box tied there to any such transaction?

A. I can't recall, sir.

1514 Q. Now on the partnership record of overages, Mr. Lubben, can you tell us whether the cash checks that you have mentioned here which you say were for overages during the partnership era were reflected in

any way on the regular books and records of the partnership?

A. Well, sir, I couldn't answer that.

Q. You don't know, do you?

A. I don't know, no sir.

Q. Do you have or were there made—let me ask you whether there were made memoranda or cash authorization slips pertaining to the checks which have been offered in evidence here, during the partnership era?

A. I would say yes, sir.

Q. Have you produced any of those here?

A. Well, sir, how can I produce them? I haven't got the records.

Q. Let me shade that somewhat. Have they been presented to you for identification in evidence here?

A. I don't recall, sir.

Q. Now in the case of General Confections, the re-
1515 ceiver obtained the records in March of 1948, as you told us?

A. Yes, sir.

Q. But I notice that you have memoranda and cash authorization slips or photostats of them which you have identified in evidence in this case, is that true?

A. Yes, sir.

Q. Have you seen a receipt which the agents gave to the receiver for the books and records which they received from him?

A. It seems to me, sir, about a year or so ago, maybe two years, the agent told me a receipt—whether I had seen the receipt or he told me about it, I don't remember.

Q. Do you know whether in February of 1945 Mr. Twohig obtained the books and records in the receiver's possession?

A. Well, I don' know that he got it in February of 1949, no, sir.

Q. I just want to know about it. I was just asking you.

1516 Q. Were you familiar with the fact that in the fall of 1945 Hausman audited the cash boxes 1 and 2 of the partnership?

A. Well, sir, I know he was in the office in 1945 and he was doing some work in there, sir, and I—no question he probably was auditing the cash boxes, books and everything else.

Q. Did you at that time see any of the Hausman reports?

A. I can't remember, sir.

Q. The plaintiff here, that is, the government, has furnished us, Mr. Lubben, a copy, photostatic copy, of certain of such work sheets of Hausman's, and in looking through those I observe—

By Mr. O'Brien: Withdraw that. We mark this sheet Defendants' Exhibit No. 25 for identification.

(Said document was marked Defendants' Exhibit 25 for identification.)

By Mr. O'Brien:

Q. I call your attention to the instrument marked Defendants' Exhibit 25 for identification and ask you to
1517 state if you can identify the handwriting on that sheet?

A. No, sir; I cannot.

Q. You are not familiar with Mr. Hausman's handwriting?

A. I don't even know if it is Hausman's handwriting.

By Mr. Lockley: I object.

By Mr. O'Brien: I know.

By Mr. O'Brien:

Q. Now, Mr. Lubben, one of the checks which you identified here is Government's Exhibit 73, which is in the form of a photostat of the face of the check, but not of the reverse side, and that item is for $35,536.00, is it not?

A. Yes, sir.

Q. And you said that you took the proceeds of that check and paid them to Huebner?

A. Yes, sir. That's the best of my recollection.

Q. Yes, sir. As a matter of fact, were not the proceeds of that check—withdraw that.

This check, Government's Exhibit 73, was drawn by General Confections on Manufacturers Trust Company, was it not?

A. Yes, sir.

1518 Q. As a matter of fact, were not the proceeds of that check applied on account of the purchase of the inventory of the partnership?

A. No, sir; that is not so.

Q. You remember that that is not so?

A. Well, sir, if I recall correctly—pardon me.

Q. I just want to know whether they were or were not.

A. Whether they were?

Q. Whether the proceeds were applied towards the purchase price of the inventory.

A. Well, sir, that check is dated March 29th and, as I recall, the first check that I ever gave to Mr. Giglio was for a hundred thousand dollars—I think a hundred thousand—and one I think for $75,000.00. And that was borrowed from the General Commercial Acceptance.

1519 Q. I know that, but I asked you whether the proceeds of this check were not applied on the purchase price of the inventory.

Just tell me yes or no.

A. No, sir; I am sure they weren't.

By the Court: Do your records indicate that 73-B is received in evidence?

By Mr. Lockley: I believe so, your Honor.

By the Court: My record didn't show, and I wanted to know.

By Mr. O'Brien: That is in. I had the notation, your Honor, 149, but I notice that 149 is the number of the check.

By the Court: It may be in. I just overlooked it.

By Mr. Lockley: Page 627 of Volume 6 of the transcript, your Honor.

By the Court: It has been received?

By Mr. Lockley: Yes, sir.

By the Court: All right.

By Mr. O'Brien:

Q. Now, you did pay for the inventory—that is, General Confections did, did it not?

A. Yes, sir; we did.

1520 Q. And from time to time you would receive bills for the payment due for the inventory, these various installments, isn't that so?

A. No, sir; that is not so.

Q. All right. It was fully paid?

A. Sir, I believe the inventory was—would you like—I could explain it to you, if you want me to.

Q. It is simple just to say whether it was paid for, Mr. Lubben, isn't it? I mean, did you pay it, or did you have some money due on it?

A. I believe, sir, that we stopped paying when the notes got down to around $12,000, and I wouldn't pay it because the condition of the contract was that Giglio was to pay the income tax, because the money was left in the company for that.

Q. I am not criticizing any failure to pay it, I just want to know whether it was paid or not. You said it was paid down to about $12,000.

A. About. I am only answering your question, sir.

Q. All right.

The payments that were made, were they made out of the funds of General Confections?

By the Court: What payments?

1521 By Mr. O'Brien: The payments made on account of the inventory.

By the Witness:

A. Well, sir, we borrowed a great deal of the money.

By Mr. O'Brien:

Q. Who is we?

A. The company, sir.

1522 Q. Yes, sir. If you borrowed it, the money went on your books, didn't it?

A. Yes, sir.

Q. And then General Confections would pay it out?

A. Yes, sir.

Q. All right.

A. I signed some notes, General Confections notes, in the amount of $2,500.00 weekly on the balance. They got a lot of money in the beginning and then I paid $2,500.00 each week.

Q. Right. And that is all shown by the books of General Confections?

A. Yes, sir.

Q. It wasn't a personal transaction, was it?

A. No, sir.

Q. Mr. Lubben, I sent you down a couple of subpoenaes to bring here certain papers, including copies of your Federal income tax returns for the years 1943 through 1946. Did you bring any with you?

A. No, sir, I don't have any.

Q. I take it it is true, as you told our people there, that you had turned any copies you had over to the

Government?

1523 A. Well, sir, I don't remember—recall saying—your people there; where do you mean?

Q. I mean the lawyers in Puerto Rico who attended to the service of the subpoenaes.

A. I don't recall ever saying that to them, sir.

Q. All right. Then what is the fact; I mean, did you have copies?

A. Well, I must have had a copy, sir, but—

Q. Do you know where they are?

A. The papers. I don't know where they are at today.

Q. Do you remember giving the Government any such copies?

A. No, sir.

Q. Did you authorize anyone else to give them to them?

A. If I did, I gave them to them, and maybe they are in these papers coming from Hillsdale. I don't know, sir.

Q. Let me ask you this: In the years 1944, 1945, and 1946, did you have any source of income other than these companies?

1524 By Mr. Lockley: I object, your Honor. I think that is a very broad question.

By the Court: He may answer.

By Mr. Lockley: Can't he be a little more specific?

By the Court: He may answer.

By Mr. O'Brien: I am trying to be proper about it.

By the Witness:

A. Well, I don't recall, sir. I received my—my mother passed away in 1945 and I got some money from that estate. I can't think at the moment if I had any more money at that time. That's many years ago, sir.

By Mr. O'Brien:

Q. About how much did that amount to?

By Mr. Lockley: I object, your Honor. I don't see that it is material how much money he got from his mother's estate.

By the Court: He may answer.

By Mr. Lockley: Irrelevant.

By the Witness:

A. I think sir,—it is only a guess—I think it was about fifteen or sixteen thousand dollars.

1525 By Mr. O'Brien:

Q. Now, in your returns, Federal tax returns for

the year 1945 did you include any of the proceeds of the checks in evidence here as income?

A. Well, sir, how could I? I paid that money out to people.

Q. Well, I appreciate that. But I am just asking you the question for the record. Did you include any of it as income?

A. It wasn't any income, sir. How could I pay it when it wasn't income?

Q. I just want an answer, Mr. Lubben.

A. Well, sir, that is an answer. And I am being very polite to you.

1526 By Mr. O'Brien: If your Honor please, may I have a direct answer?

By the Court: The question is whether or not you did. If you didn't, just answer no.

By the Witness: No.

By Mr. O'Brien:

Q. All right. And is the same true for the year 1946?

A. No, I didn't include any of it, sir.

Q. Okay.

A. Unless—when a check was written for cash, and on our books tells who got the money, and if I—I don't say, but if anything was written to me, sir, it was on my books.

Q. Well, that is not my question. My question is very simple, and I think you have answered it.

A. Thank you, sir.

Q. At that time, when the receiver or his accountants, or representatives, came over to Hillsdale to take possession of General Confections, do you know whether you gave them the purchase record and accounts payable record of General Confections?

1527 A. I wouldn't know what they got, sir. They just were in the office, and they got a lot of books.

Q. Did you retain the purchase record and accounts payable record of General Confections?

A. I retained no books, sir.

Q. Did you retain memoranda and cash authorization slips?

A. Well, sir, these men were in the place and they took all the books and the papers.

Q. I understand that, but I want to know: Did you retain those items?

A. Well, if I retained them, they were in the files, and they are in the files that are coming down, sir. I don't know.

Q. All right.

You didn't separately or consciously retain them, is that it?

A. I didn't separate them consciously or unconsciously, sir.

Q. Now, going back to the termination of the partnership with Giglio, I will ask you to tell us whether Mr. Giglio did not terminate that partnership?

A. No, sir.

1528 Q. All right. Isn't it true that Giglio found out that you were not proceeding according to either accounting method, either the one that you had followed in the proprietorship or the one that was established for the box?

A. Well, you are just telling me conversation. What is the question, sir?

Q. I am not telling you any conversations. I say, didn't Giglio say to you that that was the case?

A. Mr.—I terminated the partnership. Mr. Giglio had nothing to do with it.

Q. Did you have as much as $50,000 of I.O.U.'s in that corn box at any one time?

A. No, sir.

Q. Did you have any separate dealings with outside people which were not recorded in either corn box #2 or the candy box #1?

A. No, sir; Mr. Giglio had those, sir.

Q. I want to know whether you did.

A. No, sir.

Q. Did you have some transactions with Bert Rock?

A. Personally?

Q. Or Herbert Company?

A. Personally?

1529 Q. Your company, through you?

A. The company did, yes sir.

Q. Yes. And did you receive invoices from Bert Rock's company which you caused to be paid?

A. Did I receive invoices that I caused to be paid?

Q. Yes, sir.
A. Invoices for what?
Q. For merchandise.
A. Yes, I think he had some.
Q. Did he deliver the merchandise?
A. Well, if you let me answer, sir. Won't you, please?
Q. Well, you said yes. That's what I asked you.
A. I didn't say yes. You jump the gun all the time on me, sir.

Sir, I have stated, and there shall be—should be an affidavit someplace about it, somewhere around in here, but Mr. Louie Roth came in—

Q. Now, Mr. Lubben, I am—you say I jumped the gun, but I simply want an answer to my question. And I don't want a long explanation. If you have any to make here, your counsel can bring it out. But I want to know whether Bert Rock, or his company, sent your com-
1530 pany invoices for goods that they did not ship?

By the Court: Did not ship?

By Mr. O'Brien: That they did not ship.

By Mr. O'Brien:

Q. And whether you caused those invoices to be paid?
A. Well, sir, I didn't cause them to be paid.
Q. Were they paid?
A. Mr. Louie Roth caused them to be paid.
Q. Were they paid?
A. I think there was one or two instances; yes sir.
Q. Just one or two?
A. That's right, sir.
Q. And did Bert Rock retain any of the money?
A. A portion of it, sir.
Q. What did he get, two per cent, for his services in making the cash available to you?
A. I don't recall the percentage.
Q. Wasn't it two per cent?
A. I don't—well, sir, won't you let me answer?
Q. Well, wasn't it?
A. I don't recall the percentage.
Q. All right.
1531 A. I think it was five.
Q. And the rest of the cash you got back?
A. The company got back, sir.
Q. All right. That was one of the transactions.

A. I think there was two.
Q. There were a lot more than two.
A. Oh, no, there was not, sir.
By Mr. Lockley: I object to counsel arguing with the witness.
By the Court: Yes, counsel's statement will be stricken.
By Mr. O'Brien: I am sorry.
By Mr. O'Brien:
Q. And did you not have the same kind of transactions with Mike Cohen?
A. No, sir; I did not.
Q. And Mike Cohen did not kick back to you any of the moneys that you were having the company pay?
A. Say that—if you break it up a little smaller, sir—
By Mr. O'Brien: Read it.
(Question read.)
By the Witness:
A. That don't kind of make sense to me, sir. Will
1532 you explain it a little more?
By Mr. O'Brien:
Q. You had some corn—by you I mean Eatsum Food Products Company partnership—you had some corn transactions with Cohen, didn't you?
A. We sold him some corn; yes, sir,—some corn syrup.
Q. And corn syrup?
A. Not corn; corn syrup.
Q. That's right. And you and Cohen were also engaged at one time in procuring corn, were you not?
A. When, sir?
Q. At one time.
A. Well, that was—
Q. It doesn't matter when.
A. You are talking about Eatsum Food Products, then you say one time. Do you mean before or after?
Q. It doesn't matter.
A. Well, sir, I would like to be a little more specific.
Q. I just want to know whether you were ever engaged with Mike Cohen in procuring corn?
A. No, I was never engaged with Mike Cohen in procuring corn.
1533 Q. In any of the corn syrup transactions that you had with Mike Cohen, where did you procure the corn syrup, or he procured it, did you or your company lay out the money for the corn, for the premium?

A. Well, sir, during the Reserve Trading Company, when Mr. Kirby was showing me those invoices for four and two-tenths cents yesterday, the top of each of those invoices says, "Corn Deal." This was during the time of General Confections and Mike Cohen came to me and he told me that he was in some trouble, and I says, "What do you mean, Mike?" He says, "Well—"

Q. Mr. Lubben, I don't mean the General Confections period.

A. I am trying to explain. I didn't pay out the money for the corn, but I am going to show—

Q. Mr. Lubben, do you not have charged on the books substantial amounts of money which you say you advanced to Harris and Ryan to procure corn?

A. What books, sir?

Q. On the books of either the proprietorship or the partnership?

1534 A. Well, you would know—

Q. It doesn't make any difference which books.

A. The proprietorship—we didn't have any corn deal, and during the partnership, sir, you might know it better than me.

Q. Let's say the partnership. Did you have some dealings with Harris and Ryan?

A. Yes, sir.

Q. And did you give them money to procure corn?

A. I did, sir.

Q. I presume it would be on your books, would it not?

A. I don't presume anything, sir.

Q. Well, I must presume that, Mr. Lubben, that if you paid out money out of the company to give to Harris and Ryan, you had it entered someway on your books?

A. I would say it was entered some place on the books.

Q. All right.

A. You are talking about General Confections, now? I mean, you are talking about the proprietorship? You kind of muddle them up a little, sir.

Q. I am not talking about anything except Ryan 1535 and Harris.

A. Mr. Ryan and Mr. Harris did business with the proprietorship—no, with the partnership, sir. You

are getting me like it, too.

1536 Q. Now, in your cash box at General Confections, to add a little variety to it, did the auditors, that is, Bercu or Sproul & Scholz audit that box?

A. I don't know whether they did or whether they didn't, sir.

Q. But the boxes over at the partnership were audited, were they not?

A. Well, I really don't know whether they audited them or whether they didn't audit them.

Q. Well, didn't it get to a point to which Giglio and Roth protested about the number of cash checks that you were drawing?

A. Well, sir, Mr. Roth, and I said here at the time, Mr. Giglio didn't want me to draw these checks. They wanted merchandise to be sold for cash and the money to be given back to it and then when I paid out—we took money out of the corn box and we paid out candy invoices—I mean overages on candy, Mr. Giglio raised a lot of rumpus and Mr. Roth was continually at it because he said, "Look, I didn't get into this corn deal just to have you take all this cash and put it back in the company so we can pay income tax. I don't want

1537 you to take any more of that money out of that corn box to pay these candy invoices, these overages." Because, you see, sir, if I did take money out of the corn box and pay an overage or a candy kick-back, I mean, a premium on candy, then it would come back—then we sold the merchandise for an invoice—that cash would then come back in the books of the company. They didn't like that because then they said we got to pay an income tax.

Q. So they wanted to maintain a box just like you did at General Confections when you got loose?

A. No. It was a little different.

Q. It all depends on whether the profits from the box were carried in your books, Mr. Lubben.

A. Well, sir—

Q. But let us skip that. Didn't they object to the cash checks because they had no way of procuring an accounting from you?

A. Oh, no, sir.

Q. What accounting did they ever get from you except your statement as to what you had done with it?

A. Listen. Mr. Roth lived in that office. He was
1538 around there behind the files and everything else. He was there all the time. You couldn't—

Q. Just a minute. What record, what accounting could he have from you with what you did with the proceeds of the $30,000.00 check?

A. He knew where it went, sir.

Q. Did he accompany you to Huebner?

A. Did he accompany me to Huebner?

Q. Yes.

A. No, sir, but he used to go to the bathroom with me. He followed me there, and I will tell you that, sir.

Q. He didn't accompany you to any of the pay-outs to which you testified, did he?

A. No, sir.

Q. Isn't that what Roth was complaining about?

A. Listen, Mr. Roth, sir—

Q. Did Roth complain of that?

By the Court: Complain of what?

By Mr. O'Brien:

Q. Of the fact that he had no accounting as to what had become of the proceeds of those checks.

A. Oh, no. He never complained of that, sir.

Q. All right. He didn't complain about it. Now, you also took cash from the box, too, at times, did you not?

1539 A. I took cash from the box. What else would I take out of a cash box?

Q. I don't know. But regardless of what else you might have taken, you did take cash out of the box and on occasion you left your I.O.U., did you not?

A. I think, sir, there were a number of occasions. I don't recall the incident.

Q. I just want to know whether you did or not.

A. Well, sir, they were then carried over and charged to me on my account. If I took anything from the company, sir—you couldn't get a five-cent piece out—

By the Court: Just answer the question.

By Mr. O'Brien:

Q. Now at the time that that corn box was closed out, how much of your I.O.U.'s were in it, at the partnership?

A. Well, sir, I don't think there was any at the time because an I.O.U., if there was an I.O.U. in it, it would be transferred to the books of the company, like, for instance, if it was during this week I would take five hun-

dred dollars or several hundred dollars, or whatever it happened to be, and the following week, the following
1540 working day would be a Monday or a Tuesday, and that would be transferred to my account as a drawing account.

1541 Q. Mr. Lubben, you don't mean to say that the transactions in the corn box were carried into and reflected upon the books of the company during the partnership, do you?

A. Oh, I am only telling you, sir, about any monies that I got. They were reflected on the books of the company, cash checks or otherwise.

Q. Well ,you know that now in the case of the partnership books, is that correct?

A. I know it?

Q. You know that much about the books, that you think that it must have been recorded on the books of the partnership, if you got money?

A. Sir, I wanted the condition when I was leaving these people where they would pay the amount of money I drew out of the company as set forth on the books of the company.

Q. Referring to your visit to Boston in 1948 to see Mr. Kramer, you were accompanied by Mr. Carry, were you not?

A. Sir, I believe I made two visits to Boston in 1948.

Q. Well, you told us about one of them. I am talking about the one that you told us about.

1542 A. Well, which one was that, sir?

Q. It was after the so-called Riviera meeting.

A. Well, I don't think we testified to that meeting, sir. I can't recall it. I think it was in reference—when Mr. Kirby was stating about a meeting that I was up there, and Mr. Kramer gave me $15,000.

Q. That is, I will concede, a different meeting, sir.

A. Thank you, sir.

Q. But prior—

By Mr. Kirby: I didn't ask him anything about going up to see Kramer.

By Mr. O'Brien: It is immaterial. We will get it straightened out.

By Mr. O'Brien:

Q. You had gone to Boston some time prior to August

of 1948, and in connection with that visit, I think you told Mr. Kirby and the jury that you did not get any money from Mr. Kramer?

A. Yes, sir, but let me correct a few dates. You are getting them muddled up there, sir.

Sir, the first time that I went up to Boston, in referring to what the question was that Mr. Kirby asked me,
1543 and I believe you will find it in the book some place—well, sir, I believe it was around November of 1947.

Q. Well, all right, Mr. Lubben.

A. But, he said two meetings in 1948.

Q. Just a minute. Didn't I just say it was before your visit of August, 1948, some time before August, 1948 that you had gone up to see Mr. Kramer?

A. But you said two times in 1948, sir.

Q. We will straighten it up. It doesn't make any difference whether it was late in 1947 or early in 1948, but you were there twice, and the first time you think was late in 1947, November or December?

A. Yes.

Q. On that occasion, did you get $15,000 from Mr. Kramer?

A. On what occasion, sir?

Q. On the occasion of that visit?

A. In 1947?

Q. Yes, sir.

A. No, sir, I did not get $15,000 from Mr. Kramer.

Q. Did you get any amount from Mr. Kramer?

A. I did not get any money from Mr. Kramer.

1544 Q. Did you get any money from Mr. Hart?

A. In New York, Mr. Hart loaned me $15,000, and I signed a note for it.

Q. Who is Mr. Hart?

A. Mr. Hart was—he was an associate of Mr. Kramer's.

Q. Had you talked to Mr. Kramer before Mr. Hart gave you the money?

By Mr. Lockley: Your Honor, I object. I don't see the materiality. I have been listening.

By Mr. O'Brien: The materiality is what the man has testified before this jury. He resorts to the technicality that Kramer didn't give him the money; that his associate did give it to him.

By the Court: If Mr. Kramer did give him $15,000, what has that to do with this law suit?

1545 By Mr. O'Brien: It remains to be seen, your Honor.

By Mr. Lockley: I am still waiting to see what Haberkorn had to do with it, for that matter.

By the Court: How is that?

By Mr. O'Brien: I don't know that I have to disclose the relevancy.

By the Court: I think that unless counsel connects it up with something that is relevant, I will sustain the objection.

By Mr. O'Brien: You may assume I will and I give you the assurance I will connect it up.

By the Court: You may proceed. Connect it up with something relevant.

By Mr. O'Brien: I am not interested in anything that is surplusage or irrelevant.

By the Court: I will assume counsel will connect it up with a showing that makes it relevant.

By Mr. O'Brien: Yes, sir.

By the Court: Very well.

By Mr. O'Brien: What is the question?

1546 (Question read.)

By the Witness:

A. Yes, sir.

By Mr. O'Brien:

Q. You say that was a loan?

A. Well, sir, I signed a note for the money.

Q. Yes, sir, I understand. Did you repay it?

A. No, sir, I haven't.

Q. Following that, you went up there in August of 1948, is that true?

A. If that is what I testified, sir, to the best of my recollection, it was shortly after the meeting at the Riviera.

Q. And Mr. Carry went with you?

A. To my recollection, he did, sir.

Q. And did anyone else go with you?

A. I don't think so, sir.

Q. Did Mr. Davidson go with you?

A. I think that was in the visit of 1947, sir.

Q. So your best recollection is that you and Mr. Carry went.

Now, during that visit, you did see Mr. Kramer?

A. Yes, sir.

1547 Q. And you talked to him alone?

A. No, sir.

Q. Who else was present?

A. I believe Mr. Carry was present at the time. I wouldn't swear to it, but—

Q. That is right.

A. But, I think he was, sir.

Q. And you were sitting on a divan in his office at the time, weren't you?

A. Well, I don't know whether—

Q. Both of you?

A. Sir?

Q. Both of you?

A. I don't know about sitting on a divan in an office, sir.

Q. You don't know that?

A. No.

Q. Isn't it a fact, Mr. Lubben, that you told Mr. Kramer at that time that—I will withdraw that.

Carry was the same chap who had been connected with Blue Ribbon Trucking Company, was he not?

A. You mean I told Mr. Kramer—

Q. No.

1548 A. You said that, sir.

Q. I say, Carry was the same chap that had been connected up with Blue Ribbon Trucking Company?

A. He owned it, yes, sir.

Q. And when you told us a while ago that you sent some sugar up to Gum Products in Boston, isn't it a fact that Mr. Carry hauled that sugar?

By Mr. Lockley: Well, I fail to see the materiality of who hauled the sugar, your Honor.

By the Court: Unless you connect it up, I will entertain a motion to strike.

By Mr. O'Brien: Yes, sir.

By the Witness:

A. Well, I don't recall whether Carry hauled it all the time or whether he hired another truck.

By Mr. O'Brien:

Q. Did he haul it some of the time?

A. I think there has been several instances that I

can remember, sir, that he hauled up sugar or chocolate or something.

Q. And on some of those occasions, did he bring back cash payments made by Kramer?

A. I don't recall that, sir, no, sir.

1549 Q. You don't recall that?

A. No, sir.

Q. And was Carry present with you during the time you talked to some of the other—some of the suppliers other than Kramer following the Riviera meeting?

A. What other suppliers?

Q. Any others.

By Mr. Lockley: There is no testimony that he did talk to any others.

By Mr. O'Brien:

Q. Did you have a conservation with some of the other suppliers, people other than Kramer?

A. With Mr. Carry?

Q. Yes.

A. I don't recall any, sir.

Q. Did you have any with them alone?

A. You mean in regard to this Riviera meeting?

Q. Yes, sir.

A. Well, sir, as I stated here—

Q. I just want to know whether you did or did not have conversations with other suppliers besides Mr. Kramer.

A. I said conversations about what?

1550 Q. About the same subject-matter as was involved in the Riviera discussion.

A. Well, what was the subject-matter that I had with Mr. Kramer in Boston at this meeting?

Q. I am not interested.

A. Sir, I don't recall that it has been brought out.

1551 Q. Your recollection is correct. Now will you answer the question.

A. Did I have a conversation with other suppliers?

Q. Yes, sir.

A. Along the same conversation that I had with Mr. Kramer after the Riviera?

Q. I didn't say that. I wanted to know if in addition to talking to Mr. Kramer you also talked to other suppliers.

By Mr. Lockley: Your Honor, it seems to me that that is very general. That wasn't brought out, that he talked to any suppliers, any other suppliers yet.

By the Court: We will take our morning recess.

By the Marshal: This honorable court will recess for ten minutes.

(Whereupon a recess was taken.)

By the Marshal: This honorable court will now resume its session.

By the Witness: I am sorry I was late, your Honor.

1552 By Mr. O'Brien:

Q. Now, when you went to Boston around about August of 1948 with Mr. Carry to see Mr. Kramer, you had a conversation?

A. Yes, sir, I had a conversation.

Q. And in that conversation did you tell Mr. Kramer that you wanted $125,000.00 from your suppliers?

A. For what, sir?

Q. For leaving the country.

A. No, sir.

Q. Did you tell him you had a prepared memoranda of this sort of your dealings with the suppliers and that unless you were furnished $125,000.00 you were going into the Revenue?

A. Sir, that is all bunk.

Q. Did you tell him that?

A. No, sir.

Q. Did Mr. Kramer tell you that he had no money with which to make any such payment or any part of it?

A. Well, he wasn't going to make any payment.

Q. Did he tell you that?

A. I don't recall him saying he didn't have any money.

Q. All right. Did you, in Mr. Kramer's presence,

1553 say that you would telephone Byron Cain?

A. I think, sir, that—

Q. Did you say that?

A. I don't recall. If you would just let me—

Q. No. I just asked you, Mr. Lubben, if you said that.

A. I was told to tell him to call Byron Cain.

Q. I didn't ask you what you were told. I asked you—I want to get it exactly now—did you tell Kramer that you would call Byron Cain?

A. I don't recall whether I said "I will call Byron Cain," or whether I said, "You call Byron Cain."

Q. All right.

A. But the subject was to call Byron Cain.

Q. Correct. Now, did you tell Kramer that if there were any suppliers who did not contribute to that fund, you would lay off the proceeds of any of these cash checks on them?

A. Sir, no, sir.

Q. Now, did you, in Mr. Kramer's presence, pick up the telephone and call Byron Cain at Chicago?

A. I can't recall, sir, whether I picked up the
1554 telephone or whether he picked up the telephone or whether we called Byron Cain.

Q. You don't even know whether you called him at that time?

A. No, sir.

Q. Didn't you testify on direct that he was called while you were present with Mr. Kramer?

A. No, sir. I think I said—I said—I don't know whether we called him or whether we didn't call him.

Q. Didn't you say that you thought Mr. Kramer called him while you were there?

A. I said I thought he called him while I was there.

Q. You thought so?

A. Yes, sir.

Q. But you can't now remember whether there was such a call and what, if anything, was said?

A. No, sir, I can't.

Q. You don't remember picking up Kramer's phone and putting through a call to Chicago and talking to Byron Cain yourself right then and there?

A. Well, sir, as I said, I don't remember picking up the phone. Whether Mr. Kramer picked up the phone or whether we called Byron Cain or whether we didn't
1555 call Byron Cain—but I know I told Mr. Kramer what the message was, that I was supposed to leave the country.

Q. I didn't ask you that, Mr. Lubben. I just asked you about that telephone call.

A. No, sir. I don't remember. I just answered you, sir.

1556 Q. Yes, sir. Refreshing your recollection, did you not make that phone call, and did you not hang up the phone and say that Cain had told you that he was

not interested, that they themselves had been in to see the Government?

A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. That doesn't refresh your recollection in any way?

A. Well, I don't think it ever happened.

Q. All right.

Now, during the years 1945 and 1946, did you make any cash premium payments to Kurtz?

A. I think I made a lot of them in 1945, sir. I bought a lot of dextrose from him.

Q. All right. Very good.

And that was during the partnership, was it, if you recall?

A. No. I think, sir, that it started in the sole proprietorship, and it continued for a while in the partnership.

Q. And would the same be true of National Process Foods, Louie Cohen?

1557 A. You have already asked me that, sir.

Q. Well, I did in a specific incident, but I am asking you generally now?

A. Generally what?

Q. Whether you made cash payments, premium payments to National Process Foods?

A. When, sir? What year?

Q. In the year 1945 or 1946?

A. Well, sir, I testified that—I said that I believe in 1945 I bought some kind of a sugar mix, or doughnut, from National Process Foods in 1945, and I think we bought some in 1946, but I know I gave him a lot of cash in 1946 for re-barreling that corn, sir.

Q. Premium cash?

A. Yes, sir, premium cash, over and above the billing.

Q. And how about Millstein?

A. Sir, if I recall correctly, Mr. Millstein was—

Q. Mr. Lubben, I am just asking you if you paid the man.

A. Well, I am trying to think, sir. Will you please just let me? I am trying to be cooperative.

1558 Q. Yes, but it costs us money.

A. Sir? I am getting $9.00 a day, so I am doing the best I can.

Mr. Millstein, I think, sir, I had some transactions with him in 1945, whereby I gave him some cash.

Q. All right.

A. That was during—to the best of my recollection it was during the sole proprietorship.

Q. Excuse me just one minute.

How about Druckerman?

A. I think Mr. Kirby asked me about Mr. Druckerman, sir, whether I gave him cash.

Q. I don't remember, Mr. Lubben. What is the fact?

A. I remember it was about an incident of cocoa.

Q. Just one incident of this kind?

A. I think he asked me about one incident, or about a specific shipment of cocoa.

Q. Was it more than one occasion on which you gave Mr. Druckerman cash premiums?

A. Oh, yes, sir.

Q. Quite a number?

A. I don't know, sir, but certainly nowhere nearly as many as I gave Shotwell.

1559 Q. There were quite a number?

A. I didn't say quite a number. I just said a number. What do you call quite a number?

Q. What do you mean by a number?

A. Oh, I don't know. Probably maybe ten or fifteen times, or maybe more or maybe less.

By Mr. McConnell: I move to strike the statement about Shotwell.

By the Court: Well, Mr. O'Brien is examining the witness. I assume it is for him to determine whether it should be stricken.

By Mr. O'Brien: He said it once, your Honor.

By the Court: What is that?

By Mr. O'Brien: He said it once. I don't care if he says it again.

By the Court: It is orderly procedure that you should govern the motion to strike when you are examining the witness, Mr. O'Brien.

By Mr. O'Brien: All right.

By Mr. O'Brien:

Q. How about Gertz?

A. What about him, sir?

1560 Q. Were there cash overages paid to him during those years?

A. Yes, sir, there were some in 1945, or I believe it was 1945, or whether—I think on a couple of occasions he gave me some, and—but there was—some were in there, sir.

Q. What did he pay you, about $20,000?

A. I wouldn't know.

Q. Do you remember?

A. No, sir.

Q. But I am interested in whether you gave him some?

A. Yes, sir, I gave him some cash.

Q. Now in each of these instances—

A. I didn't give it to him—I mean, when I say I gave it to him, I gave it to him as part of a payment of an invoice, sir.

Q. Yes.

A. On part of a payment on something he sold me.

1561 Q. I am not interested in the details but just in the fact that you did pay him.

A. Yes, sir.

Q. Now, were those payments recorded on the books of the company?

A. To the best of my knowledge, sir, they were.

Q. And if they appear on the books of the company then would you say that the payments that you have described are according to the books?

A. What do you say, sir?

Q. I mean the number and amount of such payments would appear on the books of the company someplace?

By Mr. Lockley: Whose company are you talking about?

By Mr. O'Brien:

Q. Whatever company was making the payments. You didn't make them personally, did you, Mr. Lubben?

A. No, sir.

Q. And would it appear on the books?

A. To the best of my knowledge, it would, sir. I think Mr. Gertz got into some trouble once, sir. Well, he came up—

Q. I haven't asked any question about that. I just asked you about the books.

1562 A. I mean, because he checked the books.

Q. Now, during or at the time of the inception of the proprietorship, didn't you have a partner?

A. At the time of the proprietorship did I have a partner?

Q. Yes, sir.

A. No, sir.

Q. Was there no one who put up $10,000.00 at the time and who was given a half interest in the partnership?

A. No, sir.

By Mr. Lockley: In the partnership? What are you driving at?

By Mr. O'Brien:

Q. I am sorry. In the proprietorship.

A. No, sir.

Q. In the so-called proprietorship.

A. What do you mean, so-called?

Q. Well, if you had a partner, it would then become a partnership.

A. Please, sir, don't call it that.

Q. We call a sole entity a proprietorship.

A. That is what it was, sir.

Q. Didn't you have a $10,000.00 advance with Mr. Burry in exchange for a half interest in that entity?

1563 A. No, sir, I did not.

Q. Would you say that if the accountant's papers reflect such a thing that they are in error, Mr. Bercu's papers?

By Mr. Lockley: I object, your Honor. In the first place, as I understand it, this is 1945 and 1944 and it is assuming something not in evidence.

By the Court: You are assuming something in your question.

By Mr. O'Brien:

Q. Before the visit of Mrs. Cordez and Twohig, had you and Miss Feldman or others been working on these overage items in an effort to recap them and to support them with memoranda?

A. No, sir. I think Miss Feldman—Miss Feldman left, sir. I believe it was in about August, I believe, of 1947, and—

Q. When she left, someone took her place.

A. Yes, sir.

Q. Do you remember who that someone was?

By Mr. Lockley: Oh, I object to that, your Honor. This is something that is going into 1947, as I now

1564 understand it.

By the Court: He may ask him.

By the Witness:

A. I think Mr. Sweeney took her place, sir.

By Mr. O'Brien:

Q. And Sweeney didn't stay very long, did he?

A. No, sir. He wasn't—

Q. And who took his place?

A. A Mr. Tobias, sir.

Q. And was Tobias there at the time the company went into receivership?

A. Yes, sir.

Q. Did Miss Feldman come back after she had left?

A. Come back for what, sir?

Q. Come back to help you go over the books?

A. I don't recall, sir. She came back, I believe, for a visit or something.

Q. Yes.

A. And whether she did anything on the books or not, at the moment I can't remember.

Q. You just can't remember that?

A. No, sir.

Q. Now, after Messrs. Cordez and Twohig came—

A. His name—

1565 Q. (Continuing) —to see you, thereafter did you go into the Department or the Bureau of Internal Revenue for the purpose of working on the books?

A. Sir, I have never worked on the books. I never worked on the books for the companies I was connected with or the government.

Q. All right. Did you go in there for any purpose, for any extended length of time?

A. Well, several times, sir, I was told to come down to the office and I went, sir.

1566 Q. And did Miss Feldman and Tobias also do that?

A. I think on several occasions Miss Feldman came down.

Q. And Mr. Heitman?

A. I don't recall about Mr. Heitman.

Q. This was prior to October of 1951, was it not?

A. Oh, yes, sir.

Q. Quite a bit prior. Would you say it was 1948?

A. No. I don't think Miss Feldman was ever down there in 1948, to my knowledge. She may have and she may have not, I don't know.

Q. Were you there in 1948?

A. I was down there at the time they asked me for my books, once on the proprietorship, and I think that was in 1948 when they went over the Sproul and Scholz, and we got the books.

Q. Yes.

A. I can't remember being down there again after that in 1948. I said there was a number of times in 1949 that I was there.

Q. Yes, sir.

1567 By Mr. O'Brien: Yes, sir.

If the Court will indulge me a moment.

By Mr. O'Brien:

Q. On the syrup, invoices of 1946 that you testified about, Mr. Lubben, the total price of thirteen cents the syrup sold for.

A. Six cents on an invoice and seven cents in cash, sir.

Q. Yes, that's thirteen cents.

A. Yes, sir.

Q. Now, back at the time that you were having Ryan and Harris procure corn, so that you could get syrup, can you tell us what the price was on syrup?

A. Whose price, sir?

Q. The market.

A. What market, sir?

Q. There is only one market.

By Mr. Lockley: There is retail, wholesale and several other types.

By Mr. O'Brien: I think not.

By Mr. O'Brien:

Q. I am talking, of course, of the kind of deals you were having. You were selling it by the tank car

1568 generally, were you not?

A. No, sir; we brought the corn syrup in and re-barreled it during the partnership.

Q. Yes, I know, but you also handled some tank car lots, didn't you?

A. Well, sir, you bought it in a tank car.

Q. Yes, but you barreled it only when you wanted to sell it in barrel quantities.

A. No, sir.

Q. Or use it.

A. Sir, I think that during the partnership that it was all barreled.

Q. Well, in the proprietorship was that true?

A. When we got it in tank cars?

By Mr. Lockley: There is no testimony of corn syrup dealings in the proprietorship.

By the Witness:

A. In the proprietorship there was no corn syrup dealings.

By Mr. O'Brien:

Q. There were some big dealings during General Confections—under Reserve Trading, were there not?

1569 A. Yes, sir.

Q. What was the corn syrup bringing in the market, what were you getting for it at that time?

A. I believe fifteen cents, sixteen cents, maybe more, maybe less. It is all reflected in my books, sir.

Q. Right. And you also testified about that on your deposition, didn't you?

A. What deposition?

Q. The deposition you gave in Puerto Rico?

A. I don't recall that specific question you asked me, sir.

Q. Just let me ask you—and before the Kefauver Committee, too, didn't you? Remember that?

A. Yes, sir; I testified there.

Q. All right. Were the resale transactions that you mentioned—did you mention resale transactions at six and a half cents a pound, invoice price plus five and a half cents a pound cash premium?

A. To whom, sir; who did I mention that to?

1570 Q. Whoever you were talking to, before the Kefauver Committee and on your deposition.

A. I think that was about right, sir. I may be a half cent off one way or the other, something like that.

Q. It varied some at that time, did it not, Mr. Lubben?

A. Well, the price went up, sir, in 1946, and I understand, sir—while I hadn't sold any, I understand it sold as high as a quarter.

Q. And the raw corn itself, the premium started at 25 cents a bushel and went as high as 75 cents a bushel, didn't it?

A. When, sir?

Q. Over the period of the corn shortage?

A. Well, sir, let's be specific and tie it in with the company. Then I can give you—

Q. I am not interested in the company.
A. I will only answer, sir, during the time of the partnership, sir.
Q. Yes, sir.
A. Which is when I had—when we bought corn. We didn't buy any corn during General Confections.
Q. Yes.
1571 A. And I don't want you to get that impression.
Q. You dealt in corn syrup then?
A. Yes, sir.
Q. Right.
A. During the time of General Confections I believe it started out—the premium to the elevator, or the farmer, was about 25 cents a bushel, and went as high as 75 cents that we were told to pay.
Q. And the poundage of syrup to bushel varied from 8 to 16?
A. I don't understand your question, sir. What do you mean?
Q. I am sorry; you testified to that on direct, too, so I assumed you knew what I meant.
By Mr. Lockley: What page, Mr. O'Brien?
By Mr. O'Brien: I don't have the page.
By Mr. Lockley: I thought you were reading from something.
By Mr. O'Brien: No, right here, in your direct.
By the Witness:
A. Well, sir, you are framing your question wrong, sir. You want a yes and no answer from me, sir, and
1572 in order to put you straight, what you are trying to get at, I will have to go into a little detail and then you will say I am out of order. So what am I going to say, sir?
By Mr. O'Brien:
Q. Suppose you answer this one in your own way.
1573 A. Thank you, sir. A bushel of corn syrup, sir,—a bushel of corn weighed 64 pounds. It made 32 pounds of corn syrup, plus a lot of by-products, oils, starch, and what have you. And then the corn refineries that you went out and got this corn from which would give you a portion—they would sell you on an invoice at their ceiling price—not all of the corn syrup that this bushel of corn made, but a portion of it.

And I believe, sir, in the case of Penick and Ford, they sold the partnership twelve pounds and they would keep the rest of it for themselves, which they sold to the customers who had quotas with them.

See, the man with the quota, sir, had no problem. And they sold that to the man with the quota. And then they would sell you the balance.

Now, some corn companies, sir, were not quite as generous as Penick and Ford. Hubbinger, sir, only gave you eight pounds. They would not give you—they sold you eight pounds on an invoice, and the rest of it they sold to their regular customers.

Does that answer the question, sir?

1574 Q. Yes. I don't think it is entirely fair to Hubbinger, because I think you were getting fifteen pounds from Hubbinger.

A. I don't think so, from Hubbinger, sir. No, sir. I think it was eight pounds.

Q. But do recall at one point it was as low as eight?

A. And I have heard instances—I mean, it is not connected with this case—that it was as low as six.

By Mr. Lockley: I object to this hearsay. Unless you know, Mr. Lubben—

By the Court: Yes. I don't think it is advisable to spend too much time on that.

By Mr. O'Brien: I didn't intend to, Judge.

Subject to the reservation which we spoke about, your Honor, that concludes the cross.

By the Court: I am not clear as to any reservation.

By Mr. O'Brien: I think—

By the Court: Well, you take that up with me later. I haven't made any definite ruling on any reservation. I merely indicated that if you thought there was any

1575 ruling that you wanted to—if you thought I had made any rulings that you wanted to take up with me, I will be glad to hear you on it.

By Mr. O'Brien: I didn't mean that, Judge. And I think Mr. Lockley agrees, this is a matter which was arranged in Minneapolis with you, and I have a reservation.

By the Court: I am sorry. I had forgotten.

By Mr. O'Brien: In other words, I am through with the witness, except for that arrangement that was made there, and within the limits of that.

By the Court: Yes. I am sorry. I remember now. Very good.

1576 By Mr. Lockley: Your Honor, at this time I move to strike all the testimony relating to the Haberkorn transaction, all of the testimony relating to the conversation in the Morley Kramer office, and all the testimony relating to Mr. Hart and the $15,000.00 loan on the grounds that counsel has failed to tie it up in any way with the issues here at trial.

By the Court: Well, I think the testimony as to the visit to Kramer in 1947 hasn't been connected up and it may be stricken.

By Mr. O'Brien: Judge—

By the Court: Sorry?

By Mr. O'Brien: I am sorry. I didn't mean to interrupt.

When we speak of connecting up, sometimes that would clear through the witness and sometimes it would be hooked into rebuttal or answering testimony.

By the Court: If counsel contends he is going to introduce other testimony which will make that relevant,

1577 very well, I will reserve my ruling.

By Mr. Lockley: Your Honor, at this time I would like to offer the balance of Government's Exhibit 94 in evidence. The defense has offered the June 17th entry.

By the Court: Wait now.

By Mr. Lockley: Pardon me, sir.

By the Court: My records show, as to Exhibit 94, I received a portion of it.

By Mr. Lockley: Yes, sir; the June 17th entry, which is the bottom entry.

By Mr. O'Brien: That was read into the record, was it not?

By Mr. Lockley: Yes.

By the Court: And now you want to offer the balance of it?

By Mr. Lockley: Yes, your Honor.

By the Court: Any objection?

By Mr. O'Brien: I think there is.

By Mr. Lockley: I hardly see how one can stand, because they agreed that they would waive the requirement that a foundation be laid for the absence of the original in order to put in that portion of it.

1578 By the Court: That is my recollection.

By Mr. Lockley: I hardly see how a portion of it can be evidentiary without the balance of it being likewise admitted in evidence.

By Mr. O'Brien: If I may suggest, the lower portion is the portion which purports to have been written by Mr. Lubben, and he testified that was a record that was kept in the ordinary course of business.

By Mr. Lockley: That is a different subject, your Honor.

By Mr. O'Brien: That is why our offer was supported by that testimony, and it was read in. But we know of no such support or foundation at the present for the remainder of that record.

1579 By Mr. Lockley: Well, your Honor, their objection was that we had failed to produce the original.

By the Court: That is my recollection.

By Mr. Lockley: If that objection is valid as to a portion—

By the Court: Yes. When you offered the entry of June 17, you waived any foundation to the exhibit, and I asked expressly whether or not he waived the foundation to the exhibit, it being a photostat, and he said yes.

By Mr. O'Brien: We have no objection on the ground that it is a photostat, but we do not recall that there is any foundation to support the entries, except those which are in Mr. Lubben's handwriting.

By the Court: Am I correct in assuming, Mr. Lockley, that the witness stated this was a true and correct copy of his books and records?

By Mr. Lockley: Yes, sir.

By the Court: Kept in the ordinary course of

1580 business, and it was the ordinary course of business to keep such a record?

By Mr. Lockley: That is correct, he so testified.

By the Court: It may be received.

(Said document was so received in evidence by the court and marked Government's Exhibit No. 94.)

By Mr. Lockley: Your Honor, the Government has no further redirect examination, but I beg your Honor's indulgence for the purpose of having Mr. Lubben identify several more documents, which were, I believe, among those which were photostated, and on his porch.

I had not offered them to him earlier for identification,

because, in the orderly presentation of the case I expected to do it through other witnesses.

But if I may do so now, I would just like to have him identify these records as a portion of those records, just for idehtification purposes only, and not to offer them in evidence at this time. I know that is out of the ordinary order, and that is why I ask the indulgence of the
1581 Court.

By Mr. O'Brien: He is going to be available during the hearing, isn't he, Mr. Lockley?

By Mr. Lockley: Oh, yes, but I would like to have him identify these documents now while he is on the stand.

By the Court: Go ahead.

By Mr. Lockley: Thank you, sir.

Redirect Examination by Mr. Lockley.

Q. Now, Mr. Lubben, I show you Government Exhibit for Identification No. 73-A, and ask you if you have seen that document before?

A. Yes, sir; I have.

Q. And do you know whose handwriting appears on the bottom?

A. No, sir; I do not.

Q. Is that a document which was prepared in the ordinary course of business?

A. Yes, sir.

Q. Do you know what business—in connection with what business it was prepared?

A. In the business of—during the time of General Confections, sir.

1582 Q. And was that a true and correct record at the time it was made?

A. Yes, sir.

Q. Do you know where the original of that document is at the present time?

A. No, sir; I do not.

Q. Is that a true and correct copy of the original?

A. Yes, sir.

Q. When was the last time you saw the original?

A. On the sun porch of my home in February, early in February, 1948.

Q. That is the best of your recollection?

A. Yes, sir.
Q. Have you searched for the original since that time?
A. I have.
Q. Have you found it?
A. No, sir.

By the Court: My recollection is that you have identified 73-A before.

By Mr. Lockley: I am sorry, sir, if I was going over something again. I have a number of these. Exhibit 112, then.

1583 By the Court: Which one?

By Mr. Lockley: 112.

By the Court: Well, I gather from my notes that you have shown 112 to the witness.

By Mr. Lockley: Your notes are better than mine, your Honor. If I have already identified it, that's fine. I was afraid I had overlooked something.

No. 120.

By the Court: Yes.

By Mr. Lockley: Good. No. 153-A.

By the Court: Well, 53-A?

By Mr. Lockley: A; yes, sir.

By the Court: Yes.

By Mr. Lockley:

Q. Mr. Lubben, I show you Governent's Exhibit for identification 122-A.

I don't believe that one has been shown to him before, your Honor.

By the Court: Well, you have shown that to the witness before.

By Mr. Lockley: Somone else is keeping these
1584 records for me, your Honor. I am sorry.

By the Court: Why don't you check them? Go ahead.

By Mr. Lockley: 122-C.

By the Court: Yes.

By Mr. Lockley: 126-A and B.

By the Court: Yes.

By Mr. Lockley: Then thank you. That is all, Mr. Lubben.

By the Court: You better check up with your records and see that my notes are right. You have a transcript.

By Mr. Lockley: Yes, your Honor.

By the Court: But I think you will find that you covered these exhibits with Mr. Lubben during his direct examination.

By Mr. Lockley: All right, sir. Thank you very much. I am sorry to have taken up the time of the Court on that.

By Mr. McConnell: If the Court please, I want to ask one question on this last exhibit, if I may.

By the Court: Go ahead.

1585 *Recross Examination by Mr. McConnell.*

Q. Mr. Lubben, you said the last time you saw these documents was on the sun porch?

By the Court: Which documents, the ones just referred to?

By Mr. McConnell: Yes.

By Mr. McConnell:

Q. On the sun porch of your home at Hillsdale.

A. I said, sir, that was the last time, to the best of my recollection, that I have seen the originals of those documents.

Q. Didn't you testify here previously that you had turned over the originals to Mr. Davidson to be photostated and that was the last time you saw them?

A. Well, sir, I believe I turned them over the same day.

Q. Well, which was the last time you saw them, when you turned them over to Mr. Davidson—

I withdraw that.

By the Court: Counsel, I think he stated that Mr. Davidson was there on the sun porch and he says that
1586 he turned these documents over to Mr. Davidson to have them photostated and that is the last time that he saw the originals.

1587 By Mr. McConnell:

Q. Is that the fact?

A. Yes, sir; to the best of my recollection, sir.

By Mr. McConnell: That is all, your Honor.

By Mr. Lockley: Thank you, Mr. Lubben.

By the Court: That is all.

By the Witness: You mean I can leave?

By the Court: You are through for the time being.

By the Witness: Thank you, sir.

(Witness excused.)

MARY KRASNE, called as a witness on behlf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. You are Mrs. Mary Krasne?
A. Correct.
Q. K-r-a-s-n-e?
A. Right.
Q. Where do you live?
1588 By the Court: You are going to have to speak up.
By the Witness:
A. 115 Central Park West, New York City.
By the Court: You may remain seated but please raise your voice, because these jurors have to hear what you say.
By the Witness:
A. 115 Central Park West, New York City.
By Mr. Locyley:
Q. And you are married?
A. Married.
Q. What does your husband do?
A. In the food line.
Q. He buys and sells food, is that it?
A. Food, correct.
Q. Do you know the defendant, Byron Cain?
A. Yes, I do.
Q. Do you see him over there?
A. Yes, I do.
By Mr. Lockley: Let the record show that she has identified the defendant, Mr. Cain.
By Mr. Lockley:
1589 Q. Now, Mrs. Krasne, directing your attention to the early part of 1946, did you receive a telephone call at that time from Mr. Cain?
A. To the best of my recollections, I did.
Q. And what was the subject of the conversation, of that telephone call?
A. At the time he asked me if I wouldn't pick up a piece of jewelry on my way to Chicago.
Q. Were you at that time planning to come through Chicago?

A. Correct. I was packing to leave for the coast.

By Mr. McConnell: If the Court please, I object to that as not binding on the corporation. The corporation is not engaged in the jewelry business.

By Mr. Lockley: I will connect it up, your Honor, if I am permitted to go on with the testimony.

By the Court: Very well.

By Mr. Lockley:

Q. You say you received a telephone call from Mr. Cain and he asked you to pick up some jewelry?

A. I believe so, to the best of my recollections.

1590 Q. Did he state how you were to pay for it?

A. I don't recall exactly. I believe he said—

By Mr. McConnell: I make the same objection. What Mr. Cain told her about paying for the jewelry is not binding upon the corporation.

By Mr. Lockley: It is the conversation of one of the defendants.

By the Court: She may answer.

By the Witness:

A. I believe he said it would be taken care of.

By Mr. Lockley:

Q. Well, was he any more specific than that?

1591 A. Well, to the best of my recollection, I believe he said he would have the money up, and take care of it, someone would, from Mr. Lubben's office.

Q. He said someone would come up from Mr. Lubben's office?

A. Mr. Lubben's office, correct.

Q. Did someone subsequently come up from Mr. Lubben's office?

A. Yes.

Q. Do you know who it was?

A. I believe it was Mr. Lubben himself.

Q. And what happened?

By Mr. McConnell: I object to all of this transaction. I would like to have my objection stand, if I may.

By the Court: Overruled.

By Mr. McConnell: May I have the objection stand?

By the Court: Yes.

By Mr. Lockley:

Q. What happened when Mr. Lubben came up?

A. Well, I believe he gave me the money, and I went down and picked up the piece of jewelry.

Q. And how much money was it?

1592 A. I believe it was $1,400.

Q. And was that in check, or currency, or how was it?

A. It was in currency.

Q. In currency.

A. Yes.

Q. And you picked up the jewelry?

A. Yes, I did.

Q. What did you do with the jewelry?

A. I dropped it in Chicago on my way to the Coast.

Q. Well, can you be a little more specific; what do you mean you dropped it?

A. I gave it to Mr. Cain on my way to the Coast.

Q. To Mr. Byron Cain, the defendant?

A. Yes, I did.

Q. Where did you give it to Mr. Cain?

A. I believe I gave it to him at the station. I don't recall exactly.

Q. At the train station?

A. Yes, I think he met us.

Q. On the way through?

A. Yes.

Q. Did you have any conversation with him at that time?

A. I might have, I don't remember.

1593 Q. Now, was this series of events, the giving of the money to you by Mr. Lubben, your picking up the jewelry, and your delivery of it to Mr. Cain, all as a result of the telephone call you received from Mr. Cain?

A. Yes, sir.

By Mr. Lockley: That is all. Thank you.

By Mr. O'Brien: Just a moment, Mrs. Krasne, please.

By Mr. McConnell: I move to strike her testimony. There is no connection with the corporation.

By Mr. Lockley: If your Honor please, I would like to call your attention to the fact that Mr. Lubben connected this up some time ago in his testimony that on one of the sheets—

By the Court: Yes, I will deny the motion.

Cross Examination by Mr. O'Brien.

Q. Mrs. Krasne, what kind of an article was it?
A. I don't remember.
Q. Was it in a box?
A. Yes, sir.
1594 Q. In the talk you had with Mr. Cain, he didn't describe it in any way?
A. He said it was a gift to his wife.
By the Court: A little louder, please.
By the Witness: He said it was a gift to his wife.
By Mr. O'Brien:
Q. You don't know what it was; you had no talk about that?
A. No, sir.
Q. Did you have a talk with Mr. Krasne about it before you picked up the jewelry?
A. I might have. I don't remember; I might have. I don't remember. It might have been.
By Mr. O'Brien: I think that is all.
By Mr. Lockley: Thank you.
By the Court: That is all. You may be excused.
(Witness excused.)

1595 JAMES F. MORAN, a witness called herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Your name is James F. Moran?
A. That's right.
Q. And where do you live?
A. 1707 North 77th Court.
Q. And where are you employed?
A. Coca Cola Bottling Company.
Q. Do you know Mr. David Lubben?
A. Yes, sir.
Q. Are you related to him in any way?
A. He is my brother-in-law.
Q. You are married to his sister?
A. Yes, sir.
Q. Do you know the defendants, or any of them, Mr. Huebner, Mr. Cain, Mr. Sullivan?
A. Yes, sir.

Q. Which ones?

A. I know Mr. Huebner, and I have met Mr. Sullivan, and I believe I met Mr. Cain once.

1596 By Mr. O'Brien: We can't hear you, Mr. Witness. Will you talk up a little louder, please?

By the Witness: Yes, sir.

By Mr. Lockley:

Q. During the years 1945 and 1946 did you have any occasion to receive any checks from Mr. Lubben?

A. Yes, I have.

Q. All right. Now, when was the first occasion that you remember?

A. The first occasion—

By the Court: Speak up, Mr. Moran.

By the Witness:

A. The first occasion must have been in the summer or early fall of '46.

By Mr. Lockley:

Q. That was the first occasion?

A. Yes, sir.

Q. Do you recall how many checks you got at that time?

A. At that particular instant, Mr. Lubben gave me four checks for $5,000.00 each.

Q. And do you recall to whom these checks were made out?

1597 A. I believe they were made out to cash.

Q. What did you do with the checks?

A. I cashed them.

Q. Were you able to cash $20,000.00 worth of checks yourself?

A. They had Mr. Edward T. Urban's endorsement on them.

Q. Did you procure that endorsement?

A. Mr. Lubben procured it.

Q. And you took the checks to the bank, did you?

A. Yes, sir.

Q. And what did you do when you got to the bank; you got the money?

A. Yes, I did.

Q. In what form?

A. In bills of 20 and 50 and a few hundred dollar denominations.

Q. And what did you do with it?
A. I delivered it to Mr. Huebner.
Q. When was this?
A. This was in the early part of '46, in the summer or fall.
Q. The summer or fall of '46. How do you determine it was the summor or fall?
1598 A. Well, I recall the fact that I had no coat on. And I remember the particular neighborhood, why, to walk to my car I slipped the package inside my shirt.
Q. That's the package of money?
A. Yes, sir.
Q. Where did you deliver it to Mr. Huebner?
A. I delivered it to the Shotwell Manufacturing Company.
Q. Any particular place in the Shotwell Manufacturing Company?
A. Well, Mr. Huebner came downstairs. I announced myself, and he got me, and we walked upstairs. I believe it was the laboratory.
Q. In a laboratory?
A. Yes, sir.
Q. Was anyone else present?
A. I believe there was one girl, and he asked her to step out for a few minutes, he wanted to use it.
Q. When you were in the laboratory what transpired then?
A. Well, I handed the package to Mr. Huebner and he had been expecting it.
By Mr. O'Brien: I object to that.
1599 By Mr. Lockley:
Q. Did you know he had been expecting it?
By the Court: I didn't hear you.
By Mr. O'Brien: I move to strike the statement.
By the Court: Well, the statement that he had been expecting it may be stricken as a conclusion. He may state what conversation took place.
By Mr. Lockley:
Q. Did you have a conversation with him?
A. Prior to—
Q. Well, all right. Let's take them one at a time. When was your first conversation?
A. Well, Mr. Huebner called me for several days prior to it, telling me he was expecting the package.

Q. He referred to it as a package?
A. Yes, sir.
Q. All right. How many times did he call you?
A. Oh, it might have averaged four or five times a day for maybe three or four days prior.
Q. Well, why were you so long in getting the $20,000.00 over to him?
1600 A. Well, I had instructions from Mr. Lubben not to—
By Mr. O'Connell: I object to what he heard from Mr. Lubben. Any conversation he had with him outside of our presence is not binding on us.
By the Court: I will sustain the objection.
By Mr. Lockley:
Q. Did you cash the checks on the same day that you received them?
A. No, I didn't.
Q. Do you know how long you waited?
A. It might have been four days.
Q. And was it in that interval that Mr. Huebner was calling you?
A. Yes, sir.
1601 What was the nature of his conversation on the telephone?
A. He wanted to know if I had gotten the package from Mr. Lubben.
Q. All right. Now, let's go back to the laboratory. Will you state what happened in there after you gave Mr. Lubben the money—Mr. Huebner the money, I mean?
A. Well, he walked in and—I mean it is just general—
By the Court: Keep your voice up, sir.
By the Witness:
A. Just general conversation with Mr. Huebner. I told him I had the package for him. And he opened the package, and he saw the bank wrappers on the bundle, and he asked me where I got the money.
By Mr. Lockley:
Q. What did you tell him?
A. I told him it was money I had gotten from Mr. Lubben.
Q. Was there any more conversation that you can recall?

A. No.

1602 Q. What did he do with the money, after you handed it to him?

A. After I handed it to him he broke the wrappers and proceeded to count the bills.

Q. Did anything happen at that time?

A. No, not that I recall.

Q. How many times did he count it?

A. To my recollection just one.

Q. All right. Now, did you subsequently get another check from Mr. Lubben?

A. Yes, sir.

Q. I show you Government's Exhibit No. 133, in evidence, a check for $17,190.00, dated December 4, 1946, and ask you if that is the check.

A. Yes, sir.

Q. Now when did you receive that check?

A. About December 4th.

Q. All right. And you turned it over. And tell me when it was cashed at the bank.

By Mr. McConnell: December 4, what year?

By the Witness: '46, sir.

By the Witness:

A. The bank stamp is December 20th.

1603 By Mr. Lockley: All right.

Q. Now, will you also turn it on its reverse and tell me who endorsed it.

A. It is endorsed by David Lubben and also Mr. Edward T. Urban.

Q. And did you see either Mr. Lubben or Mr. Urban place those endorsements thereon?

A. Yes, I did.

Q. Were they both placed on at the same time or different times?

A. At the same time.

Q. And when was that?

A. At the time he wrote the check.

Q. All right. Now after you had the check endorsed, what did you do with it?

1604 By the Court: Let's see. Does this have an exhibit number?

By Mr. Lockley: Yes, sir, it does. No. 133, I believe. I intended to call it out. 133, yes.

By the Court: This is another occasion, is that it?

By Mr. Lockley: Yes, your Honor. The first one was $20,000. This one is seventeen. This is the second occasion.

By Mr. Lockley:

Q. All right, Mr. Moran.

A. Now, what was the question, sir?

By Mr. Lockley: Will you read the question?

(Whereupon the question was read as above recorded.)

By the Witness:

A. After the check was endorsed, I had it as per Mr. Lubben's instructions.

By Mr. McConnell: I move to strike out Mr. Lubben's instructions as not binding on us.

By the Court: No, I will deny the motion.

1605 By Mr. Lockley:

Q. Did you receive any telephone calls from Mr. Huebner during that interval?

A. Yes, sir; I did.

Q. What was the subject of those telephone calls?

A. Again he wanted to know when—or when I was going to deliver the package that Mr. Lubben had promised him.

Q. Where was Mr. Huebner calling you, at your home or at your office?

A. Most of the time at the office. Once or twice we received—I received a phone call at home.

Q. All right.

Now, you took the check to the bank, and you got it cashed on December 20th, is that right?

A. Yes, sir.

Q. Then what did you do with the money?

A. Well, that particular day, I happened to be on my way home for lunch, and I did take it home with me.

Q. You took it home at lunch time?

A. Yes, sir.

Q. Did you have it in any sort of a container?

A. I had it wrapped in a bundle of newspaper.

1606 Q. Did you do anything with it after you got home?

A. Well, I showed my wife what $17,000 looked like.

Q. You mean you had never seen $17,000 in one place before?

A. No, I haven't.

Q. All right. Then what happened after you left—I presume you left your home after lunch; what happened then?

A. I called Mr. Huebner, telling him that I was on my way, and I had the package.

Q. All right.

A. And I went over to Shotwell Manufacturing Company, and I announced myself, and Mr. Huebner brought me—or brought me upstairs again to the same room.

Q. And what happened then?

A. And I handed him the package, and he opened it, and counted the bills. And I guess he figured it was okay.

1607 By Mr. McConnell: I move to strike out what he figured.

By the Court: I am sorry.

By the Witness: I said the figure was okay.

By Mr. Lockley:

Q. You mean it counted out correctly?

A. Correctly, to $17,190.25. And Mr. Huebner thanked me, and asked me if I wanted to take some marshmallows home for the children.

Q. He offered you a bag of marshmallows?

A. Yes, sir.

Q. Was there any conversation at that time that you can recall?

A. No, sir; outside of the fact that I thanked him for the offer of the marshmallows, but I didn't care for any.

By the Court: We will take our noon recess now. We will be in recess until two o'clock.

By the Marshal: Will the audience remain standing while the jury files out, please.

This honorable court will be in recess until two o'clock this afternoon.

1608 (Whereupon a recess was taken to 2:00 o'clock P.M. of the same day, being Tuesday, September 22, 1953.)

1609-1618 • • •

• • (Caption—No. 52 CR 143) • •

1619 Chicago, Illinois, Wednesday, September 23, 1953, 10:00 o'clock a. m.

Court met pursuant to adjournment.

Present:
Mr. Edward J. Calihan, Jr.
Mr. John Lockley,
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein:—

By the Clerk: 52 C 143, United States of America versus Shotwell Manufacturing Company, et al, case on trial.

1620 JAMES F. MORAN, a witness called herein in behalf of the Government having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Continued) By Mr. Lockley.

Q. Mr. Moran, I believe I neglected to ask you whether you saw the defendant, Mr. Huebner, to whom you paid these two deliveries of money. Do you recall seeing him, or do you now see him in the courtroom?
A. Yes, sir.
Q. Will you point him out?
A. Yes. Mr. Huebner is sitting in the back of the room with the glasses on.
By Mr. Lockley: The record will show the defendant was identified.
You may cross examine.

Cross Examination By Mr. McConnell.

Q. Where do you live, Mr. Moran?
A. 1707 No. 7th Court, Elmwood Park.
Q. How long have you lived there?
A. How long have I lived there? Approximately—
By the Court: Speak up, Mr. Moran.
By the Witness. About seven years.
1621 By Mr. McConnell:
Q. You had been living there at the time of the transaction you testified to?

A. Yes, sir.
Q. Is your wife Janet Moran?
A. That is correct.
Q. And she is a sister of David Lubben?
A. Yes, sir.
Q. How long have you been married?
A. Thirteen years.
Q. Now, Mr. Ed Urban that you testified about, what is his business?
A. He is in the candy manufacturing business.
Q. Was he with the Close Candy Company?
A. Yes, sir.
Q. Were you ever with that company?
A. No, sir.
Q. By whom were you employed at the time of 1946, in the summer and fall of 1946?
A. The Haberkorn Candy Company.
Q. And what did they do?
A. Manufactured candy.
Q. Mr. Urban also had an interest in that company, did he not?
A. Yes, sir.
1622 Q. And your wife had some interest in it?
A. Yes, sir.
Q. And in what capacity were you employed in it?
A. As general production manager.
Q. Now can you fix the date of your first transaction at the bank?
A. The exact date, no, sir, I can't.
Q. As I understood your testimony, there were four checks involved, is that correct?
A. That is correct, sir.
By Mr. McConnell: Have we those checks?
By Mr. Lockley: Yes, sir.
By Mr. McConnell:
Q. Did anybody go to the bank with you?
A. No, sir.
Q. You went alone?
A. Yes, sir.
1623 Q. Well, how did you fix the time?
A. Well, I recall the fact that I didn't have a coat on because I recall cashing this money and being in the neighborhood of Halsted and Madison Street. I carried the money from the bank to my car. I slipped the package inside my shirt.

Q. That is the only way you can fix the time?
A. Yes, sir.
Q. It was a hot day, was it?
A. Yes, sir.
Q. And you had $20,000.00 in all?
A. Yes, sir.
Q. In what denominations?
A. 20's, 50's and a few hundreds.
Q. Did you have anybody identify you at the bank at that time?
A. No, sir.
Q. What was the name of the bank again?
A. Mid-City Bank.
Q. Where is that located?
A. At Halsted and Madison Street.
Q. Who did you deal with there at the bank at that time?
A. I don't recall the man's name. I was told who
1624 to see by Mr. Edward Urban.
Q. Well, was he an officer of the bank?
A. No, sir. I don't believe so.
Q. A teller?
A. A teller.
Q. You can't remember his name?
A. No, sir.
Q. Is he still there?
A. That I don't know.
Q. Do you still do business with that bank?
A. No, sir.
By Mr. McConnell: Now, on the second check—I think we do have that here, do we not?
1625 By Mr. Krane: It is on the table there. It is a December 4 check.
By Mr. Calihan: It is 94.
By Mr. Lockley: 94, is it?
(Document handed to counsel.)
By Mr. McConnell:
Q. On the check under date of December 4, 1946, did anybody go to the bank with you at that time?
A. No, sir.
Q. You went alone?
A. Yes, sir.

Q. Did I understand you to say on your direct examination that you saw this check drawn?

A. Yes, sir.

Q. Where was it drawn?

A. I believe it was the Haberkorn Candy Company.

Q. Mr. Lubben was there at the Haberkorn Candy Company when he drew it?

A. Yes, sir.

Q. And he made this out in your presence?

A. Yes, sir.

Q. On December 4th?

A. Yes, sir.

Q. And endorsed it?

1626 A. Yes, sir.

Q. And turned it over to you I take it?

A. After he had Mr. Urban endorse it.

Q. Then did he go away somewhere?

A. Yes, sir.

Q. Back to New York?

A. I believe so, sir.

Q. Now, who did you deal with at the bank when this check was cashed?

A. That particular check, I had a little difficulty cashing it.

Q. I didn't ask you that. I asked you who you dealt with.

A. The first time I went to the bank, it was one of the officers. Mr. Urban had told me to see the same man, and I went to his window, and evidently the man had been out to lunch, so one of the officers was filling in. And he gave me a little hard time about cashing it. He wanted to know why we needed that much cash.

Q. You don't know who this man was?

A. I don't recall; no, sir. Not by name, no.

Q. I show you a notation on the check, Close & Co. on the back of the check. Who put that on there?

1627 A. The man at the window.

Q. What did Close and Company have to do with this transaction?

A. Well, they were evidently guaranteeing the check, to my knowledge.

Q. Close and Company pleaded guilty to income tax evasion because of receiving black market over ceiling prices, did they not, here in the District Court?

A. Yes, sir.
Q. Now, what were the denominations of those bills?
A. Speaking about this check, sir?
Q. Yes.
A. The same denominations, twenties, fifties, and a few hundreds.
Q. And what date was it?
A. That we cashed it?
Q. Yes.
A. It was on or about the 20th.
Q. Of December?
A. Of December, yes.
1628 Q. How do you fix that date?
A. Well, it was getting close to Christmas time, and I do recall that.
Q. Is that the only way you fix it, is getting close to Christmas?
A. Yes, sir; it was close to Christmas week.
Q. And what did you do with that money, did you put it in a wallet, or in your trousers, or where did you put it?
A. No, sir; it was put in an envelope.
Q. Now, on the first transaction I understood you to say that you went home to lunch with the money.
A. Not the first one, sir. This one.
Q. Oh, this one. So you must have been in there in the morning to get the money at the bank?
A. Yes, sir.
Q. And you went home with the money in an envelope, is that it?
A. Yes, sir.
Q. And you showed it to your wife?
A. That's correct.
Q. Now, that wasn't the first time your wife had seen cash moneys from Mr. Lubben, was it?
1629 A. In that large amount; yes, sir.
Q. Yes.
A. The first time.
Q. Isn't it a fact, Mr. Moran, that Mr. Lubben was sending your wife cash moneys—
By Mr. Lockley: I object.
By Mr. McConnell:
Q. —on numerous occasions?
By Mr. Lockley: I object.
By the Court: Sustain the objection.

By Mr. McConnell: I am laying the basis of impeachment. It is material to the case.

By the Court: I will sustain the objection.

By Mr. McConnell:

Q. Do you know of any transactions, of your knowledge between Ronald Stone and your wife involving cash moneys?

By Mr. Lockley: I object, your Honor. It is beyond the scope of the direct examination.

By the Court: The same ruling.

By Mr. McConnell:

Q. When you were out at the Haberkorn Candy Company did you keep a cash box—

1630 By Mr. Lockley: Well, I object.

By Mr. McConnell:

Q. Or ins and outs of cash receipts?

By the Court: Yes, I will sustain the objection.

By Mr. McConnell:

Q. Do you recall a time when the Shotwell Company purchased the Haberkorn Candy Company?

By Mr. Lockley: I object, your Honor. It is beyond the scope of the direct examination.

By the Court: Yes, I will sustain the objection.

By Mr. McConnell: I want to show that the witness is prejudiced by something that occurred after he became—

I want to make an offer of proof on that.

By the Court: Make your offer of proof.

By Mr. McConnell: Shall I make it right now?

By the Court: Yes, you can make it out of the hearing of the jury.

By Mr. McConnell: Out of the hearing of the witness, too.

1631 (Whereupon the following proceedings were had beyond the hearing of the jury and the witness:)

By Mr. McConnell: I want to prove that this man, when he came to the Haberkorn Candy Company, after Shotwell purchased it, was discharged by Mr. Huebner.

By the Court: He was discharged by whom?

By Mr. McConnell: By Mr. Huebner.

By the Court: All right, go ahead and prove it, if that is what you have in mind.

(Whereupon the following proceedings were had in the hearing and presence of the jury:)

By Mr. McConnell:

Q. You were working for Haberkorn Candy Company at the time Shotwell took it over, were you not?

A. No, sir.

Q. You were not?

A. No, sir.

Q. When did you leave the Haberkorn Candy Company?

A. In March—I believe it was '48.

Q. March of 1948?

A. I believe that's correct.

1632 Q. Isn't it a fact that you were working there and that Mr. Huebner discharged you as an employee?

By Mr. Lockley: I object. He has already answered.

By the Court: He may answer.

By the Witness: I may answer?

By the Court: Yes.

By the Witness:

A. As far as Shotwell taking over Haberkorn Candy Company, I knew they were in there, they were coming in. Whether this transaction had been completed, I did not know.

By Mr. McConnell:

Q. But Mr. Huebner discharged you as an employee of the company?

A. Yes, sir.

Q. Did you know that Mr. Lubben, your wife's brother, bought that company back and then gave you a job back there again?

By Mr. Lockley: I object, your Honor. That is not in evidence.

By the Court: Well, he may answer.

By Mr. Lockley: It is beyond the scope.

By the Witness: I don't know what you mean by 1633 buying it back.

By Mr. McConnell:

Q. Well, did he get it back, the company, from Shotwell?

A. No, sir; not that I know of.

Q. Did you go back to work for it at any time?

A. No, sir.

Q. You never did?
A. Not after I left it, no.
Q. What are you doing now?
A. I am a sales supervisor for the Coca Cola Bottling Company.
Q. Now, I think you said you made the package up of the $20,000 in newspapers. Where did you do that?
A. The teller at the bank wrapped it for me.
Q. Wrapped it in a newspaper?
A. Yes, sir.
Q. And you put the newspaper package inside your shirt?
A. Yes, sir.
Q. How big a package was it?
A. Oh, it might have been a package about—(indicating)—maybe two inches by (indicating). So gross.
1634 Q. Just two inches?
A. Approximately.
Q. You don't know whether that man is still there?
A. No, sir.
Q. At the bank. Have you ever seen him since; when is the last time you ever saw him?
A. The last time was in cashing that particular check that you have in evidence there.
Q. Did you have to sign any receipt of any kind down at the bank when you got this money?
A. No, sir.
Q. They let you come in and cash the check without endorsing it?
A. Yes, sir.
Q. That is true of the other checks; you didn't have to endorse them to get the money?
A. No, sir.
Q. And yet they questioned the amount of the money, didn't they?
A. The officer.
Q. At the amount, and refused to cash that particular check.

Did you give a statement to the Government on this
1635 transaction?
A. Yes, sir.
Q. When?
A. I gave it to Mr. Krane at my home.
Q. Well, when?

A. When? It was several months ago.

1636 Q. Did you give that statement about the time of the Close prosecution, Close & Company?

By Mr. Lockley: I object, your Honor. I fail to see what relevancy there is to that.

By the Court: Well, fix the time.

By the Witness:

A. I was not involved in the Close & Company prosecution.

By Mr. McConnell:

Q. I didn't ask you that. I asked you about the time of the Close & Company prosecution. You know when that was, don't you?

A. Not too—not offhand, no, sir. Just from reading in the newspapers.

Q. Well, Mr. Urban also pleaded guilty to that indictment, did he not?

A. So I read.

Q. Did you make a signed statement of this transaction to the Government?

A. For this particular case?

Q. Yes, sir.

A. Yes, sir.

Q. Now did Mr. Lubben come to Chicago from time

1637 to time to visit your wife, his sister?

A. Yes, sir.

Q. He did that pretty often, didn't he?

A. You might say frequently.

Q. Would he come to your home at that time?

A. Yes, sir.

Q. And you would visit with him when he made these trips?

A. Yes, sir.

Q. Have you talked to Mr. Lubben about this transaction?

A. Yes, sir.

Q. When is the last time you talked to him about it?

A. Now, I don't understand whether you mean at the time of making it out—

Q. No. I mean since the transaction happened. Did you refresh your recollection as to your testimony in this case?

A. Oh, in the past week.

By Mr. McConnell: That is all I have.

Cross Examination by Mr. O'Brien.

Q. Where are the four $5,000.00 checks?

1638 A. I don't know, sir.

By Mr. O'Brien: Do you have them, Mr. Lockley?

By Mr. Lockley: No, we do not have them, Mr. O'Brien, or I would certainly have them here.

By Mr. O'Brien: Well, in the absence of a foundation for the—in the absence of those checks, your Honor, I move to strike out the witness's testimony concerning the four checks.

By the Court: I will deny the motion.

By Mr. O'Brien:

Q. Mr. Moran, isn't it a fact that you were in to see Mr. Huebner at the Shotwell plant only once?

A. No, sir.

Q. Did you have occasion to visit at the plant for any purpose other than the two times which you mentioned yesterday?

A. I believe I had been there once or twice before, sir.

Q. For what purpose?

A. Well, at one time, Haberkorn Candy was completing purchase of a piece of machinery that they had.

1639 Q. And at that time did you go through the plant?

A. Yes, sir.

Q. Did you see the laboratory?

A. I don't recall. I don't believe so, sir.

Q. Do you remember where the laboratory was?

By the Court: Keep your voice up, Mr. Moran.

By Mr. O'Brien:

Q. Do you remember where the laboratory is?

A. All I can remember is that it was upstairs.

Q. Do you know where upstairs?

A. No, sir. I couldn't describe it, the location.

Q. Well, now, think a minute. Weren't you out there to see Mr. Huebner in the month of June of 1946?

A. It might have been, sir.

Q. And do you remember that on that occasion as you were leaving, you turned to the phone operator and told her to give you these marshmallows which you talked about?

A. No, sir, I don't recall that because I never got any—I never accepted any.

By Mr. O'Brien: May I have the check.

1640 By Mr. O'Brien:

Q. Referring to the check, Exhibit 133, do you recall whether one of the officers approved the check or okayed it?

A. Of the bank?

Q. Yes.

A. The man at the window okayed it.

Q. The teller?

A. Or he made the notation.

Q. The teller himself?

A. Yes, sir.

Q. And did he not send you to one of the officers?

A. No, sir.

Q. And if there is any aproval on this check, it is your recollection that that was put on by the teller?

A. That is my recollection, sir.

Q. That is the man at the window?

A. At the window.

Q. The same window at which you got the money?

A. Yes, sir.

Q. You had no familiarity with the state of the account of General Confections, Inc.—I withdraw that.

1641 Do you know whether General Confections, Inc., had an account at the bank?

A. At Mid-City?

Q. Yes.

A. I doubt that very much, sir.

Q. Did Haberkorn?

A. Yes, sir.

Q. Is there any officer at that bank with whom you had customarily had dealings for Haberkorn?

A. No, sir. I visited the bank very, very seldom.

Q. Was it Mr. Urban's job to visit the bank in connection with such dealings for Haberkorn?

A. In connection with Haberkorn?

Q. Yes.

A. Most of our banking was done by mail, sir.

By Mr. O'Brien: That's all.

1642 *Cross Examination by Mr. Kirby.*

Q. Mr. Moran, on the back of the check the name of Urban appears, isn't that true?

A. Yes, sir.

Q. Did the name of Urban also appear on the back of the four checks which we don't have, but which you say you cashed?

A. Yes, sir.

Q. Was Urban in the bank when you got the money?

A. No, sir.

Q. Now, the check we have was dated December 4th, isn't that right?

A. Yes, sir.

Q. And you didn't cash it for a couple of weeks, is that right?

A. That is correct.

Q. So it was two weeks late at the time you cashed it, is that right?

A. Correct.

Q. And Urban wasn't there?

A. No, sir.

Q. And you didn't know the people at the bank?

A. No, sir.

1643 Q. And they didn't know you?

A. No, sir.

Q. They didn't deposit it and hold it for collection, did they?

A. I don't understand that, sir.

Q. Well, they just up and gave you seventeen thousand dollars in cash, right bang at the noon hour, is that what you said?

A. Well, the officers—at first—

Q. Wait a minute. Is that when you got the money, when you went in there at the noon hour?

A. Yes.

Q. And the check was already two weeks late?

A. Yes, sir.

Q. And you didn't endorse it?

A. No, sir.

Q. So now you are telling us that Urban didn't get the money, but you got it just like that, one noon hour, with no identification, two weeks late, and you walked out and gave it to Huebner, is that correct?

A. That is correct.

Q. Wait a minute. And was it about like that with the four checks of five thousand dollars each?

1644 A. I had no trouble with those at all.

Q. Well, from my experience, you had an un-

believable small amount of trouble on this check for $17,000.

By Mr. Lockley: I object, your Honor.

By the Court: It isn't for you to make that kind of a comment, counsel. You are not testifying.

By Mr. Kirby: I have a bank account.

By the Court: That doesn't make any difference. If you are going to testify, you will have to take the witness stand.

By Mr. Kirby: Let me inquire—I apologize to the Court, but let me inquire about those four checks for $5,000.

By Mr. Kirby:

Q. Did you sign those?

A. No, sir.

Q. Urban had?

A. Yes, sir.

Q. And Mr. Lubben testified here that he had to leave those in town because his account was kind of low. Did you hold those too for a while before you presented them?

1645 A. For a short while, yes, sir.

Q. And they were late, or stale checks, when you went to the bank? Is that right?

A. If you call a week or two, stale, yes, sir.

Q. And Urban wasn't there now?

A. At the bank?

Q. Yes.

A. No, sir.

Q. Urban didn't get the money?

A. No, sir.

Q. He just gave it to you but didn't ask you to sign it, the check?

A. That is correct, sir.

1646 Q. Did they ask you to sign anything else that would indicate that you are the one that got the money?

A. No, sir.

Q. And they never saw you before?

A. We offered to have him call Mr. Urban, to have him verify it.

Q. They didn't want to bother with that?

A. Well, whether they did, I don't know.

By Mr. Kirby: Thank you.

Redirect Examination by Mr. Lockley.

Q. Mr. Moran, maybe you can help clear up how you were able to cash $20,000.00 in checks in a bank where you weren't known.

By Mr. Kirby: Excuse me. He cashed $37,195.25.

By Mr. Lockley: I am asking the witness about the first transaction, Mr. Kirby.

By Mr. Lockley:

Q. Will you tell me about the first transaction involving $20,000.00? Do you know of any arrangement that would have been made that would have eased
1647 your path?

By Mr. McConnell: I object to the arrangements that were made.

By the Court: You may answer.

By the Witness:

A. The four $5,000.00 checks cleared all right. That is the first time I had seen an endorsement of that nature.

By Mr. Lockley:

Q. What sort of an endorsement was it?

A. Mr. Lubben signed the check.

By Mr. McConnell: I object to the contents of these checks. The best evidence is the check itself.

By the Court: He may answer.

By Mr. Lockley:

Q. Do you have a recollection? Do you have an independent recollection of what that endorsement was?

A. Yes, sir. The endorsement was "These checks are cashed or endorsed as a courtesy only, not for payment to Mr. Urban." And Mr. Urban signed underneath that.

Q. When you went to the bank with these four
1648 $20,000.00 checks, did you know to whom to go?

A. Yes, sir.

Q. Had you been given a name?

A. Yes, sir.

Q. Or a number of a window or anything of that sort?

By Mr. O'Brien: I object to the leading questions. This is redirect examination.

By the Court: He may tell us if he was instructed to go to a certain person at the bank.

By the Witness:

A. Mr. Urban told me the man to see.

By Mr. Lockley:

Q. Do you remember his name?

A. No, I don't.

Q. Do you remember about where his window was located?

A. The bank, as I recall, is laid out on Halsted Street running north and south. It would be north and south. As I recall, it was at the south end of the bank. The teller's cage would be about the east window.

Q. Now, when you got there did you introduce
1649 yourself or did you have any letter of introduction?

A. I had.

By Mr. O'Brien: I object to the leading questions. I submit that counsel should merely ask him what he did.

By Mr. Lockley:

Q. Well, what did you do when you got there?

By the Court: He may state what he did, if anything, when he got there.

1650 By the Witness:

A. I went to the window and I told the man I was from Close & Company, and I wanted the cash for these checks. I told him the denomination of bills I wanted.

By Mr. Lockley:

Q. And he just handed you the money?

A. Yes, sir.

Q. Now you said in December when you cashed this $17,000.00 check that when you first went to the window an officer of the bank was there. Do you know who that was?

A. No, sir.

Q. Do you know what position he had in the bank?

A. I believe he was a vice president. I am not sure.

Q. Well, did you cash the check at that time?

A. At that moment, no, sir.

Q. Well, what did you do?

A. Well, the officer, I started to say, questioned the amount of money, why we needed so much cash. He didn't like the account of General Confections. He looked it up in Dun & Bradstreet. As I recall his conversation he just said he couldn't give me that kind of cash.

1651 Q. Then where was the check this time?

A. Well, I retained the check.

Q. He gave it back to you, is that it?

A. He gave it back to me, yes, sir.

Q. Then what did you do after that, after he refused to cash it?

A. I went back to Haberkorn Candy and I had a five-pound box of candy made up and I went back to the bank and waited for the other teller, the man I was supposed to have seen. He happened to be still out at lunch.

I can recall waiting behind the post for this other man to leave his duty or his cage and the one I was supposed to see, have him come back on duty.

Q. You waited inside the bank?

A. Yes, sir.

Q. Until the teller came back from lunch?

A. That is right, sir.

Q. Do you know who the teller was; were you able to recognize him by sight?

A. At that time, yes, sir.

Q. Well, what did you do when he came back?

A. When he came back, I gave him the box of
1652 candy and told him Mr. Urban okayed a check for me to cash and handed it to him and he cashed it.

By Mr. Lockley: That's all.

By Mr. McConnell: I want to ask him one question.

Recross Examination by Mr. McConnell.

What is our next number, do you know?

Will you please mark this Defendants' Exhibit 26 for identification.

(Said document was marked Defendants' Exhibit 26 for identification.)

By Mr. McConnell:

Q. Mr. Moran, I show you a document which is marked for identification Defendants' Exhibit 26, and ask you to examine that and state whether or not that is your signature.

A. Yes, sir, that is my signature.

Q. Now will you look at those minutes.

I asked you on cross examination what your employment was with the Haberkorn Candy Company. You told us you were a plant manager.

A. Yes, sir.

Q. You were actually president of the company, 1653 were you not?

By Mr. Lockley: I object, your Honor. It is not within the direct.

By Mr. McConnell:

Q. You were president of the company, were you not, at that time?

By Mr. Lockley: It is beyond the scope of the redirect examination.

By the Court: He may answer.

By the Witness: May I answer?

By the Court: Yes.

By the Witness:

A. Yes, sir. I carried the title of president.

By Mr. McConnell: That's all.

Recross Examination by Mr. Kirby.

Q. Mr. Moran, what brand was that five pound box of candy?

A. It was without name, sir.

Q. Is it something that I could buy on the market now?

A. No, sir, at no time. It was a sample box, sir.

Q. Was it something to do with financial transac- 1654 tions?

By Mr. Lockley: I object, your Honor.

By the Court: I didn't hear the question.

By Mr. Kirby: I will withdraw it. He said it is off the market.

By the Court: Is that all?

By Mr. Kirby: Oh, I would like to ask him another question.

By Mr. Kirby:

Q. You say you showed this money to your wife because she had never seen that much money?

A. That is correct.

Q. That is Janet Moran?

A. That is right, sir.

Q. Did she have a bank account?

A. She has a joint one with myself.

Q. And didn't she ever have as much as $17,000.00 in that bank account?

By Mr. Lockley: I object, your Honor. What she had in a bank account, and what she saw in cash are two different things. It is beyond the scope of the direct examination.

1655 By the Court: The question is whether she had seen actual currency in that amount and not whether she had a bank account or not.

By Mr. Kirby: The question is material if I can be indulged in it.

By the Court: Well, he may answer.

By the Witness:

A. Was her bank account ever greater than $17,000.00?

By Mr. Kirby:

Q. Yes.

A. I think it might have been, sir, for a few months.

Q. When?

A. Probably about, oh, it might have been back about in 1944 or 1945.

Q. But not around 1948?

A. Oh, no, sir. I wish it were.

Q. Mr. Lubben testified about your sister buying a $67,500.00 mortgage.

By Mr. Lockley: I object.

By Mr. Kirby:

Q. Now, do you know anything about that?

By Mr. Lockley: I object, your Honor.

By the Court: Yes. I will sustain the objection.

1656 By Mr. Kirby: That's all.

By Mr. Lockley: Thank you, Mr. Moran.

(Witness excused.)

SAMUEL J. DAVIDSON, a witness called on behalf of the Government having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Now, Mr. Davidson, what is your full name?

A. Samuel J. Davidson.

Q. What is your occupation?

A. I am an attorney.

Q. An attorney. Where do you practice?

A. The state of New Jersey.

Q. Where do you live?
A. Hillsdale, New Jersey.
Q. During the year 1948, did you know a Mr. David Lubben?
A. I did.
Q. And in what connection?
A. I represented him as an attorney.
1657 Q. He is a client of yours?
A. He is a client of mine.
Q. Did you also know him in any other capacity besides professionally?
A. Well, with the passing of time, we became good—
By the Court: Speak up, Mr. Davidson.
By the Witness:
A. I say, with the passing of time, we became friends and I visited with him socially.
By Mr. Lockley:
Q. Now, during the month of February, 1948, do you have any recollection of any visit at Mr. Lubben's home?
A. Well, I visited him quite often and I am sure that I visited with him during the month of February, 1948.
Q. And have you ever met any of the defendants in the case on trial, Mr. Frank Huebner, Mr. Harold Sullivan, or Mr. Byron Cain?
A. I have met them all.
Q. Will you point them out?
A. Mr. Frank Huebner is the gentleman with the gray suit sitting with his arms folded at the counsel table next to Mr. Byron Cain who is sitting there with the
1658 gray suit—or a blue suit, rather. Mr. Harold Sullivan is the gentleman with the gray hair and gray suit—with the tan suit.
By Mr. Lockley: May the record show that the defendants were identified.
By Mr. Lockley:
Q. Now, were you ever present during the month of February, 1948, or about that time in Mr. Lubben's home when any one of the defendants was present?
A. Yes, I was there when Mr. Frank Huebner was there.
Q. About when was that?
A. It was the early part of February.
Q. Did you see certain records at that time?

A. Well, I overheard that Mr. Lubben was to give some records or was about to give some records to Mr. Huebner, so I called Mr. Lubben out.

Q. Well, now, wait a minute. You overheard—was this in the presence of Mr. Huebner?

A. Well, Mr. Huebner and Mr. Lubben were on the—were in the sun parlor, sun porch, and I was in the living room. I wasn't particularly concerned with what was happening there, but the conversation became a little loud so I couldn't help overhear it.

1659 Q. Well, proceed. What was the conversation?

A. Mr. Huebner wanted to borrow some of Mr. Lubben's records so that he could take them back to Chicago with him to compare them with the Shotwell books.

And it was then that I got a hold of Mr. Lubben. I don't know whether I walked in the back and called him out or whether I sent the maid in to get him out.

1660 Q. Now, as a result of that, was Mr. Huebner given the records?

A. No, sir, he was not.

Q. What was done with them?

A. The records were put in a light manila envelope, and sealed, and Mr. Huebner put some penciled notations on the flap of the envelope where it was sealed.

Q. Do you know what happened to that envelope subsequently?

A. Well, I know that the envelope subsequently was delivered to Mr. Huebner.

Q. And before that time?

A. Before that time, Mr. Huebner opened the envelope in my presence, and he gave me the records and I had them photostated.

1661 Q. Well, now, I show you Government's Exhibits for Identification Numbers 13, 73-A, 94, 95, 96, 97, 98, 100, 112, 120, 122-A, 122-C, 126-A, 126-B, and 153-A, and I ask you if you have seen these photostats before?

A. Yes, sir; I have.

Q. And in what connection did you see them?

A. When I delivered them to Mr. Lubben.

Q. Have you seen the originals of those photostats before?

A. Yes, sir; I have.

Q. And where?

A. When I delivered them to Mr. Lubben prior to his inserting them back into this envelope that I have mentioned previously.

Q. Well, when did you first see the originals of those documents?

A. The first time I saw the originals of those documents was in the evening that this—or the afternoon that this conversation took place at Mr. Lubben's home with Mr. Huebner.

Q. And were those the documents that were placed in the envelope?

A. They appear to be, sir.

1662 Q. And are those the documents which you subsequently had photostated?

By Mr. Kirby: I ask that be stricken, the response that they appear to be, as too indefinite to be of weight, as evidence.

By the Court: Overruled. The answer may stand.

1663 By the Witness: Is there a question pending?

By Mr. Lockley:

Q. You had those originals photostated, I understood?

A. Yes, sir; I did.

Q. Then what did you do with the photostats?

A. I delivered them to Mr. Lubben.

Q. Are those the photostats?

A. Yes, sir; they are. I recognize Mr. Lubben's handwriting on them, and I recognize that this writing was on the originals when I gave them out to be photostated.

Q. And what did you do with the originals?

A. I returned them to Mr. Lubben.

Q. And do you know what he did with them?

A. Yes, sir.

By Mr. McConnell: Unless he was there, present, I object to what Lubben did with them.

By Mr. Lockley: That is what we are trying to develop.

By Mr. Lockley:

Q. Do you know what he did with them?

A. Yes, sir.

1664 Q. Were you present at the time?

A. Yes, I was.

Q. What did he do?

A. Mr. Lubben gave the envelope to Mr. Frank Huebner, when we visited here in Chicago at the Shotwell plant.

Q. And when was that?

A. It was in the early part of February. I am trying to place a time—I was in Palm Springs, California, on February 11.

Now, this was either a day or two before that.

Q. And in what year?

A. 1948.

Q. Were you able to identify the envelope in question by any particular—

A. Yes, sir; the envelope had the same pencil marks on it, and Mr. Huebner opened it in our presence, and he pulled the papers out and looked at them. And there was no objection from him, so he must have recognized them.

By Mr. Lockley: Your Honor, at this time I wish to offer the photostatic copies of those exhibits into evidence.

1665 They have previously been identified by Mr. Lubben, and I believe we have now laid a foundation for the absence of the originals, since they are unavailable and in the hands of the defendants.

By Mr. McConnell: I object.

By Mr. O'Brien: Do you have the exhibits at hand?

By Mr. Lockley: Yes, sir.

By Mr. McConnell: I object to them as no proper foundation having been laid to bind the corporation in that transaction.

By Mr. Kirby: On behalf of the defendant, Harold Sullivan, I make the objection that they are not shown to have been connected with him, and that the jury should be instructed that in no event should they be considered with respect to him.

By the Court: Well, of course, insofar as these exhibits are concerned, the Court will have to determine their competency as to the respective defendants, or the jury will have to, in light of all the evidence.

1666 If the originals were given to Mr. Huebner, as the witness states,—of course, he was an officer of The Shotwell Manufacturing Company.

Whether or not they are competent as to the other defendant will, I suppose, depend upon the testimony that connects up the other defendants with the offense set forth in the indictment.

And I will receive the exhibits in evidence, and we will have to determine later on, in light of the entire record—or the jury will—as to their competency with respect to the various defendants.

1667 By Mr. Kirby: Well, if the Court please, Mr. Sullivan is a defendant, of course, as we know, as an individual.

By the Court: That's right.

By Mr. Kirby: And I am sure that it would be proper—

By the Court: Supposing we have this understanding—I realize the difficulty that counsel has in protecting the record—if they are not connected up as to the defendant Sullivan, or any of the defendants, of course, I will entertain a motion to strike.

By Mr. Kirby: All right. I don't mean to prolong the discussion, except that while these things are so readily apparent to you, and, to a degree, fully apparent to me, I was wondering if it was completely plain to the jury, who haven't had the burden of the law that we have had over the years.

We can take that up by a motion to strike later on.

By the Court: Yes, I will entertain your motion
1668 to strike, if they are not connected up with the defendant, Sullivan.

By Mr. Kirby: Thank you, Judge.

By the Court: And, of course, that same ruling will be for the benefit of any other defendant who desires to make a motion to strike any and all of these exhibits, if the defendant takes the position that they are not competent evidence as to such defendant.

At this time it is difficult for the Court to make a definitive ruling, or final ruling as to whom these exhibits will be competent. That will depend, I take it, on the entire record that is before the Court at the close of the case. And I will entertain, of course, motions to strike on behalf of every defendant who feels that any exhibits are not competent evidence as to him or as to it.

By Mr. McConnell: That protects the record all right, except I want to add—it was implicit in my previous objection, but to make it specific—while Mr. Huebner
1669 was an officer of the corporation, if it should appear from the evidence that his interest was adverse to that of the corporation, as a matter of law the corporation

would not be bound, and I would want to raise that point.

1670 By the Court: Yes, if Mr. Huebner was acting solely in his individual capacity, and if these events—if they are sustained—indicate that he was not acting in the course of his employment, or in pursuance of his employment as vice president of the company, of course, they are competent only as to Huebner. I think we can clarify that after we have the entire picture, which as yet, I take it, the Court does not have.

(Said documents were received in evidence by the Court and marked Government's Exhibits 13, 73-A, 94, 95, 96, 97, 98, 100, 112, 120, 122-A, 122-C, 126-A, 126-B and 153-A.)

By Mr. Lockley:

Q. Mr. Davidson do you have any knowledge, from your conversation in the sun porch, as to the purpose Mr. Huebner had for these records?

By the Court: Well, now, are you calling for conversation?

By Mr. McConnell: I object to that.

1671 By Mr. Lockley: Yes.

By the Court: If you are, then you direct your question to conversation rather than asking for a conclusion.

By Mr. Lockley:

Q. What did Mr. Huebner say at that time?

A. I don't have any recollection of the conversation other than what I have given you.

Q. What is your best recollection?

A. My recollection is that Mr. Lubben was about to give these records to Mr. Huebner—

By the Court: He was what?

By the Witness:

A. Was about to give these records to Mr. Huebner, and I, as an attorney, felt that once those records were out of Mr. Lubben's hands, he would have no way—

By Mr. Kirby: If the Court please, the feelings of Mr. Davidson, as an attorney on behalf—

By the Court: Yes.

By Mr. Kirby: —on behalf of Mr. Lubben are completely immaterial.

1672 By the Court: Yes. Not what you felt, Mr. Davidson. Just tell what the conversation was in the pres-

ence of Mr. Huebner.

By Mr. O'Brien: I think he has been over that.

By the Court: Sorry.

By Mr. O'Brien: He has been over that.

By Mr. McConnell: He said he couldn't give any more.

By the Court: If he has been over it, if there isn't anything in addition, then you have completed it.

By Mr. Lockley: I am not sure I have asked him this question, your Honor.

By the Court: All right.

By Mr. Lockley:

Q. Did you hear Mr. Huebner state for what purpose he wanted these records?

By Mr. Kirby: I object to that as leading.

By the Court: He may state any conversation, or any statement made by Mr. Huebner in this regard.

By the Witness: Yes. Mr. Huebner wanted the
1673 record so that he could conform or correct the books of The Shotwell Manufacturing Company.

By Mr. Lockley:

Q. All right. Now, directing your attention—

By Mr. O'Brien: I object to that.

By Mr. McConnell: I move to strike it out as not conversation.

By Mr. O'Brien: I object. It stated a conclusion and doesn't purport to be a part of a conversation. He is just stating why. If you will read the answer to the last question—

By the Court: Can't you tell us what Mr. Huebner said, as close as you can, in that regard?

By the Witness: Well, Mr. Huebner asked Mr. Lubben for the—

By the Court: Keep your voice up.

By the Witness:

A. Mr. Huebner asked Mr. Lubben for these records. He wanted the supporting records—I think he called them. Mr. Lubben, after he had talked with me, did not give him those records, because he told Mr. Huebner that
1674 he had received promises in the past—

By Mr. McConnell: This isn't conversation.

By the Court: Go ahead. He is answering, I think.

By the Witness:

A. He told Mr. Huebner that he had received promises in the past and that they were not lived up to. And there-

fore, he didn't feel that he wanted to give him the records at that time.

My recollection is that there was some sort of a transaction pending at that time in connection with the sale, or purchase of some stock in the Haberkorn—

By Mr. Lockley: You are still not responsive.

By the Court: Tell us what Huebner said. That is what we are after.

By the Witness:

A. I am afraid that I can't repeat the conversation at this late date.

By Mr. Lockley:

Q. Repeat it as best you can.

By Mr. O'Brien: I submit that it—

1675 By Mr. Lockley: Nobody expects him to repeat it word for word.

By Mr. O'Brien: Your Honor, Mr. Davidson is a lawyer.

By the Court: If he can't remember the exact conversation he can state the substance of it.

By the Witness:

A. The substance of the conversation was that Mr. Huebner wanted these records so he could take them back to Chicago with him to correct or conform the Shotwell books, because they had no—there were some entries missing on their books. And Mr. Lubben had told him—or told Mr. Huebner, in my presence, that all of these transactions appearing on these supporting documents, appeared in his—that is, Mr. Lubben's corporation's books.

And I guess that's about all there was to it.

By Mr. Lockley:

Q. All right, sir. Now, directing your attention to a later time in 1948, did you have any further conversation with any one of the defendants?

A. Yes, some time in August.

1676 Q. Which defendant?

A. 1948. With Mr. Byron Cain.

1677 Q. And who was present at that time?

A. Mr. Lubben, myself, Mr. Byron Cain—

Q. And where?

A. —and a man by the name of—

Q. Go ahead.

A. Patrick Grace.

Q. Where was this conversation?

A. At Fort Lee, New Jersey, at a night club.

Q. What was the night club?

A. Known as the Club Riviera, or Riviera.

Q. The Club Riviera. All right. Now, will you please tell us what was said during the course of that conversation?

A. Well, Mr. Cain opened the conversation, and he addressed his language to Mr. Lubben, and he says, "You know the Internal Revenue—or someone from the Internal Revenue Department has walked into our office in Chicago. They talked with Stanley Graflund and Stanley Graflund gave them books and records. It looks like hell is going to break loose soon.

"Now, Mr. Grace, the gentleman who is here with me, is a friend of Bob Hannegan's, and he does his contact work for him here in the East, and Mr. Grace had been
to the Internal Revenue office in New York, and as
1678 a result of what he found there I can tell you that
hell will break loose.

"Dave, you don't want to be in a position where you are going to have to put your finger on people that you have been very friendly with, that you have done business with. It is going to be very embarrassing to you and I am sure that you don't want to do that."

Then they talked about Mr. Lubben going off somewhere to South America, so he would not be available when the case came on for trial, if there should be indictments.

They also talked about Lubben getting the Shotwell account. I think it was a syndicate store account that was mentioned at that time. And I remember quite distinctly Mr. Lubben telling Mr. Cain that, "I have had the Shotwell account once before, and when I needed it you took it away from me. I am not interested in that."

Then the conversation simmered down, or came down to Lubben's zoning problem that he had out in Hillsdale in connection with a factory that he had at Hillsdale,
New Jersey. And there was talk about a syndicate
1679 being formed between Mr. Kramer, and Mr. Cain,
to purchase this factory and land at Hillsdale for something like $75,000.00.

And then it came back to the fact that if Lubben were not around, if he were in a country in South America, why—and his taxes were paid—there would be no way of his coming back here, or being compelled to come back to the country to testify.

It was at that point that I injected myself into the picture. And I told these gentlemen, "I can't see any reason why Mr. Lubben should go to South America, or any place else, because from what I know of his affairs he hasn't committed any crime, and there is no reason for him to run away. He may owe some money to the government. Whether it is ten thousand, or a hundred thousand, or even a million, is nothing—is no reason for a man to pick up and run. And if he did do that, the onus of this entire tax situation would be thrown on him. And it is quite possible that he never would be able to come back," because I felt that there might be a conspiracy angle to the thing, and the statute of limitations would not run.

1680 And I suggested that we leave. It was then that Mr. Grace injected himself into the picture, and he said, "Well, I don't know what you have to concern yourself about. If Lubben's taxes are paid there will be no—the government won't be looking for him. He will only be a witness. And, on top of that, you know Giglio—" who is a former partner of Mr. Lubben—"Giglio is involved in this matter. He has a lot of powerful friends, and Lubben is going to wind up in a lot of trouble."

1681 It was at that point that I said, "Well, if this is a threat, I think we better go now."

Then Mr. Grace handed us a card and he—from that card I saw he was an attorney, was a member of a law firm in Brooklyn. I think the firm was Grace and Grace, and he left word, or he stated to us—"When you want to make an appointment, call me. He said, "Call me in a few days. Come in and let's talk about this some more."

I did go to Mr. Grace's office with Mr. Lubben.

Q. Before that, do you have any recollection as to who opened the conversation with respect to the formation of the syndicate?

A. It was Byron Cain.

Q. Can you recall what he said?

A. Well, he said, "If you could get rid of your property you would have nothing to hold you here. If you could get rid of that factory, the acreage in Hillsdale, there would be nothing to hold you here. And I am sure that Kramer and myself will pay you $75,000 for the property."

1682 And it was then that Grace said the taxes will be deducted from that, "and you won't have to pay—there

will be no problem as far as you are concerned, Lubben."

Q. Did Mr. Lubben state any satisfaction with the $75,000 figure?

A. Well, he just—he felt that the property was worth more than that, but there wasn't too much comment on his part.

Q. Now, you say you subsequently went to Pat Grace's office?

A. Yes.

Q. Did you have another meeting at a later time with any one of the defendants?

A. Yes.

Q. Which one?

A. Byron Cain.

Q. And where was that?

A. Oh, that was at LaGuardia Airport, New York. And also at the Gotham Hotel in New York City.

Q. And when?

A. It was in 1951.

Q. In 1951. Are you able to place it any more definitely?

1683 A. Well, either the latter part of July, or the early part of August, as best I can remember.

Q. Now, do you know how that meeting came to be arranged?

A. Well, I was at Mr. Lubben's home, visiting with him, and a telephone call came in, and Mr. Lubben told me that, "It's Byron Cain on the phone. Take the extension, Sam."

So I did take the extension. I went upstairs in his bedroom where he had another outlet on the phone. And I listened. And Mr. Cain asked Mr. Lubben when he is coming to Chicago. And Lubben told him he didn't have any money, and "What do you want to see me about? And I don't know when I will be out to Chicago."

Cain said, "All right. I will see you in about a week."

1684 Now, subsequently, I did go with Mr. Lubben to LaGuardia Airport.

Q. How long after the telephone call was that?

A. Oh, within a day or so. This was on a Saturday, Saturday morning. We met—Mr. Lubben and I drove—

By the Court: Hours or days, or minutes after this conversation, that you say you went to the airport?

By the Witness:

A. It was a matter of a couple days.

By the Court: A couple days?

By the Witness: A couple days. I will say two days, because I subsequently learned there was another call on Friday, the day before we went. But I wasn't at Lubben's home. I don't recall being there when the call was received.

By Mr. Lockley:

Q. And you went to LaGuardia Airport with Mr. Lubben, and what happened then?

A. That's right. We saw Mr. Cain come off the plane, and he recognized us, and Mr. Cain said to Mr. Lubben, "Dave, can we go somewhere to talk?"

1685 And Lubben said, "Well, Byron, we have had some meetings at the Gotham Hotel, New York. Why can't we go there today?"

So Mr. Cain said all right. "Let's go."

So we got into Lubben's car, and we drove to the Gotham Hotel. We got there about—a little after twelve, possibly half past twelve, and we got a table at the rear of the dining room, where we were taken care of.

Now, at that—strike that. Mr. Cain then asked Lubben how he was getting along with his zoning problem. Mr. Lubben told him he had the same trouble that he has always had, maybe a little more. And then he wanted to know why he can't dispose of the farm that he had, that is, the factory, and the acreage.

And Lubben told him, "Well, we just can't get any buyers. I would like to get out of there tomorrow, if I could."

And then Byron said, to Lubben, "Now, Dave, look! There is going to be—"

By the Court: Speak up.

By the Witness:

A. "There is going to be someone from the In-
1686 ternal Revenue Department getting in touch with you. It seems that Mr. Mammel from the Internal Revenue Department and a man by the name of Krane have been down to the Shotwell plant, and they have been raising a terrible commotion around the place. Everybody knows that we are under investigation right now, and it is rather embarrassing. It is embarrassing to me because of my connections that I have with various corporations."

He mentioned that he was a trustee of some University.

And, "Dave, on these figures, on these entries you have on your books, if they come to you, will you please tell them that they were exchanges of merchandise, that they are not cash payments?"

It was then that I got into the conversation. I said to Mr. Lubben, I said, "Dave, was that so, were they exchanges of merchandise?"

Mr. Lubben said, "No."

"Well, then, Dave, if it wasn't exchanges of merchandise, you cannot say anything that is not the truth, because you are going to get in trouble.".

Then some trivialities were exchanged, which to my mind at that time didn't register to be of any im-
1687 portance.

And it was about three thirty, or about three o'clock, that we left the Gotham Hotel, and we left—we drove to the airport.

On the way to the airport, in the car, Mr. Cain again took up the conversation about Mr. Lubben stating to whoever will come from the Internal Revenue Department that they were exchanges of merchandise involved in his entries, and they weren't.

And then he said that he had to get back to Chicago today—for that night, he had an appointment, I think he said with the late Mayor Kelly's widow, who had some problem with her executor, and he wanted to be there at seven thirty or thereabouts.

That about took in the ride from the hotel to the airport.

And we got to the airport. Mr. Cain had to wait for the plane, At the airport, he again talked about these exchanges. And then he asked Mr. Lubben what he was going to do, and where he was going.

1688 So Mr. Lubben told him that he has been down to Puerto Rico, and that that is where he expects to settle. He has also been over to the Virgin Islands, which is close to Puerto Rico, and that there was a pier for sale, that was owned by the Danish West Indies Company. And Mr. Cain said he might have someone who was interested in buying that pier, and he would see Mr. Lubben in about two or three weeks.

In addition to that, Mr. Cain mentioned that he was the owner of some defunct oil well—I think it was in

Oklahoma, I am not certain of the state—that was being dismantled, the pipes were being taken out, and that he would come down to Puerto Rico to look the land over, and that he would give Lubben the Shotwell account again.

And Mr. Lubben said, "I am not interested in the Shotwell account. I just don't want to be concerned with it."

By Mr. Lockley:

Q. Does that exhaust your recollection?

A. That about exhausts my recollection.

Q. Was any reference made at that time to a settlement of the case, or an attempt to settle?

1689 A. Yes. Mr. Cain said that he had tried to settle the tax case—I am not certan whether he said he or the company—had tried to settle the case, that he wanted to do it when Bob Hannegan was alive, and he was talked out of it, he had advice against it.

In addition to that he wanted to hire some attorney here in Chicago who was supposed to be a tax expert—I think his name was Boyden, or Boden—or some such name, and Mr. Boden had died. And, as he put it, "He was now in one hell of a fix," because the Government was breathing down his back.

Q. During the course of the conversation, did Mr. Cain make any reference as to why he wanted Mr. Lubben to testify to the exchanges of merchandise?

A. Yes, he said that if there was some proof that there were merchandise exchanges for some of these entries, instead of cash payments, that it would raise an issue with the Government, and he might be able to compromise the tax case.

Q. Does that exhaust your recollection?

A. I think it does.

Q. Was any reference made to who was going to

1690 pay these taxes?

A. I think Mr. Cain said that he was going to pay it.

Q. Did Mr. Lubben say anything?

A. Well, Mr. Lubben said, "If you do, you are a fool, because you ought to get a hold of Frank Huebner, who got the money from me, and put them in piles,"—I think he said three piles—and when he would have the piles what was supposedly to be evenly divided, he would

take some money from one pile and put it in his pocket, or put it on top of the other pile, with the comment that it was for the races, or some other purpose that he had.

By Mr. Lockley: May we have our morning recess?

By the Court: We will take our morning recess now. We will suspend for ten minutes.

By the Marshal: Will the audience kindly remain standing while the jury files out?

This Honorable Court will recess for ten minutes.

(Short recess.)

1691 By Mr. Lockley: You may cross examine.

Cross Examination by Mr. O'Brien.

Q. Mr. Davidson, how many times did you meet Mr. Sullivan?

A. Not very often, sir.

Q. How many, can you say?

A. Maybe three or four times, if I—if that many.

Q. Was that here in Chicago or in the East?

A. I don't recall ever having met Harold Sullivan in Chicago.

Q. And then I take it, it must have been in the East that you met him?

A. Yes, either at Lubben's home or at one of the hotels in New York.

Q. Now about how many times?

A. Oh, I can't tell you that, sir.

Q. Was he at Lubben's home in February of 1948?

A. He may have been.

Q. You don't remember?

A. I don't recall. I know he was there at least one time, that I saw him there.

By the Court: Are you speaking of Sullivan 1692 now?

By the Witness: Yes, Mr. Sullivan.

By Mr. O'Brien:

Q. And was he at the Riviera meeting?

A. No, sir.

Q. Or at the meeting at the airport and at the Gotham on the day that you mentioned?

A. No, sir.

Q. Was Mr. Huebner present at the airport Gotham meeting?

A. No, sir. The only one that was present was Mr. Byron Cain, of the defendants.

Q. How many times did you meet Mr. Huebner?

A. Oh, possibly half a dozen times. Maybe it was a little more.

Q. Well, one time, I take it, was in February of 1948, at Mr. Lubben's home?

A. That is right, sir.

Q. What were the other occasions? Were those casual meetings or did they have to do with business?

A. Well, they had to do with business, but my meeting with Mr. Huebner was rather casual.

Q. You had no business to transact with Mr. 1693 Huebner as Lubben's lawyer?

A. No, sir. I transacted no business with Mr. Huebner.

Q. Yes. Now Byron Cain, you testified to two meetings with him, is that correct?

A. Yes.

Q. And you said that you were out to Palm Springs February 11, 1946, was that?

A. 1948.

Q. Or 1948, I should say. Was that to meet Byron Cain?

A. Yes, that was to meet Mr. Cain at his home there.

Q. And the purpose of that meeting was to procure his signature to certain papers?

A. Yes, to an assignment of a real estate mortgage and a chattel mortgage.

Q. Those were papers which were in some way involved in the so-called Haberkorn deal?

A. No, sir. Those were papers that were involved in connection with the property in Hillsdale.

Q. I appreciate that, but was that the assignment 1694 made at or about the time of the Haberkorn deal?

A. Well, I imagine it was made—

Q. Or do you know?

A. My recollection is, you see, I did not represent the principals in the Haberkorn deal.

Q. Well, that comes back to me now. As a matter of fact, you came out to Chicago one time in connection

with the Haberkorn deal but by that time there was some separate representation here?

A. That is correct.

Q. And you never got it?

A. That is correct, sir.

Q. So that your only connection with that matter was your visit to Palm Springs to get Mr. Cain's signature on the assignment of the mortgage which covered the Hillsdale farm property?

A. That is correct, and to take his acknowledgment.

Q. Yes, sir. And you did get that and you brought it back?

A. Yes, sir, I did.

Q. Now have you had any meetings of a business nature with Mr. Cain other than the three which you have described?

A. Well, I have sat with Mr. Cain and Mr. Lubben
1695 and Mr. Huebner at other times. Now, when you refer to business meetings—

Q. Well, yes. I am not interested in all the meetings you may have had.

A. Well, there were a number of meetings, yes.

Q. What other meetings?

A. Well, if you will tell me relative to what.

Q. You spoke of business meetings. I have tried to exclude mere social visits.

A. Lubben had zoning troubles.

Q. Yes, sir.

A. As a result of those zoning difficulties, Lubben's company, General Confections, and Saddle River Farms had spent quite a bit of money. Lubben's—strike that. General Confections was located in New York and Lubben had a chicken farm at this property in Hillsdale where the candy factory subsequently was installed and my recollection is that Mr. Huebner, Mr. Cain and another gentleman from the Shotwell Company, whose name I can't recall, advised Mr. Lubben to move his plant from New York to New Jersey and get rid of the chickens and be able to save a certain amount, be able to save quite a bit of money in connection
1696 with his labor, rent, and so on.

Q. Mr. Davidson, that is all right. I will accept it.

A. Now—

Q. I don't want to wander too far afield, but these

other meetings, did they have anything to do with the subject matter of your testimony today?

A. Yes. You see, subsequently, Mr. O'Brien, Mr.— or General Confections and possibly Saddle River Farms joined in the transaction. A loan was obtained from the Sterling National Bank in New York City.

Q. Is that the one in connection with which that mortgage was given?

A. That is right.

Q. On which you went out to get the assignment?

A. That is right. Now, that loan was received by the company as the result of a guarantee executed by Mr. Byron Cain for $75,000.00 and the corporations gave back a real estate mortgage covering property in Hillsdale and covering property contiguous to the Hillsdale Whitecliff Lake, New Jersey, and also chattel mort-
1697 gages on the New Jersey plant and on the New York plant. Those were the documents which were the subject of the assignment which Mr. Cain executed at Palm Springs.

1698 Q. I so understand. Now, these other meetings were meetings which had to do in some way with that subject-matter, the matter of the Sterling Bank loan?

A. Yes. The reason for those other meetings was that, I believe, it was Mr. Huebner that told Mr. Lubben that it would cost, oh, $15,000.00 or eighteen thousand, or some nominal figure to move the plant from Bronx, New York, to New Jersey.

It developed that when the plant had moved from the Bronx, New York, to New Jersey, that practically the entire loan was used up and there wasn't any operative capital.

Q. Now—

A. I was told—

Q. Mr. Davidson.

A. Yes.

Q. You see, we have been all over that. I am just trying to find out if there were any other meetings which had to do with the subject-matter of your testimony here today.

A. Well, Mr. O'Brien, I am trying to tell you that.

Q. Well, if you will, please—

By the Court: It depends on what you mean by "subject-matter" I suppose.

1699 By Mr. O'Brien: Well, Mr. Davidson is a lawyer, your Honor, and he knows what the subject-matter of his conversation here, his testimony here today, was. Well, I will withdraw the question and get on to what I wanted to ask about.

By Mr. O'Brien:

Q. Now, you gave a statement to the government October 24, 1951, did you not?

A. Yes, sir, I did.

Q. And on the same day, was Mr. Lubben with you?

A. Yes, sir, he was present when I gave a statement.

Q. And the statement was given to Messrs. Krane, Twohig and Mammel?

A. Yes, sir.

Q. Did you know that Mr. Lubben testified in respect of this Riviera incident?

A. Did I know that he had testified?

Q. Yes, here in this court room.

A. Well, I assume that he had testified, but no one told me.

Q. In your testimony today, I believe you said that Mr. Cain suggested that Lubben leave the country.

1700 A. Yes, sir.

Q. Were you asked that when you made your statement on October 24th to the agents?

A. Well, I was asked to recall what transpired.

Q. Your statement to the agents was signed and sworn to, by you?

A. Yes, sometime later, at my office.

Q. November 15, 1951, as a matter of fact, wasn't it?

A. If that is the date on it, that is the correct date. It was signed sometime after I gave it.

Q. Now, in that, is it not true that you stated that Pat Grace at that time—that it was Pat Grace who suggested that if Lubben would go to South America for about two years and if his taxes were paid, the thing would blow over? Did you say that?

A. Yes, sir, I did.

Q. And nowhere in this statement do you say or did you say that Mr. Cain said that?

A. Well, if you will look at the first part of the statement, you will find that it was Mr. Cain who was doing the talking.

Q. Yes. I do find that he was talking. That is, you are talking and you had been introduced and Mr. Cain has done some talking but he hasn't said a word about South America. 1701

A. May I see the statement, please?

Q. Yes, sir, you may.

(Handing document to the witness.)

A. It looks like you are right, Mr. O'Brien.

By the Court: I don't hear you.

By the Witness:

A. I say, it looks like you are right. I had read the whole—I have not read—will you strike. I had taken the conversation in its entirety and I was led to believe that it was Mr. Cain's desire that Lubben do just what I testified because you have at the beginning—

By Mr. O'Brien:

Q. Well, I haven't asked you for an explanation.

A. It is all right.

Q. Mr. Davidson, it is one of the reasons I asked you whether you knew that Mr. Lubben had testified in this court room on that subject.

By Mr. Lockley: Did you answer, Mr. Davidson?

By the Witness: I know nothing about Mr. Lubben's testimony. 1702

By Mr. O'Brien: Yes, he did answer.

By the Witness:

A. Except what I can surmise he must have testified.

By Mr. O'Brien:

Q. There is no question pending.

A. Well, you asked me a question.

Q. I didn't think so.

A. I am sorry.

Q. Your answer to my last question was you think I am right, after reading this statement.

Now, I notice that you did not give the jury this part of the conversation which appears also in this statement:

"Cain told me—he told me—"

By Mr. Lockley: Just a moment. That statement is not in evidence. I don't believe you are permitted to read from it at this time.

By the Court: Yes. I will sustain the objection.
1703 By Mr. O'Brien:

Q. When you were talking to the agents, Mr. Davidson—withdraw that.

In this conversation at the Riviera or at Mr. Grace's office, did Mr. Grace tell you that Cain had made a disclosure and that therefore Grace had nothing further to tell you?

A. No. What he did say was that Mr. Cain was thinking of making a disclosure or that he intended to make a disclosure and that therefore he had nothing more to talk to us about.

Q. Well, he did say that, did he not?

A. Yes.

By Mr. Lockley: I am sorry. I didn't hear the question, counsel.

By the Witness: I wasn't asked that.

By Mr. O'Brien: Will you please read the question.

(Whereupon the question and answer were read as above recorded.)

By Mr. O'Brien:

Q. Did Grace say that Cain had been in to see the Bureau of Internal Revenue?

A. No, sir. He never told me that.

1704 Q. Did he say that he was going in to see the Bureau of Internal Revenue?

A. No, sir. The language that he used was that Mr. Cain was thinking of making a disclosure or was about to make a disclosure. I recall that distinctly, because Mr. Lubben turned to me and said, "Sam, what is a disclosure?"

Q. And did you tell him?

A. So I told him—

Q. What did you tell him?

A. As best I could—

By Mr. Lockley: I object.

By Mr. O'Brien:

Q. Well, what did you tell him?

By Mr. Lockley: I object, your Honor, to conversations.

By the Court: Oh, I think I will sustain the objection.

By Mr. O'Brien:

Q. But you did say that at the Riviera meeting in

August of 1948, Cain said that someone had come, some Revenue agent had come to the Shotwell plant and Graflund had given him some papers?

A. Yes.

1705 Q. Now was that the first time that you had ever heard that?

By the Court: I am sorry I didn't hear that.

By Mr. O'Brien:

Q. Was that the first time that you had ever heard that that had occurred?

A. Yes, that was the first knowledge that I got of it.

Q. No one told you that before?

A. No, sir.

Q. Had you yourself been to the Bureau of Internal Revenue in New York concerning the tax problems or tax matters of Mr. Lubben's companies?

A. When?

Q. Prior to August of 1948.

A. No, sir.

Q. Did you, in August of 1948, know that anyone had been to the Bureau of Internal Revenue for Mr. Lubben's companies?

A. No, sir, I did not.

Q. And if such a thing had occurred, Mr. Lubben had not mentioned it to you?

By Mr. Lockley: Well, I object, your Honor. He

1706 has answered that he didn't know.

By the Court: You are assuming something now not in evidence and I will sustain the objection.

By Mr. O'Brien:

Q. Did Mr. Lubben say anything of the kind to you?

A. No, sir.

Q. At or prior to the time of the Riviera meeting?

A. No, sir.

Q. Were you, before or after the time of the Riviera meeting, working on any of the tax matters for Mr. Lubben's companies?

A. No, sir. I had nothing to do with his tax matters.

Q. Now when was it that Mr. Cain said that he was willing to pay four hundred to $450,000.00?

A. My recollection is that it was at this 1951 meeting.

Q. Was it then that Mr. Lubben said that he was a fool if he did that?

A. Yes.

Q. Will you tell me again, so I may have it accurately, the reason that Mr. Lubben assigned when he 1707 stated that?

A. Well, Mr. Lubben said that Frank Huebner, when he got the money, would put—would divide it up in three piles and they were supposed to be equal piles. Of course, I am not giving it to you verbatim. I am giving it to you as I recall it to have been.

Q. Yes.

A. And I think that Lubben said he ought to have him down to the cellar and make him give back the money because he had stolen from his partners.

Byron Cain didn't say anything to that.

Q. And by "his partners", do you mean those interested in the three piles?

A. I have no idea who he meant.

Q. Did Mr. Cain say at that time that he was making efforts to settle the tax matters here in Chicago?

A. Are you speaking of the 1951 meeting?

Q. Yes.

A. No, sir.

Q. He just said that he was willing to pay four 1708 hundred to $450,000.00, was that it?

A. I think he said he was willing—he was willing to pay.

Q. Is that all he said?

A. And that someone had advised him against it. He was willing to pay it when Bob Hannegan was alive.

Q. Now you gave a deposition in this case in New York, didn't you, Mr. Davidson?

A. Yes, sir, I did.

Q. Going back to February of 1948, did Mr. Huebner get a ride back to New York from your farm?

A. I couldn't say. I would imagine that he did.

Q. Excuse me.

A. Because, Lubben always took his guests back to New York City in his car.

Q. Did you ride with him either to or from the farm on that occasion?

A. I may have.

Q. And didn't Mr. Lubben also?

A. Well, I would not have gone to New York with Mr. Huebner unless Mr. Lubben were along.

Q. As Mr. Huebner was leaving the farm, were you still present with Mr. Lubben at Lubben's home?

1709 A. I think I was, yes.

Q. And when he left, did you or Mr. Lubben in your presence say anything about visiting Morley Kramer?

A. No, sir.

Q. Did you visit Kramer in Boston with Mr. Lubben?

A. I don't think I have ever met Mr. Kramer in my life.

Q. Did you go to Boston with Mr. Lubben to Mr. Kramer's office?

A. Yes, we did go to Gum Products. That was Mr. Kramer's company.

Q. And is it true that the reason you didn't meet him was that they asked you to wait outside?

A. That is correct, sir.

Q. And by "they" I mean Mr. Lubben and Mr. Carry.

A. Yes.

Q. And you did wait until they had concluded their discussion and had come out?

A. I returned to New York with them.

Q. And you went back with them?

A. That is my recollection.

Q. Yes, sir. And was that before or after the time of the Riviera meeting?

1710 By Mr. Lockley: Your Honor, I think I will object to this line of questioning relating to Mr. Kramer. It is beyond the scope of the direct examination and I believe your Honor ruled the other day that it was immaterial and the previous testimony could be stricken.

By the Court: I think it is outside the scope of the direct.

By Mr. O'Brien: Well, I don't know how closely I am to be confined to the direct in testing the story.

By the Court: A little more closely than the rules of evidence require.

By Mr. O'Brien: That would be somewhat within the Court's discretion. I do not mean to pursue the matter, but I would like, while the witness is here, to get a small part of it that fits in with something that we want to develop later.

By the Court: I will sustain the objection.
By Mr. O'Brien:

Q. At the time of the meeting in February, 1948,
1711 was Mr. Lubben having trouble about money?

A. I think he was.

Q. And was that also true in August of 1948?

By Mr. Lockley: Well, I object, your Honor. That is beyond the scope of the direct examination.

By the Court: Well, he may answer.
By the Witness:

A. Yes. I was told—I was told that Mr. Cain had promised to put up an additional $50,000.00 when they moved from the factory—when they moved the factory from New York to New Jersey, but the money never came. The money was never advanced.
By Mr. O'Brien:

Q. You were told by whom that Cain—

A. By Mr. Lubben.

By Mr. O'Brien: Well, I move to strike that. I am asking for what—

By Mr. Lockley: Well, he asked the question, your Honor, and it was responsive.

By the Court: Well, you have gone into it.

By Mr. O'Brien: All right.

By Mr. O'Brien:

1712 Q. Now, was there any other reason why he was having money trouble?

A. Well, I wouldn't know of any specific reason except that when a man needs money, he needs it.

Q. Well, on your deposition, Mr. Davidson, did you not testify that Lubben had to make—that what Lubben told you was that he had to make tax payments and that he needed money?

By Mr. Lockley: Oh, I object to that, your Honor. What Mr. Lubben told him is clearly hearsay. It is also beyond the scope of the direct examination and I believe it is immaterial.

By the Court: Well, I think we are getting outside the scope of the direct examination now, Counsel. I will sustain the objection.

By Mr. O'Brien: Your Honor may sustain an objection to this too, but I do wish to make the record, unless you consider that I make a formal offer.

I have one further question which I would like to record:

1713 By Mr. O'Brien:

Q. Did you also testify on your deposition and answer and say that you did know that Lubben was having income tax trouble and that he was in consultation with Sproul & Scholz and you went along, possibly to pick up some legal angles that might require research?

A. That is correct.

By Mr. Lockley: Your Honor, I object to that. I think it is beyond the scope of the direct examination again and it is immaterial.

By the Court: Yes. I will sustain the objection.

By Mr. Lockley: I move that it be stricken.

By Mr. O'Brien:

Q. Were you present at the Sproul-Scholz office when Mr. Crodez and Mr. Twohig took the records of the proprietorship?

By Mr. Lockley: I regret the necessity of objecting continually, your Honor.

By the Court: Yes.

By Mr. Lockley: But it is going beyond the scope

1714 of the direct examination.

By the Court: It certainly is going outside the scope of the direct examination.

By Mr. O'Brien: I think that is all.

Cross Examination by Mr. McConnell.

Q. How long have you been practicing law, Mr. Davidson?

A. Close to twenty-five years, sir.

Q. On this Riviera meeting night, where were you prior to the meeting at the Riviera?

A. I was visiting at Mr. Lubben's home.

Q. Did you know at that time that you were going to be called that night?

A. No, sir.

Q. For a Riviera meeting?

A. No, sir.

Q. Had Mr. Lubben told you that he had had a communication from Mr. Morley Kramer; that Mr. Cain and Mr. Grace were coming down to see him?

A. This is something new to me, sir.

Q. Well, then you didn't know it, is that right?

A. No, sir. No, sir.

1715 Q. The only reason you knew you were there was just to enjoy television, is that it?

A. Yes, that and possibly Mr. Lubben had a question or two he wanted to ask me while I was available.

Q. You took care of his legal matters at that time?

A. No, sir, I did not.

Q. What were you, a sort of constant legal attendant of his at that time?

A. Will you define the "constant legal attendant" so that I can answer the question?

Q. You have been practicing law for twenty-five years and you know the word "constant", don't you?

By Mr. Lockley: Your Honor, I object to counsel arguing with the witness.

By the Court: Yes, I think so. The use of "constant legal attendant," there is no basis for it.

By Mr. McConnell:

Q. Were you with him constantly?

Withdraw the question.

How often were you with him?

A. Quite often.

1716 Q. How many times a week did you spend with him at his home in Hillsdale?

A. Oh, there were times when I spent a short time every day of the week with him, and there were other times when I omitted a day or so.

Q. And you were engaged in legal discussions, were you, or advising him legally, were you, at those times?

A. I took care of whatever questions he may have propounded to me on a legal matter, of a legal nature, and I visited with him socially.

Q. Well, at these times you were going over there practically every day in the week, were you charging him for your time as a lawyer?

A. I was on a retainer, sir.

By Mr. Lockley: I object, your Honor.

By the Court: Well, he has answered.

By Mr. McConnell:

Q. Well, anyway, what was the night of the Riviera meeting? Now, let us have that again.

A. What do you want to know about that night?

Q. What was the date?
A. As I say, it was in 1948, in August.
Q. Can't you fix it any closer than that?
1717 A. No, sir, I can't.
Q. You didn't make any memoranda?
A. I made no notes.
Q. You don't keep time records in your office, as a lawyer?
A. It was not necessary in this particular case because I was on a retainer.
Q. And you didn't?
A. No, sir, I did not.
Q. So all you can tell us is it was some time in August?
A. That is correct.
Q. And what time of the day was it?
A. It was in the evening. It was quite late.
Q. What time?
A. Well, I didn't look at any clock, but I imagine it was about ten o'clock or after that when we started out.
Q. How did you get to the meeting? What was the occasion for your going to the Riviera night club?
A. Mr. Lubben had received a telephone call and he called me—
Q. Was that in your presence?
A. He told me that Byron Cain had called or was
1718 calling, and I think he stopped in the middle of the conversation and said, "Sam, would you like to come with me to the Riviera? I am going to meet Mr. Cain." Or "Byron", I think he said.
Q. So a call came while you were sitting there with Mr. Lubben?
A. Yes. We were enjoying the television program.
Q. And how far is it from that place in Hillsdale to the Riviera?
A. A matter of miles or—I don't know. It is about twelve miles or thirteen miles or fifteen miles at the most. I have never clocked it.
Q. About what time did you get over there?
A. Well, we went directly. It may have been ten-thirty when we reached there.
You see, at that particular time, I had no inkling that it was going to become an important event.

Q. I didn't ask you that did I? Did I ask you whether there was any inkling in your mind it was going to be something important?

A. I don't want to argue with you, counsel.

By Mr. Lockley: You are still arguing with the witness.

1719 By Mr. McConnell:

Q. Now, had you ever met Mr. Grace before that time?

A. Never saw him before in my life.

Q. But you did meet him there that night?

A. Yes, sir.

Q. And he and Mr. Cain were there at that time, is that right?

A. That is right. They met us in the vestibule, or the entrance there.

Q. Were they there when you and Lubben arrived?

A. Yes, sir.

Q. And you say Mr. Grace was a lawyer from Brooklyn?

A. Yes. He gave me a card, and I think I visited him at his office subsequently.

Q. Now, did you know whether or not Mr. Lubben had obtained a passport at that time?

By Mr. Lockley: At what time?

By Mr. McConnell: At the time of the Riviera meeting.

By the Witness:

A. No, sir; I don't.

By Mr. McConnell:

1720 Q. Did you know of his obtaining a passport at any other time?

A. Well, I know that he obtained a passport. But if you want me to fix the time, I can't.

Q. Did he obtain the passport before or after that Riviera meeting?

A. I don't know, sir. I can't tell you.

Q. But you do know he obtained a passport?

A. Yes, sir.

Q. Did you see the passport?

A. I may have seen it. I don't recall.

Q. Did he consult with you about obtaining it?

A. No, sir.

Q. You didn't know anything about it until after he had obtained it, is that it?

A. Well, he may have mentioned the passport to me.
Q. Did he tell you he was applying for one?
A. No, sir; I don't recall his ever telling me.
Q. But you were his legal adviser at that time, were you not?
A. Why, is there anything wrong about that?
Q. I asked you a simple question. You can give me a yes or no answer. Were you or weren't you?
A. I was on retainer.
1721 Q. At the time he was applying for a passport, is that true?
A. I don't know whether my retainer had ceased prior to that time or not.
Q. Well, you do know he got a passport?
A. I subsequently learned, yes.
Q. Now, at this meeting at the Riviera night club, you say that Mr. Grace suggested that he get a passport?
A. I didn't say anything like that.
Q. Didn't you tell that to the Government Agent in your statement, that Mr. Grace said—
A. No, sir; there was no talk about a passport.
Q. Was there any talk by Mr. Grace—advice by Mr. Grace that he should go away to South America?
A. Yes, definitely.
Q. And at that same time there was discussion of income tax proceedings which might or might not be started by the Federal Government, is that right?
A. Yes.
Q. And you, as a lawyer, knew that Mr. Cain was wanting—or Mr. Grace, on behalf of Mr. Cain, or Mr. Cain, or the other way around—was wanting Mr. Lubben to leave the country because of that investigation,
1722 is that right?
A. I gathered that from their conversation.
Q. Well, you surmised it, at least, at that time?
A. Definitely.
Q. You had a pretty definite idea that that was what was being talked about, didn't you?
A. That is correct.
Q. And you were a lawyer?
A. And I objected rather strenuously.
Q. Yes, I know. You did object very strenuously. And you suggested that the meeting break up, didn't you?
A. That's right.

Q. But you also discussed at that meeting the question of the purchase of Mr. Lubben's business—for how much money?

A. I never discussed that at all.

Q. Wasn't there a discussion of the purchase of some property of Mr. Lubben's over in Hillsdale?

A. Well, Mr. Cain talked about that.

Q. That's what I am asking you, wasn't there some discussion about that subject?

A. Yes, there was.

Q. And you knew that that subject was being discussed that night, didn't you?

1723 A. Well, I couldn't help hearing it.

Q. And you knew that that discussion was connected up with the question of the Federal Income Tax liability, too, didn't you?

A. I didn't know—

By Mr. Lockley: There is no such evidence.

By the Court: He may answer.

By the Witness: What is that question, sir?

(Question read by the reporter as above recorded.)

By the Witness:

A. No, sir; I did not.

By Mr. McConnell:

Q. Well, it took place at the same time, didn't it?

A. That's right.

Q. In the same meeting?

A. That's correct.

Q. Between the same parties?

A. Yes.

Q. Is that right?

A. Yes.

1724 Q. And you thought that it was time for you to leave because there might be some conspiracy, is that right?

A. That's right. That's correct.

Q. Conspiracy between whom?

A. Well, if Mr. Lubben had agreed to the suggestion, it would have been between Mr. Lubben, Mr. Cain, and Mr. Grace, and possibly I might have been involved, too.

1725 Q. And a conspiracy to do what?

A. A conspiracy to evade the income tax laws.

Q. Is that the conspiracy you had in mind?
A. That was my opinion at that time.
Q. Did you have in mind a conspiracy of any other kind, except conspiracy to evade the income tax laws?
A. You see, Mr. McConnell—
Q. I just asked you a question.
A. I know. Well, I am answering it. I didn't reflect too much. I just didn't like what was happening.
Q. Did you reflect about it later?
A. I didn't give too much thought to it later.
Q. Did you like it any better later than you did then?
A. I never liked it at any time.
Q. You never liked it at any time. You knew that this proposal was made, however, about the purchase of Mr. Lubben's property at that meeting, didn't you?
A. The suggestion was made.
Q. Did you go back with Mr. Lubben to Mr. Grace's office after that meeting?
1726 A. Yes.
Q. And you went back on the very proposal you are telling us now you didn't like at all, didn't you?
A. No, sir; we didn't go back on that at all.
Q. And at that time Mr. Grace told you, and told Mr. Lubben, that they weren't interested because they were going to make a disclosure, isn't that the fact?
A. Mr. Grace didn't talk to us too—much to us at all.
Q. Didn't he say that, that they weren't interested because they were going to make a disclosure; didn't he say that?
A. We have two questions. Will you, please, Mr. Stenographer, read the question, his last two questions.

(Record read.)

By Mr. McConnell:
Q. Didn't he say that?
A. The only way I can answer that is this—
Q. No. Let me have an answer to my question. Did he or didn't he say that?
A. No, sir; he did not use that language.
Q. Did he say that in substance?
1727 A. No, sir.
Q. Now, you testified here a moment ago that Mr. Lubben turned to you in this discussion and asked what is meant by a disclosure.

A. That's right.
Q. Was that in the same talk?
A. Well, disclosure—
Q. Was it in this talk?
A. Sir?
Q. Was it in that talk?
A. No, it was outside. Mr. Grace told us—
Q. When did you first hear of the word about disclosure?
A. At Mr. Grace's office.
Q. This meeting we are now talking about?
A. Yes, sir.
Q. Which came after the Riviera meeting, didn't it?
A. That's right.
Q. So at least you were still talking about income tax at that time, were you not, in the meeting in Mr. Grace's office?
A. The only language he used was that Mr. Cain is contemplating making a disclosure, was making plans
1728 for a disclosure, "Therefore, what I talked to you about the other night, you can now forget it."
Q. Not interested any more?
A. Not interested.
Q. But you were interested?
A. No, sir; I wasn't.
1729 Q. Because you went back to Grace's office for a further conference about it, didn't you?
A. I wasn't interested in that at all. I was interested to ascertain what the man had in mind, that's all.
Q. You knew what he had in mind at the Riviera meeting, and you said you didn't like it; isn't that the fact?
A. Well, I had some idea as to what he had in mind, yes.
Q. And having the idea of what he had in mind, you still went back to see him at his office with Mr. Lubben, didn't you?
By Mr. Lockley: Well, that question has been asked and answered a half dozen times, and it is a very general one.
By Mr. McConnell: I know it is one you don't like and one the witness doesn't like.
By Mr. Lockley: Whether he is talking about that—what he had in mind was the disclosure or the sale of the

property, he can't answer what the question has reference to.

1730 By Mr. McConnell:

Q. Now, you said you told Mr. Lubben what a disclosure was. What did you tell Mr. Lubben a disclosure was?

By Mr. Lockley: I objected to that before and again I object.

By Mr. McConnell: We have connected it up. It is connected with what he is talking about.

By the Court: I sustained the objection to that question when it was asked by Mr. O'Brien.

1731 By Mr. McConnell:

Q. Now, when was it that Mr. Lubben said that Mr. Cain was a fool if he paid this tax?

A. When we were at the LaGuardia Airport, while Mr. Cain was waiting for his plane to come in, or to go out.

Q. And what tax were you talking about at that time?

A. Well, Mr. Cain told us he was talking about some four hundred some odd thousand dollars in income tax the government was seeking.

Q. Were you talking about a tax on this Shotwell Corporation at that time; is that the tax you were talking about?

A. Well, that's the only tax we would be talking about.

Q. All right. And in reference to that subject Mr. Lubben said he would be a fool if he paid it, didn't he?

A. That's right, because Mr. Cain said that he was going to pay it himself, as the other people involved with him didn't want to pay, or some such thing.

Q. That isn't the reason you gave us a minute ago, is it?

1732 A. Of course it is.

Q. Didn't you say that he said he was a fool to pay it because Frank Huebner received it and would divide it into three piles?

A. Yes, he added that to his reason.

Q. He said that as a reason why he was a fool to pay it, didn't he?

A. He added that to his reason, yes.

Q. Said that Mr. Huebner had stolen from his partners, that was the words you used, is that right?

A. That's right.

Q. Now, you knew who the three piles represented, didn't you?

A. I didn't know.

Q. You knew there were three people?

A. I have heard a rumor.

Q. What rumor had you heard?

By Mr. Lockley: Well, I object to what he heard in the way of rumors.

By Mr. McConnell: I am asking for his knowledge of these three piles, what he knew about it.

By the Court: He may answer.

By the Witness:

1733 A. I heard a rumor that these three piles were to be—that was black market money.

By Mr. McConnell:

Q. Yes.

A. That it was divided between Mr. Huebner, Mr. Sullivan and Mr. Cain. But I have no personal knowledge.

1734 Q. In the first part of your testimony you also said something about horses, too, didn't you?

A. Yes.

Q. Didn't he say something about the horses?

A. Yes.

Q. And you got that information from Mr. Lubben, didn't you?

A. Well, Mr. Lubben said that to Mr. Cain at that time.

Q. Now, isn't it a fact that after Mr. Grace had told you he wasn't interested in talking any more about what you talked about at the Riviera night club, you made your trip up to see Morley Kramer?

By Mr. Lockley: Well, I object to that. It is beyond the scope of the direct examination.

By the Court: I think that is beyond the scope of the direct examination.

By Mr. McConnell: I would like to make an offer of proof on it, if the Court please.

By the Court: Certainly.

By Mr. McConnell: I would like to make it outside the presence of the witness, if I may.

1735 (Whereupon the following proceedings were had outside the hearing of the jury and the witness:)

By Mr. McConnell: I want to show by this line of questioning that after knowing what the situation was, that the tax liability was involved—

By the Court: Is this your offer of proof?

By Mr. McConnell: Yes, sir.

By the Court: I can't hear you.

By Mr. McConnell: —that this man went up with Mr. Lubben to get money by blackmail from Mr. Morley Kramer.

By Mr. Lockley: He has already said that he wasn't inside Kramer's office.

By Mr. McConnell: I am fixing the time of when he went, as after this. They are claiming that we are trying to submit something to them to go away, and we have a right to show it was just the other way, that they were submitting a proposition to us, that if we would pay them the money, they would go away. That is in issue,
1736 and I think it is perfectly proper cross examination to show times, and places, and how that worked, and what the logic of the situation is.

By the Court: Who is Morley Kramer?

By Mr. McConnell: He was a supplier who was supposed to have been paid over ceiling price, market price.

By the Court: In connection with these defendants?

By Mr. O'Brien: Supposed to be in the syndicate.

By Mr. Lockley: The $75,000 proposed syndicate.

By Mr. McConnell: Which was discussed at the Riviera night club.

1737 By Mr. Lockley: And Mr. Davidson previously testified he doesn't know Kramer, never met him. He went up and sat outside in the ante-room.

By Mr. McConnell: I want to know the time he went after the meeting.

By Mr. Lockley: It has been offered completely.

By Mr. O'Brien: No.

By the Court: Let's find out whether or not he does know him, ever talked to Morley Kramer.

By Mr. O'Brien: He went up to do it and they kept him waiting outside.

By Mr. Lockley: It doesn't prove anything. He could go up there for a million reasons.

By Mr. McConnell: It proves who this thing emanated from.

(Whereupon the following proceedings were had in the hearing and presence of the jury:)

By the Court: You may ask him whether or not he ever had any talk with Mr. Morley Kramer, if that 1738 is what your offer of proof is directed to.

By Mr. McConnell: First I would like to fix the time.

By the Court: You may.

By Mr. McConnell:

Q. Did you go up to Boston to the Gum Products Company after this meeting?

A. I don't recall.

Q. You don't recall?

A. I don't recall when we went up. But I know I was up there at one time.

Q. Did you meet Mr. Kramer up there?

A. Never met Mr. Kramer.

Q. You sat outside while Mr. Lubben and Mr. Carry—

A. That's correct.

Q. —went in to see him.

Going back to the Riviera meeting for a moment, wasn't there a discussion—

By the Court: I think it is about adjournment time, counsel. We will be in recess until two o'clock.

(Whereupon a recess was taken to 2:00 o'clock P. M. of the same day, Wednesday, September 23, 1953.)

1739

(Caption — No. 52 CR 143)

Chicago, Illinois,
Wednesday, September 23, 1953,
2:00 o'clock P. M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas McConnell,
Mr. William T. Kirby.

And Thereupon the following proceedings were had herein:

By the Marshal: This Honorable Court will resume this session.

SAMUEL J. DAVIDSON, a witness heretofore called herein on behalf of the Government, having been 1740 heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination (Ctd.) by Mr. McConnell.

Q. Now, Mr. Davidson, at that meeting at Pat Grace's office which you testified about this morning, did Mr. Grace state in your presence to you and Mr. Lubben that Byron Cain had the Shotwell Manufacturing Company make a voluntary disclosure or some kind of a disclosure of the money?

Do you remember, "Well, what has the Shotwell Manufacturing Company got to do with the disclosure?" Did Lubben say that, "What has the Shotwell Manufacturing Company got to do with the disclosure?"

A. I don't recall that, sir.

Q. Did he say "because the money is divided between Huebner and Sullivan and Byron Cain?"

By Mr. Lockley: Counsel, if your Honor please, is reading from a statement which I don't believe is in evidence.

By Mr. McConnell: I am asking him if he said that.

By the Court: Well, reframe your question that 1741 way, then, Counsel.

By Mr. McConnell: I thought I did. I asked him if that was said in his presence by Mr. Lubben.

By the Witness:

A. At Grace's office?

By Mr. McConnell:

Q. Yes.

A. No, sir.

Q. It wasn't?

A. No, sir.

Q. Did you try to contact Mr. Grace after that Riviera meeting?

A. Yes. I tried to call him several—maybe two or three times.

Q. Did you try to contact Mr. Hannegan?

A. Hannegan, no, sir.

Q. You finally got him and made a contact with Mr. Grace and you arranged the meeting for Mr. Lubben to come over and see him, didn't you?

A. Well, I did talk to Mr. Grace.

Q. Well, did you arrange the meeting?

A. Well, I must have arranged a meeting because when I got him on the telephone he made an appoint-
1742 ment for us to come over on the day that we came over.

Q. And did he tell you at that time, did Mr. Grace tell you at that time that Mr. Cain had made some arrangement about making a disclosure or he would make a disclosure and hence he had nothing further to tell us and if there was anything further, he would contact us?

A. That is right. That is correct.

Q. Now, at this Riviera meeting, isn't it the fact that Mr. Lubben in your presence and in the presence of Mr. Grace and Mr. Cain said that "If you will give me $125,000.00, I will go to South America?"

A. Definitely not, sir.

Q. Going back for a moment to these documents which you testified to about here this morning, that you saw on the porch of Mr. Lubben's home down at Hillsdale, when did you take those documents out to be photostated?

A. The very next day.

Q. Now, what was the date of that meeting? Can you give us the date on it?

A. I can't, sir.

1743 Q. I think you said this morning you had no way to refresh your recollection as to when that date was, is that right?

A. That is right, sir.

Q. Do you remember what photostating company you took them to?

A. Well, my recollection is I took it to Burpo's Brothers or I had them sent to Burpo's in Newark, in Newark, New Jersey.

See, I don't recall whether I took it or someone from my office took it out.

Q. At that time on that porch did you hear some discussion about the assignment of the mortgage that Mr. Cain had?

A. No, sir.

Q. Was there any discussion there in your presence about—

A. If there was, I didn't hear it.

Q. Was there any discussion in your presence about a Haberkorn Candy Company?

A. Well, I knew that there was a Haberkorn Candy Company in existence but I don't recall any discussion at all about that that night, that day.

Q. Nothing was said about the Haberkorn Candy
1744 Company?

A. Not in my presence.

Q. Was this meeting at night or in the daytime?

A. I believe it was in the afternoon, sir.

1745 Q. And were you there all the time with Mr. Huebner?

A. It may have been either a Saturday or a Sunday, or a holiday, but I—my recollection is that it was in the afternoon.

Q. And what time did you arrive at the meeting, do you remember?

A. I don't recall.

Q. Were you there all—

A. I may have been there when Mr. Huebner arrived, or I may have come in later.

Q. Were you there all the time that Mr. Huebner was there with Mr. Lubben?

A. I imagine I was, sir. I don't—I was asked this morning whether I went to New York to take Mr. Huebner back, and if I stayed—if I stayed at that house when Lubben went to New York, then I took the ride with him to the city.

Q. Did you go out to the barn?

A. No, sir.

Q. You never had any trip out to the barn?

A. No, sir.

Q. Did anybody go out to the barn when you were there?

1746 A. I don't know whether anybody went, of my own knowledge. I don't know of any visit to any barn, nor did I take any.

Q. You didn't see Mr. Huebner or Mr. Lubben going out to the barn while you were there?

A. I don't recall their going out of the house.

Q. Now, this transaction that you had—you had these documents which have been identified here this morning, and put them in an envelope, is that right?

A. They were put in an envelope. I didn't put them in any envelope.

Q. Well, who put them in the envelope?

A. I think Mr. Huebner put them in an envelope.

Q. Was the envelope there? Was it Lubben's envelope he put them in?

A. Lubben furnished the envelope.

Q. Lubben furnished the envelope?

A. I say, that he furnished the envelope. I don't know where the envelope came from, but I know the documents were in an envelope, and Mr. Huebner sealed it and put those pencil marks on the back of it.

1747 Q. So the envelope was sealed when it was given to you, is that right?

A. It was sealed when it was given to Lubben.

Q. And it was sealed when it was given to you, wasn't it?

A. No, sir.

Q. You saw it sealed in your presence, did you not?

A. That is correct.

Q. And it was turned over to Mr. Lubben?

A. That's right.

Q. And the purpose of sealing it was to see whether or not the documents were in the same condition when they were going to be gotten later by Huebner, that they were then in?

A. I assume that was so.

Q. That was the only possible purpose for it, wasn't it?

A. I imagine so, yes.

Q. And you knew that at that time; you knew that at that time, didn't you?

A. Now, what—

By Mr. Lockley: I object, your Honor. He is call-
1748 ing for the witness' conclusion, and is arguing.

By the Court: He may answer.

By the Witness: What was the last question, sir?

(Question read by the reporter as above recorded.)

By the Witness:

A. I knew the documents were not to be tampered with.

By Mr. McConnell:

Q. And they were sealed in the envelope?

A. That is correct.

Q. And that was to insure that they weren't tampered with?

A. That's correct.

Q. And you hadn't made any photostats of them at that time, had you?

A. No, sir.

Q. So you took the envelope after it was sealed, and initialed, wasn't it?

A. Well, there was writing on it. I don't know what he had on it.

Q. That was to further assure that it wouldn't be tampered with, wasn't it?

1749 A. That's correct.

Q. And you took that sealed envelope, which you knew was sealed to insure the integrity of the contents, and you opened it, didn't you?

A. I didn't say that.

1750 Q. Did you open it?

A. No, sir; I didn't open it. Mr. Lubben did.

Q. Who did open it?

A. Mr. Lubben must have opened it. I didn't open it.

Q. When did you get the letter from Mr. Lubben?

By Mr. Lockley: What letter?

By Mr. McConnell: Or the envelope, rather.

By the Witness:

A. That same day Mr. Huebner was there.

By Mr. McConnell:

Q. Was Mr. Huebner there at the time?

A. Not when it was opened; no, sir; but I got the envelope—

Q. Wait a minute now. He wasn't there when it was opened, but you say he was there up until the time he went to New York in the automobile, isn't that it?

A. That is correct.

Q. And you got the envelope before they left for New York, was that it?

A. No, sir; I didn't say that.

Q. When did you get the envelope?

1751 A. I got the envelope when Mr. Lubben returned from New York.

Q. So you didn't get it at the time Mr. Huebner was there, as you said this morning, did you?

A. I didn't so testify.

Q. Didn't you testify this morning that you got it in Huebner's presence?

A. No, sir.

Q. You got it when, that night after Mr. Huebner—Mr. Lubben came back from New York?

A. I got it that night.

Q. And it was opened at that time, wasn't it?

A. When I got it it was opened. I had nothing to do with opening it.

Q. So it was open when you got it?

A. That is correct.

Q. So you knew it wasn't in the same condition as it was when you had seen Mr. Huebner have it initialed?

A. Well, the envelope wasn't in the same condition, but as to the contents—

Q. Well, it had been opened, hadn't it?

A. It had been opened.

Q. And after being opened you took it over to
1752 have it photostated?

A. That is correct, sir, so that Mr. Lubben could have supporting proofs—

Q. I just asked you if you took it over to have it photostated.

A. Either I or somebody from my office took it over. I don't recall whether I did it or not.

Q. And you got back the original documents?

A. That is correct.

Q. Did you put them in an envelope and seal them?

1753 A. No, sir; I returned them all to Mr. Lubben with the photostatic copies.

Q. I thought you said this morning you delivered them to Mr. Huebner.

A. I don't know where you got that from, sir.

Q. You didn't deliver them to Mr. Huebner?

A. No, sir.

Q. All you did was give them back to Mr. Lubben?

A. I gave them back to Mr. Lubben.

Q. And that was the end of the transaction so far as you were concerned, is that it?

A. That's right. And the next time that I saw th envelope—

Q. I didn't ask you when the next time was that you saw the envelope.

A. I am sorry.

Q. Now, you testified this morning that you went all the way out to Palm Springs, California—

A. Yes, sir.

Q. —to get a guarantee of the Sterling Bank mortgage?

A. No, sir; I didn't go there to get a guarantee, and that wasn't my testimony.

My testimony was that I flew to Palm Springs,
1754 California, to get an assignment of a mortgage—
of a real estate mortgage, and a chattel mortgage.

Q. You are right. I stand corrected. Let's go back a little.

You testified this morning about a $50,000 additional amount that was asked by Mr. Lubben, in addition to the $75,000 mortgage; do you recall that?

A. I didn't so testify. I said—

Q. Were you present at the Gotham Hotel when the amount of $50,000 was discussed with Mr. Cain?

A. Yes, I may have been there.

Q. Now, when was that?

A. It was before the assignment date.

Q. And it was before this date in February, wasn't it? Down on the porch at Hillsdale?

A. It may have been, sir. I have no way of recalling it, becau. I have no records.

Q. You don't keep any office records of where you are and what you are doing?

A. Not in a matter where you are on retainer.

Q. But you recall being at the Gotham Hotel with reference to a $50,000 transaction, don't you?

A. Well, I didn't say it was a $50,000 transaction, sir.

1755 Q. Do you recall being at the Gotham Hotel?

A. I recall being at the Gotham Hotel, now that you bring it up. Mr. Cain had promised—

Q. Wait a minute.

A. —Mr. Lubben--

Q. Wait a minute. Who was there, first?

A. Who was there?

Q. Yes.

A. Mr. Lubben was there, Mr. Cain was there, Mr. Huebner was there, and I don't know whether Mr. Sullivan was there or not.

Q. All right. Now, at that discussion, at the Gotham Hotel, was the subject of $50,000.00 additional money to go to Lubben's company discussed?

A. Yes, it was.

Q. Now, didn't Mr. Lubben ask for $50,000.00 additional money over what had already been paid, that is, the $75,000.00 by Mr. Cain?

A. Yes, but the reason for that was—

Q. Just: Did he?

A. Yes, he did.

Q. And Mr. Cain refused to pay it, didn't he?

A. Well, it wasn't a question of refusing to pay anything. It was a question—

1756 Q. Did he refuse to give him $50,000.00 additional money?

A. If he used the word "loan", I will say, yes, he refused the loan of an additional $50,000.00.

Q. Were you present at any discussion after that between anybody—either Mr. Cain or Mr. Huebner or Mr. Lubben, which had to do with getting an assignment of that Sterling Bank mortgage from Mr. Cain?

A. Yes, I think we met at a lawyer's office in New York.

Q. Now, where was that?

A. A Mr. Posis.

Q. Poser?

A. Posis, P-o-s-i-s. I don't recall the name of his law firm, but he was the man who handled that transaction.

Q. Whose lawyer was he?

A. He was Byron Cain's attorney.

Q. Byron Cain's attorney?

A. As far as I know. He may have been Shotwell's attorney.

Q. Now, who was present at that meeting?

A. I can't tell you, sir. I don't recall.

1757 Q. You don't remember?

A. I don't remember who was there. I know I was there.

Q. When was it, do you know?

A. It must have been—it was prior to my trip to Palm Springs, California.

Q. Well, how much prior to your trip to Palm Springs, California?

A. I can't tell you that either, sir. I don't recall. It is four years or more.

Q. I know it is a long time ago. Was it after your meeting on the porch at Hillsdale?

A. When you say after—I was not involved in any meeting—

Q. I just asked you—I am trying to place the date of this meeting in Mr. Posis' office.

A. Let's have it understood then. I was not involved in any meeting.

Q. I didn't ask you whether you were involved in any meeting, I asked you when this meeting was which you say you attended.

By Mr. Lockley: I object to any further testimony along this line. It is beyond the scope of the direct
1758 examination. I have been waiting to find what the materiality is.

By Mr. McConnell: It isn't beyond the scope of the direct examination. You went into the assignment of the mortgage. It leads up to it.

By Mr. Lockley: I don't recall that any reference was made to a meeting in Posis' office at any time. The only question of assignment of mortgage that came up was when Mr. Davidson volunteered the information that he flew out to get an assignment of a mortgage. There was no reference to anything prior to that.

By Mr. McConnell: It leads up to that.

By the Court: You mean it has something to do with Palm Springs?

By Mr. McConnell: That's right.

By the Court: All right. Go ahead.

1759 By the Witness: What was that last question?

(Question read by the reporter as above recorded.)

By Mr. McConnell:

Q. Fix it as near as you can. I can't ask you to be exact, but give us an approximate time.

By Mr. Lockley: Are you referring to the meeting in Posis' office?

By Mr. McConnell: Yes, at which Mr. Lubben was present.

By the Witness:

A. It may have been in January of 1948.

By Mr. McConnell:

Q. Now, was an assignment of the Cain mortgage discussed at that time?

A. I think it was, sir.

Q. And were arrangements made there at that time for you to go out to Palm Springs?

A. No, sir. The arrangements for me to go out to Palm Springs were made after I had arrived in Chicago, and after the Haberkorn deal was closed.

Q. All right. Now, after the Haberkorn deal was closed—did you have something to do with the Haber-
1760 korn deal closing?

A. No, sir.

Q. But after the Haberkorn deal was closed, you were to go out and get an assignment of the Cain mortgage, was that right?

A. That's correct.

Q. And you went out to Palm Springs, and you got an assignment of that mortgage?

A. Yes, sir.

Q. Now, that was a mortgage on all of Lubben's property down at Hillsdale, wasn't it?

A. Hillsdale, Whitecliff Lake, a chattel mortgage covering the equipment in the factory, and I think there was another chattel mortgage covering some of the items that were at the New York plant.

1761 Q. Securing a note made for $75,000, wasn't it?

A. Yes. The note was a prime obligation.

Q. That mortgage Mr. Cain had paid, hadn't he, or bought from the Sterling Trust Company?

A. Yes, it was assigned to him.

Q. And you brought it back to Mr. Lubben, didn't you, after you got the assignment?

A. I brought the assignment back.

Q. That's right. You brought the assignment back to Mr. Lubben?

A. I did, yes.

Q. Now, after this had happened, was that when these papers were delivered to Mr. Huebner?

A. No, sir.

By the Court: Which papers?

By Mr. McConnell: After the assignment of the mortgage had been brought back, your Honor, to Mr. Lubben.

By Mr. McConnell:

Q. Was that when these papers were delivered to Mr. Huebner?

A. Are you referring to the papers—

Q. That you had photostated—

A. That I had photostated?

1762 Q. Yes.

A. No. They were delivered before that. They were delivered after the Haberkorn deal was closed. That is the best of my recollection.

Q. And that transaction took place immediately after, as part of the closing of the Haberkorn deal?

A. I don't know. You have got two questions. Will you let me have the first question, please?

Q. Let's withdraw the question, and I will give you a brand new one.

A. All right. That's fine.

Q. Were the papers delivered to Mr. Huebner right after the Haberkorn deal was closed?

A. I didn't attend at the closing of the Haberkorn deal.

Q. You told us you knew when they were delivered.

A. I can say that my information is that they were delivered the same day.

Q. That's right.

By Mr. Lockley: Well, I move that be stricken, your Honor, if it is just his information.

By Mr. McConnell: He is representing this man as a lawyer.

1763 By Mr. Lockley: He said he didn't represent him during the Haberkorn deal.

By the Court: I suppose it would be hearsay, if you—

By Mr. Lockley: Purely.

By the Court: Well, I suppose, if it is hearsay testimony, he could have it. He is not objecting to it.

By Mr. McConnell:

Q. Did you have anything further to do with that matter; was that the end of your participation in the Haberkorn deal, or anything growing out of the Haberkorn deal?

A. I had nothing to do—

By Mr. Lockley: I don't understand the question, your Honor. I must assume the witness doesn't.

By the Court: I think he has said he had nothing to do with the Haberkorn deal.

By the Witness: I had nothing to do with it.
By Mr. McConnell:

Q. Did you have anything further to do with the
1764 assignment of this mortgage which you had obtained from Mr. Cain?

A. Are you referring to the assignment of the mortgage?

Q. Yes, I am referring to the assignment of the mortgage.

A. All right. Let's keep the record straight.
Now, what—

Q. What did you do with it; after you gave it to Mr. Lubben, did you do anything further with it?

A. I think I recorded the documents, and I gave them to Mr. Lubben, delivered them to him, so he could transfer it to his sister, or whatever he wanted to do with it.

Q. Now, at the time you received these documents from Mr. Lubben, back on the porch in Hillsdale, did you sit down and study the documents?

1765 A. No, I didn't study them.

Q. Did you read them?

A. I glanced at them.

Q. You glanced at them?

A. That is about all.

Q. And now, after four years—when was it, in 1948? After five years you can tell this jury that these photostats are the exact copies of the originals in that envelope?

A. Well, some of those photostats have Mr. Lubben's writing on them.

Q. Yes.

A. I know his handwriting.

Q. You know his handwriting?

A. Yes.

Q. That is the only way you know it is the same?

A. The others, they appear to be similar to what my recollection tells me.

Q. They just appear to be similar. You can't tell us of your own knowledge that they are exactly the same, can you, at this time, five years later?

A. I don't think that any human being can.

Q. I don't either. That's all.

1766 *Cross Examination by Mr. Kirby.*

Q. Mr. Davidson, down in New York, under an order of court, you gave a deposition, didn't you?

A. Yes, I testified.

Q. And attorneys for the government were there, as well as attorneys for the defense?

A. Yes.

Q. Do you recall being asked this question and did you make this answer:

By Mr. Lockley: What page?

By Mr. Kirby: Page 148.

By Mr. Kirby:

Q. (Reading):

"Q. When was it that you first met Mr. Lubben?

"A. It was in August, 1946, that is, July or August of 1946."

Do you recall that?

A. Yes, sir.

Q. Is that the answer you made?

A. Yes.

Q. Do you recall being asked at page 112 these questions and making these replies:

1767 "Q. So, he was having some trouble"—referring to Lubben—

"and he was being pressed for money?

"A. Oh, yes. No doubt about it.

"Q. About when was that, 1947?

"A. Well, ever since I met the man. I mean, within a short time after I met him he was having money troubles."

Do you remember those questions and did you give those answers?

A. Yes, sir.

Q. And at page 139 is the question:

"Q. Well, did Lubben talk to you some time prior to that about his tax problem?

"A. Oh, yes.

"Q. About how long before?

"A. Oh, that tax problem was a continuous thing. When he first talked to me about the tax problem it may be six, seven or eight months after I met him or it may have been a year, but I doubt it."

Did you answer in that way to those questions?

A. Yes, sir.

1768 Q. So that almost ever since you knew him he has had these problems about his income tax that he has talked to you about, isn't that right?

A. He has had income tax problems, yes.

Q. And don't the problems, Mr. Davidson, relate to what happened to this cash money he handled? Isn't that the big problem?

A. No, sir.

Q. That isn't involved in it at all?

A. That is not the big problem.

Q. No problem. The government isn't interested so far as you know, about whether he ought to pay tax or not?

A. Mr. Kirby, I don't know whether the government is interested or not.

By Mr. Lockley: I object to what you consider to be the government's interest in the matter and he has already answered the question.

By Mr. Kirby: He said that the witness had tax troubles.

By Mr. Lockley: Well, all right.

By Mr. Kirby: Almost continuously since he knew him.

1769 By Mr. Lockley: Ask him what kind of troubles they were.

By Mr. Kirby:

Q. Did I understand then that you say that these large sums of cash were not involved in Mr. Lubben's tax troubles?

A. Which large sums of cash are you talking about?

Q. Well, Mr. Lubben was asked about sums which were totaling several—oh, a million and a half.

By Mr. Lockley: I object to what Mr. Lubben was asked.

By the Court: You are going far outside the scope of any direct examination now, Counsel.

1770 By Mr. Kirby:

Q. Well, have you represented Mr. Lubben more or less continuously, sir, since you first met him in 1946?

A. I have always—I am sorry. I didn't mean to interrupt you. Will you please read that question again.

(Question read.)

By the Witness:

A. No, sir, I have not.

Q. When have you represented him?

A. When I met Mr. Lubben in 1946, he was having zoning trouble. I was retained.

Q. The question was, when, Mr. Davidson?

A. The latter part of July or the early part of August, and I fix that in 1946—I fix that because in connection with that retainer, I had a trip to make for him during the month of August out to Tucson, Arizona, and from there to Albuquerque, New Mexico.

Q. In 1946?

A. In 1946.

Q. When did you stop representing Mr. Lubben?

A. Well, I have never represented Mr. Lubben
1771 continuously. Mr. Lubben gave me particular assignments.

Q. Do you represent Mr. Lubben now?

A. I have some matters for him now, yes.

By Mr. Kirby: Thank you.

By the Court: Mr. Lockley—

By the Witness: May I be excused?

By the Court: Apparently. Mr. Lockley, do you have any redirect examination?

By Mr. Lockley: Just a couple of questions, your Honor.

Redirect Examination by Mr. Lockley.

Q. Mr. Davidson, you stated both on direct examination and on cross examination that Mr. Lubben said to Mr. Cain that he was a fool to pay this four hundred or $450,000.00 in tax. Now, was anything further said about that payment, if you can recall?

A. Yes. Mr. Lubben tied that in with the statement that Mr. Huebner took these various piles—took these various sums of money he got and put them in piles and stole from his partners and—

1772 Q. Go ahead.

A. And my recollection is that Mr. Lubben thought that he would be a fool to pay it without getting it from Mr. Huebner or whoever also got the money, because Byron Cain said he was willing to pay it himself. I mean, that is my thinking at the moment.

Q. There was nothing said that the taxes should not be paid?

A. No.

Q. Just that Mr. Cain shouldn't bear the whole burden?

A. That is correct. I didn't mean to give that impression.

Q. Now, with reference to the tax problems that you referred to in your deposition, can you be a little more specific as to what kind of a tax problem Mr. Lubben had?

A. Well, he had a problem, for example, with a man by the name of Giglio who was a partner of his for a while before my time, who entered into an agreement to pick up—pay income tax amounting to approximately $25,000.00 or thereabouts, which was never paid. He had trouble getting him—he couldn't file his tax return
1773 for that particular year.

Q. Why not?

A. Because he didn't have any books and records.

Q. Do you know where they were?

A. I don't know where they were, but I was told by Mr. Lubben—

By Mr. Kirby: I object. It is purely hearsay.

By the Court: Very well. The objection is sustained.

By Mr. Lockley:

Q. As a matter of fact, Mr. Davidson, did you ever file any lawsuits against Mr. Giglio?

A. No. When I testified in the deposition, I was under the impression that I had. I was getting ready to file when I was substituted by another attorney.

By Mr. Kirby: I object. It is not responsive to the question.

By the Court: Well, it may be stricken.

By Mr. Lockley: That's all.

By the Court: Apparently that's all.

By the Witness: Thank you. Am I excused, sir?

1774 By the Court: Well, Mr. Lockley will have to tell you whether you are excused or not.

By Mr. Lockley: As far as the Government is concerned, Mr. Davidson, that's all.

Mr. Heitmann—

By Mr. O'Brien: May I ask, while Mr. Davidson is still here—I haven't heard any further report, Judge, about this barn—these barn papers.

By the Court: I am sorry.

By Mr. O'Brien: I haven't heard, Mr. Lockley, anything further about these barn papers. That was a week ago.

By Mr. Lockley: Supposing you come up here and tell us, Mr. Davidson.

By the Witness: Oh, those papers—

By Mr. O'Brien: Yes.

By the Witness: I personally addressed those cards, on Sunday.

By the Court: Well, you are now referring to the papers that were going to be boxed up and sent here?

1775 By the Witness: That is right. I went back East. I took care of some of my business and I went up to see the gentleman who is supposed to be packing these cartons. There are about ninety-six of them. I addressed them all for him on Sunday. He was supposed to have given them to the Railway Express on Monday, so they should be arriving here. If they are not here today, they will be here tomorrow.

By Mr. O'Brien: Yes. We have Mr. Davidson under subpoena too.

By the Witness: If you want them, just give me a couple of days.

(Witness excused.)

WILLIAM H. HEITMANN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Mr. Heitmann—

By the Court: William H.?

1776 By the Witness: That is right.

By Mr. Lockley:

Q. Mr. Heitmann, what is your occupation?

A. My occupation is factory superintendent.

By the Court: Now Mr. Heitmann, you will have to speak up so the jury can hear you.

By Mr. Lockley: You speak up so the people can hear you.

By the Court: The people won't hear you if you don't speak up.

By the Witness: I will be glad to speak up.

By the Court: Mr. Lockley, you haven't got his name in the record yet. He hasn't given his name for the record, except privately to the Court and to the reporter.

By Mr. Lockley:

Q. Will you give us your full name?

A. William H. Heitmann.
Q. Where do you live?
A. 8811 Second Avenue, North Bergen, New Jersey.
Q. Where are you employed? Where were you employed in 1944?
A. In 1944 I was employed by Eatsum Food Products Company.
1777 Q. By whom was that owned at the time?
A. I believe it was owned by Mr. Lubben and Mr. Giglio.
Q. In 1944?
A. In 1944? No. It was owned by Mr. Lubben in 1944.
Q. And how long did you continue in the employ of the Eatsum Food Products Company?
A. Until it was taken over by a partnership, Mr. Giglio and Mr. Lubben.
Q. Did you continue in the employ of the partnership?
A. I did.
Q. And how long?
A. Until it terminated.
Q. Then what did you do?
A. I was working for General Confections.
Q. How long did you stay with them?
A. I stayed with them until they closed.
Q. What was your job during the period that you were working for Eatsum and General Confections?
A. Factory superintendent. Assistant factory superintendent.
Q. Factory superintendent and assistant factory
1778 superintendent?
A. No. I said assistant factory superintendent.
Q. Have you met any of the defendants here, Mr. Byron Cain or Mr. Frank Huebner, or Mr. Harold Sullivan?
A. I met Mr. Huebner and I met Mr. Cain. I have not met Mr. Sullivan.
Q. Will you point out Mr. Huebner and Mr. Cain?
A. Mr. Huebner is in the rear, and the one with the glasses on, and Mr.—I don't see Mr. Cain here.
Q. Do you wear glasses, Mr. Heitmann?
A. Well, I do, sir.

Q. Put them on. If you want to, you may walk down to the table, and see if you can see a little better.

A. There is Mr. Cain back there with the blue suit on.

By Mr. Lockley: Let the record indicate that the defendants were pointed out.

By Mr. Lockley:

Q. Mr. Heitmann: I show you Government Exhibit No. 13, and ask you if you have ever seen that before?

1779 A. Yes, sir; I seen this before. I seen the original of it.

Q. Where did you see the original of it?

A. Well, it was given to me by Mr. Lubben.

Q. Where was that?

A. At the factory.

Q. Factory of what?

A. General Confections, or Eatsum.

Q. In New York City?

A. In New York City, right.

Q. And what is that piece of paper?

By Mr. McConnell: I object to that. It is calling for the contents of the document.

By the Court: Well, I don't think—

By Mr. Lockley: I just meant for him to describe what it was, you Honor.

By the Court: I don't think you have made any foundation as to the witness having any knowledge of the paper, outside of the fact that it was given to him.

By Mr. Lockley: Well, the document is in evidence, your Honor.

By the Court: I know that. But you are now attempting to ask him something about a document, and you

1780 don't know whether he has any knowledge of it or not yet.

By Mr. Lockley:

Q. You received that from Mr. Lubben?

A. That is right.

Q. When was that?

A. Before I made one of the trips for him.

Q. Before you made the trips for him?

A. That is right.

By Mr. McConnell: I can't hear a thing back here. I can't hear a word.

By the Court: You will have to speak louder, Mr. Heit-

mann. This courtroom is apparently a difficult one in which a voice can carry.

By the Witness: All right.

By Mr. Lockley:

Q. Did you receive anything else at the time you received that instruction, or that exhibit?

A. Yes. I received some money from him.

Q. Do you know how much?

A. Well, it was about $3,000, I think.

Q. Anything else?

A. And this instruction sheet.

1781 By the Court: Will you speak a little louder, please?

By the Witness: An instruction sheet.

By Mr. Lockley:

Q. Did you receive the money in currency or—

A. I received some cash, yes. I received some in cash, and two checks.

Q. And two checks?

A. Yes.

Q. Where did you get the cash?

A. I got some cash in Youngstown, Ohio.

Q. Oh, you didn't get it from Mr. Lubben?

A. I got some from Mr. Lubben, and I got some in Youngstown, Ohio.

Q. Do you know how much you got from Mr. Lubben?

A. I am not positive any more how much I got from him.

1782 Q. Do you have any present recollection at all?

A. As to the amount?

Q. Yes. Well, did you receive anything at the time that you received the money?

A. I received two checks from him at the time I received some money. I received some money, a small amount for my expenses.

Q. Speak up. Besides the money, what did you receive?

A. I received two checks from him.

Q. And what else?

A. And the instruction sheet.

Q. Was that government's Exhibit 13 which you have seen?

A. That is the exhibit which you have there.

Q. If you examine Government's Exhibit 13, will

that refresh your recollection as to how much money you received?

A. According to this, I did not receive anything but the two checks from Mr. Lubben, and my expense money.

Q. And your expense money?

A. That is right.

Q. All right. I show you Government's Exhibits 1783 92 and 93 and ask you if you have seen those before?

A. Yes, sir. These are the two checks I received from Mr. Lubben.

Q. What did you do with them?

A. I cashed these at the bank in Chicago, here.

Q. What bank?

A. Mid-City Bank of Chicago.

By the Court: Speak up, Mr. Heitmann.

By the Witness:

A. Mid-City Bank of Chicago, National Bank.

By Mr. Lockley:

Q. Well, let us go back a minute. On leaving New York, did you come directly to Chicago?

A. No, sir, I did not. I went to Youngstown, Ohio.

Q. What did you do in Youngstown?

A. I picked up $13,039.25.

Q. What did you do after that?

A. I come to Chicago.

By Mr. O'Brien: Your Honor, I object to his reading from that exhibit and that document. We would like to know and the record should show his own recollection of these events. We can read that document 1784 ourselves.

By the Court: Yes.

By Mr. Lockley:

Q. Do you have any recollection as to what you did in Youngstown?

A. Yes, sir. I picked up some money in Youngstown as per instructions.

Q. Do you know how much?

A. Around $13,000.00.

Q. All right. And then from whom did you get it?

A. I don't know from whom, but it is from—

Q. Well, is there anything that would refresh your recollection?

A. Well, I know there was some super market out

there and I forgot the name of the gentleman I was to see.

Q. At any rate, you picked up about $13,000.00?
A. That is right.
Q. And you also had those two checks at that time?
A. I had these two checks, yes.
Q. Now you came to Chicago?
A. That's right.
Q. What did you do when you arrived at Chicago?
A. I went out to the Shotwell Manufacturing Com-
1785 pany to see Mr. Huebner.
Q. When was that? Can you give the day?
A. I arrived here on a Friday. I am not sure of the exact date.
Q. Do you know what time of the day it was?
A. I think it was around the middle of the month.
Q. Do you know what time of the day it was?
A. Yes. I arrived here in the morning.
Q. How did you get to the Shotwell plant?
A. I took a taxi out there.
Q. What did you do when you got there?
A. I asked for Mr. Huebner and met him.
Q. What year was this?
A. I believe this was in 1946.
Q. Do you know the month?
A. I believe it was in May.
Q. After you asked to see Mr. Huebner, what did you do?
A. Well, after I saw Mr. Huebner, we went up to his laboratory and I gave him some money.
Q. How much money?
A. I guess about eight or nine thousand dollars. I am not sure of the amount.
Q. Well—
1786 By Mr. O'Brien: When was this, Mr. Lockley? You haven't said yet.
By Mr. Lockley: I understood it was May, 1946.
By Mr. Lockley:
Q. Is that correct?
A. May, 1946, on a Friday.
Q. Was there anything that would refresh your recollection as to the amount of money you gave him?
A. Yes. The instruction sheet.
By Mr. O'Brien: Well, he testified what it was.
By Mr. Lockley: He said approximately.

By Mr. Lockley:

Q. I wonder if there is anything that would refresh your recollection as to the exact amount.

A. Not the exact amount. I can't tell the exact amount.

Q. You were given this sheet, you said?

A. Yes.

Q. Is there anything on the sheet to help you refresh your recollection?

A. On the sheet is the amount I was supposed to
1787 pay Mr. Huebner.

Q. Take a look at this sheet and tell us how much you paid Mr. Huebner?

A. I paid him $8,179.00.

Q. And how did you make that payment?

A. In cash.

Q. That is, currency?

A. That is right.

Q. What size bills?

A. I think they were in denominations of 50 dollars.

Q. How did you carry the money?

A. In an envelope.

Q. In an envelope?

A. That is right.

1788 Q. You gave it to Mr. Huebner in the—

A. In his laboratory.

Q. In the laboratory?

A. Yes.

Q. Now, was there any conversation at that time?

A. Well, there was generalities.

By the Court: I don't hear you.

By the Witness: We were just talking generalities, and I told him I would be back the next day to take him some more.

By Mr. Lockley:

Q. Did he say anything?

A. He said he would wait for me until I got there.

Q. All right. What did you do the next day then?

A. The next day I met Mr. Urban at his bank to cash these two checks.

Q. Which Mr. Urban is that?

A. Mr. Edward Urban of Close and Company.

Q. Did you arrange to meet him at the bank?

A. I did.

Q. Which bank was that?

A. That was Mid-City National Bank.
Q. And did Mr. Urban endorse the checks at that time?
1789 A. Mr. Urban endorsed the checks. I endorsed them, and he collected the money and gave it to me.
Q. Did he endorse it in your presence?
A. He did.
Q. What sort of money did he turn over to you?
A. I believe they were fifty and one hundred dollar bills.
Q. How much?
A. They totaled forty-six hundred dollars.
Q. Is that the amount of those checks?
A. The amount of the two checks.
Q. All right. Then after you received the money, what did you do?
A. Well, I paid Ed Urban what I was supposed to pay him, according to this sheet, and then I went out to Mr. Huebner, and paid him the balance.
Q. What time of the day was this?
A. This was around the noon hour.
Q. What did you do when you got—did you go to the Shotwell plant?
A. I went back to the Shotwell plant.
Q. What did you do when you got there?
A. I met Mr. Huebner.
Q. Where?
1790 A. At the plant. And then we left the plant and I gave him the envelope with the balance of the money in it.
Q. Where did you give him the money?
A. Somewhere outside the plant.
Q. On the sidewalk outside, or somewhere? Was it close by the plant?
A. Well, not far away from the plant.
Q. Was the plant open at that time?
A. No, it was not.
Q. What day of the week was this?
A. It was a Saturday.
Q. About what hour of the day?
A. Oh, it was around—oh, I believe—
Q. Saturday afternoon?
A. Right.

Q. How much did you give Mr. Huebner?

A. I believe I gave Mr. Huebner about seven thousand dollars, or something like that.

Q. Did you give him more than the money you received from those two checks?

A. I am not positive. I may have had some, though I doubt it. But I paid him on a Friday what I was supposed to give him on Friday, and the balance I
1791 gave him on Saturday morning, or Saturday noon, rather.

Q. All right. Would an examination of this instruction sheet refresh your recollection?

A. Yes.

Q. As to the amount you gave him on Saturday?

A. Yes. On Saturday I gave him $6,038.05.

Q. Was there any conversation at that time?

A. Yes. I told Mr. Huebner he was to understand this was for payment, partial payment on the car of chocolates that went to the West Coast.

Q. Did he say anything?

A. He just acknowledged the check, and that's all.

Q. Have you made any other trips besides the—

A. Yes, I made one, I believe, before this.

Q. All right. When was that?

A. That was during the holidays in 1945.

Q. What holidays?

A. I think it was close to the Christmas holidays.

Q. What did you do on that occasion?

A. I brought some money to Mr. Huebner.

Q. Are you able to fix a date any more definitely than that?

A. Well, I am sure it was in December, because
1792 see—all the stores had their Christmas decorations out, and so on.

Q. How much money did you give Mr. Huebner on that occasion?

A. I gave him $10,000.

Q. Where?

A. At the factory, in his laboratory.

Q. And in what form was the money?

A. In 50-dollar bills, I believe.

Q. Did anything happen in the laboratory?

A. Why, he just counted the money.

Q. Counted the money?

A. That is right.
Q. Did he count it more than once?
A. Not that time. He only counted it once and found it right, but the previous—the second time I was there, he counted the money and he thought he found a shortage, and so he recounted it and found it was correct, the amount that I gave him.
Q. Where did you get the ten thousand dollars that you gave to Mr. Huebner?
A. I got it from Mr. Lubben.
Q. Did you have any conversation with Mr. Huebner as to why you were paying him the ten thousand
1793 dollars?
A. Yes. I told him it was for Mr. Lubben. It was something—payment of his.
Q. Was that all of the conversation?
A. That was all.
Q. Did Mr. Huebner say anything?
A. He just acknowledged the fact that he received the money.
Q. Did you know what the money was for?
A. Well, I fear it was for premium payments.
By Mr. O'Brien: I object and move that be stricken. There is no connection.
By the Court: Yes. The answer may be stricken.
By Mr. Lockley: All right.
You may cross examine.

1794 *Cross Examination by Mr. Kirby.*

Q. Mr. Heitmann, how many payments did you make altogether, to Huebner?
A. To the best of my recollection, I made two payments.
Q. And the first one you say was in Christmas of 1945?
A. I believe it was Christmas of 1945, around the Christmas season in 1945.
Q. You remember you testified too on a deposition and pursuant to order of court in this case, didn't you?
A. That is right.
Q. And government counsel was there?
A. That is right.

Q. Do you remember being asked this question—by the way, when was the second visit, so I don't get too mixed up?

A. The second visit was in May, 1946.

Q. I see. Now, then, do you remember being asked these questions and your making these replies:—

By Mr. Lockley: What page, Mr. Kirby?

By Mr. Kirby: 182.

1795 By Mr. Kirby:

Q. Now, this is the question:

"Q. Now can you place any more definitely the time of your first visit to Chicago for this purpose?

"A. No. I am afraid I can't. I can't tell you the exact dates or near the dates, because I know I was out there twice.

"Q. Can you tell me the date of the second visit?

"A. Yes. I think that was—it may have been in November or the early part of December. I know it was around the holidays or close to the holidays, anyway.

"Q. In the year of 1946?

"A. 1946, yes."

So that at that time, you were asked those questions and did you make those answers?

A. I did.

Q. So at that time, you said that the second visit was in December of 1946, didn't you?

A. Well, I got my visits mixed up, in all probability. I didn't remember.

1796 Q. You say it was in May of 1946, is that right?

A. The second visit was in May of 1946.

Q. Now, when you were asked the question before you said you couldn't fix the date but now you say you can fix it and it was late in 1945, is that right?

A. That is right.

Q. Now, you testified that you gave Mr. Huebner on the first visit about $3,000.00, is that right?

A. On the first visit?

Q. Yes, sir.

A. No. I testified just now on the first visit that I gave him $10,000.00.

Q. I am sorry. When did you give him the three?

A. Three?

By Mr. Lockley: There is no testimony that there was any $3,000.00.

By the Witness:

A. I did not give him $3,000.00. I didn't say that.

By Mr. Kirby:

Q. The three thousand was what you picked up to start with?

A. Yes, what I picked up, the money I got at 1797 Youngstown.

Q. I see. In my notes here it is eight, as I see it. Do you have that exhibit there?

A. I have it right here. I gave him that amount on the third line.

By the Court: May I have the number of that exhibit, please?

By Mr. Kirby: It is Government's Exhibit 13.

By Mr. Kirby:

Q. Is this the first visit?

A. That is the second visit.

Q. On the first visit, where did you get that money?

A. I got it from Mr. Lubben at his office.

Q. What form did he give it to you in?

A. He gave it to me in 50-dollar bills, I believe, in an envelope.

Q. And you just simply brought that right straight out?

A. I brought that right out.

Q. It was on the second visit that you made this stop-over at this super market?

A. That is right, at Youngstown.

1798 Q. Now, do you say now that Mr. Lubben—or excuse me—that Mr. Huebner was alone or with others when you gave him this first payment?

A. He was alone when I gave him his first payment. There was somebody in his laboratory when we got there and he asked them to leave.

Q. Well, on the second visit, was he alone?

A. On the second visit—on the Friday, he was alone in the laboratory. When I got there on Saturday, there were some people in his office and we left.

Q. On the second visit, did you have lunch with Mr. Huebner?

A. No, sir. I had lunch with him on the first visit.

Q. Well, you were asked at page 186:

"How about the second visit?"

And your answer:

"The second visit, I had lunch with him."

Is that a mistake?

A. That is a mistake that I made. I got the visits mixed up.

Q. And you say now that the amount you gave
1799 to Mr. Huebner the second time was how much?

A. It was eight thousand. That is eight thousand some odd dollars on a Friday and six thousand some odd dollars on a Saturday.

Q. That is a total of how much?

A. Well, it is better than fourteen thousand dollars.

Q. Do you recall when you were asked about this before, the second one—let me ask you this—the second day that you met him, the second time, you gave him how much?

A. About six thousand dollars.

Q. Do you recall being asked before at page 187, Mr. Heitmann, in making this answer as to the second visit, the second time:

"Q. You again had a package, an envelope?

"A. That is right.

"Q. What were the contents?

"A. $10,000.00, I think.

"Q. In currency?

"A. In currency."

Now, was it ten?

A. Well, I figure it was around ten. I didn't remember the exact amount of money that I had.

1800 Q. But now you do?

A. Now I do, from the exhibit there.

Q. And you now say it was six?

A. On the second day there was a little better than six and the first day there was a little better than eight. That is on the Friday. There were two visits there.

Q. I assume that since the testimony that you gave down there at that deposition that you have been interviewed?

A. No, I did not give that testimony—the deposition—of course, I did not remember the exact amount that I gave.

Q. Yes, Mr. Heitmann. My question to you is this, that since you gave your deposition you have been interviewed?

A. That is right.

Q. And since then you say you have a better memory of what the transactions were?

A. That is right.

1801 Q. But I am sure, Mr. Heitmann, that when you were being asked questions in New York you were giving us your best recollection of the matter?

A. I was, definitely.

Q. And you were under oath?

A. I was under oath.

By Mr. Kirby: Thank you.

Say, I just want to ask Mr. Heitmann a couple more questions, Vincent, if you will just tolerate me for a minute.

By Mr. Kirby:

Q. Did you handle, sometimes, currency from boxes that were kept on Mr. Lubben's business premises?

A. No, sir; I did not.

By Mr. Lockley: Again I object. It is beyond the scope of the direct examination.

By the Court: Yes, I will sustain the objection.

By Mr. Kirby:

Q. Let me pose a specific question, whether in August of 1945 you were paid from boxes on Mr. Lubben's premises, as much as—

1802 By Mr. Lockley: I object.

By Mr. Kirby:

Q. —thirty thousand in cash?

By Mr. Lockley: I object. It is beyond the scope of the direct examination.

By the Court: Yes. I will sustain the objection.

By Mr. Kirby: If the Court please, you will recall that there has been some testimony about currency coming from the box.

By the Court: I understand that full well. But you are now exceeding the scope of the direct examination.

Cross Examination by Mr. O'Brien.

Q. Do you remember, Mr. Heitmann, on the deposition I asked you—withdraw that.

The deposition was taken last October, was it not, in New York City?

A. Yes.

Q. And do you remember who was present on our side?

A. Yes, Mr. Sullivan was present, I believe you were present, Mr. Cain was there.

1803 Q. You met Mr. Cain at that time?

A. That's the first time I met Mr. Cain.

Q. Is that the only time you met him?

A. That's the only time I met him.

Q. Until you came to the courtroom here?

A. That's right, Mr. Cain in the courtroom here.

Q. Now, at the end of that examination, I asked you whether you had recently conferred with the folks at the Treasury Department, the Revenue Department?

A. Right.

Q. And you said you had?

A. Not recently. I said I had.

Q. You had within some months?

A. Within some months.

By Mr. Lockley: Well, I object. In any event, it is beyond the scope of the direct examination, no matter what was done at the deposition.

By Mr. O'Brien: I think, counsel—perhaps I shouldn't say so—but the conception of what is the scope of the direct is very peculiar to me. A man that said one thing here and one thing there. And I certainly have a

1804 right to show what chance and opportunity he had had to refresh his recollection at the time he was testifying last October.

By the Court: I said he has answered the question. I assume that is tantamount to a ruling.

By Mr. O'Brien:

Q. You recall that I did ask you that, Mr. Heitmann, whether you had had that opportunity; do you understand the question?

A. I believe I do. I know I didn't have any opportunity to talk over the deposition at the Treasury Department or anywhere else.

Q. No. But you had been down there within some months preceding the time of the deposition and they had interrogated you about these amounts, had they not?

A. No, they had not.

By Mr. Lockley: I object. There is nothing improper—

By Mr. O'Brien: I didn't say there is anything improper.

By the Court: Well, he said they had not.

By Mr. O'Brien:

1805 Q. As a matter of fact, Mr. Heitmann, without reference to this Exhibit, Government Exhibit 13, you can't tell us about the dates or the amounts or just where you went, or who you saw, from the time you left New York, can you?

A. I think I can make that quite clear. On the first trip I went to see Mr. Huebner. I went directly to Chicago.

On the second trip, I went out to Youngstown, collected some money, come to Chicago, saw Mr. Huebner, paid him, stayed over the next day, went to the bank with Mr. Urban, collected some more money, and went out to Mr. Huebner again. Made the payment as per the instruction sheet.

Q. Well, just what payments did you make now; tell us about them.

A. In the first trip that I made out here, I paid him $10,000. That was a direct trip.

Q. Was the first trip the one when you came right to Chicago?

A. Came right to Chicago.

Q. And the second trip was via Youngstown?

A. That's right.

1806 Q. And on the second trip, what payments did you make?

A. On Friday I paid him eight thousand some odd dollars, and on Saturday I paid him six thousand some odd dollars.

Q. Does that cover all the payments you made on that trip?

A. That covered the payments I made to Mr. Huebner on that trip.

Q. What other payments, if any, did you make?

A. I made some payments to Mr. Urban—Eddie Urban.

Q. How much?

A. Whatever is on the slip there.

Q. That's what I want to know. And when did you make it to Urban?

A. I made that on Saturday morning after we had been to the bank.

Q. To Urban or to Huebner?

A. To both.

Q. Did you get the money to pay Urban at the bank?

A. I did.

Q. You didn't pay Urban out of the money you got at Youngstown, then?

1807 A. Right, I did pay some of that money that I got out of Youngstown.

Q. Which is it?

A. Either one. If I add the two together, I paid both. It added to so much money and I had to pay each one so much.

Q. First you tell me you paid him with the money you got from the bank and now you say you may have paid him with the money you got at Youngstown. Which is it?

A. Well, after I paid Mr. Huebner on Friday I had so much money left.

Q. How much did you have left, approximately?

A. If I had thirteen thousand I paid out eight, I had about five thousand dollars left.

Q. Before you paid Urban?

A. Before I paid Urban. Then we went to the bank and I collected $4,600.00.

Q. How much did you pay Urban?

A. And I paid Urban whatever the amount is on the slip there.

Q. You don't know what that was?

A. No. A balance of around three thousand some odd dollars, I believe.

1808 Q. Can you state approximately how much you paid Urban; without figuring it up can you tell us?

A. About $3,000 or so.

Q. And how much did that leave?

A. About six thousand some odd dollars.

Q. After you paid Frank Huebner, you think you had about five thousand dollars left?

A. I had nothing left after I paid Frank Huebner.

Q. After the first payment that you made to Huebner?

A. Well, after the first payment, yes, I think I had about five thousand.

By the Court: Perhaps we can take our recess now.

We will take our afternoon recess and suspend for ten minutes.

(Short recess.)

By Mr. O'Brien:

Q. Was it on your first or second visit that you had lunch with Mr. Huebner?

A. On the first visit, as near as I can recollect.
Q. And that was at the Lake Shore Club, was it not?
1809 A. That's right.
Q. Over on the lake?
A. On the lake front.
Q. On your second visit you did not have lunch?
A. We did not have lunch, no.
Q. Was the second visit on a Saturday?
A. It was on a Friday and a Saturday.
Q. Friday and Saturday. Now, you had come to Chicago around—let's see; it is hard for me to keep these visits straight. Your second visit was on a Friday and a Saturday?
A. That's right.
Q. And you made a payment, or payments, of how much, do you say?
A. On Friday I paid him eight thousand some odd dollars, and on Saturday I paid him six thousand some odd dollars.
Q. That was in May?
A. Beg pardon?
Q. In May of '46?
A. May of '46.
Q. And those were the payments which Mr. Lubben told you were related to some shipment of chocolates to the west?
A. That's right.
1810 Q. And did he say to whom the shipments had been made, of those chocolates?
A. He did not.
Q. Now, back in December of '45, you came through Chicago on the way to Kansas City, did you not?
A. I do not think so, no.
Q. Did you go to Minneapolis?
A. Not on that trip.
Q. In December of '45?
A. I did not.
Q. Did you ever go to Kansas City or Minneapolis?
By Mr. Lockley: I object, your Honor. It is beyond the scope of the direct examination.
By the Court: He can answer yes or no.
By the Witness: Will you repeat the question, please?
(Question read by the reporter as above recorded.)

By the Witness:
A. I did.
By Mr. O'Brien:
Q. Alone?
1811 A. Alone.
Q. Do you remember the purpose?
By Mr. Lockley: I object, your Honor.
By the Court: Yes, I will sustain the objection.
By Mr. O'Brien:
Q. Do you remember when it was?
A. I do not.
Q. You have no recollection at all of the time?
A. Not of the time. I believe it was in 1945.
Q. And did you bring money for delivery?
By Mr. Lockley: I object, your Honor. The general nature of the question—
By the Court: Yes, I will sustain the objection.
By Mr. Lockley: —is beyond the scope of the direct examination.
1812 By Mr. O'Brien: Well, I would like to be heard momentarily on that. May I be heard here?
By the Court: Well, it seems to me it is so evident, I don't see that we should labor the point. He has testified regarding the two visits.
By Mr. O'Brien: That's right.
By the Court: You can cross examine him as to those two visits. But the government hasn't called him for any other purpose. And unless you can show any relevancy to these other visits, with these visits, then I say it is entirely outside the scope of the direct examination.
By Mr. O'Brien: Well, of course, that is what I am trying to do.
By the Court: Well, you can make an offer of proof.
By Mr. O'Brien: That's what I mean.
By the Court: All right. Come forward.
By Mr. O'Brien: Outside the presence of the witness?
By the Court: Yes.
1813 (Whereupon the following proceedings were had outside the hearing of the jury and the witness:)
By Mr. O'Brien: It is our position that he was not here in December of '45 to make any payment to us, and that he did not make such a payment. I am informed that he was here—through Chicago at or about that time on his

way to make a payment either at Kansas City or Minneapolis, and I believe that the witness is confused as to the payment made to us at that time and the payment made to the other people, of whom we are informed.

By the Court: You can ask him if he was in Minneapolis in December of '45, at or about that time, if that is what you have in mind. But you are not going to explore any other payments, if that is what you want.

By Mr. O'Brien: No, I have a specific thing in mind. He says he was there, but he can't remember the time in '45 when he was there.

1814 By the Court: But you already explored the other so-called—

By Mr. O'Brien: No, I say on the payment he says he made to us in December of '45, he was really through Chicago to make to somebody else. I am not interested in the details of it, but I do say he is confused on those two payments, between the one he made there and the one that he made here.

1815 By the Court: You can cross examine him as to whether or not he was in Minneapolis in '45. But you certainly are not going to go into what may have taken place in Minneapolis, or what payments he made there. It can't have any possible relevancy to the payments he made in Chicago.

By Mr. O'Brien: Well, I don't know in actual performance how far you will permit me to interrogate him, but I did want to go on the record, because I consider what I have to ask him is closely related to what I think is his confusion on that. And the things that I want to ask him about, he will know when I mention them, and they may straighten him out on that. That is why I wanted to do it.

By the Court: Well, you can go forward and see what objection is made.

(Whereupon the following proceedings were had in the hearing and presence of the jury:)

By Mr. O'Brien:

Q. Now, Mr. Heitmann, you do say that you re-
1816 member in the year of '45 going either to Kansas City or to Minneapolis?

A. That's right.

Q. Which place was it, or was it both?

A. I went to both.

Q. And can you tell us the time of your visit to Minneapolis in the year 1945?

A. The only thing I can recall about it, it was during the summer months, I believe. It was kind of warm.

Q. How do you recall that?

A. By the heat, I think. I did not carry an overcoat.

Q. And when was your visit to Kansas City?

A. I am not sure of the dates. I can't recall.

Q. May it have been in the latter part of 1945, your visit to Kansas City?

A. It could have been, yes.

1817 Q. And did that visit have to do with the delivery of money?

A. That's right.

Q. The expenses of your two visits to Chicago, and of your visit to Minneapolis, and your visit to Kansas City, were paid by your company?

A. That's right.

Q. Which, in December of 1945, was the Eatsum Food Products, the partnership?

A. That's right, 1945.

Q. If any of those visits was early in the year 1945, the company would be the proprietorship, would it not?

A. Early in 1945?

Q. Yes.

A. Well, I didn't make any visits in early 1945.

Q. As I am reminded, Mr. Heitmann, the partnership commenced to operate June 1st, 1945.

A. That's right.

Q. And I think my question should be, then: If any of the visits you have mentioned were made before that time, the expenses would have been paid by the proprietorship?

A. I did not make any trips before that time.

1818 Q. All right. Then all of the visits that you mentioned, including the two to Chicago here, were made after June 1st, 1945?

A. That's right.

Q. Now, the monies that you were delivering at Kansas City and at Minneapolis had nothing to do with Huebner, did they?

A. They did not.

Q. Did you procure those monies for Kansas City and Minneapolis at the same bank, the Mid-City National Bank?

By Mr. Lockley: I object, your Honor. I have been trying to give counsel some latitude, but I think we are going beyond the scope.

By the Court: He may answer it.

By the Witness:

A. I did not.

By Mr. O'Brien:

Q. You procured the money in the east?

A. In New York, right.

Q. And brought it with you in currency?

A. That's right.

By Mr. O'Brien: That is all.

By Mr. McConnell: I have a couple of questions.

1819 *Cross Examination by Mr. McConnell.*

Q. If I understand your testimony, you can't tell us where you got this money in Youngstown, is that right?

A. I do not recall.

Q. There is nothing on this memorandum that you referred to that refreshes your recollection?

A. That's right.

Q. In other words, it doesn't tell you where it came from, does it?

A. It does not.

Q. And without telling you where it came from, you just don't know where it came from, do you?

A. That's correct.

Q. The other things you have testified to, which you read from the memorandum, it does tell you about names and places, is that right?

A. That's correct.

Q. How long were you in Youngstown?

A. About one day. I was met at the airport there by the person I was to meet, and we went over to the hotel.

Q. And you don't know who he was?

A. I don't remember his name. I only met the

1820 man once.

By Mr. McConnell: That is all.

1821 By Mr. McConnell:

Q. You said that this was in—

By Mr. McConnell: Where is the document you used?
(Document handed to counsel.)
By Mr. McConnell:
Q. You say that this memorandum was entirely in Mr. Lubben's handwriting, is that correct?
A. That is correct.
Q. And it is?
A. It is. This is a copy of it.
By Mr. McConnell: I was referring then to Government's Exhibit 13, received in evidence.
That is all the questions I have.

Redirect Examination by Mr. Lockley.

Q. Now, Mr. Heitmann, were you in any doubt as to whether you made a visit in May of 1946?
By Mr. McConnell: I object to whether he was in any doubt.
By the Court: Will you put that question again.
1822 By Mr. Lockley: I am asking if he has any doubt that he made a visit in May of 1946.
By the Witness:
A. I have not.
By the Court: You may answer.
By Mr. Lockley:
Q. You are not in any doubt?
A. I am not in any doubt about that.
Q. You also testified that you made another trip around Christmas time?
A. That's right.
Q. Well, now, if the trip around Christmas time was in 1945, that would have been the first trip, is that correct?
A. That is correct.
By Mr. Kirby: If the Court please, I do think it is improper, and I object after a witness has been cross examined, for the Government to turn—with all his many years of experience in the Department of Justice, to get up and ask these leading questions.
By the Court: Has he had many years of experience?
1823 By Mr. Kirby: Well, I understand he has been in the Department of Justice for many years and that he is one of their stars.

But, in any event, if it were his first year, he should know that you shouldn't ask these leading questions. And I object to that last question.

By the Court: Well, I assume your observation is quite proper, but I take it Mr. Lockley was trying to clear up any confusion that might appear by reason of the witness having reversed his visits in the deposition, and which came out on cross.

By Mr. Kirby: Well, I respectfully—

By the Court: I think, under those circumstances, counsel has a right to call to the witness's attention these two dates to see if there is any confusion in his mind with respect thereto.

By Mr. Kirby: I beg to stress the point, your Honor, that he shouldn't do it by leading questions. And that last question, if your Honor has it in mind, I object to 1824 as leading.

By the Court: Well, the answers may stand.

By Mr. Lockley:

Q. Well, do you have any doubt in your mind as to whether this was 1945 or 1946?

By the Court: You mean the first visit?

By Mr. Lockley: Yes, the first visit.

By Mr. Lockley:

Q. The one around Christmas.

A. I can't say exactly that I am definite about it, but I believe it was 1945.

Q. That is your best recollection?

A. That is my best recollection of the matter. I know the second one was in 1946.

Q. Where did you stay on the Christmas visit, do you remember that?

A. Yes, I stayed at the hotel near the lake front.

By the Court: Near the what?

By the Witness: Near the lake front here in Chicago.

By Mr. Lockley:

Q. Do you know the name of the hotel?

1825 A. I do now, yes. It is the Webster Hotel.

Q. The Webster Hotel?

A. That's right.

Q. Had you ever stayed there before?

A. I did not.

Q. Well, how did you come to stop at the Webster?

A. Mr. Huebner was kind enough to get me a place there. It was hard getting rooms in Chicago and I called him up and he secured the reservation for me.

Q. Had you ever stayed there before?

A. I never stayed there before or since.

By the Court: This is your first visit, that you stayed at the Webster?

By the Witness: The first visit, at the Webster.

By Mr. Lockley:

Q. Now, there was also some reference made on cross examination to a slight discrepancy in your testimony on the deposition and here on direct. Was I the Government attorney which counsel refers to as having been present during the course of that deposition?

A. You were not.

By Mr. Kirby: I will stipulate that you were not.

1826 By Mr. Lockley: Thank you.

By Mr. Kirby: The name was Gorman, the other fellow.

By Mr. Lockley:

Q. Did you at that time have the instruction sheet, Government's Exhibit 13, to refresh your recollection?

A. I did not.

Q. How long had it been since you had seen this?

A. I only saw it—it must have been seven years.

Q. You hadn't seen it for about seven years?

A. I hadn't seen it for a period of years, I hadn't seen it at all.

Q. When did you next see it, after the deposition?

A. I saw it, I believe, this—I believe in June or July of this year.

1827 Q. In June or July of this year?

A. Yes.

Q. And did that refresh your recollection?

A. That did refresh my recollection.

Q. Did the Eatsum Food Products Company have a customer known as Imperial Candy Company?

A. They did.

Q. And where was that located?

A. In Youngstown, Ohio.

Q. That was in Youngstown, Ohio?

A. Youngstown, Ohio.

Q. Does that refresh your recollection as to where you went in Youngstown?

A. That is where I went, I believe.

Q. You now have an independent recollection that when you went to Youngstown you went to the Imperial Candy Company?

A. I believe that was the one I went to see.

Q. I don't want you to take my word for it. I want to know if you remember it.

A. I believe that is it.

By Mr. Kirby: If the Court please, that illustrates why I objected to his leading the witness.

1828 By the Court: It is leading. I appreciate that. But the answer may stand.

By Mr. Lockley: That is all. Thank you, Mr. Heitmann.

By Mr. O'Brien: Mr. Heitmann, just one question, if I may, your Honor.

Recross Examination by Mr. O'Brien.

Q. Where did you stop—

By the Court: Sit down, Mr. Heitmann.

By Mr. O'Brien:

Q. Where did you stop on the other visit? You say you stopped at the Webster Hotel on the one visit.

A. Yes.

Q. At what hotel did you stop on the other visit?

A. The Sherman Hotel.

Q. The Sherman House?

A. That's right.

By Mr. Lockley: All right, Mr. Heitmann.

(Witness excused.)

1829 BEATRICE FELDMAN, a witness called herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. What is your name?

A. My name is Beatrice Feldman.

Q. And where do you live, Miss Feldman?

A. 105-07 66th Avenue, New York City.

Q. What is your occupation?

A. I am an office manager and bookkeeper.

Q. How long have you followed that occupation?
A. About sixteen years.
Q. Where were you employed in 1944?
A. In July of 1944 I was employed by the Eatsum Food Products Company.
Q. The Eatsum Food Products Company?
A. That's right.
Q. And who employed you?
A. You mean who hired me?
1830 Q. Yes.
A. Well, Mr. Bercu hired me as office manager for the firm.
Q. And for whom did you work?
A. For Mr. David Lubben.
Q. And who was Mr. Bercu?
A. Mr. Bercu was the outside auditor who was employed to make a monthly audit.
Q. Is he a certified public accountant?
A. He is.
Q. Now, what was your employment in 1945?
A. Well, as of June 1st, 1945, a partnership was formed, and I continued as the office manager and bookkeeper for the partnership.
Q. That continued to be known as Eatsum Food Products?
A. That's correct.
Q. And you continued to work for them for the balance of the year?
A. That is correct.
Q. And in 1946 where did you work?
A. Well, on March 9, 1946, the partnership was dissolved—
By the Court: March?
1831 By the Witness: 9, 1946.
By the Witness:
A. And I was requested to stay on for the liquidation of the partnership, which I did.
By Mr. Lockley:
Q. Do you mean it was legally dissolved on March 9th?
A. Well, I don't know whether it was legally dissolved. The partnership was ended as of March 9th. Mr. Lubben left the partnership, and we started to liquidate the business, as such, collecting the accounts receivable, and paying out the bills that were still open and payable.

Q. And who asked you to remain with the partnership?

A. Well, I believe that Mr. Lubben and Mr. Roth asked if I would stay on to liquidate.

Q. And how long did that process of liquidation take?

A. Well, I left the employ of the partnership in the end of July of 1946, at which time they were still liquidating.

Q. And then what did you do after the end of July?

A. I went to work for General Confections in the
1832 Bronx.

Q. That was again Mr. Lubben?

A. That's correct.

Q. Now, were your duties throughout all of these various organizations the same?

A. They were.

Q. And what were they again?

A. I was employed as head bookkeeper and office manager. I supervised the keeping of the books. I told the girls what to do, and, in general, ran the office.

Q. Well, what was the nature of the books kept by the Eatsum sole proprietorship during the year 1945?

A. We had a cash receipts book, a cash disbursements book, a purchase book, a sales book, a general journal, a general ledger, a petty cash book, and a payroll book.

Q. And is that a complete double entry—so-called double entry set of books, to your knowledge?

A. It is.

Q. Now, I show you Government's Exhibit for Identification No. 5, and ask if you have seen that before?
1833 When you are through with it, just put it on the table.

A. I have seen this before.

Q. And what does it purport to be?

A. This is the purchase book for the period from September, 1944 to May of 1945.

Q. Of the Eatsum sole proprietorship?

A. That's correct.

By the Court: You call it the purchase book?

By the Witness: That's correct, sir.

By Mr. Lockley:

Q. And was that a book kept by you?

A. It was kept either by me or under my supervision.

Q. Did you have other employees who also worked on the books?

A. Yes, sir, we did.
Q. And they came to you for instructions, did they?
A. That's correct.
Q. Was that a book that was kept in the ordinary course of business?
A. It was.
Q. And were the entries in it true and correct, 1834 to the best of your knowledge and belief?
A. They were.
Q. And were they made contemporaneously?
A. I am sorry.
Q. Were they made at or about the time the entries were made?
A. Yes, they were.
By Mr. O'Brien: I don't know that I understand that last question.
By Mr. Lockley: I mean by that, were the entries made at or about the same time as the transactions they intend to reflect.
By the Witness: I gathered that, sir. I am sorry.
By Mr. Lockley:
Q. All right. I show you Government Exhibit for Identification No. 6, and I ask if you have seen that before?
A. I have.
Q. What does that purport to be?
A. This is the accounts payable ledger that was kept for the period from April, 1944, to the close of the single ownership, May of 1945.
Q. And was that book also kept under your 1835 supervision and direction?
A. It was.
Q. Is it true and correct, to the best of your knowledge and belief?
A. It is.
Q. Was that a book kept in the ordinary course of business?
A. It was.
Q. Were the entries made therein at or about the time they occurred?
A. Approximately.
Q. Going back to the purchase book, Miss Feldman, what is the purpose of a purchase book?
A. Well, the entries made in a purchase book are

taken from the invoices which you receive for merchandise that you purchase from different vendors.

Q. And after the entries are contained therein, what information does it reflect?

A. It reflects the monies due and payable at any given time to the various individuals.

Q. And now the accounts payable ledger. What does that reflect?

A. The accounts payable ledger shows the monies
1836 due to any one particular individual at the particular time that you look at it.

Q. It shows how much the business owes?

A. That's correct.

1837 Q. I now show you Government's Exhibit No. 7 and ask you if you have seen that book before?

A. Yes, I have.

Q. What does that purport to be?

A. This is a record of the cash disbursements for the single ownership, from September, 1944, to May, 1945.

Q. Was that a record kept under your supervvision and direction?

My Mr. O'Brien: What was the period again?

By the Witness: This is a cash disbursements book from the period 1944 to May, 1945.

By Mr. Lockley:

Q. Was that book kept under your supervision and direction?

A. It is.

Q. Was it kept in the ordinary course of business?

A. It was.

Q. Was it true and correct, to the best of your knowledge?

A. It was.

Q. Can you tell us the purpose of a cash disburse-
1838 ments book?

A. A cash disbursements book contains a record of all checks issued as taken from the stubs of the check book for the business.

Q. Does it show anything besides the checks issued?

A. It does. It shows the name of the individual to whom the check was issued, the amount of the check, any deduction for discount, freight and the total amount posted to the accounts payable ledger.

Q. Is that sometimes also referred to as the check register?

A. Yes, I believe it is.
Q. It shows the amount paid out by check?
A. That is correct.
Q. Now, I show you Government's Exhibit for identification No. 8 and ask you if you have seen that before?
A. I have.
Q. And what does it purport to be?
A. This is the general journal for the period from January, 1945, to May of 1945.
Q. Of what company?
A. The Eatsum sole proprietorship.
1839 Q. Is that a book likewise kept under your supervision and direction?
A. That is correct.
Q. Was it true and correct at the time it was made?
A. It was.
Q. And was that a book kept in the ordinary course of business?
A. It was.
Q. What is the purpose of a general journal?
A. Well, there are certain entries and books which cannot be handled through the cash receipts or cash disbursements and these entries are contained in the journal.
Q. Now I show you Government's Exhibit for identification No. 9 and ask you if you have seen that before?
A. I have.
Q. What does it purport to be?
A. This is the general journal for the single ownership from January 1, 1945, to May, 1945.
By Mr. O'Brien: Isn't that what we just had?
1840 By Mr. Lockley:
Q. What do you call it?
A. I am sorry. It is the general ledger. I think I said the general journal.
Q. Is that a book kept in the ordinary course of business?
A. Yes, sir.
Q. Is that kept under your supervision and direction?
A. Mr. Bereu posted this from the books of original entry.
Q. Did you make any entries in it?
A. I don't believe so.
Q. Is that one of the books which was kept as a part

of the ordinary course of business of the Eatsum Food Products Company, sole proprietorship?

A. It was.

Q. Is it true and correct, to the best of your knowledge?

A. It was.

Q. Miss Feldman, is that all of the books and records of the sole proprietorship or are there any more that you know of?

A. Well, there was a petty cash book. There was
1841 also a sales book which I don't believe is here.

Q. And what information would be contained in the petty cash book?

A. Well, they—we maintained a petty cash box, I believe, and we had something like $50.00 or $100.00 in it which we used for the purchase of stamps or for trucking charges and miscellaneous supplies that we purchased for the office for which we had to pay cash.

1842 Q. Those were charges for small purchases?

A. That is correct.

Q. And what is the other record that you refer to?

A. The sales book.

Q. And what information is contained in it?

A. That would be a record of the sales made to the different people to whom we sold merchandise.

Q. During the period of the partnership, can you describe the books and records kept at that time?

A. We had the same books. We opened a new set of books at the time the partnership was formed, but they consisted of the same types of books.

Q. Will you name them?

A. The cash receipts book; the cash disbursements book; purchase book; a sales book; a general ledger; general journal; petty cash book; payroll book.

Q. And when did you last see those books?

A. I saw one of the books at the office at 253 Broadway.

Q. And what is at 253 Broadway?

A. I believe that is the Special Investigation Department.

By Mr. Kirby: Treasury?

1843 By the Witness: I believe so.

By Mr. Lockley: Will you please mark this Government Exhibit 9-A for identification.

(Said document was marked Government's Exhibit 9-A for identification.)

By Mr. Lockley:

Q. I show you Government Exhibit for Identification No. 9-A, and ask you if you have seen that before?

A. Yes, I have seen this before.

Q. Where was that?

A. Both at the offices of the Eatsum partnership at 19 Rector Street, and also at the Treasury Department.

Q. That is the book you referred to as the one you saw at 253 Broadway?

A. That is correct.

Q. Was that one of the books and records kept by the partnership in the ordinary course of business?

A. That is so.

Q. What book is it?

A. This is the general ledger.

Q. Was that kept by you or under your supervision and direction?

1844 A. At the beginning it was kept by the accountant, and then I started to post it up.

Q. And who were the accountants during the period of the partnership?

A. Well, we had two sets of accountants, Mr. Bercu —that was Bernard Bercu and Company, and we also had Louis J. Roth.

Q. Did Mr. Roth succeed Bercu?

A. No. Mr. Roth came into the partnership at the same time the partnership was formed, and he took an independent audit with the understanding that he represented Mr. Giglio's interest.

Q. So you had two sets of accountants working on the books at the same period of time?

A. That is correct.

Q. For whom was Mr. Bercu working?

A. Mr. Bercu was employed by the Eatsum Food Products partnership, and he had come in with Mr. Lubben at the time the partnership was formed.

Q. And Mr. Roth, who was he employed by?

A. Well, he then was employed by Eatsum Food Products partnership.

Q. Did both of them remain throughout the course of the partnership?

1845 A. No, Mr. Bercu left as auditor for the firm, I believe, in November or December of 1945.

Q. Did Mr. Roth then remain?
A. He did.
Q. He remained throughout the end of the partnership, did he?
A. That is correct.
Q. Now did you answer my question as to where you had last seen the balance of the books you enumerated for the partnership?
A. I don't believe I did. The last time I saw the full set of books was at 19 Rector Street.
Q. What was 19 Rector Street?
A. The offices of the partnership were located at 19 Rector Street.
Q. And who had custody of them at that time?
A. Mr. Roth and Mr. Giglio.
Q. Was Mr. Roth associated with the partnership at that time?
A. He was not.
Q. When was that?
A. That was the end of July.
Q. What year?
A. 1946.
Q. Now after leaving the partnership, you say 1846 you went to work for General Confections?
A. That is correct.
Q. And what sort of books did they maintain?
A. They maintained the same books, mainly a general and cash receipts, cash disbursements, purchases, sales, general ledger, general journal, petty cash, and payroll book.
Q. Did you also work for the Reserve Trading Company?
A. I did.
Q. What sort of books were kept by that company?
A. The same books—cash receipts,—
Q. The same as you have just enumerated?
A. That is correct.
Q. Now I show you Government's Exhibit 10 for identification, and ask if you have seen that before?
A. I have.
Q. What does that purport to be?
A. This is the binder containing all of the books of the Reserve Trading Company.

Q. You mean all of the books you have enumerated are contained in that one volume?

A. Correct, with one exception. There was no
1847 payroll book on Reserve Trading Company. There were no salaries paid; and there was no petty cash book.

Q. And was that book kept by you?

A. It was.

Q. Was it kept in the ordinary course of business?

A. It was.

Q. Was it true and correct at the time that it was made?

A. It was.

1848 By Mr. Lockley: Will you stamp this Government's Exhibit 11 for identification.

(Said document was marked Government's Exhibit 11 for identification.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 11, and ask you if you have seen that before.

A. I have.

Q. What does that purport to be?

A. This was the general journal for the period from April, 1946, to July, 1946, for the General Confections.

Q. From April to July, of General Confections?

A. That is correct.

Q. Was that kept by you in the ordinary course of business or under your supervision and direction?

A. Part of it was.

Q. Was the balance of it kept under your supervision?

A. Yes, it was.

Q. Was it true and correct at the time it was
1849 prepared?

A. Yes.

Q. And was that a book kept in the ordinary course of business?

A. It is.

By Mr. Lockley: Will you please stamp this Government's Exhibit 11-A for identification.

(Said document was marked Government's Exhibit 11-A for identification.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 11-A, and ask you if you have seen that before.

A. I have.

Q. What does it purport to be?

A. This is a general journal for the period from April, 1946, to February, 1947, for General Confections.

By the Court: Is that a general journal?

By Mr. O'Brien: Is that a general journal overlap?

By the Witness: Yes. May I explain that, please.

1850 By Mr. Lockley:

Q. Yes. Will you explain it.

A. When I came to work for General Confections I found that they had started to use this small book which was a six-column journal and the three debit columns and the three credit columns were not sufficient to handle the type of entries we were making, so I started this twelve-column journel and rewrote the entries, copied them exactly from the small book to the large book.

Q. For how long a period of time was that overlap?

A. That would be for the period from April to July.

Q. And was that a record that was kept in the ordinary course of business?

A. It was.

Q. Was it true and correct to the best of your knowledge?

A. It was.

Q. And at least for the period after July, was it kept under your supervision and direction?

A. It was.

By Mr. Lockley: Will you please mark this Government's Exhibit for identification No. 12.

1851 (Said document was marked Government's Exhibit 12 for identification.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 12 and ask you if you have seen that before.

A. Yes, I have seen this before.

Q. What does that purport to be?

A. This is the general ledger or general journal for General Confections from March 1, 1947, to February, 1948.

Q. So that there will be no confusion, you say that there is the general journal for General Confections?

A. That is right, general journal for General Confections.

Q. Now, was that book kept under your supervision and direction?

A. Only up until the end of July of 1947.

Q. And was it true and correct, to the best of your knowledge?

A. It was.

Q. Was it a book that was kept in the ordinary
1852 course of business?

A. It was.

By Mr. Lockley: Will you please mark this Government's Exhibit 140 for identification.

(Said document was marked Government's Exhibit 140 for identification.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 140, and ask you if you have seen that before.

A. I have.

Q. What does that purport to be?

A. This is the accounts payable ledger for the period—

Q. Was it—

A. For the period commencing March 1, 1947.

By the Court: What date?

By the Witness: March 1, 1947 until March, 1948.

By Mr. Lockley:

Q. And was that record kept under your supervision and direction?

A. For the period that I worked there, yes.

1853 Q. And is it true and correct to the best of your knowledge and belief?

A. It is.

Q. Is that a record made in the ordinary course of business?

A. It is.

Q. With respect to the General Confections Corporation, have I showed you all of the books that were kept by you or under your supervision, to the best of your knowledge?

A. No.

Q. Which ones are missing?

A. I don't believe you showed me the cash disbursements book, the sales book. The sales book is not here.

Q. When did you last see the cash disbursements book?
A. At the time that I left Mr. Lubben's employ.
Q. And is the purchase book there?
A. No.
Q. The accounts pay book?
A. This accounts payable ledger is for the period commencing March 1, 1947. There should be another one from March 9, 1946 to March 1, 1947.

1854 Q. And when did you last see those records?
A. Those records were at the office in New Jersey when I left Mr. Lubben's employ in July or August, 1947.
Q. Do you know where they are at this time?
A. I do not.
Q. Well, now, directing your attention to the period of the sole proprietorship of the Eatsum Food Products Company, do you know if purchases were made at that time from The Shotwell Manufacturing Company?
A. This is for the single ownership?
Q. Yes.
A. Yes, there were.
Q. Now when a purchase was made, can you tell us what the ordinary routine was in so far as the books and records kept by the sole proprietorship were concerned? How was that recorded on the books?
A. Well, in the case of Shotwell, we added a pencil notation covering the amount of payment due for the overage on the face of the invoice.

By Mr. Kirby: If the Court please, this would surely be hearsay evidence to this witness and so that we

1855 can keep straight on what the truth is, I wish that that last statement might be stricken and the witness be interrogated as to what she did, how she did it, from whom she secured her knowledge, and things of that kind.

By Mr. McConnell: I want to also object at this time to this lady, or whoever she was working for, doing things to Shotwell invoices outside the presence of Shotwell.

By the Court: Well, I take it—what do you say, Mr. O'Brien?

By Mr. O'Brien: I think it would be most helpful and we would avoid objections if Miss Feldman could first describe the general practice of handling the books which she has been doing, the general pattern, and then when we get to the items in controversy here, let us take

those up specifically so that we don't fall within generalities.

By Mr. Lockley: That is what we intend to do.

By Mr. O'Brien: You started off asking about 1856 Shotwell.

By Mr. Lockley: I didn't ask her about Shotwell. I am afraid she assumed I intended to ask her that.

By the Court: Supposing you ask her generally what the practice was.

By Mr. Lockley: Yes.

By the Court: Without going into the alleged premium payments.

By Mr. Lockley:

Q. Generally, what was the practice with respect to recording a payment on the books of the Eatsum sole proprietorship?

A. Well, let me put it this way: In the case of—well, let us forget items that had overages on them.

We would get an invoice, it would be checked as to the extension, as to the correct amount of the extension and it would be entered on the purchase book and the notation made on the invoice of the page in the purchase book to which it had been posted. From there, this particular item would be posted to the accounts payable ledger sheet for that particular firm.

1857 Q. From the purchase book?

A. From the purchase book to the accounts payable ledger sheet.

Q. From the concern from whom the purchase was made?

A. That is correct.

Q. And then, were there more entries made with respect to the purchase or was that all?

A. There were, at times.

Q. Now, when payment was made, what entries were made on the books?

A. Then we would enter in the cash disbursements book the amount of the check, the name of the firm, to whom it had been drawn, and the accounts payable item —that is, it would be posted to the accounts payable item in the cash disbursements sheet.

Q. All right. So you draw a check, you enter it in the cash disbursements book and you also enter it on the other side of the accounts payable ledger?

A. Yes. The next step would be to take it from the cash disbursements book to the accounts payable ledger sheet for the individual concerned.

Q. Now, prior to the issuance of a check, was there any other record prepared?

1858 A. Yes, depending on what the check was being issued for.

Q. Well, in the case of a check issued to cash, what sort of records were kept?

A. We would have to make out a cash authorization slip showing how the check was drawn, to cash, the name of the firm or individual that was going to get the cash, the amount of money that was being drawn, and in most instances, the purpose for which it was being used, whether it was the purchase of material or whether it was the payment of any other item.

Q. All right. Now, how was that check to cash recorded on the books of the company?

A. The check to cash would be entered in the cash disbursements book in the regular manner and next to the word "cash" would appear the name of the firm or the individual to whom it had been paid.

Q. And how about on the accounts payable ledger?

A. Well, from the cash disbursements book, we would enter that item on the ledger sheet for the individual firm or person to whom it was paid.

Q. Who instructed you in the method of bookkeeping?

1859 A. Mr. Bercu and Mr. Lubben.

Q. Well, with respect to the bookkeeping system generally?

A. Well, Mr. Bercu.

Q. Who was responsible for instituting this system of cash authorization slips?

A. Mr. Bercu.

Q. Now, directing your attention to the period of the Eatsum partnership from June 1, 1945, to the time you left which would be July, 1946, was there any change in the method of bookkeeping which you have just described, that you know of?

A. I am not sure of that. I believe there was a change.

Q. And in what respect?

A. I don't know whether when we started the partnership we continued keeping our records in the same way or whether the change came immediately upon the formation of the partnership. I have no way of checking it.

Q. What was the nature of the change?

A. Well, there had been a number of discussions and Mr. Roth felt that we should not show—

By Mr. Kirby: If the Court please, I object to
1860 that. She wasn't asked for conversation.

By Mr. Lockley: That is right.

By Mr. Lockley:

Q. Don't tell us what was said.

A. I am sorry.

Q. Let us know what the end result was.

A. Well, the end result was there was a change in the handling of cash payments.

Q. And just what was the nature of the change, if you know?

A. Well, in one instance they were taking—

By Mr. Kirby: Is this the change that she is not sure about or is this the change that she is sure of?

By the Witness: Well, there were several changes in that period, if I may add that, and it is a little bit difficult to pinpoint them. We still drew—let me put it this way, we still drew cash.

By Mr. Kirby: Excuse me. Is this a change about which the witness feels sure she knows or is this still one about which she is not too sure, if I may ask the good
1861 lady to tell us?

By Mr. Lockley:

Q. Is this the one you aren't sure about when it started?

A. There is one I am not sure about when it started. I am sure of two changes but I cannot be sure when the first change came about. I am sure of the second change.

1862 Q. You know the change but you don't know exactly when it was inaugurated, is that what you are trying to say?

A. Yes, that is correct.

By Mr. Kirby: I wonder, which is this?

By the Witness: Well, since we are discussing the usual method of handling cash—

By Mr. Kirby: Excuse me. I am not discussing the usual method. We are talking about this one.

By Mr. Lockley: If you please, Mr. Kirby—

By Mr. Kirby: I object.

By the Witness: Would you mind repeating the question? Let us put it that way. I will start all over again.

By Mr. Lockley:

Q. Will you tell us what were the changes which were inaugurated in the keeping of the books of the company during the period of the partnership?

A. There were changes inaugurated in the handling of invoices with respect to certain items that had appeared on them previously.

Q. What do you mean by that?

A. One, we had added certain information on the 1863 invoices—we no longer did.

Q. I see. Did you keep any other record of that information which you had previously kept on the invoices?

A. I did.

Q. Where did you keep it?

A. I kept rough copies, rough memoranda, I should say.

Q. Memoranda notes?

A. That is correct.

Q. Now, were there any other changes?

A. Well—

Q. You referred to another one that you weren't sure of when it started?

A. This is the one I am not sure of as to when we stopped entering certain information on invoices. I have no way of telling that.

Q. Well, if you had the books and records, could you tell us?

A. Yes, I could.

Q. Well, now, with respect to the handling of checks to cash during the period of the General Confections, how was it handled there?

A. We still drew cash authorization slips.

1864 Q. And did you continue entering certain information on the invoices?

A. No, we did not.

Q. How was such information then recorded?

A. I kept—

By Mr. Kirby: Excuse me. I think he is repeating himself.

By Mr. Lockley: No, I am not. I am going over to General Confections now, Mr. Kirby.

By Mr. Kirby: I am touchier than I thought.

By the Court: I think it is adjournment time, Counsel.

By Mr. Lockley: Yes, sir. I don't know whether she answered the question or not.

By the Witness: I wanted to ask you to repeat the last question.

By Mr. Lockley: Let us let it go until tomorrow morning.

By the Court: We will be in recess until 10:00 o'clock tomorrow morning.

By the Marshal: Will the audience remain standing until the jury files out?

This Honorable Court will recess until 10:00 o'clock

1865 tomorrow morning.

(Whereupon an adjournment was taken in the above-entitled cause until Thursday, September 24, 1953, at the hour of 10:00 o'clock a. m.)

1866

• • (Caption—No. 52 CR 143) • •

Chicago, Illinois
Thursday, September 24, 1953,
10:00 o'clock a.m.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley.
Mr. Vincent O'Brien
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:—

(Whereupon Government's Exhibits 6-A, 6-B, 10-A, 10-B, 10-C, 10-D, 10-E, and 10-F were marked for identification.)

1867 By the Clerk: 52 CR 143, The United States of America versus The Shotwell Manufacturing Company, et al, case on trial.

By Mr. Lockley: I note, your Honor, that the defendant, Harold Sullivan—oh, I am sorry.

By Mr. Kirby: Harold is here, and here I am. Glad to see you.

By Mr. Lockley: You were hiding.

By Mr. Kirby: You can't hide Harold. He is too big.

BEATRICE FELDMAN a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Continued) by Mr. Lockley.

Q. Well, Miss Feldman, at the close of yesterday afternoon, I was asking you about the method of handling checks to cash during the period of General Confections in 1946.

Now, did you continue to enter the additional information on invoices in the same manner as you previously
1868 testified that it was done in the Eatsum sole proprietorship?

A. No, we did not.

Q. Now how was that additional information recorded, if there was such information?

A. It was recorded on the cash authorization slip, and this authorization slip was then posted to the purchase book as a regular purchase.

Q. Was the full amount of the invoice posted from the cash authorization slip?

A. No, just the full amount of the overage payment.

By Mr. O'Brien: Full amount of what?

By the Witness: Of the overage payment.

By Mr. Lockley:

Q. Now what figure was recorded on the accounts payable book?

By Mr. Kirby: The what?

By Mr. Lockley:

Q. The accounts payable book.

A. First the invoice—

By Mr. Kirby: Excuse me. I did appreciate that the lady said there was a change. Now, which entity are you talking about, Mr. Lockley?

By Mr. Lockley: The General Confections.

By Mr. Kirby: Thank you.

1869 By the Witness:

A. The full amount of the invoice was entered on the purchase slip. The full amount of the cash authorization was entered on the purchase book, and both amounts were posted to the accounts payable ledger sheet for the particular company.

By Mr. Lockley:

Q. Two separate entries?

A. That is true.

1870 Q. Now I failed to ask you yesterday, what was the period covered by Exhibit 9-A. Now, will you tell us what period is covered by Government's Exhibit 9-A for identification?

A. I believe I did identify this.

Q. I know, but what period of time?

A. Oh, this is from June 1, 1945, to March 9, 1946.

Q. And what entity was in existence at that time?

A. That was the partnership.

Q. Now with respect to Exhibit for identification No. 10, Government's Exhibit No. 10, what was the period covered by that book?

A. This was for Reserve Trading for the period from August, 1946, until June 30, 1947.

Q. Now with respect to the entries on the Reserve Trading purchase book, from where were those amounts obtained, in the purchase book?

A. Some of them were from regular invoices and others were from authorization slips.

Q. What amount was obtained from the regular invoices?

A. The invoice amount of the item.

Q. And what amount was obtained from the au-

1871 thorization slip?

A. The amount of overage payable on the item.

Q. Were there subsequent entries made after those in the purchase book?

A. I am sorry. I don't understand.

Q. In some other book of the company?

A. Yes. The items were transferred from the purchase book to the accounts payable ledger.

Q. And in what amounts?

A. For the actual invoices plus the authorization slip.

Q. And now, when the amounts were paid, were there entries made in the books for that?

A. There were.

Q. And was there one entry or two entries and from where was the information obtained?

A. Well, as the checks were issued, whether the payment of the invoice or the overage, the checks and the explanation were entered in the cash disbursements book and from the cash disbursements book, the items were entered on the ledger sheet for the individual firm.

Q. Was that in two entries or one?

A. You mean for the invoice price plus the overage?

1872 Q. Yes.

A. If there were two checks drawn, there were two entries.

Q. Were cash authorization slips required for cash checks for the entity Reserve Trading Company?

A. They were.

1873 By Mr. Lockley: At this time I offer Exhibit No. 5 in evidence, which is the purchase book of the sole proprietorship.

By Mr. McConnell: I object to it on behalf of the corporation on the basis and the grounds that the testimony of the witness has shown that the entries made in it are made from invoices which she, or somebody in her office, has marked up after they left Shotwell, not binding on the Shotwell Company, and self-serving.

By Mr. O'Brien: If the Court please, I think it would be best to let Mr. Lockley go on with the books and if I have objection to them, I would like to do it by way of a motion after the cross that pertains to those items. In other words, I don't want to interrupt by cross examining about each item as it comes up at this time.

By Mr. Lockley: These are books made in the regular course of business.

By the Court: I will receive the exhibit in evidence.

1874 (Said document was received in evidence by the Court and marked Government's Exhibit No. 5.)

By Mr. Lockley:

Q. Now, yesterday, Miss Feldman, you identified Government's Exhibit for identification No. 6 as the accounts payable ledger. I now show you Government's Exhibits for identification 6-A and 6-B and ask you if you have seen those before.

A. I have.

Q. And what are they?

A. This is the ledger sheet for The Shotwell Manufacturing Company for the life of the single ownership.

Q. For what period of time?

A. From May, 1944, to May, 1945.

Q. And was that a part of the accounts payable ledger kept in the ordinary course of business?

A. It was.

Q. Were those entries made by you or under your supervision and direction?

A. They were.

Q. Were they true and correct at the time they were prepared?

A. That is so.

1875 By Mr. Lockley: At this time we offer Exhibits 6-A and 6-B in evidence.

By Mr. McConnell: I object to these sheets for the same reason that I have given for the previous book, representing a mark up of invoices of Shotwell Manufacturing Company; and for the further reason that insofar as they encompass entries in '44, they are outside the period of the indictment.

By Mr. Lockley: We can eliminate the portion of the objection relating to 1944, your Honor, by just offering that portion of the exhibit 6-A, which relates to entries made in 1945.

By the Court: What is 6-B?

By Mr. Lockley: 6-B is a continuation, sir. It begins—

By the Court: Both sheets then extend from May, '44 to May, '45?

By Mr. Lockley: The first sheet begins with June, 1944, and ends with April—

By the Witness: No.

By Mr. Lockley:

Q. Maybe the expert better tell us.

1876 A. The first sheet commences as of May 17, 1944, and the last entry on there is April 28 of 1945. And 6-B commences at April 20, 1945, and concludes at May 31, 1945.

By the Court: The exhibits may be received.

By Mr. McConnell: If the Court please, I don't know whether I am clear. Did you limit your offer to 1945, and not offer the 1944 items?

By Mr. Lockley: That is correct.

By the Court: I so understand his offer.

(Said documents were received in evidence by the Court, and marked Government's Exhibits 6-A and 6-B.)

By Mr. Lockley: I now offer Government Exhibit for Identification No. 7, which is the Eatsum Food Products Company cash disbursement book. And I limit my offer to the entries contained in that book for the year 1945.

By Mr. McConnell: I make the same objection to this offer, that it is based on invoices which have been
1877 marked up without any authority of Shotwell.

By the Court: The exhibit may be received.

(Said document was received in evidence by the Court, and marked Government's Exhibit 7.)

By Mr. Lockley:

Q. I show you Government Exhibit for Identification 10-A, and ask you if you have seen those before—and 10-B?

A. Yes.

Q. And what are they, what do they purport to be?

A. They are the purchases for the month of October.

By the Court: Again, please.

By the Witness: They are the purchases for the month of October for the Reserve Trading Corporation.

By the Court: What kind of sheets?

By the Witness: Purchase sheets.

By the Court: Purchase sheets?

By the Witness: Purchase records.

1878 By Mr. Lockley:

Q. And those are part of the purchase book which

was previously identified by you yesterday as part of the records of Reserve Trading Corporation?

A. That's correct.

Q. Were they kept under your supervision and direction?

A. They were.

Q. And were they made in the ordinary course of business?

A. They were.

Q. Are they true and correct, to the best of your knowledge?

A. They are.

By Mr. Lockley: I offer Exhibits 10-A and 10-B.

By Mr. McConnell: I make the same objection to Exhibits 10-A and 10-B as heretofore made, as being self-serving, based on marked up invoices.

By the Court: They may be received.

By Mr. Lockley: I am at a loss to understand the objection to marked up invoices. As I understand it, 1879 invoices are sent by a supplier to a customer, and when they are received by him, it seems to me, he can tear them up, throw them away, mark them, or do whatever he wants. I am frankly at a complete loss to understand that.

By Mr. McConnell: You can tear them up, or anything else, but it isn't binding on us. That is my point. We didn't authorize you to do it.

By Mr. Lockley: I don't think any authorization is necessary.

(Said documents were received in evidence by the Court and marked Government's Exhibits 10-A and 10-B.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 10-C and ask if you have seen that before?

A. Yes, I have.

Q. And what does it purport to be?

A. This is a ledger sheet for the Shotwell Manufacturing Company out of the Reserve Trading Corporation book.

Q. And is that part of the accounts payable record of

the Reserve Trading Company?

1880 A. It is.

Q. Was that kept under your supervision and direction?

A. Yes, it was.

Q. And was that a record made in the ordinary course of business?

A. It was.

Q. Was it true and correct, to the best of your knowledge?

A. Yes.

By Mr. Lockley: I offer Exhibit 10-C in evidence.

By Mr. McConnell: The Corporation makes the same objection as to Exhibit 10-C.

By the Court: The exhibit may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 10-C.)

1881 By Mr. Lockley:

Q. I now show you Government's Exhibits for identification 10-D, E and F, and ask if you have seen those before

A. I have.

Q. And what do they purport to be?

A. These are the cash disbursement sheets for the months of October and November from the Reserve Trading Corporation.

By the Court: What year?

By the Witness: 1946.

By Mr. Lockley:

Q. And were those records made under your supervision and direction?

A. They were.

Q. Are they true and correct, to the best of your knowledge?

A. They are.

Q. Are they records made in the ordinary course of business?

A. They are.

By Mr. Lockley: I offer Exhibits 10-D, E and F in evidence.

By Mr. McConnell: I make the same objection,

1882 if the Court please, as to those documents.

By the Court: They may be received.

(Said documents were received in evidence by the Court and marked Governments Exhibits 10-D, 10-E and 10-F.)

1883 By Mr. Lockley:

Q. I show you Government's Exhibit for Identification 23-A, and ask you if you have seen that before?

A. I have.

Q. And what does that purport to be?

A. This is an invoice from The Shotwell Manufacturing Company.

Q. Is that a record kept in the ordinary course of business?

A. It is.

Q. By whom was it prepared, do you know?

A. The original invoice was prepared by The Shotwell Manufacturing Company.

Q. And was it received by you in the ordinary course of business?

A. It was.

Q. Did it become part of the books and records of the Eatsum sole proprietorship?

A. It did.

Q. Calling your attention to the penciled notations thereon, do you recognize that handwriting?

A. No, I don't.

Q. Were those notations made under your supervision and direction?

1884 A. They were.

Q. Well, what do they purport to be?

A. That is the amount of overage that we were paying for pounds of gum drops.

Q. Were those records a part of the Eatsum sole proprietorship books and records?

A. They were.

Q. Made in the ordinary course of business?

A. They were.

Q. Were they true and correct at the time they were prepared?

A. Yes.

Q. Now, I show you Government's Exhibit for Identification 23-B, purporting to be an invoice of The Shotwell Manufacturing Company, and ask you if you have seen that before?

A. I have.

Q. Was that a record kept in the ordinary course of business?

A. It is.

Q. Was that true and correct at the time it was received by you?

A. Yes, sir.

Q. Was it made a part of the books and records of the Eatsum sole proprietorship?

1885 A. Yes, sir, it was.

Q. I call your attention to the penciled notations. Do you recognize the handwriting?

A. No.

Q. Were those records made under your supervision and direction?

A. They were.

Q. Were they a part of the books and records of the Eatsum sole proprietorship?

A. They were.

Q. Were they true and correct to the best of your knowledge?

A. Yes, sir.

By Mr. Lockley: Your Honor, I offer in evidence Government's Exhibits 23-A and 23-B for identification.

By Mr. McConnell: I object to Government's Exhibits 23-A and 23-B on the ground that Miss Feldman had no authority from Shotwell to mark up Shotwell's invoices, and they are self-serving.

By Mr. O'Brien: As to Government's Exhibit 23-B,

1886 your Honor,—Judge as to Government's Exhibit 23-B, it is undated. It doesn't show the date of the shipment, and we object to it on that basis. The item 23-A is dated December 26, 1944.

By Mr. Lockley: Well, I will tie that in, your Honor, by showing that those were both paid by check issued in January, 1945, and I will further tie it into the books and records of the company showing that these shipments—this 23-B was received in 1945.

By the Court: Perhaps you had better defer your offer. What is Exhibit 23? My notes aren't clear.

By Mr. Lockley: I have that in my hand, your Honor. That is a check which has not yet been offered or received, or identified.

By Mr. Lockley:

Q. Miss Feldman, I will show you Government's Exhibit for Identification No. 23, purporting to be a check, and I ask you if you have seen that before?

A. I have.

Q. Do you recognize the handwriting?

A. I recognize the signature.

1887 Q. Whose signature is it?

A. Mr. Lubben's.

1888 Q. Was that a record made in the ordinary course of business?

A. It is.

Q. Would it be made under your supervision and direction?

A. It was.

Q. Was it true and correct at the time it was prepared, to the best of your knowledge?

A. Yes, sir.

Q. Now, will you please refer to the purchase book which, I believe, is Government's Exhibit 5, and I show you Government's Exhibit for identification No. 23 and ask you whether that is recorded—

By the Court: 23 what?

By Mr. Lockley: No. 23-A. I am sorry.

By Mr. Lockley:

Q. I ask you if that is recorded in the purchase book?

A. It is.

Q. Will you give us the date, line and page, please?

A. It is recorded in the purchase book for the month of December, 1944, on page 36, line 33.

Q. And in what amount?

A. For $3,636.98.

1889 Q. Is that the amount of the printed figures on the invoice?

A. No, sir, it is not. That is the amount of the printed figure plus the penciled notation for the overage.

Q. Will you now refer to the accounts payable book and tell me if that invoice is entered in the accounts payable book, Government's Exhibit 6-A?

A. Yes, it is. Here (indicating).

By the Court: Tell the exhibit number when you refer to something like that.

By Mr. Lockley: It is 23-A.

By the Court: Will you refer to the exhibit number hereafter?

By Mr. Lockley: Yes. 23-A is the exhibit which I am asking to have related to Exhibit 6-A.

By the Witness:

A. It appears from Exhibit 6-A under the date of December 26th from page 36 that the amount is $3,636.98.

By Mr. O'Brien: I—

By Mr. Lockley: That book is in evidence.

By Mr. Lockley:

1890 Q. Will you now refer to the cash disbursements book and tell me if—that is number what, No. 7? It is Exhibit No. 7. Tell me if Exhibit 23-A is entered.

Strike that question.

A. Not as an individual check.

Q. Strike that question, now.

I show you Government's Exhibit 23-B and I ask if that exhibit is entered in Exhibit 5, the purchase book?

A. It is.

Q. And in what amount?

A. It is entered for $6,177.00.

Q. Is that the total amount of the invoice or is that the printed amount?

A. That is a printed amount, plus the penciled notation for the overage.

Q. Is that invoice likewise recorded in the accounts payable book, Exhibit 6-A?

A. It is.

Q. And in what amount?

A. For $6,177.00.

Q. I now show you Government's Exhibit for identification No. 23 and ask you if that has any relation,

1891 if you know, to Government's Exhibit for identification 23-A and 23-B?

A. It has.

Q. And what is that relationship?

A. Check No. 2317 was issued in payment of both invoices for the printed amount.

Q. How is that recorded on that cash disbursements book, Government's Exhibit 7?

A. On page 45 of the cash disbursements book it appears as a payment to the Shotwell Manufacturing Company on January 12th, a net check of $4,198.28, purchase discount of $85.70 and a total debit to the account of $4,284.98.

By the Court: How much again?

By the Witness: A total debit of $4,284.98.

By Mr. Lockley:

Q. Is there an entry of that check in the accounts payable ledger, Exhibit 8-A?

A. There is.

1892 Q. In what amount?

A. $4,284.98.

Q. Now, Exhibits 23-A and 23-B for identification then were paid by Exhibit 23, and what is Exhibit 23 dated?

By Mr. McConnell: I object to the statement of counsel that they were paid. We haven't seen the check yet.

By Mr. Lockley: That is the testimony of the witness. I re-offer Exhibits 23-A, 23-B and I offer Government's Exhibit 23.

By the Court: The answer may stand.

By Mr. McConnell: I would like to cross examine on this, if the Court please, I mean on the document.

By the Court: Are you offering now some exhibits?

By Mr. Lockley: Yes. Government's Exhibits 23, 23-A and 23-B for identification, your Honor.

By the Court: Counsel may examine on them as to foundation.

Cross Examination by Mr. McConnell.

Q. I understand you to say, Miss Feldman, that the check in the amount of $4,199.00 was for the full amount of both the printed invoice and the overage. Was that correct?

A. I did not say that, sir. I said—

Q. The check was only for the amount of the printed invoice as you received it from Shotwell, isn't that true?

A. That is correct.

Q. And does not include any overage?

A. Does not include the pencilled overage on the bill at that time.

By Mr. McConnell: That's all.

By the Court: The exhibits may be received in evidence.

(Said documents were received in evidence by the Court and marked Government's Exhibits 23, 23-A and 23-B.)

By Mr. McConnell: I want to make my objection, if the Court please. I want to make my objection and
1894 move to strike the invoices that are marked up.

Direct Examination (Ctd.) by Mr. Lockley.

Q. I show you Government's Exhibit 24-A and ask if you have seen that before.
A. I have.
Q. What does it purport to be?
A. It is an invoice from Shotwell Manufacturing Company for spice buttons.
Q. Is that a record received by you in the ordinary course of business?
A. Yes.
Q. Was it made a part of the books and records of the Eatsum sole proprietorship?
A. It was.
Q. It was kept under your supervision and direction?
A. That is correct.
Q. I show you Government's Exhibit for identification No. 24 and ask you if you have seen that before.
A. I have.
Q. Do you recognize the handwriting on it?
A. No.
1895 Q. Is that a record made in the ordinary course of business?
A. It is.
Q. Is it made under your supervision and direction?
A. It was.
Q. Was that correct to the best of your knowledge at the time it was prepared?
A. Yes, sir.
By Mr. Lockley: I offer in evidence Government's Exhibits 24 and 24-A for identification.
By Mr. O'Brien: We don't see the relationship she has testified to.
By Mr. McConnell: I would like to ask a question about that too, now, if I may.
By the Court: Yes.

Cross Examination by Mr. McConnell.

Q. Miss Feldman, this check to the Shotwell Manufacturing Company, Government's Exhibit 24, is only for the

amount of the printed invoice as you received it from the Shotwell Manufacturing Company, is that not the fact?

1896 A. That is correct.

Q. And it does not include the amount of the pencilled items which have been pencilled on the invoices, is that true?

A. That is correct.

By Mr. O'Brien: Let me see it.

Cross Examination by Mr. O'Brien.

Q. Is the check related to this invoice, 24-A, Miss Feldman?

A. I believe it is.

Q. The printed invoice is $1,257.30 and the check is $1,232.15. How is that explained?

A. May I see the check, please?

Q. Yes.

A. In the upper left hand—

Q. It may be a discount but you haven't said it.

A. It is a discount in the upper left hand corner where there is a notation under the No. 61544 for $1,257.30 less a two per cent discount of $25.15, which made the check $1,232.15.

1897 Q. One other question as to the penciled amount $1524.00, even.

A. Yes.

Q. Which appears on Exhibit 24-A. Is there an entry on your books made at the time as the date of this check for that amount?

A. I don't follow you, sir.

Q. Have you any—you have entered on your—

By the Court: Louder please, Mr. O'Brien.

By Mr. O'Brien:

Q. This check for $1232.15 is put on the Shotwell's accounts payable?

A. The check appears on the Shotwell's accounts payable.

Q. And that takes care of that part of this invoice, Government's Exhibit 24-A?

A. It takes care of one part of the invoice.

Q. Now, is there also an entry on the Shotwell accounts payable for $1524.00, the penciled—

A. No. I believe that amount was taken care of at a later date.

Q. That is all I want to know now. Was there an entry for $1524.00 made at the same time?

A. No, there was not.

By Mr. O'Brien: That's all.

1898 By the Court: The exhibits may be received in evidence.

(Said documents were received in evidence by the Court and marked Government's Exhibits 24 and 24-A.)

Direct Examination (Continued) by Mr. Lockley.

Q. Now with respect to Exhibit 24-A, Miss Feldman, is that recorded on the purchase book?

By the Court: Wait a minute, now.

By Mr. Lockley: Exhibit No. 5.

By the Court: You have 24-A. The check is 24.

By Mr. Lockley:

Q. I show you the invoice 24-A, and ask you if that was recorded on the purchase book, Exhibit No. 5?

A. It is.

Q. And in what amount?

A. It appears as $2,781.30.

Q. And is that the full amount of the invoice plus the penciled notations?

A. That is the typed amount plus the penciled notations.

1899 Q. Is that likewise recorded in the accounts payable ledger, Exhibit 6-A?

A. It is.

Q. And in what amount?

A. $2,781.30.

By Mr. O'Brien: Under what date?

By the Witness: January 10th.

By Mr. Lockley:

Q. Is that the full amount of the invoice, both the printed amount and the written amount?

A. It is, sir.

Q. Now with respect to Government's Exhibit 24, is that recorded in the cash disbursement book, Exhibit No. 7?

A. It is.

Q. And in what amount?

A. It appears in the check book for the face of the check, as $1,232,15.

By Mr. O'Brien: How much was that, Miss Feldman?

By the Witness: $1,232.15, the purchase discount of 25.15, and a net amount debit to accounts payable of $1,257.30.

1900 Q. And is that likewise recorded in the accounts payable book, 6-A?

By Mr. O'Brien: What is the date on that last item?

By the Witness: January 22nd is the date of the check.

By Mr. Lockley:

Q. And is there an entry in the accounts payable book with relation to that check?

A. There is.

Q. And what is that entry?

A. The entry appears on January 26th—on January 22nd—I am sorry—for $1,257.30.

Q. I show you Government's Exhibit for identification 25-A and I ask you—

By the Court: Mr. Lockley, I have a little difficulty in following the testimony, not having seen the check, and not having seen the invoice, and I wonder if it wouldn't be a good plan when they are received in evidence to read them so that the jury and I may know what it is, otherwise she reads the figures and I can't follow her.

1901 By the Witness: I am sorry.

By the Court: I can't follow her, not knowing just what the exhibits reflect.

By Mr. Lockley: I had not done so for fear that the defense might object to it.

By the Court: When the exhibits are introduced in evidence it is appropriate for counsel to read the salient portions of them to the Court and jury so that we can follow the testimony more clearly.

By Mr. Lockley: Going back to the original—

By the Court: If I understood her testimony correctly, the check, that is, Exhibit 24 is, according to her testimony, in payment of invoice 24-A, not including the so-called overages.

By Mr. Lockley: That is correct, your Honor.

By the Court: But she stated that the full amount of

the invoice, plus the overages, was entered on the accounts payable book, is that right?

By Mr. Lockley: Yes, sir.

1902 By Mr. O'Brien: On the purchase book.

My Mr. Lockley: On both the purchase book and the accounts payable book, was my understanding.

By Mr. Lockley:

Q. Am I correct, Miss Feldman?

A. That is so.

By the Court: All right. Now, if you will give me the amount of the check.

By Mr. O'Brien: Now, there was one more thing she said, Judge, that I am confused about, too, and I know something about it.

This last entry in the cash disbursements book, Exhibit 7, she said that so fast, gave the figures so fast, I couldn't follow what she said.

By Mr. Lockley:

Q. What are the entries in the cash disbursements book, Miss Feldman, with respect to Exhibits No. 23 and No. 24?

A. Which is Exhibit 24?

(Documents handed to the witness.)

By Mr. O'Brien: Well, you have already given us 23, haven't you, Mr. Lockley?

1903 By the Court: Well, I think your question is before the witness now, Mr. Lockley.

1904 By Mr. Lockley: Yes, your Honor.

By the Witness: Do I repeat both checks?

By Mr. O'Brien: She already testified to 23.

By Mr. Lockley:

Q. Since counsel is satisfied with 23, just give us the information on 24.

A. The check 2408 appears on page 47 of the cash disbursements book for January, 1945, on line 35. Net cash amount is $1,232.15. The discount is $25.15, and the debit to the accounts payable is $1,257.30.

By Mr. O'Brien: Now, wait. I didn't get that. $1,257.30?

By the Witness: That's right.

By Mr. McConnell: And what was that date in January?

By the Witness: 22nd.

By Mr. Lockley: Exhibits 23-A and 23-B are Shotwell Manufacturing Company invoices to Eatsum Food Products Company for 683 cases of gum drops, on Exhibit 23-A, at a weight of 20,490 pounds, and a price of seven and three-quarter cents, for a total of $1,587.98. There
1905 is an extension of ten cents, and a total of $2,049, for a sum total in the amount of $3,636.98.

By the Court: Again.

By Mr. Lockley: $3,636.98.

By the Court: Is that the face of the invoice, or is that the face of the invoice plus the so-called overage?

By Mr. Lockley: The $3,636.98 is the invoice plus the overage.

By the Court: What is the face of the invoice?

By Mr. Lockley: The face of the invoice is $1,587.98.

By the Court: Then the overage is how much?

By Mr. Lockley: $2,049.

By the Court: That makes a total of $3,636.98, right?

By Mr. Lockley: That is correct, your Honor.

And Exhibit 23-B is a Shotwell Manufacturing Company invoice, No. C65050, for 1,160 cases of gum drops at 30 pounds each, 34,800 pounds, at 7-¾ cents, for an invoice price of $2,697.00.

1906 There is an extension of ten cents for the amount of $3,480.00, making a total of $6,177.00.

1907 By Mr. McConnell: If the Court please, he says an extension. I think it should be made clear to this jury that he is talking about the face amount as it comes from Shotwell, then something that his organization or the Eatsum organization put on the checks.

By the Court: When you say extension I take it you mean the handwritten amount of the overage?

By Mr. Lockley: That is correct, your Honor.

Exhibit 23 is a check dated January 12, 1945, to the Shotwell Manufacturing Company in the amount of $4,199.28.

And on the face of it—

By the Court: That is sufficient information now, I suppose, to tell me and tell the jury—

By Mr. Lockley: There is a further explanation, your Honor, that this check is in payment of invoice No. 60254, which is Exhibit No. 23-A, and 65050, which is
1908 Exhibit No. 23-B, less a two per cent discount of $85.70, for a total amount of $4,199.28.

By the Court: In other words, it is in payment of the face amount of those two invoices, not including the overage.

By Mr. Lockley: That is correct, your Honor.

And my understanding of Miss Feldman is that the total amount is recorded in the purchases book, which includes the overage.

By the Witness: That is so.

By Mr. Lockley:

Q. And the total amount is posted to the accounts payable book?

A. That is correct.

1909 Q. Including the overage?

A. That's correct.

Q. And only the invoice amount is recorded on the cash disbursements book for the amount of the check?

A. That's correct.

Q. At this time?

A. That's correct.

Q. And only the invoice amount is posted to the accounts payable ledger sheet of the Shotwell Manufacturing Company?

A. That's correct.

Q. So at this point you have an amount owing to Shotwell?

A. That's correct.

By Mr. Lockley: Is that clear, your Honor?

By the Court: Yes.

By Mr. O'Brien: May I ask this question? While you are on those items, do you have somewhere in the cash disbursements book that picks up these precise overages, so-called?

By the Witness: Yes.

By Mr. O'Brien: In these dollar amounts. On

1910 Exhibit 23-B you have an item of $3,480.00 in pencil. Is that the overage figure?

By the Witness: That was the figure that was—the amount of the overage on that particular transaction.

By Mr. O'Brien: And on Exhibit 23-A you have a figure of $2,049.00, which is the overage figure?

By the Witness: That's correct.

By Mr. O'Brien: Now, do you have subsequent entries in the cash disbursements book for those two figures, $3,480.00 and $2,049.00?

By the Witness: You mean for the individual figures?

By Mr. O'Brien: Yes.

By the Witness: No. The overages were paid in the group of bills.

1911 By Mr. O'Brien: I just want to know if they appear there, because if they did, while you are on it, I would like to get it.

By Mr. Lockley: I think this will clarify itself as we go along.

By the Court: All right.

By Mr. Lockley: The testimony will show that the overages were not paid by individual checks.

By Mr. Kirby: I except to the statement of counsel. Let him prove—

By the Court: At least that is what the evidence reflects to date, as I understand it.

I say, the evidence reflects that the overages were not paid by checks. The Government contends that the overages were paid by cash.

Is that right?

By Mr. O'Brien: Sure, but—

By the Court: Well, just for clarity, I think that is a fair statement to make.

By Mr. O'Brien: There is no doubt about that, but the question is—

By the Court: I am not raising other questions. I 1912 am merely stating that, that up to date we haven't had any evidence that any of the so-called overages were paid by checks, and I don't understand that the Government contends that they were paid by check. The Government contends they were paid by cash.

By Mr. Lockley: We will eventually tie in checks to these particular overages as we go along, your Honor.

By the Court: Yes, but up to date, we haven't had any.

By Mr. Lockley: Not to this point; no, sir.

Exhibit 24-A is a Shotwell Manufacturing Company invoice to Eatsum Food Products Company for 508 cases of spice buttons, 30 pounds each, for 15,240 pounds, at eight and one-quarter cents, total invoice price of $1,250.30. That is invoice No. C61544.

Exhibit No. 24—

By the Court: The amount of the invoice is how much?

By Mr. Lockley: The amount of the printed in- 1913 voice is $1,257.30, and the overage, or the pencil extensions are ten cents a pound on 15,240 pounds, or

$1,524.00, for a total amount of $2,781.30.

Exhibit No. 24 is a check, No. 2408, dated January 22, 1945, in the amount of $1,232.15, with the description number 61544, which is Exhibit No. 24-A, less two percent, $25.15, in the amount of $1,232.15.

By Mr. McConnell: May I ask one question on that discount, your Honor?

By the Court: Well, you may.

By Mr. McConnell:

Q. Miss Feldman, was that two percent discount for cash on the invoice?

1914 By the Witness: That was two per cent cash on the face of the invoice.

By Mr. McConnell: For prompt payment of the invoice, is that it?

By the Witness: I believe it read that way. According to the invoice, the terms were cash ten days, net 30, one per cent discount on marshmallows and two per cent on candy.

By Mr. Lockley:

Q. Was there any discount on the overage payments, Miss Feldman, if you know?

A. What was that?

Q. Was there any discount on the overage payments?

A. No.

Q. I show you Government's Exhibit for identification 25-A and ask you if you have seen that before?

A. I have.

Q. And what does that purport to be?

A. That is an invoice from the Shotwell Manufacturing Company for spice buttons.

Q. Is that a record received by you in the ordinary course of business?

A. It is.

1915 Q. From the books and records of the Eatsum proprietorship?

A. Yes.

Q. Is it true and correct, to the best of your knowledge?

A. Yes.

Q. I show you 25-B—

Before I do that, let me ask you if you recognize the penciled handwriting on Exhibit No. 25-A?

A. May I clarify that, that I know it is the handwriting of the accounts payable clerk, but I don't know who she was at the time.

Q. Was she working under your supervision and direction?

A. Yes.

Q. Were those entries true and correct at the time they were made?

A. Yes.

1916 Q. Were these entries made in the ordinary course of business?

A. Yes.

Q. With respect to 25-B, which purports to be an invoice of The Shotwell Manufacturing Company, have you seen that before?

A. I have.

Q. Was that received by you in the ordinary course of business?

A. It was.

By Mr. Lockley: I wonder if I might speed these up by handling several at a time?

By the Court: Just as you think best.

By Mr. Lockley:

Q. I also offer you 25-C, and 25-D, and ask if you have seen those before?

A. I have.

Q. Were those received by the Eatsum Food Products Company in the ordinary course of business?

A. They were.

Q. I direct your attention to the penciled notations and ask if you know by whom they were made?

A. By the accounts payable clerk.

1917 Q. Were they made under your supervision and direction?

A. They were.

Q. Were they a part of the books and records of the company?

A. They were.

Q. Were they true and correct to the best of your knowledge, at the time they were made?

A. Yes, they were.

Q. I show you Government Exhibit for Identification 25, purporting to be a check, and ask you if you have seen

that before?

A. I have.

Q. Do you recognize the handwriting?

A. The accounts payable clerk.

Q. Was that a record made under your supervision and direction?

A. Yes.

Q. Was it made in the ordinary course of business?

A. It was.

Q. Was it true and correct at the time it was prepared?

A. It was.

By Mr. Lockley: I offer Exhibits 25, 25-A, B, C, 1918 and D.

By Mr. McConnell: I want to ask Miss Feldman whether or not those notations, those pencil notations that you identify as being made by a clerk, whether they were on the invoice when they were received from The Shotwell Manufacturing Company?

By the Witness: No, they were added in our office.

By Mr. McConnell: I object to the documents—the parts of the documents which were altered by adding the pencil memorandums.

By Mr. O'Brien: Who was the accounts payable clerk, Miss Feldman?

By the Witness: We had a number of them. I am not sure who it was at that time.

By Mr. O'Brien: You were there in January of 1945?

By the Witness: Yes.

By Mr. O'Brien: Was it Miss Jeretsky?

By the Witness: No.

By Mr. O'Brien: Was it Miss Seider?

By the Witness: No.

By Mr. O'Brien: Were those notations put on by 1919 the auditors?

By the Witness: By the who?

By Mr. O'Brien: By Bercu's office?

By the Witness: No, they were made by us.

By the Court: The exhibits may be received in evidence.

(Said documents were received in evidence by the Court and marked Government's Exhibits 25, 25-A, 25-B, 25-C and 25-D.)

By Mr. Lockley:

Q. Now, Miss Feldman, I show you Exhibits for Identification 26-A, and 26-B, and ask if you have seen those before?

1920 By the Court: Are you now going to another transaction? Are they tied up with 25?

By Mr. Lockley: Perhaps I better retrace my steps.

By the Court: Let's clear up 25 and tell the jury what they are. Otherwise it is impossible for us to follow.

By Mr. Lockley: All right, sir.

By Mr. Lockley:

Q. With respect to 25-A, B, C and D, will you tell me if those are recorded in the purchase book of the Eatsum proprietorship?

A. They are.

Q. And in what amount?

A. Invoice 61094 is recorded for $3,159.08.

Q. What exhibit number is that?

A. That is Exhibit No. 25-B.

Q. And is that amount the invoice price or the invoice plus the extensions?

A. That is the invoice plus the extensions.

Q. With respect to 25-B—

By Mr. O'Brien: Well, Judge, we have no objection to the use of the word "extensions" so long as

1921 it is—

By Mr. Lockley: I hardly know what else to refer to it as.

By Mr. O'Brien: All right.

By the Court: Refer to it as overage then.

By Mr. O'Brien: Just so long as it is understood to be defined as Mr. Lockley first defined it.

By the Court: I am sorry?

By Mr. O'Brien: Just so long as the term "extension" in the record is defined as Mr. Lockley defined it before.

By the Court: Well, it purports to be the handwritten notations of the alleged overage. That is what it purports to be.

By Mr. O'Brien: That is what it is, sure, not extensions.

By Mr. Lockley: I will call it overages, if that will please you more.

By Mr. McConnell: You better call it alleged overages.

By Mr. Lockley: All right. We will call it alleged overages then.

1922 By the Witness:

A. Invoice No. 59931, which is Exhibit 25-A, appears on page 45 of the purchase book, line 22, as $2,447.33.

By Mr. Lockley:

Q. And is that the invoice price or the invoice plus the alleged overage?

A. It is.

Q. It is what?

A. It is the total of the typewritten amount plus the amounts of the alleged overage.

Q. And how is Exhibit 25-C recorded; that is, on the purchase book, Exhibit 5?

A. 25-C appears on page 47 of the purchase book, line 15, in the amount of $2,874.38.

Q. And is that the amount of the invoice price or the invoice plus the alleged overage?

A. That is the invoice plus the alleged overage.

Q. And with respect to Exhibit No. 25-B—

By Mr. O'Brien: Mr. Lockley, maybe I can save some words for the Reporter, they have a happy expression on there, they call it the full price. Is that right, Miss Feldman?

1923 By the Court: Let's go forward.

By the Witness:

A. Exhibit 25-D appears on page 47, line 16 of the purchase book, in the amount of $2,847.00.

By Mr. Lockley:

Q. Now, what relation, if any, does Exhibit 25 have to Exhibits 25-A, B, C, D and E, if you know?

A. Exhibit 25, which is check No. 2484, represents payment to the Shotwell Manufacturing Company of the typewritten amounts on the four invoices, which are Exhibits 25-D, C, B and A.

By Mr. Lockley: Now, for further clarification—

By Mr. McConnell: Are you offering them now?

By Mr. Lockley: I had understood they were offered and received, Mr. McConnell.

Exhibit 25-A is a Shotwell Manufacturing Company invoice for 447 cases of spice buttons, 13,410 pounds, 8-1/4 cents a pound, $1,106.33, invoice price.

By the Court: Again.

By Mr. Lockley: $1,106.33, invoice price, plus a
1924 ten cents per pound alleged overage on 13,410 pounds, or $1,341.00 alleged overage, for a total price of $2,447.33.

25-B is a similar invoice for 17,310 pounds spice buttons at 8-1/4 cents a pound, $1,428.08, invoice price, ten cents a pound alleged overage on 17,310 pounds, or $1,731.00, for a total price of $3,159.08.

25-C is a similar invoice for 15,750 pounds of spice buttons at 8-1/4 cents for an invoice price of $1,299.38, an overage of ten cents a pound on 15,750 pounds, $1,575.00, for a total of invoice and overage of $2,874.38.

1925 Exhibit 25-D is a similar invoice for 15,600 pounds of spice buttons at eight and one-quarter cents, or $1,287.00, plus an alleged ten cents a pound overage on 15,600 pounds, $1,560.00, for a total of $2,847.00.

Exhibit 25 is a check in the amount of $5,018.37, dated January 26, 1945, from Eatsum Food Products Company endorsed by The Shotwell Manufacturing Company, with the explanation, invoice No. 61904, which is Exhibit 25-B, 59931, which is Exhibit 25-A, 63830, Exhibit 25-C, and 64176, which is Exhibit 25-D, the total amount of $5,120.79, less two percent discount of $102.42, for the face amount of the check of $5,018.37.

By the Court: Give me the printed invoice amount on Exhibit 25-B.

By Mr. Lockley: D as in Day?

By the Court: B as in Button.

By Mr. Lockley: The printed amount is $1,428.08.

1926 By Mr. Lockley:

Q. Now, Miss Feldman, I show you Government's Exhibits 26-A and 26-B and ask you if you have seen those before?

A. I have.

Q. Well, are those records received by you in the ordinary course of business?

A. They were.

Q. What do they purport to be?

A. They are invoices from Shotwell Manufacturing Company for gum drops.

Q. Are those records a part of the business records of the Eatsum Food Products Company?

A. They are.

Q. I show you Government's Exhibit for identification No. 26 and ask you if you have seen that before?

A. I have.

Q. What does that purport to be?

A. That is a check to the Shotwell Manufacturing Company in payment of—

Q. Never mind. Just describe—is that a record made in the ordinary course of business?

A. It is.

Q. Do you recognize the handwriting?

1927 A. No.

Q. Was it a record made under your supervision and direction?

A. It is.

Q. Is it true and correct, to the best of your knowledge?

A. Yes.

By Mr. Lockley: I offer Government's Exhibits 26, 26-A and 26-B—pardon me. I am sorry.

By Mr. Lockley:

Q. I neglected to ask you about the penciled extensions, Miss Feldman. Do you recognize the handwriting?

A. The accounts payable clerk.

Q. Were those records made under your supervision and direction?

A. They were.

Q. Were they made as part of the records of the Eatsum Food Products Company?

A. They were.

Q. Are they true and correct, to the best of your knowledge?

A. Yes, sir.

1928 By Mr. Lockley: I now offer in evidence Government's Exhibits 26, 26-A and 26-B for identification.

By Mr. McConnell: I would like to ask one question about Government's Exhibits 26-A and 26-B.

By the Court: Very well.

Cross Examination by Mr. McConnell.

Q. I call your attention, Miss Feldman, to the stamp on these invoices "Paid, February 9, 1945" and also I call your attention to the fact that the check which is

Government's Exhibit 26 is under date of February 9, 1945, and I ask you whether or not that "Paid" reference only refers to the amount of the printed invoice and not the overage, the alleged overage?

A. That refers only to the amount of the printed invoice.

Q. So when it states "Paid" on that invoice, it does not include the "Paid" of the alleged overage?

A. That is correct.

By Mr. McConnell: I object to the documents as
1929 far as they have been marked up.

By the Court: They may be received in evidence.

(Said documents were received in evidence by the Court and marked Government's Exhibits 26, 26-A and 26-B.)

Direct Examination (Ctd.) By Mr. Lockley.

Q. Now, Miss Feldman, Exhibit 26-A, an invoice of the Shotwell Manufacturing Company, will you tell me if that is recorded on the purchase book of the Eatsum Food Products Company, Government's Exhibit No. 5?

A. It is.

Q. In what amount?

A. It appears on page 53 on the purchase book of February, 1945, line 19, in the amount of $2,928.75.

1930 Q. Is that the amount of the printed invoice plus the alleged overage?

A. It is.

Q. Is that invoice recorded on the accounts payable ledger sheet of The Shotwell Manufacturing Company, Exhibit 6-A?

A. Yes, it is.

Q. And in what amount?

A. $2,928.75.

Q. That is the amount of the printed invoice plus the alleged overage, is that correct?

A. That is correct.

Q. I show you Government's Exhibit 26-B and ask if that is recorded in the purchase book, Exhibit 5.

A. It is.

Q. And in what amount?

A. $2,481.45.

Q. Is that the total amount of the invoice?

A. That is correct.

Q. That is the printed amount plus the alleged overage?

A. Plus the alleged overage.

Q. Is that recorded in the accounts payable book, 1931 Exhibit 6-A?

A. It is.

Q. In what amount?

A. $2,481.45.

Q. I now show you Government's Exhibit in evidence No. 26, and ask you if that has any connection to Government's Exhibits 26-A and 26-B?

A. It has.

Q. What is it?

A. Check No. 2649 is in payment of the printed amounts on the invoices Nos. 68259 and 66013.

Q. And is that recorded in the cash disbursements book?

A. It is.

Q. And in what amount?

A. Net cash, $2,314.96, purchase discount, $47.24 and a debit to accounts receivable of $2,362.20.

Q. Do you know what that amount reflects with respect to invoices Government's Exhibits 26-A and 26-B?

A. Well, that reflects a payment of the printed amounts on both invoices.

By Mr. Lockley: Is that transaction clear, your 1932 Honor, or shall I go through it? Do you think it is clear?

By the Court: Now, if you will tell me what Government's Exhibits 26-A, B and C are as to amounts—

By Mr. Lockley: All right, your Honor.

By the Court: You are going into the details as to the exact amounts of cash. I think we are primarily interested in the amount of the invoice and the amount of the alleged overage. State that, so that we may follow it.

By Mr. Lockley: The amount of invoice Government's Exhibit 26-A is $1,278.75.

By the Court: Seventy-five cents?

By Mr. Lockley: Seventy-five cents. The overage is ten cents a pound on 16,500 pounds, or $1,650.00. The total is $2,928.75.

Exhibit 26-B, the invoice amount is $1,083.45. The overage is ten cents on 13,980 pounds or $1,398.00 for a total of $2,481.45. The check to The Shotwell Manufacturing Company, endorsed by them, is for $2,314.96, and it 1933 has the description "C-68259", which is Exhibit 26-B, and "C-66013", which is Exhibit 26-A, in the amount of $2,362.20 less a two per cent discount of $47.24 or a net amount of $2,314.96.

By the Court: We will take our morning recess now. We will spend ten minutes, members of the jury.

By the Marshal: Will the audience remain standing while the jury files out.

This honorable court will recess for ten minutes.

(Whereupon a recess was taken.)

By Mr. Lockley:

Q. Miss Feldman, I show you Government's Exhibit in evidence 27-A, and ask you if you have seen that before.

A. I have.

Q. When was that?

A. The notation in pencil is in my handwriting.

Q. Did you prepare the typewritten portion of it?

A. I did.

1934 Q. What is that document?

A. That is a recap sheet of money due Shotwell Manufacturing for the overages on the various items.

Q. Was that prepared by you?

A. It was.

Q. From what information?

A. From the memos I kept as to the amount of poundage of the different items.

Q. What is the amount shown due on the settlement sheet?

A. $10,849.00.

Q. I show you Government's Exhibit No. 27 in evidence, check for $10,849.00, and ask you if those exhibits are in any way related?

A. They are.

Q. What is Exhibit No. 27?

A. Exhibit No. 27 is a cash issued—is a check issued to cash for $10,849.00.

Q. I show you Government's Exhibit No. 28 in evidence, and ask you if you have seen that before?

A. I have.

Q. What is that exhibit?

A. It is a check issued to cash for $6,183.00.

1935 Q. Now, Exhibit 27-A. I call your attention to that. Does that have any connection with Government's Exhibit 23-A and B, 24-A, 25-A and B in evidence, and if so, what?

A. Yes. Several of these invoices, specifically 24-A, 23-B, 23-A, and 25-A, are included in this recap sheet.

Q. Will you turn to Exhibit No. 5, the purchase book —pardon me. Turn to Exhibit No. 7, rather, the cash disbursements book.

Will you first explain; what is the relationship that you just testified there was between Government's Exhibits 27-A, and 23-A, and B, 24-A, and 25-A?

A. Well, Exhibit No. 24-A is invoice 61544, which is invoiced as 15,240 pounds of spice buttons. Now the invoice we received from Shotwell, we had made a penciled notation on there of the overage, and that amount was transferred to the recap sheet.

Q. What is that amount?

A. The amount here is $1,524.00, but that appears in total on the recap sheets as part of ... extension, but the poundage was transferred as it appeared.

1936 Q. What is the relationship between the other invoices?

A. Number—Exhibit 25-A which is invoice C 59931, calls for 13,410 pounds of spice buttons. That also appears on the recap sheet.

By the Court: What is the amount of the overage?

By the Witness: And the amount of the poundage—

By the Court: Give me the amount of the overage.

By the Witness: The overage as it appears on the invoice is $1,341.00.

By the Court: $1,341.00?

By the Witness: That is right.

By the Court: That appears on the recap sheet?

By the Witness: Well, as the recap sheet was worked we showed the poundage, multiplied by the overage, for the particular item, and then got the total for the total of the poundage.

By Mr. Lockley:

Q. And what is the relationship of Exhibit 23-A

1937 and B?

A. 25-B is invoice—is exhibit number—I am

sorry. 25-B is Invoice C19044 for 17,310 pounds of spice buttons, and that also appears on the recap sheet.

Q. Now, is there any relationship to Exhibit 25-B?

A. 23-B?

Q. All right.

A. Which is Invoice No. C65050 in the amount of 34,800 pounds of gum drops. It also appears on this recap sheet.

1938 Q. Will you tell me whether, if you know, Government's Exhibit 27 in the amount of $10,849.00 is included in the cash disbursements book—

A. It is.

Q. —Exhibit 7?

A. It is.

Q. What is that entry?

A. It appears on page 46 of the cash disbursements book for January, 1945, on line 30. The entry is check No. 2367, January 19th, cash to Shotwell, $10,849.00 and the debit to accounts payable is $10,849.00.

Q. Now will you examine the accounts payable, Government's Exhibit 6-A. Does that entry appear thereon?

A. It does.

Q. In what amount?

A. $10,849.00.

Q. What is the significance of that entry?

A. That entry paid the overages on the specific group of invoices.

By Mr. McConnell: I object to that statement, the entry paid for the overages. It may record such payments, but—

1939 By the Court: Well, I don't know that I follow the witness's answer.

By Mr. Lockley:

Q. Can you qualify your answer, Miss Feldman?

A. Well, the entry of the check for $10,849.00 appears on the accounts payable ledger sheet.

Q. What does that indicate?

A. That indicates that the payment was made to The Shotwell Manufacturing Company.

By the Court: The answer may stand.

By Mr. Lockley:

Q. Now with respect to Government's Exhibit 28, is that recorded in the cash disbursements book?

A. It is.

Q. And in what amount?
A. $6,183.00.
Q. Is that the face amount of that check?
A. It is.
Q. Is there any description on the cash disbursements book?
A. Yes, "Cash, Shotwell Manufacturing Company."
Q. On which line and page?
A. That is on page 54 of the cash disbursements book for February, 1945, line 35.
1940 Q. Is there an entry on the accounts payable ledger, Government's Exhibit 6-A, relating to that check?
A. There is.
Q. What is that entry?
A. That entry is for $6,183.00.
Q. What does that entry signify?
A. That the money was paid to Shotwell.
Q. I call your attention to some pencilled notations on the bottom of Government's Exhibit 27-A, and ask you if that has any relationship to Government's Exhibit 25-A?
A. Yes, it has. I described that as one of the four invoices that were included on this recap sheet.
Q. Does that cash authorization slip have any reference to Exhibit, Government's Exhibit 26-B?
A. No, it does not.
By Mr. Lockley: Now, if your Honor please, Government's Exhibits 27 and 28 are checks to cash.
By the Court: I know, but you have offered them, haven't you?
1941 By Mr. Lockley: Yes, sir. They have been offered previously.
By the Court: 26—
By Mr. Lockley: 27 is a check to cash in the amount of $10,849.00. Government's Exhibit 28 is a check to cash in the amount of $6,183.00. These exhibits were received at the time Mr. Lubben testified.
By the Court: Oh, they have already been received?
By Mr. Lockley: Yes, sir. I was just showing the relationship.
By the Court: You say they were identified by Mr. Lubben?

By Mr. Lockley: Yes, sir, they were identified.

By the Court: And received during the time he was on the stand?

By Mr. Lockley: That is correct.

By the Court: All right.

By Mr. Lockley: Government's Exhibit 27-A is a typewritten slip of paper headed "Shotwell Manufacturing Company", with the words "spice buttons" and the date January 10, 1945, and the amount—

1942 By the Court: Have you offered 27-A?

By Mr. Lockley: Yes, sir. It was likewise offered and identified.

By the Court: If you would tell me that—Government's Exhibits 27-A and 27 and 28 have already been offered and received?

By Mr. Lockley: Yes, sir.

By the Court: Now go ahead.

By Mr. Lockley: There is the next entry of January 12, 1945, for 17,310 pounds for a total of 32,550 pounds at ten cents, or $3,255.00.

There is a column headed "gum drops" December 6, 1944, 20,100 pounds; December 8, 1944, 23,580 pounds; December 9, 1944, 20,100 pounds; December 12, 1944, 23,460 pounds; December 26, 1944, 20,490 pounds; and January 5, 1945, 34,800 pounds or a total of 142,530 pounds at ten cents— $14,253.00, with a notation "advanced, $8,000.00.", leaving a balance of $6,253.00,—in the amount of $9,508.00.

There is also a pencilled notation on January 13, 1943 1945, for 13,410 pounds of spice buttons, and a pencilled notation "$1,341.00" making a total of $10,849.00, which is the amount of check No. 27.

By Mr. McConnell: While you are indicating the checks, will you indicate the endorsement on the back too.

By Mr. Lockley: These endorsements were by Freda Seiderer.

By Mr. Lockley:

Q. I might ask you, Miss Feldman, if you recognize the endorsements on the back?

A. I do.

Q. Of Government's Exhibits 27 and 28?

A. Yes, sir.

1944 Q. Whose endorsements are they?

A. They are the endorsement of my assistant, Frieda Seiderer.

Q. Do you know what she did with those checks? Do you have any independent recollection?

A. What she did with the checks?

Q. Yes.

A. Yes. She would take them to the bank, cash them and bring the cash back either to me or to Mr. Lubben.

Q. If she gave it to you what did you do?

A. I turned it over to Mr. Lubben.

By the Court: Well, will you help me straighten out my record, Mr. Lockley. Did I understand that Government's Exhibits 24-A, 23-A, 23-B and 25-A are included in the recap sheet 27-A?

By Mr. Lockley: Yes, your Honor.

By Mr. Lockley:

Q. Miss Feldman, you have examined Government's Exhibits 23-A and 23-B, 24-B, 25-A, B, C, D, and 26-A and B, and I ask you what relationship, if any, and if you know, Government's Exhibits 27 and 28 bear to those invoices?

1945 A. Would it be all right if I use these sheets that I have here with me?

Q. Do you have some work papers that you have prepared?

A. Yes.

Q. When did you make them?

A. I made them last April.

Q. From what information did you make them?

A. I made them from whatever records were available here in Chicago.

Q. What records were those?

A. The records of the Eatsum single ownership, copies, duplicate copies or photostats of Shotwell invoices and checks in payment of invoices and recap sheets that were available.

Q. Well, are those the records which are now in evidence?

A. That is right.

Q. In your possession on the stand?

A. Correct.

By Mr. Lockley: May she use her work papers, your Honor.

By the Court: Well, I don't follow just what you are referring to.

1946 By Mr. Lockley: She has some work papers which she said she prepared from the evidence which has now bee . introduced and which would help her in organizing her testimony.

By the Court: Well, I have no objection.

By Mr. Lockley: And from an examination of the work papers.

By Mr. Kirby: If the Court please, I don't mean to be impolite with the lady, but on behalf of the defendant Sullivan, I do object because quite an essential question in the very proof here is going to be as to what memoranda exists to support what Mr. Lubben did with this cash that he did get and this young lady, Mr. Lubben has testified, did prepare memoranda.

Now, we are at a juncture where there is not a memoranda in evidence, so if it is asked that she be permitted to refer to memoranda she has recently prepared. Because the question of her memoranda will be of such moment in the case, I must respectfully object to

1947 her use of any recently prepared memoranda because the memoranda of this lady will be an important question in the proof, and so I most sincerely object to her use of new memoranda.

By Mr. Lockley: I have no intention, your Honor—

By the Court: You haven't made clear to me just what data she used in preparing this memoranda and whether or not the data is now in evidence.

By Mr. Lockley: Yes, your Honor. With respect to the matters the pending question refers to, the data is all in evidence.

By the Court: What data are you now referring to?

By Mr. Lockley: I am referring to the invoices which have been introduced, the checks to the Shotwell Manufacturing Company.

By the Court: Which invoices? Do you mean all the invoices are in evidence?

1948 By Mr. Lockley: At this point, I have only asked her relating to invoices, Government's Exhibits 23-A and B, 24-A, 25-A, B, C, D, and 26-A and B which are all in evidence.

I also asked her with reference to checks to cash, Government's Exhibits 27 and 28.

By the Court: Say that again.

By Mr. Lockley: The question will also relate to two checks to cash.

By the Court: 27 and 28?

By Mr. Lockley: Government's Exhibits 27 and 28, which are in evidence. If deemed necessary to do so, we can give Miss Feldman a pencil and paper and she can make her addition and subtraction on the stand or we can provide a blackboard. This is merely to expedite the testimony.

By the Court: Have you named all the exhibits that she has used in supplying the summary that she is now desiring to use in testifying?

By Mr. Lockley: In so far as we have gone, and
1949 in so far as the question is now pending, yes, her papers will, of course, include other exhibits which have not been introduced but which will be introduced in the normal course of events.

By the Court: Well, what has she done with reference to these exhibits which you have named, in making these computations? Are they merely mathematical?

By Mr. Lockley: That's all, your Honor. During the time this case was set for trial last April, Miss Feldman was here expecting to testify at that time and she prepared the summaries. They are merely mathematical computations from the invoices and checks and books of the Eatsum partnership or the Eatsum sole proprietorship which are in evidence or which will be in evidence and all of which, incidentally, have been shown to the defense and they are aware of them and have been aware of them for some time.

1950 By the Court: When was this shown to the defendant?

By Mr. Lockley: All of the exhibits which Miss Feldman also had available at the time she prepared her computations.

By Mr. Kirby: If the Court please, let me stress again, sir, that the question of what proof exists as to what happened to this cash after Mr. Lubben got it, is very material. When we asked—

By the Court: Perhaps you should direct your statement, however, to the matter that is now before the Court.

By Mr. Kirby: Yes, sir.

By the Court: He says,—or rather Mr. Lockley says that she has used the exhibits that are now in evidence, and to which reference has been made, and she has made certain mathematical computations, addition, subtraction, and what-not, in order to expedite her testimony.

What is your objection to the use of that memoranda?

By Mr. Kirby: It is memoranda by Miss Feldman.

1951 This is a crucial part of the case of the Government.

By the Court: If it isn't right, if the mathematical computations are not right, I suppose that can be demonstrated.

By Mr. Kirby: I am not making myself plain.

By the Court: No.

By Mr. Kirby: The existence of memoranda, whether they exist or not,—

By the Court: They are here in evidence.

By Mr. Kirby: Yes, but she has now talked about four invoices, and she is running out of contemporaneous memoranda, and they want to substitute April, 1953 memoranda.

By Mr. Lockley: No.

By Mr. Kirby: And that will introduce confusion in this case, to which I object.

By Mr. Lockley: I am very—

By Mr. McConnell: Just a minute.

If your Honor please, I add this further objection: It is perfectly all right, when evidence is in the record, as I understand it, for an accountant to summarize it.

1952 By the Court: Yes.

By Mr. McConnell: And to testify to a summary, but this summary Mr. Lockley is talking about includes all the evidence, some of which is not yet in.

By the Court: Oh, no, I have limited Mr. Lockley to the use of the exhibits with reference to the specific exhibits which are in evidence.

I did not include the use of this memoranda as to the exhibits which are not in evidence.

By Mr. McConnell: I understand him to say it is based on all the evidence, some of which is in, and some of which is not in.

By the Court: I didn't understand Mr. Lockley that way.

By Mr. Lockley: Your Honor, I have no intention of introducing this evidence. It is merely for the purpose of expediting this trial of the case.

By the Court: Can't you make it clear to me whether or not it is based on any documents which are not in evidence?

1953 By Mr. Lockley: It is based on documents which are not in evidence, which are now—

By the Court: Well—

By Mr. Lockley: May I explain?

By the Court: All right.

By Mr. Lockley: (Continuing)—which consists of checks to The Shotwell Manufacturing Company and invoices of The Shotwell Manufacturing Company, which we just haven't reached yet.

By the Court: Well, then we will have to wait until you reach them.

By Mr. Lockley: Can't you use that portion of the exhibit, or of the memoranda which relate to the exhibits we have already in.

By the Court: If you make it clear what the underlying data is, so we will know, and so there will be no misunderstanding—

By Mr. Lockley: The underlying data relates to that portion of the exhibit, or the work papers he now desires to us, are the invoices which are in evidence, and the checks to cash which are in evidence, and checks to The Shotwell Manufacturing Company which are in evidence.

1954 By Mr. McConnell: May I suggest—

By the Court: Can't you identify them by exhibit number?

By Mr. Lockley: Yes, sir.

By Mr. McConnell: May I suggest that counsel lay the foundation for the whole summary, and then she can testify, if she wants to, from it.

By the Court: Well, now, it appears that a portion of this summary is based on exhibits which are not in evidence. I take it Mr. Lockley wants her to use these computations with respect to an explanation of certain exhibits which are in evidence? Is that right?

By Mr. Lockley: That is all, your Honor.

1955 By the Court: Well, then the exhibits which he has named are the exhibits which constitute the underlying data?

By Mr. Lockley: They are Government's Exhibits 23-A and B, 24-A, 25-A, B, C, and D, and 26-A and B, invoices of the Shotwell Manufacturing Company, Government's Exhibits 23, 24, 25, and 26, which are checks issued to the Shotwell Manufacturing Company, Government's Exhibits 27 and 28 which are checks issued to cash and Government's Exhibit 27-A which is the recap or settlement sheet, all of which are in evidence.

By the Court: Well, then, you better lay a foundation for your exhibit with reference to—

By Mr. Lockley: I beg your pardon?

By the Court: You had better lay foundation with reference to these memoranda, as to the exhibits which you have now mentioned.

By Mr. Lockley: I have no intention of offering it in evidence, your Honor, or even identifying it for evidentiary purposes.

1956 By the Court: I understand that, but nevertheless, you will have to lay a foundation. You will have to ask her what she has done in making these computations with respect to the exhibits you have named.

By Mr. Lockley: Well, Miss Feldman—

By Mr. McConnell: I object to it if he is not going to offer it in evidence. I object to his having her testify from a document not in evidence. He can put it in evidence if it is a proper summary and she can testify from it.

By the Court: Do you have any objection to putting it in evidence?

By Mr. Lockley: I have no objection. I had some question in my mind as to whether it was evidentiary. She pointed out it was made last April. It wasn't made contemporaneously with the entries in the book or the receipt of the invoices in payment of the checks.

By the Court: If the defendants want it in evidence, of course they can make the offer.

1957 By Mr. Lockley: They are perfectly welcome to do it and they are perfectly welcome to use it for the purposes of cross examination.

By the Court: Now, will you ask the witness what she has done in making these comput ns so we will know what the summary purports to be?

By Mr. Lockley:

Q. Now, Miss Feldman, have you made a summary or a work sheet?

A. Yes.

Q. Will you explain what you used in preparing that summary or work sheet, will you explain what is on it?

A. I took the ledger sheets for the single ownership. I took the checks in payment of the invoices, the cash checks. I entered all the invoices on the summary, showing both the actual typed amount and the alleged overage and the total of the two.

I then proceeded to show the checks that were issued in payment of the typed amount on the invoices. I also showed what checks were drawn to cash and how they were applied.

1958 Q. Now, will you describe what you mean by how they were applied?

A. I showed which checks issued to Shotwell covered which specific invoices. I also showed which checks to cash covered what particular invoices so that, for the purposes of testifying, if it were possible we would have to do away with my sitting and figuring this.

Q. And you made that last April?

A. That is correct.

Q. Did you use anything which has not yet been shown to you in evidence in the preparation of that work paper?

A. No, except for the items past the point which we have gotten.

Q. You mean, there are certain items which relate to the period after Government's Exhibit No. 26-B which have not yet been shown to you, is that correct?

A. That is correct, sir.

Q. But up to that point, the only documents which you have used are already in evidence?

A. That is right.

1959 By the Court: Very well.

By Mr. McConnell: I still object to it. Now she has got just part of the picture. You just can't cut it up that way in little pieces. I understand it is tied in backwards and forwards and whether or not the books balance out—

By the Court: I see no objection. They are going forward with an explanation of the exhibits which are not in

evidence, in so far as they may be reflected in her computations.

By Mr. Kirby: Judge, may I ask just one little question?

By the Court: You may.

Cross Examination by Mr. Kirby.

Q. At what point chronologically do you stop with the contemporaneous memoranda and go to the new ones? So far, I don't come down later than January, 1945, with any recap sheet that was made at the time.

By Mr. Kirby: Am I right, Mr. Lockley? So far
1960 you have only shown us a recap sheet that was made back there for January, 1945.

By Mr. Lockley: That is right.

By Mr. Kirby: So we have the first month of the indictment period and we are leaving the papers she summarized then and going on there to the ones she made while getting ready for trial.

By Mr. Lockley: I am afraid you don't understand, Mr. Kirby. We are not using her recent papers as evidence of the payment of any amounts or drawing the checks to cash.

1961 By Mr. Kirby: What I mean is we haven't been able to come further down on the books that were prepared in the old days than the first few days of the year. Now, we have to go to the new ones, is that right?

By Mr. Lockley: At this point it is difficult for her to summarize this number of checks and invoices and show how they tied in together without some help by way of that previously prepared work sheet.

By Mr. Kirby: All right. I just wanted to understand that we leave the papers that were formerly prepared right in the first month of the indictment period.

By the Court: You may proceed.

By Mr. Lockley: Excuse me just a moment, your Honor.

I might add that the purpose of putting in the evidence in chunks, so to speak, is that there were periods when a check to cash was issued, which brought the account into balance, or Mr. Lubben said he was even Stephen at regular intervals, at times. What I have
1962 done up to now is to show there were certain invoices

received, there were checks in payment of those invoices, and now we come to a point where a check was issued to cash in payment of the overages.

By use of the work sheets, Miss Feldman can more readily testify as to which invoices those checks to cash have any relation.

By the Court: You may proceed.

By Mr. Lockley:

Q. All right. Will you get out your work sheets, Miss Feldman.

Now, are you able to tell us with respect to Government's Exhibit No. 27, a check for $10,849.00 what that check was in payment for, as reflected on the books of the Eatsum sole proprietorship?

A. That was in payment of the overages entered on the—

By Mr. McConnell: I object to her stating that. If she wants to say that the books indicate that, all right.

1963 By Mr. Lockley: That is the question, Mr. McConnell.

By the Court: I understand from her testimony that the books indicate that this check for $10,849.00 was in payment of certain overages.

By Mr. Lockley: As reflected on the books.

By the Court: Yes, as reflected on the books.

By Mr. Lockley: She is not testifying that those payments were made. She is merely testifying that that is what is shown on the books.

By the Court: Very good.

By Mr. Lockley:

Q. All right. Will you tell us which invoices?

A. I believe that I already have on this one particular—

Q. Let us go over it again.

A. All right. Check No. 2367, which is Government's Exhibit 27, for $10,849.00 covers the following invoices: In January of 1945, No. C-65050.

Q. Exhibit 23-A. That is Exhibit 23-A.

1964 By the Court: Let us have that again.

By Mr. Lockley:

Q. Government's Exhibit 23-A.

A. Invoice No. 61544.

Q. 24-A.

By the Court: Twenty—

By Mr. Lockley:

Q. 24-A.

A. 61904.

Q. 25-B.

A. And 59931.

Q. 25-A.

All right. Now with respect to the Exhibit 28, a check to cash for $6,183.00, what do the books of the Eatsum partnership reflect that that was in payment of,—Eatsum sole proprietorship?

A. Check No. 2593, Exhibit No. 28, covered the payment of overages on invoices Nos. 63830—

Q. That is 25-C.

A. 64176—

Q. 25-D.

A. 66013—

Q. 26-A.

1965 A. 68259.

Q. That is 26-B.

Now, are you able to state whether the account was in balance at that time, the account of The Shotwell Manufacturing Company with the Eatsum sole proprietorship?

A. It was not in balance because there was a February 8th invoice following that.

Q. Which had not yet been paid?

A. That is right.

Q. Now I show you Government's Exhibit for identification No. 29-A and also Government's Exhibit No. 29-B, purporting to be invoices of The Shotwell Manufacturing Company, and I ask you if you have seen those before.

By the Court: Have they been received?

1966 By Mr. Lockley: No, sir. None of the invoices of the Shotwell Manufacturing Company except—

By the Court: That is Exhibit 29-A and B?

By Mr. Lockley: Yes, sir.

By Mr. Lockley:

Q. Have you seen those before?

A. I have.

Q. Are those records received by you in the ordinary

course of business?

A. They are.

Q. Are they kept as a part of the regular books and records?

A. Yes, sir.

Q. Were they true and correct to the best of your knowledge?

A. Yes, sir.

Q. I show you Government's Exhibit 29 and ask you if you have seen that before?

A. I have.

Q. Do you know in whose handwriting it was prepared?

A. Accounts payable clerk.

Q. Was that a record in the ordinary course of 1967 business?

A. It is.

Q. Was it made under your supervision and direction?

A. Yes, sir.

Q. Is it true and correct to the best of your knowledge and belief?

A. Yes, sir.

Q. With respect to the penciled notations on Government's Exhibits 29-A and 29-B, have you seen those before?

A. I have.

Q. Do you know by whom they were made?

A. Accounts payable clerk.

Q. Were they made in the ordinary course of business?

A. Yes, sir.

Q. Under your supervision and direction?

A. Yes, sir.

By Mr. Lockley: I now offer in evidence Government's Exhibits 29, 29-A and 29-B.

By Mr. McConnell: Your Honor, I would like to ask a question.

1968 By the Court: All right.

Cross Examination by Mr. McConnell.

Q. Miss Feldman, both of these invoices which are Government's Exhibits 29-A and 29-B bearing the mark "Paid on February 27, 1945", may I ask you whether

or not that "Paid" refers to the check made to the Shotwell Manufacturing Company under date February 27, 1945?

A. It does.

Q. And that check which is Government's Exhibit 29 is only for the face amount of the printed invoice and does not include the amount shown as penciled, of alleged overages?

A. That is correct. It is just the face of the invoice.

By Mr. McConnell: I object to the documents in so far as they contain penciled statements of alleged overages. It is purely self-serving.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the
1969 Court and marked Government's Exhibits 29, 29-A and 29-B.)

Direct Examination (Ctd.) by Mr. Lockley.

Q. I show you Government's Exhibits for identification Nos. 30-A, 30-B, 30-C and 30-D, purporting to be invoices of the Shotwell Manufacturing Company and ask you if you have seen those before?

A. I have.

Q. Were they records received in the ordinary course of business?

A. They were.

Q. Are they true and correct to the best of your knowledge?

A. Yes, sir.

Q. I direct your attention to the penciled notations on the bottom. Do you know by whom they were prepared?

A. The computation, you mean?

Q. The penciled notations.

A. There was a notation, a notation on 30-A. It is a notation of the receiving record but I don't know—
1970 Q. Referring to the extensions of the alleged overages.

A. Oh, the extension of the alleged overages are on the accounts payable.

Q. Were they made under your supervision and direction?

A. Yes.

Q. Were they part of the books and records of the business?

A. Yes.

Q. I show you Government's Exhibit for identification No. 30 and ask if you have seen that before?

A. I have.

Q. Was that prepared by you or under your supervision and direction?

A. It was.

Q. Was it part of the books and records of the company?

A. Yes.

Q. Is it true and correct to the best of your knowledge?

A. Yes, sir.

By Mr. Lockley: I offer in evidence Government's 1971 Exhibits 30 and 30-A, B, C, and D.

By Mr. McConnell: I would like to ask a question.

Cross Examination by Mr. McConnell.

Q. Miss Feldman, again I ask you whether or not the reference to "Paid" on these invoices refers to the check in the amount of $4,884.97, Government's Exhibit 30, and refers only to the amount of typed material?

A. That is correct.

Q. And not the handwritten material on the invoices?

A. That is correct.

By Mr. McConnell: I object to the documents. They are self-serving in so far as the contents of the handwritten memoranda.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 30, 30-A, 30-B, 30-C and 30-D.)

1972 *Direct Examination (Continued) by Mr. Lockley.*

Q. Now, calling your attention to Exhibit 29-A, can you tell me if that is recorded in the purchase book of the Eatsum Food Products Company?

A. It is.

Q. And in what amount?

A. It is entered in the purchase book, February, 1945, on page 55, line 32, in the amount of $2,369.63.

Q. And is that the amount of the invoice price or the invoice plus the alleged overage?

A. That is the invoice price plus the alleged overage.

Q. And is it also recorded in the accounts payable record, Exhibit 6-A?

A. It is.

Q. And in what amount?

A. $2,369.63.

Q. I show you Exhibit 29-B. Is it recorded in the purchase book?

A. It is.

By the Court: Does the account payable entry include the alleged overage, the full amount of the invoice and the alleged overage?

1973 By the Witness: Yes. I am sorry.

By Mr. Lockley:

Q. Is 29-B recorded in the purchase book?

A. Yes, it is.

Q. In what amount?

A. $2,556.83.

Q. And is that the amount of the invoice plus the alleged overage?

A. That's correct.

Q. Now, I show you Exhibit 29, check for $2,146.55, and ask you if that has any relation to Exhibits 29-A and 29-B?

A. It has.

Q. What is that relationship?

A. That is the check to the Shotwell Manufacturing Company in payment of the typed amounts on both invoices.

Q. And is that recorded in the cash disbursements book?

A. It is.

Q. In what amount?

A. It appears as net check for $2,146.55, discount of $43.91, a debit to accounts payable of $2,190.46.

Q. And does that include any overages?

1974 A. That does not.

Q. That is just the invoice?

A. Correct.

Q. Is that also recorded in the accounts payable ledger sheet of the sole proprietorship, Exhibit No. 6-A?

A. It is.

Q. And in what amount?

A. $2,190.46.

By Mr. Lockley: Exhibit 29-A is an invoice in the amount of $1,034.63—

By Mr. O'Brien: Have you offered those?

By Mr. Lockley: Yes, Mr. O'Brien.

By Mr. O'Brien: Have they been received?

By Mr. Lockley: Exhibits 29, 29-A and B, I believe so.

By Mr. O'Brien: O. K.

By Mr. Lockley: —ten cent alleged overage on 13,350 pounds, or $1,335.00, for a total amount of $2,369.63 on Exhibit 29-A.

1975 29-B is an invoice for $1,155.83, plus a ten-cent alleged overage on 14,010 pounds, or $1,401, for a total of $2,565.83.

Exhibit 29 is a check for $2,146.55, to The Shotwell Manufacturing Company, endorsed by them, with the description 2845, Invoice 68817, which is Exhibit 29-A, for $1,034.63; and February 16, 1945, Invoice No. 70524, which is Exhibit 29-B, for $1,155.83, less cash two per-cent discount of $43.91, or a total of $2,146.55.

By Mr. Lockley:

Q. Now, I ask you to look at Exhibit 30-A, in evidence, and tell me if that is recorded on the purchase book of the Eatsum Food—

A. It is.

Q. And in what amount?

A. $2,655.38.

Q. And is that the amount of the invoice, or the invoice plus the alleged overage?

A. Invoice plus the alleged overage.

Q. Is it likewise recorded in the accounts payable book, Exhibit 6-A?

A. It is.

Q. And in what amount?

1976 A. $2,655.38.

Q. Is that again the amount of the invoice plus the overage?

A. Yes, sir.

Q. I also show you Exhibit 30-B, and ask if that is recorded in the purchase book?

A. It is.
Q. And in what amount?
A. $2,409.
Q. And is that the amount of the invoice, or the invoice plus the overage?
A. Invoice plus the overage.
Q. And is that recorded in the accounts payable book, Exhibit 6-A?
A. It is.
Q. And in what amount?
A. $2,409.
Q. Is that the amount of the invoice, or the invoice plus the overage?
A. Invoice plus the overage.
Q. I show you Exhibit 30-C and ask if that is recorded in the purchase book?
A. It is.
Q. And in what amount?
1977 A. $3,285.00.
Q. Is that the invoice, or the invoice plus the overage?
A. Invoice plus the overage.
Q. Is that recorded in the accounts payable book?
A. It is.
Q. And in what amount?
A. $3,285.00.
Q. Is that the total amount, Invoice plus the overage?
A. It is.
Q. I show you Exhibit 30-D, and ask if that is recorded in the purchase book?
A. It is.
Q. And in what amount?
A. $2,677.28.
Q. Is that the amount of the invoice plus the overage?
A. It is.
Q. And is it recorded in the accounts payable book?
A. It is.
Q. And in what amount?
A. $2,677.28.
Q. I show you Exhibit No. 30, and ask if that
1978 has any relationship to Exhibits 30-A, B, C, and D?
A. It has.

Q. And what is that relationship?

A. The check is in payment of the typed amounts of the four invoices.

Q. And is that recorded on the cash disbursement book?

A. It is.

Q. And in what amount?

A. Net check is $4,884.97, the discount is $99.69, the debit to the accounts payable is $4,984.66.

Q. And that check is in payment of the invoice amounts of these exhibits 30-A, B, C, and D?

A. That is correct.

Q. Less two percent discount?

A. That is correct.

By Mr. Lockley: Exhibit 30-A is an invoice for $1,238—

By the Court: Which one now?

By Mr. Lockley: 30-A.

—an invoice for $1,238.00 plus overage of ten cents a pound, $1,455.00, a total of $2,655.38.

1979 30-B is an invoice, 13,200 pounds, at eight and one-quarter cents, for $1,089.00, plus an alleged ten cent overage, totaling $1,320.00, for a total price of $2,409.00.

Exhibit 30-C is an invoice, eight and one-quarter cents for $1,485.00, plus a ten cent alleged overage of $1,800.00, for a total of $3,285.00.

1980 Exhibit No. 30-D is an invoice at 8¼ cents a pound, $1,210.28—

By the Court: Again, please?

By Mr. Lockley: $1,210.28, plus a ten-cent overage per pound, $1,467.00, a total of $2,677.28.

And check No. 3057, which is Exhibit 30, issued to The Shotwell Manufacturing Company by Eatsum Food Products and endorsed by Shotwell, in the amount of $4,884.97, carries the explanation that it is for invoices 71295, which is Exhibit 30-D; 70866, which is Exhibit 30-B; 70944, which is Exhibit 30-C; and 70683, which is Exhibit 30-A—total of $4,984.66, less two per cent of $99.69, a total amount of $4,884.97.

By Mr. Lockley:

Q. Miss Feldman, I show you Government's Exhibits for identification 31-A, 31-B, 31-C, 31-D and 31-E, and ask if you have seen those before.

A. I have.

Q. And what do they purport to be?

A. They are invoices from Shotwell Manufactur-
1981 ing Company.

Q. Are they records received by you in the ordinary course of business?

A. They are.

Q. And were they a part of the books and records of The Shotwell Manufacturing Company?

A. They were.

Q. Are they true and correct, to the best of your knowledge?

A. Yes, sir.

Q. With respect to the handwriting, was that made under your supervision and direction?

A. It was.

Q. Is it true and correct, to the best of your knowledge?

A. Yes, sir.

Q. Is that a part of the books and records of the company?

A. Yes, sir.

Q. I show you Exhibit 31 for identification and ask if you have seen that before.

A. I have.

Q. And what does that purport to be?

A. That is the check in payment of the invoice
1982 amounts on these five invoices.

Q. Is that a record kept in the ordinary course of business?

A. Yes.

Q. Was it made under your supervision and direction?

A. It was.

Q. Is it true and correct, to the best of your knowledge?

A. Yes, sir.

By Mr. Lockley: I offer Exhibits 31 and 31-A, B, C, D and E in evidence.

1983 *Cross Examination by Mr. McConnell.*

Q. Miss Feldman, these invoices, which are Government's Exhibits 31-A through D, are invoices which

are marked paid, and the check appears to be in the amount of $8,086.85. Is that $8,086.85 the printed amount of those invoices?

A. That is correct.

Q. And the "paid" refers to the payment not of the penciled amounts but of the printed amounts on the invoices, is that correct?

A. That is correct.

By Mr. McConnell: I object to the pencil memoranda on the invoices.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 31, 31-A, 31-B, 31-C, 31-D and 31-E.)

By the Court: Perhaps you could make that statement for the record when that is a fact, Mr. Lockley. If the check is merely in payment of the face amount
1984 of the invoice, you could make that statement for the record, and that will avoid any further questions in that regard, and we might expedite matters.

By Mr. Kirby: I think, Mr. Lockley, it is true that your checks, Exhibits 25, 26, 29, 30 and 31, were all simply payments of the invoices, isn't that true, Mr. Lockley?

By Mr. Lockley: That is correct.

By the Court: I think Mr. McConnell covered that by his examination.

Direct Examination (Continued) by Mr. Lockley.

Q. Miss Feldman, is Exhibit 31-A recorded in the purchase book?

A. It is.

Q. Of the Eatsum Food Products Company?

A. Yes.

By the Court: Can't you cover them at one time, A, B, C, D and E, if you want to ask if they are recorded in certain books.

1985 By Mr. Lockley:

Q. Are they recorded in the purchase books, 31-A, B, C, D, and E?

A. They are.

Q. And in what amounts?

Perhaps we could simplify it by asking: Are they recorded only in the amount of the invoice price?

A. No, they are recorded in the amount of the invoice price plus the overage.

Q. All right.

A. They are all recorded in the month of March.

Q. And all in the invoice price plus the overage?

A. That's correct.

Q. And are they likewise recorded in the accounts payable ledger?

A. They are.

Q. And in what amount?

A. The invoice price plus the overage.

Q. Now, I show you check, Exhibit No. 31, for $8,086.85, and ask you if that has any relationship to Exhibits 31-A, B, C, D, and E?

A. It has.

Q. And what is that relationship?

A. The check is in payment of the invoices from 1986 Shotwell.

Q. And where the "Paid" stamp appears on the invoice, that relates only to the payment of the invoice price?

A. Of the typewritten amount, that is right.

Q. And is the check, Exhibit No. 31, entered in the cash disbursements book?

A. It is.

Q. And is it likewise entered in the accounts payable book?

A. Yes.

Q. What does the entry in the accounts payable book indicate?

A. That on March 20th, the check was issued to Shotwell Company in the gross amount of $8,251.89.

Q. And was there at that time a balance due The Shotwell Manufacturing Company, according to your books?

A. Yes, there was.

Q. Was that for invoice amounts or premium amounts?

A. Let's see. For premiums.

Q. Insofar as the invoice amounts were concerned, were you at that time in balance and paid up; are 1987 you able to tell?

A. I can't tell from the ledger sheet.

Q. Well, strike the question then.

A. All right.

By Mr. Lockley: Exhibit 31-A is a Shotwell invoice to Eatsum for $1,099.73—

By Mr. McConnell: You haven't offered these yet.

By the Court: Yes, he has offered them, and they have been received.

By Mr. Lockley: —$1,099.73, plus a ten cent overage on 14,190 pounds, or $1,419, for a total of $2,518.73.

1988 Exhibit 31-B is for 14,370 pounds at seven and three-quarter cents, or $1,113.68, plus a ten cent overage of $1,437, for a total of $2,550.68.

Exhibit 31-C is for 44,670 pounds at eight and one-quarter, $3,685.28, plus a ten cent overage of $4,467.—

By the Court: Again.

By Mr. Lockley: $4,467, a total of $8,152.28.

Exhibit 31-D, an invoice at seven and three-quarter cents for $1,120.65, plus ten cents a pound overage on 14,460 pounds, or $1,446.00, for a total of $2,566.65.

Exhibit 31-E, is an invoice to Shotwell at eight and one-quarter cents, for $1,232.55, plus a ten cent overage on 14,940 pounds, for $1,494, a total of $2,726.55.

By the Court: We will suspend now.

We will suspend, members of the jury, until two o'clock this afternoon.

By the Marshal: Will the audience kindly remain standing until the jury files out?

1989 This Honorable Court will now recess until two o'clock this afternoon.

(Whereupon a recess was taken in the above entitled cause, until two o'clock p.m. of the same day, being Thursday, September 24, 1953.)

Nos. ~~470-471~~ 1

TRANSCRIPT OF RECORD

Office - Supreme Court, U. S.
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SUPREME COURT, U.S.

In the

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11108 *vs.*

THE SHOTWELL MANUFACTURING COMPANY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11109 *vs.*

BYRON A. CAIN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11110 *vs.*

FRANK J. HUEBNER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11111 *vs.*

HAROLD E. SULLIVAN,
Defendant-Appellant.

U. S. C. A.
FILED
JUL 8 1954
KENNETH J. CARRICK

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

The Schaefer Press, Inc.—ANdover 3-6850

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PRINTED RECORD

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1990

(Caption—No. 52 CR 143)

Chicago, Illinois,
Thursday, September 24, 1953,
2:00 o'clock P. M.

Court met pursuant to recess.

Present:
Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:—

By Mr. Lockley: Exhibit No. 31 is a check to the Shotwell Manufacturing Company in the amount of $8,086.85, endorsed by the Shotwell Manufacturing Company, 1991 and bearing the notation, or description, that it is for invoices C71541, in the amount of $1,099.73—

By the Court: Well, you have covered that, haven't you?

By Mr. Lockley: Well, that is the exhibit 31-A—

By the Court: Well, doesn't it appear that 31 is in payment of the face amount of Exhibits 31-A through E?

By Mr. Lockley: That's correct. It is in payment of the face amounts of 31-A, B, C, D, and E. And that information is contained on the face of the check itself.

By the Court: Very well.

BEATRICE FELDMAN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Continued) by Mr. Lockley.

Q. Now, Miss Feldman, I show you Exhibit for identification 32-A and ask if you have ever seen that be-
1992 fore?

A. I have.

Q. And is that a record received in the ordinary course of business?

A. It is.

Q. What does that purport to be?

A. It is an invoice from the Shotwell Manufacturing Company for 14,370 pounds of gum drops.

Q. Are the penciled notations made in the ordinary course of business?

A. They are.

Q. Were they made under your supervision and direction?

A. They were.

Q. Are they true and correct, to the best of your knowledge?

A. Yes, sir.

Q. I show you Exhibit No. 32, purporting to be an Eatsum Food Company check and ask if you have seen that before?

A. Yes, sir.

Q. Was that a record made in the ordinary course of business?

A. Yes.

1993 Q. Was it made under your supervision and direction?

A. It was.

Q. Was it true and correct at the time it was prepared?

A. It was.

By Mr. Lockley: I offer Exhibits 32 and 32-A.

By Mr. McConnell: Are you going to show that the "Paid" mark, that it was paid for, and the pencil mark, "Paid" were put on after they got them?

By Mr. Lockley:

Q. Does the "Paid" mark on the invoice, 32-A, relate only to the invoice price?

A. That's correct.

Q. And the penciled memorandum was prepared—or placed on the invoice after it was received by the Eatsum Food Products Company, is that correct?

A. That's correct.

By Mr. McConnell: I object to the pencil memoranda for the reasons I have stated.

1994 By the Court: They may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 32 and 32-A.)

By Mr. Lockley:

Q. Now, Miss Feldman, with respect to Exhibit 32-A, will you tell me if that is a record that is recorded in the purchase book?

A. It is.

Q. Of the Eatsum Food Products Company. And is it recorded in the amount of the invoice price, or the invoice plus the overage?

A. It is recorded in the amount of the invoice price plus the overage.

Q. And is it recorded also on the accounts payable book?

A. It is.

Q. And in what amount?

A. $2,550.68.

Q. Is that the invoice plus the overage?

A. That is.

Q. I show you Exhibit No. 32, which is a check in the amount of $1,091.00. Is that recorded on the cash disbursements book?

A. It is.

1995 Q. And in what manner?

A. It is shown on the cash disbursements book of April, 1945, on page 77, line 33. The net amount was $1,091.41, the discount was $22.27, and the debit to accounts payable was $1,113.68.

Q. And was that figure posted to the accounts payable book, Exhibit 6-A?

A. It was.

Q. What does that indicate?

A. That indicates that the amount typed on the invoice was paid to Shotwell.

By Mr. Lockley: Exhibit 32-A is a Shotwell invoice to Eatsum Food Products for 14,370 pounds of gum drops at seven and three-quarter cents, for an invoice price of $1,113.68, plus a ten cent overage per pound of $1,437.00, for a total amount of $2,550.68.

1996 The check, Exhibit 32, is in the amount of $1,091.41, showing—

By the Court: One thousand—

By Mr. Lockley: $1,091.41, showing on its face that it was in payment of invoice 75029, which is Exhibit 32-A.

By Mr. Lockley:

Q. I show you Exhibit 33-A and ask you if you have seen that before.

A. I have.

Q. Is that a record received in the ordinary course of business?

A. It is.

Q. Were the pencil notations made thereon after it was received, the pencil notations?

A. Yes, that's right.

Q. Were they made under your supervision and direction?

A. They were.

Q. And does the "paid" stamp on the invoice indicate the payment of the invoice price?

A. That is so.

Q. I show you Exhibit 33 and ask if you have seen that before.

1997 A. I have.

Q. Is that a record made in the ordinary course of business?

A. It is.

Q. Was it true and correct, to the best of your knowledge, at the time it was made?

A. Yes, sir.

Q. That is the business of the Eatsum Food Products Company, sole proprietorship?

A. That is correct.

Q. Was it made under your supervision and direction?

A. It was.

By Mr. Lockley: I offer Exhibits 33 and 33-A in evidence.

By Mr. McConnell: I object to the pencil memorandum for the same reason.

By the Court: They may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 33 and 33-A.)

By Mr. Lockley:

Q. With respect to Exhibit No. 33-A, is that recorded on the purchase book of the Eatsum sole proprietorship?

1998 A. It is.

Q. And in what amount.

A. The amount of $2,641.20.

Q. Is that the amount of the invoice plus the overage?

A. Yes, it is.

Q. And is it likewise recorded on the accounts payable book?

A. It is.

Q. And in what amount?

A. $2,641.20.

Q. That is again in the amount of the invoice plus the overage?

A. That is correct.

Q. I show you Exhibit 33, which is a check for $1,130.14, and ask you if that is recorded on the cash disbursements book?

A. It is.

Q. And is it also recorded in the accounts payable book?

A. It is.

Q. And what does the record in the accounts payable book reflect?

A. Payment of $1,153.20.

1999 Q. To whom?

A. To The Shotwell Manufacturing Company.

By Mr. Lockley: Exhibit No. 33-A is a Shotwell invoice to Eatsum Food Products for 14,880 pounds at 7¾ cents, for $1,153.20, plus a ten-cent overage, amounting to $1,488.00, for a total of $2,641.20.

Exhibit 33 is a check of Eatsum Food Products to The Shotwell Manufacturing Company in the amount of $1,130.14, showing on its face that it was paid—or that it was used in payment of Exhibit 33-A, less two per cent discount.

By Mr. McConnell: You haven't indicated that it wasn't in payment of the pencilled alleged overage.

By Mr. Lockley: I believe Miss Feldman so testified, but—

2000 By Mr. Lockley:

Q. Miss Feldman, was that in payment of the invoice price, or the invoice plus the overages?

A. That was in payment of the invoice price.

Q. I show you Exhibits for Identification 34-A, 34-B, and 34-C, and ask if you have seen those before?

A. I have.

Q. Are they a part of the books and records of the Eatsum Food Products Company?

A. They are.

Q. Kept in the ordinary course of business?

A. That is so.

Q. Were the penciled notations placed thereon after they were received?

A. They were.

Q. Were they placed under your supervision and direction?

A. Yes, sir.

Q. And were they correct at the time they were prepared?

A. Yes, sir.

Q. Does the "Paid" stamp thereon indicate only the payment of the invoice price?

A. That's correct.

2001 Q. I show you Exhibit for Identification No. 34, purporting to be a check and ask if you have seen that before?

A. I have.

Q. Was that made under your supervision and direction?

A. It was.

Q. And is that a part of the books and records of the Eatsum Food Products Company?

A. It is.

Q. Kept in the ordinary course of business?

A. Yes.

By Mr. Lockley: I offer Exhibits 34, 34-A, 34-B, and 34-C.

2002 By Mr. McConnell: I object to the penciled memoranda on these documents for the same reason I have already given, if your Honor please.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 34, 34-A, 34-B and 34-C.)

By Mr. Lockley:

Q. Miss Feldman, will you look at the purchase book and tell me if Exhibit 34-A, and Exhibit 34-B and 34-C are recorded therein?

A. They are.

Q. In what amount are they? Let me put it this way:

Are they in the amounts of the invoices or the invoice plus the overage?

A. They are entered in the amount of the invoice plus the overage.

Q. And are they posted to the accounts payable ledger sheet, Exhibit 6-A?

A. They are.

Q. Is that also in the amount of the invoice plus
2003 the overages?

A. That is so.

Q. Now, with respect to the penciled notations on those invoices, Government's Exhibit 34, that is, A, B and C, when were those penciled notations placed thereon?

A. After we received the invoices.

Q. How soon afterwards?

A. As soon as they were processed through the accounts payable clerk.

Q. How long would that be in terms of hours or days?

A. It may have been a day, it might have been an hour, depending on when they arrived and how busy we were in the office.

Q. With respect to all the other invoices you have been shown this morning, 23-A, B, 24-A, 25-A, B, C, D, 26-A, B, 29-A, B, 31-A, B, C, D, E, and 32-A and 33-A, would the answer be the same?

A. Yes, it would.

2004 Q. Now I show you Government's Exhibit No. 34.

By Mr. McConnell: May I ask a question on that?

By Mr. Lockley: Yes.

Cross Examination by Mr. McConnell.

Q. Did you make those entries yourself?

A. No. They were made under my supervision.

Q. Did you see the entries made?

A. At the time they were actually written?

Q. Yes.

A. No. The girls were following instructions.

Direct Examination (Continued) by Mr. Lockley.

Q. Did you see the invoices after the entries were made?

A. I would have. I signed some of the checks for these invoices.

Q. You know of your own knowledge that those entries were placed at or about the time the invoices were received, do you?

A. That is right.

Q. Now with respect to Government's Exhibit No. 2005 34, is that reflected on the cash disbursements book?

A. It is.

Q. What was that exhibit in payment of?

A. The exhibit is in payment of Exhibits No. 34-A, B and C.

Q. The invoice price or the invoice plus the premium?

A. The invoice price.

Q. Is it also recorded in the accounts payable book?

A. It is.

Q. What does the record in the accounts payable book reflect?

A. It reflects the payment to Shotwell of the amounts typed on the bills.

Q. That is, just the invoice price?

A. That is correct.

Q. Government's Exhibit 34-A is a Shotwell invoice to Eatsum Food Products for gum drops, 14,370 pounds at 7¾ cents for $1,113.68 plus a ten cent a pound overage or $1,437.00, for a total of $2,550.68.

Government's Exhibit 34-B is a Shotwell invoice 2006 for spice buttons at 8¼ cents for a total of $1,225.13 and a ten-cent overage for a total on the overage of $1,485.00, and a total of $2,710.13, invoice plus overage.

Government's Exhibit 34-C is an invoice for spice buttons at 8¼ cents a pound, 13,830 pounds for $1,140.98 and 30 pounds at 8¼ for $2.48, making a total invoice price of $1,143.46 plus a ten-cent overage, amounting to $1,386.00, for a total invoice plus overage of $2,529.46.

2007 By the Court: What is the total invoice price?

By Mr. Lockley: $1,143.46.

By the Court: And the overage is $1,286?

By Mr. Lockley: $386.00.

Government's Exhibit No. 34 is an Eatsum check to The Shotwell Manufacturing Company endorsed by Shotwell in the amount of $3,412.62, bearing the invoice numbers of Exhibits 34-A, B, and C, and showing on its face that it was in payment of those invoices, less two percent discount.

By Mr. Lockley:

Q. Miss Feldman, I show you Government's Exhibits for Identification 35-A, 35-B, 35-C, 35-D, 35-E, 35-F, 35-G, and 35-H, and ask you if you have seen those before?

A. I have.

Q. Were those records received in the ordinary course of business?

A. They were.

Q. Were they a part of the books and records of the Eatsum Food Products Company?

A. That is correct.

2008 Q. With respect to the writing appearing thereon, was that made on or about the time the invoices were received?

A. That is correct.

Q. Was it made under your supervision and direction?

A. Yes, sir.

Q. Was it true and correct at the time it was prepared?

A. Yes, sir, they were.

Q. With respect to the "Paid" stamp thereon, does that relate to the invoice price, or the invoice plus the overage?

A. The invoice price.

Q. I show you Government's Exhibit for Identification 35, and ask you if you have seen that before?

A. I have.

Q. And was that a record kept in the ordinary course of business of the Eatsum Food Products Company?

A. It was.

Q. Was it true and correct at the time it was prepared?

A. Yes, sir.

Q. Was it made under your supervision and di-

2009 rection?

A. Yes, sir, it was.

Q. Was it true and correct at the time it was made?

A. It was.

By Mr. Lockley: I offer Government's Exhibits 35-A, 35-B, 35-C, 35-D, 35-E, 35-F, 35-G, 35-H, and 35, in evidence.

By Mr. McConnell: I object to the documents which are invoice items—

By the Court: The exhibits may be received.

By Mr. McConnell: —for the reasons I have given.

(Said documents were received in evidence by the Court and marked Government's Exhibits 35, 35-A, 35-B, 35-C, 35-D, 35-E, 35-F, 35-G, and 35-H.)

By Mr. Lockley:

Q. Miss Feldman, do you know when the penciled memoranda contained on Exhibits 35-A to 35-H, inclusive, were placed thereon?

A. Shortly after they arrived at the office.

Q. Would that be a matter of hours or days?

A. Several hours, several days.

2010 Q. Now, will you examine Government's Exhibit No. 5, the purchase book, and tell me if Government's Exhibits 35-A, to 35-H, inclusive, are recorded therein?

By the Court: Is there a summary sheet to indicate whether or not they were recorded in the purchase book or the payables book?

By the Witness: Yes, it would.

By the Court: Well, let her use that to determine that matter, if she has that information from a prior examination of the books, and we can get along with that.

By Mr. Lockley:

Q. All right, Miss Feldman.

A. These were all entered in the purchase book.

Q. And in what amount?

A. In the amount of the original invoice, plus the penciled notations for overage.

Q. Were they also recorded in the accounts payable book?

A. They were.

Q. In what amount?

2011 A. The original invoice price plus the overage amount.

Q. I show you Government's Exhibit No. 35, which is a check for $14,930.24, and ask if that is recorded in the accounts,—or rather, in the cash disbursements book, Exhibit No. 7?

A. It is.

Q. Is it also recorded in the accounts payable book?

A. It is.

Q. Now what relationship if any, if you know, does Government's Exhibit 35 bear to Government's Exhibits 35-A to 35-H?

A. It represents the payment made to The Shotwell Manufacturing Company for the invoice price shown on the invoice.

2012 By Mr. Lockley: Exhibit 35-A is a Shotwell invoice for citrus drops at 13 cents, invoice price $1,006.20 and a 10 cent overage of $774.00 for a total of $1,780.20.

35-B is an invoice for chocolate—for box chocolate Cardinals at 37⅓ cents, $2,016.00 plus an overage of 18¾ cents for a total of $1,012.50—a total of $3,028.50, both overage and invoice.

35-C is an invoice for 197 cases of Krafton chocolates at 37⅓ cents, total invoice price of $1,765.12 and an 18¾ cents overage—$886.50. Also, 450 cases of citrus drops at 13 cents for an invoice price of $1,755.00, and a 10 cent overage, $1,350.00.

By the Court: Well, I have lost you on that.

By Mr. Lockley: You lost me?

By the Court: The face of the invoice indicates a charge of $1,755.00?

By Mr. Lockley: That is 65, your Honor.

By the Court: How much?

2013 By Mr. Lockley: 65.

By the Court: Now, give me the total of the invoice.

By Mr. Lockley: There were two items on that invoice. One was Krafton chocolates and the other was citrus drops.

By the Court: That is right.

By Mr. Lockley: The total invoice for the two is $3,520.00—

By the Court: Again?

By Mr. Lockley: The total invoice for the two is $3,520.12 plus the overages for a total of $5,756.62.

By the Court: All right.

By Mr. Lockley: 35-D is an invoice again for two items, 76 cases of box chocolate Cardinals at 37⅓ cents, $680.96 invoice, and 18¾ cents overage or $342.00.

There were 438 cases of citrus drops at 13 cents, for a total of $1,708.20, plus 10 cents overage of $1,314.00.

The total invoice price is $2,389.16 and the total in-
2014 voice plus overage is $4,045.16.

By the Court: Four thousand—

By Mr. Lockley: $4,045.16.

By the Court: Give me the overage.

By Mr. Lockley: On what?

By the Court: Give me the overage.

By Mr. Lockley: The overage is $342.00 plus $1,314.00—$1,656.00.

By the Court: How much?

By Mr. Lockley: $1,656.00.

35-E is an invoice for spice buttons at 8¼ cents. The invoice price is $1,336.50 and a 10 cent overage—$1,620.00. The total is $2,956.50.

2015 Exhibit 35-F is Cardinal chocolates at 37½ cents, total invoice, $2,688.00, with an overage of eighteen and three-quarter cents—$1,350.00. Total invoice plus overage, $4,038.00.

Exhibit 35-G is an invoice for gum drops at seven and three-quarter cents, for a total invoice price of $1,043.93—a ten cent overage, $1,347.00. The total invoice plus overage is $2,390.93.

Exhibit 35-H is spice buttons at eight and one-quarter cents, $1,235.03 invoice price, a ten cent overage amounting to $1,497.00, and a total of $2,732.03.

Exhibit 35 is a check to The Shotwell Manufacturing Company from Eatsum Food Products endorsed by Shotwell, in the amount of $14.930.24, which is in payment of these invoices 35-A to H, inclusive, less two percent discount.

By Mr. Lockley:

Q. I show you Government's Exhibit for Identification 36-A, and ask if you have seen that before?

A. I have.

Q. Is that a record received in the ordinary course
2016 of business?

A. It is.

Q. Was it a part of the books and records of the Eatsum Food Products Company?

A. It was.

Q. Were the penciled memoranda made under your supervision and direction?

A. They were.

Q. When were they made?

A. After the receipt of the invoice at our office.

Q. How soon thereafter?

A. Within a day or two.

Q. Were they true and correct at the time they were prepared?

A. They were.

Q. I show you Government's Exhibit 36 for identification, and ask if you have seen that before?

A. I have.

Q. Do you recognize the handwriting?

A. I do.

Q. Whose is it?

A. Mine.

Q. Was that a record made in the ordinary course of business?

2017 A. It was.

Q. Is it true and correct to the best of your knowledge?

A. Yes.

Q. Is it a part of the books and records of the Eatsum Food Products Company?

A. It is.

By Mr. Lockley: I offer Government's Exhibits 36 and 36-A in evidence.

By Mr. McConnell: I object to the penciled memoranda on 36-A, for the reason I have already given.

By the Court: The exhibits may be received in evidence.

(Said documents were received in evidence by the Court and marked Government's Exhibits 36 and 36-A.)

By Mr. Lockley:

Q. Now, Miss Feldman, can you state whether Government's Exhibit 36-A is recorded in the purchases book of Eatsum Food Products Company?

A. It is.

Q. And in what amount?

A. The month of April.

Q. In what amount?

2018 A. Oh, in what amount? I am sorry.

Q. Can you tell that from your work papers?

A. Yes, right here—$16,825.00.

By the Court: I think we are primarily interested in whether or not it was the invoice plus the overage.

By the Witness: It is entered in the amount of the invoice plus the overage.

By Mr. Lockley:

Q. Is it also recorded in the accounts payable book?

A. Yes, sir.

Q. In what amount?
A. $16,825.00.
Q. Is that the invoice plus the overage?
A. It is.
Q. I show you Government's Exhibit 36, the check for $10,976.00, and ask if that is recorded in the accounts payable book?
A. It is.
Q. To what account?
A. The Shotwell Manufacturing Company.
Q. Does that have any relationship to Exhibit 36-A?
A. It does.
2019 Q. What is that relationship?
A. It represents the payment for the typed amounts on the invoice.
Q. Is it also recorded on the accounts payable book, that is, Government's Exhibit 36?
A. It is.
2020 Q. What does that indicate?
A. It indicates that the payment was made to Shotwell.

By Mr. Lockley: Government's Exhibit 36-A is a Shotwell invoice to Eatsum Food Products for Cardinal chocolates at 37⅓ cents, total invoice price of $11,200.00, and 18¾ cents overcharge, amounting to $5,625.00, for a total invoice plus overage of $16,825.00.

Exhibit 36 is a check of Eatsum Food Products Company to Shotwell Manufacturing Company endorsed by Shotwell in the amount of $10,976.00.

By Mr. Lockley:
Q. I show you Government's Exhibit for identification 37-A and ask if you have seen that before.
A. I have.
Q. Is that a record received in the ordinary course of business?
A. It was.
Q. Was it part of the books and records of the Eatsum Food Products Company?
2021 A. Yes, sir.
Q. With respect to the penciled notations thereon, were they made under your supervision and direction?
A. They were.
Q. At what time were they made?
A. Several days after the arrival of the invoice.

Q. Were they true and correct to the best of your knowledge?

A. They were.

Q. Were they a part of the books and records of the Eatsum Food Products Company?

A. They were.

Q. With respect to the paid stamp on the invoice, what does that indicate?

A. It indicates that the typed amount of the invoice was paid to The Shotwell Manufacturing Company.

Q. What is just the invoice amount?

A. Just the invoice amount.

Q. I show you Government's Exhibit for identification 37 and ask you if you have seen that before.

A. I have.

Q. Was that prepared under your supervision and direction?

2022 A. It was.

Q. Do you know the handwriting?

A. The accounts payable clerk.

Q. Was that a true and correct record at the time it was prepared?

A. It was.

Q. Is it a part of the books and records of the Eatsum Food Products Company?

A. Yes, sir.

By Mr. Lockley: I offer Government's Exhibits 37 and 37-A in evidence.

By Mr. McConnell: I object to the pencilled memoranda on Exhibit 37-A for the reasons I have given.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 37 and 37-A.)

By Mr. McConnell: Did you ask what that paid stamp on this invoice indicated?

By Mr. Lockley: Yes.

By Mr. McConnell: I didn't hear you.

By Mr. Lockley:

2023 Q. I will ask you again, Miss Feldman, what does the paid stamp on this invoice indicate?

By the Court: She has gone into it.

By Mr. Lockley: Mr. McConnell asked some question about it.

By the Court: Go ahead.

By Mr. Lockley:

Q. Will you look at the purchase book and let me know if that invoice is recorded therein?

A. It is.

Q. Is it in the amount of the invoice only or the invoice plus the overage?

A. The invoice plus the overage.

Q. Is it likewise recorded in the accounts payable ledger?

A. It is.

Q. Government's Exhibit 6-A?

A. Yes.

Q. That is the invoice plus the overage?

A. That is correct.

Q. With respect to Government's Exhibit 37, a check for $2,672.00, is that recorded in the cash disbursements book?

A. It is.

2024 Q. And is it likewise recorded in the accounts payable book?

A. It is.

Q. To what account is it recorded?

A. Shotwell Manufacturing Company

Q. What does that indicate?

A. That the invoice price was paid by check to Shotwell Manufacturing Company.

2025 By Mr. Lockley: Exhibit 37-A, is an invoice for two items, gum drops at seven and three-quarter cents, for an invoice price of $1,232.25, and Cardinal chocolates for thirty-seven and a third cents, to al invoice of $1,496.32. The total invoice price for both items, $2,728.57.

The overage on gum drops, at ten cents, is $1,590.

By the Court: One thousand five hundred—

By Mr. Lockley: Ninety.

The overage on Cardinal chocolates, at eighteen and three-quarter cents, appears to be, $751.50. The total amount of the invoice plus premiums, is $5,070.70.

And the check, Exhibit 37, for $2,672.00, shows that it was paid for Invoice No. 80602, which is Exhibit 37-A, less two percent discount.

By Mr. Lockley:

Q. I show you Government's Exhibits for identification 38-A and 38-B, and ask you if you have seen those before?

2026 A. I have.

Q. And what do they purport to be?

A. They are invoices received from The Shotwell Manufacturing Company.

Q. And were they a part of the books and records of the Eatsum sole proprietorship?

A. They were.

Q. Were they kept under your supervision and direction?

A. They were.

Q. With respect to the penciled notations thereon, were they maintained under your supervision and direction?

A. That's correct.

Q. Were they part of the books and records of the sole proprietorship?

A. They were.

Q. Were they true and correct at the time they were prepared?

A. Yes.

Q. Do you know when they were placed on the invoice?

A. A short time after the receipt of the invoice.

Q. A matter of days or hours?

2027 A. Hours or days.

Q. With respect to the "Paid" stamp on the invoice, what does that indicate?

A. That indicates that the amount typed on the invoice was paid by check to Shotwell.

2028 Q. I show you Exhibit for identification No. 38 and ask if you have seen that before.

A. I have.

Q. Do you recognize the handwriting?

A. The accounts payable clerk.

Q. Is that a record made in the ordinary course of business?

A. Yes, it is.

Q. Was it a part of the books and records of the Eatsum Food Products Company?

A. It is.

Q. Is it true and correct, to the best of your knowledge?

A. Yes, sir.

By Mr. Lockley: I offer Exhibits 38, 38-A and 38-B in evidence.

By Mr. McConnell: I object to the pencil memoranda on 38-A and B for the reasons I have given.

By the Court: The exhibit may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 38, 38-A and 38-B.)

2029 By Mr. Lockley:

Q. Miss Feldman, are you able to tell us whether Exhibits 38-A and 38-B are recorded in the purchase book.

A. They are.

Q. And in the amount of the invoice or the invoice plus overage?

A. The invoice plus overage.

Q. Are they also recorded in the accounts payable ledger?

A. They are.

Q. And in what amount?

A. The invoice plus overage amount.

Q. I show you Government's Exhibit, in evidence, No. 38 and ask if that is recorded in the cash disbursements book.

A. It is.

Q. And is it also recorded in the accounts payable ledger?

A. It is.

Q. To what account?

A. Shotwell Manufacturing Company.

Q. And what relationship if any is there between Exhibit 38 and Exhibits 38-A and B?

2030 A. Exhibit 38 represents the payment of the amounts typed on the invoice to Shotwell Company.

By Mr. Lockley: Exhibit 38-A is for Cardinal chocolates, at 37-1/3 cents, $11,200.00, invoice, plus 18-3/4 cents overage, amounting to $5,625.00, a total of $16,825.00.

Exhibit 38-B is two items, gum drops at 7-5/4 cents, for an invoice price of $955.58, and Cardinal chocolates at 37-1/3 cents for an invoice price of $1,845.76, a total invoice price of $2,801.34.

There is an overage on the gum drops of ten cents, amounting to $1,233.00.

By the Court: One thousand—

By Mr. Lockley: —two hundred thirty-three dollars; and of 18-3/4 cents on the chocolates, amounting to $927.00, the total invoice, plus premiums, $4,961.34.

By the Court: I didn't get that.

By Mr. Lockley: For $4,961.00.

By the Court: What are the two overage figures, please?

By Mr. Lockley: $1,233.00—

2031 By the Court: Yes.

By Mr. Lockley: —and $927.00. $2,160.00.

Exhibit No. 38 is a check to The Shotwell Manufacturing Company, endorsed by them, in the amount of $13,721.31, showing on its face that it was in payment of invoices 80635 and 80639, which are Exhibits 38-A and 38-B, respectively, less two per cent discount.

2032 By Mr. Lockley:

Q. I show you Exhibit for identification No. 39-A and ask if you have seen that before?

A. I have.

Q. Is that a record received in the ordinary course of business?

A. It is.

Q. Is it a part of the books and records of the Eatsum sole proprietorship?

A. Yes, it is.

Q. With respect to the penciled notations, were they placed under your supervision and direction?

A. They were.

Q. And do you know when they were placed thereon?

A. Within hours or days after the receipt of the invoice.

Q. Were they a part of the books and records of the company?

A. They were.

Q. Are they true and correct, to the best of your knowledge?

A. Yes, sir.

Q. I show you Exhibit for identification No. 39 and ask you if you have seen that before?

2033 A. I have.

Q. And is that a part of the books and records of the Eatsum Food Products Company?

A. It is.
Q. Was it made in the ordinary course of business?
A. Yes, sir.
Q. Is it true and correct, to the best of your knowledge?
A. Yes, sir.
Q. Was it prepared under your supervision and direction?
A. It was.
By Mr. Lockley: I offer Exhibits 39 and 39-A in evidence.
By Mr. McConnell: The same objection to the penciled memo on 39-A.
By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 39 and 39-A)

By Mr. Lockley:
Q. Now, Miss Feldman, I show you Government's Exhibit 40, in evidence, a check to cash in the amount
2034 of $18,000.00—
By the Court: On 39-A and 39, will you conclude your testimony regarding that?
By Mr. Lockley: I am sorry, your Honor.
By the Court: Otherwise I lose the trend of it.
By Mr. Lockley: I am sorry. I am trying to skip a step.
By Mr. Lockley:
Q. Will you look at Exhibit 39-A and tell me if that is recorded in the purchase book, Exhibit No. 5?
A. It is.
Q. And in what amount?
A. $3,202.08.
Q. And is that the invoice plus the overage?
A. It is.
Q. And is it so recorded in the accounts payable ledger?
A. It is.
Q. As owing to whom?
A. Shotwell Manufacturing Company.
Q. That is in the amount of the invoice plus the overage?

A. That's correct.

2035 Q. I show you Exhibit 39 and ask if the check is recorded in the cash disbursements book?

A. It is.

Q. And as paid to whom?

A. The Shotwell Manufacturing Company.

Q. Is it also recorded in the accounts payable ledger?

A. It is.

Q. And what does that record reflect?

A. The record reflects the payment of $1,546.08 to Shotwell Manufacturing Company for the amount typed on the invoice.

Q. And is there any relationship between that invoice and that check?

A. Yes, the check is in payment of the typed amount on this invoice.

2036 By Mr. Lockley: Exhibit No. 39-A, is an invoice of The Shotwell Manufacturing Company to Eatsum Food Products Company for two items, gum drops at seven and three-quarter cents, for the invoice amount of $1,116; Cardinal chocolates at 37-1/3 cents, for the invoice amount of $430.08; the total invoice amount is $1,546.08.

A ten cent overage on Cardinal chocolates, in the amount of $1,440.00, and an eighteen and three-quarter overage—I am sorry, I think I said Cardinal chocolates. That was on gum drops. Eighteen and three-quarter cents on Cardinal chocolates, amounts to $216.00, for a total overage of $1,656.00, and a total overage plus invoice of $3,202.08.

Exhibit No. 39 is a check of Eatsum to The Shotwell Manufacturing Company, endorsed by them, in the amount of $1,515.16, showing on its face that it paid Invoice No. 80887, which is Exhibit 39-A, less two percent discount.

2037 By Mr. Lockley:

Q. Now, Miss Feldman, I show you Exhibits 40, 40-B, and 40-D, all of which are in evidence, and ask if you have seen those before?

A. I have.

Q. Are those recorded on the cash disbursements book of the Eatsum Food Products Company?

A. They are.

Q. And where?

A. Exhibit 40 is on page 64 of the cash disbursements book of March, 1945.

Q. How does that entry read?

A. Cash, Shotwell Manufacturing Company, $18,000.00.

By the Court: Well, now, let's see that I follow you. You are reading now from what book?

By Mr. Lockley: Exhibit No. 5—I am sorry, Exhibit No. 7.

By the Court: State your answer again.

By the Witness: The entry reads: Cash, Shotwell Manufacturing Company, $18,000.00.

By the Court: Under what date?

2038 By the Witness: March 6th.

By the Court: All right.

By Mr. Lockley:

Q. 1945?

A. That's right.

Q. And that check is made to cash, is it not?

A. That is so.

Q. When was the entry in the cash disbursements book placed therein?

A. When ever the check book was entered in there.

Q. On the date indicated in the book, is that correct?

A. Either the same day, or the day following.

By Mr. McConnell: Isn't there a date in the book?

By the Witness: Yes, there is, March 6.

By Mr. Lockley:

Q. That was the $18,000 one?

A. That was the $18,000 one.

Q. I now show you Exhibit 40-D, a check for $22,124.13, and ask if that is entered in the cash disbursements book?

A. It is.

Q. And what is the nature of the entry?

A. It reads: Cash, Shotwell Manufacturing Com-

2039 pany, on May 2nd, $22,124.13.

Q. And what is the date of that check?

A. May 3rd.

Q. Now, I show you Government's Exhibit 40-B, a check for $15,[illegible].00 to cash, and ask if that is entered in the cash disbursements book?

A. It is.

Q. And what is the nature of the entry?

A. On March 28th, cash, Shotwell Manufacturing Company, $15,000.

Q. I now show you Exhibit 40-A, and ask if you have seen that before? It is in evidence.

A. I have.

Q. And what is it?

A. It is a cash—

By the Court: What number is that?

By Mr. Lockley: 40-A.

By the Court: I thought we had 40-A, that check of $18,000.

By Mr. Lockley: Let's see here. No, sir; that was 40.

By the Court: Oh! I am sorry. 40-A is a memorandum of some kind?

By Mr. Lockley: A cash authorization slip.

2040 By Mr. Lockley:

Q. Is that correct, Miss Feldman?

A. That's right.

Q. Do you recognize the handwriting?

A. It is my own.

Q. Did you prepare that?

A. I did.

Q. And when?

A. On March 6, 1945.

Q. And at whose instructions?

A. Mr. Lubben's.

Q. What does that cash authorization slip purport to show?

A. That there is a payment of $18,000.00 in cash to The Shotwell Manufacturing Company for overages.

Q. And is there any relationship between the cash authorization slip, Exhibit 40-A, and the check for $18,000.00, Exhibit 40?

A. There is.

Q. And what is it?

A. Exhibit 40, which is check No. 2887, was issued for this cash authorization slip.

Q. Is there any notation on the cash authorization slip which indicates the number of the check?

2041 A. There is.

Q. And what is it?

A. The authorization slip reads that the date paid was March 6, 1945, by check No. 2887.

Q. And is that the check that you hold in your hand?

A. That is.

Q. I now show you Government's Exhibit No. 40-C, in evidence, and ask if you have seen that before.

A. I have.

Q. And what is it?

A. It is a cash authorization slip for $15,000.00, to Shotwell.

Q. Do you know by whom it was prepared?

A. By me.

Q. And when?

A. On March 26, 1945.

Q. At whose instructions?

A. Mr. Lubbens.

Q. Is there any relation between that exhibit and Exhibit 40-B, a check for $15,000.00?

A. There is.

Q. And what is that?

A. Check No. 2306 was issued for this cash au-
2042 thorization.

Q. Is there any notation on the cash authorization slip which indicates the number of the check?

A. There is.

Q. And what is it?

A. The notation reads: Date paid, March 28, 1945; Check No. 32006.

Q. Is that the number of the check?

A. That is.

2043 Q. I show you Exhibit No. 40-E and ask if you have seen that before?

A. I have.

By the Court: 40-E?

By Mr. Lockley: E, your Honor.

By the Court: That is not in evidence.

By Mr. Lockley: I believe not. I am going to lay a foundation now.

By the Witness:

A. I have.

By Mr. Lockley:

Q. And do you recognize the handwriting thereon?

A. Yes.

Q. Whose is it?

A. My own.

Q. When was it prepared?

A. It was evidently prepared sometime in April.

Q. What year?
A. 1945.
Q. And was that a record kept by you?
A. It was.
Q. As a part of the books and records of the Eatsum Food Products Company?
A. This was a memo record that I used later on to
2044 make a recap sheet from.
Q. Was it your practice to keep such records?
A. It was.
Q. Was that true and correct at the time it was prepared?
A. It was.
By Mr. Lockley: I offer Exhibit 40-E in evidence.
By Mr. McConnell: I object to 40-E on the grounds that it is self-serving, on the ground that no proper foundation has been laid that it is part of the books and records of the company.
By the Court: It may be received in evidence.
By Mr. O'Brien: We have never seen that before.
By Mr. Kirby: I make the further objection that there was an order heretofore entered—I don't know whether we ever got a copy of that.
By Mr. Krane: It was made available.
By Mr. Kirby: Did you give us a copy?
By Mr. Krane: We weren't required to. We were
2045 required to make them available and if you so desired, to make your own copies. That document was shown to you.
By Mr. Kirby: We were under the impression that we had been given copies.
2046 By Mr. Lockley: I showed you this particular copy in court the other day, as I recall, when you asked for it.
I am informed by Mr. Krane that it has been made available to the defense, and they have seen it as long as a year ago.
By Mr. O'Brien: That may be, Mr. Lockley. I don't know.
By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 40-E.)

By Mr. Lockley:
Q. What does Exhibit 40-E purport to be, Miss Feldman?

A. This is a record of the shipments that came in from Shotwell Manufacturing Company for the period from April 4 to April 14.

Q. What year?

A. Of 1945.

Q. And what is the purpose of that record?

A. This record shows that the invoice amounts, the weight of each item, the total amount shipped, and, in some instances, the extension has been made for the overage.

2047 Q. Now, I ask you if you will total Government's Exhibits Nos. 40, 40-B, and 40-D, which are all checks to cash; what do they total?

A. $55,124.13.

Q. I ask you if you know what relationship, if any, those three checks have to Government's Exhibit 29-A and Exhibits 29-B, 30-A, B, C and D, 31-A to E, inclusive, 32-A, 33-A, 34-A, B, C, 35-A to H, inclusive, 36-A, 37-A, 38-A, and B, and 39-A, which are on the table beside you?

A. The exhibits numbers 40, 40-B, and 40-D, represent the overages due and paid on these invoices received from February 8 to April 24, which commenced with Exhibit 29-A through 39-A.

2048 Q. And what was the total amount of the premiums due and paid at that time?

A. The total amount of premiums due was $55,174.50.

By the Court: Sixty cents?

By the Witness: Fifty cents, your Honor. We paid $55,124.13, and the difference of $50.37 represents an adjustment that was made.

By Mr. Lockley:

Q. Do you know the nature of the adjustment?

A. No, not offhand.

Q. Was there any further balance due on the premiums at that date?

A. No, there was not.

Q. Would you state what date it was that those were paid up to?

A. That was—wait a minute, you say no further balance on this batch of bills?

By Mr. Lockley: On the overages, according to your records.

By the Court: Just a moment, Mr. Lockley.

2049 By Mr. Kirby: The Court will recall that I made a point a little earlier as to whether proof was being made from memoranda she made in April of 1953 or memoranda made back at the time of the transactions. And I would like to inquire whether these recapitulations, the summaries that Mr. Lockley is now inquiring about, are the matters that she has recapitulated in preparation for shortening her proof here or whether they are existing pieces of paper that we can look at, that were in existence in 1945.

By the Court: I understand she is testifying from the books and records of the company, and it is her opinion and her statement that Exhibits 40-A, 40-B and 40-D are payments of the overages as reflected in invoices 29-A to 39-A, inclusive.

By Mr. Kirby: But is there a piece of paper?

By the Court: Yes, she says the books and records show that.

2050 By Mr. Kirby: But does she have a recap, Judge, that shows that?

By the Witness: I don't need a recap, sir. The ledger sheets are keyed off.

By Mr. Kirby: I am happy to have her statement that she doesn't need one, because to me that indicates she doesn't have one. Am I correct in that?

By the Witness: I have the authorizations here, sir, but I am further clarifying the issue by saying that the payments for the original invoices amounts, plus the overage checks, are keyed off on the ledger sheets to show which items were included in the overage payments.

By Mr. Kirby: If the Court please, I am trying to find out whether there was a recap memo that shows this or whether she had to summarize that recently.

By the Court: She says she is testifying from the books and records.

By Mr. Kirby: But is there a recap of those books and records?

By the Court: You will have to find out on cross
2051 examination. She is not depending now on the summary. As I understand it, she is endeavoring to point out on the books and records of the Eatsum Food Products Company that they reflect, according to her statement,

that these overages were paid, as indicated by entries in the books and records.

By Mr. Kirby: As distinguished from a separate recap sheet made up at that time.

By the Court: That is the way I understand it.

By Mr. Kirby: All right. Thank you.

By Mr. Lockley: With the exception that there is a recap sheet, No. 40-E, for a portion of that period.

By Mr. Kirby: Yes, the first month, I think.

By the Court: That is April 4th to April 14th.

By Mr. O'Brien: Yes, sir.

2052 By Mr. Lockley:

Q. Miss Feldman, just what period of time does that recap sheet cover?

A. From April 4 to April 14.

By the Court: All right.

By Mr. Lockley: Yes.

By Mr. Lockley:

Q. Now, Miss Feldman, I show you Government's Exhibit for Identification 41-A, and ask if you have seen that before?

A. I have.

Q. Is that a record received in the ordinary course of business?

A. It is.

Q. Is it a part of the books and records of the Eatsum Food Products Company?

A. It is.

Q. Were the penciled notations made under your supervision and direction?

A. They were.

Q. And when were they made thereon?

A. Within hours or a day after the invoice was received.

Q. With respect to the stamp "Paid" on the invoice, what does that indicate?

2053 A. That indicates that the amount typed on the invoice was paid to Shotwell Manufacturing Company by check.

Q. I show you Government's Exhibit for Identification No. 41, and ask if you have seen that before?

A. I have.

Q. Was that a record made in the ordinary course of business?

A. It is.
Q. Was it made under your supervision and direction?
A. Yes, sir.
Q. Is it a part of the books and records of the Eatsum sole proprietorship?
A. Yes, sir.
Q. Is it true and correct to the best of your knowledge?
A. Yes, sir.
By Mr. Lockley: I offer Exhibits 41 and 41-A.
By Mr. McConnell: I object to the pencil memorandum on 41-A, for the reasons I have heretofore stated.
By the Court: The exhibits may be received.

2054 (Said documents were received in evidence by the Court and marked Government's Exhibits 41 and 41-A.)

By Mr. Lockley:
Q. Can you state, Miss Feldman, if the invoice 41-A, is recorded in the purchase book of the Eatsum sole proprietorship?
A. It is.
Q. And in what amount?
A. $5,410.92.
Q. And is that the premium plus the invoice price?
A. It is.
Q. And is that same amount recorded in the accounts payable ledger?
A. Yes, sir.
Q. I show you Government's Exhibit No. 41, and ask if that is recorded in the cash disbursements book?
A. It is.
Q. Who prepared that record?
A. The check?
Q. Yes.
A. The accounts payable clerk.

2055 Q. And who signed it?
A. I did.
Q. When did you sign it?
A. On the day it was issued.
Q. When was that?
A. On May 4, 1945.
Q. And is there a record of that check in the accounts payable ledger?
A. There is.

Q. And what does that reflect?

A. It reflects the payment to The Shotwell Manufacturing Company of the amount typed on the invoice.

By Mr. Lockley: Exhibit 41-A is a Shotwell invoice to Eatsum Food Products for 402 cases of Cardinal chocolates at 37½ cents, invoice price $3,601.92, plus an overage of 18¾ cents, for a total of $1,809.00, and a total invoice plus premium of $5,410.92.

Exhibit 41 is an Eatsum Food Products Company check to Shotwell, endorsed by them, in the amount of $3,529.88—

By the Court: $3,529?

2056 By Mr. Lockley: Correct, and 88 cents—showing that it was in payment of Invoice No. 72993, less two percent discount.

That invoice is Exhibit 41-A.

By the Court: Well, we can take our afternoon recess now.

We will suspend for ten minutes.

By the Marshal: Will the audience please remain standing until the jury files out?

This Honorable Court will now recess for ten minutes.

(Short recess.)

2057 By the Court: You may proceed.

By Mr. Lockley:

Q. I show you Government's Exhibit for identification No. 42-A and ask if you have seen that before?

A. I have.

Q. Was that a record received in the ordinary course of business?

A. It is.

Q. Is that part of the books and records of the Eatsum sole proprietorship?

A. It is.

Q. And with respect to the penciled notations, were they made under your supervision and direction?

A. They were.

Q. At about what time were they prepared?

A. Within matters of days after the invoice was received.

Q. Does that invoice bear a paid stamp?

A. It does.

Q. What does that indicate?

A. That the amount typed on the invoice was paid to the Shotwell Manufacturing Company, by check.

Q. Is that record true and correct to the best of
2058 your knowledge?

A. It is.

Q. I show you Government's Exhibit for identification No. 42 and ask if you have seen that before?

A. I have.

Q. Was that prepared under your supervision and direction?

A. Yes, sir.

Q. Is it a part of the books and records of Eatsum Food Products Company?

A. That is correct.

Q. Was it true and correct to the best of your knowledge at the time is was prepared?

A. Yes, sir.

Q. Whose signature appears thereon?

A. Mine.

By Mr. Lockley: I offer Government's Exhibits 42 and 42-A in evidence.

By the Court: 42 has been received, Mr. Lockley.

By Mr. Lockley: I believe not, your Honor.

By the Court: Well, my records indicate it.

2059 By Mr. McConnell: I object to the penciled memoranda, Judge.

By the Court: 42 has been received, if I understood your exhibit number right. I may have misunderstood.

By Mr. Lockley: I had not previously offered it, your Honor.

By the Court: Which exhibit is it?

By Mr. Lockley: 42.

By the Court: 42?

By Mr. Lockley: It is a check.

By Mr. McConnell: I object to 42-A. It has a penciled memorandum on it. I object to it for the same reason I have already given.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 42 and 42-A.)

By Mr. Lockley:

Q. Miss Feldman, I call your attention to some penciled numbers, 191899 on Exhibit 42-A. Do you know what those numbers represent?

2060 A. Offhand, no, unless it is a car number.

By the Court: Speak a little louder, Miss Feldman.

By the Witness:

A. Offhand, I say no, unless it is a car number.

By Mr. Lockley:

Q. A railroad car number?

A. It could be a railroad car. No. It was ABC Forwarding. I don't know how it would have gotten on.

Q. Those numbers have no significance?

A. No, no particular significance.

Q. Will you check your purchase book and see if Exhibit No. 42-A is recorded therein?

By the Court: So that I may check the records to see that they are correct, will you look up in your record to see whether or not immediately after Exhibit 40-B—

By Mr. Lockley: There was Exhibit 40 and 40-A, B, C, D and E.

By the Court: What is the cash authorization, the $15,000.00 check? What exhibit number is that?

2061 By Mr. Lockley: That is 40-A. Wait a minute, the $15,000.00 check was 40-C, your Honor.

By the Court: 40 what?

By Mr. Lockley: 40 sub letter C.

By the Witness: Yes, this invoice is entered on the purchase book.

By Mr. Lockley:

Q. And in the amount of the invoice or the invoice plus the premium?

A. The invoice plus the premium.

Q. Is it also entered on the accounts payable ledger?

A. It is.

Q. And in what amount?

A. The invoice plus the premium.

Q. I show you Government's Exhibit 42 and ask if that is recorded on the cash disbursements book?

A. It is.

Q. In whose account?

A. Shotwell Manufacturing Company.

Q. Is it also recorded on the Shotwell accounts payable ledger?

A. It is.

2062 Q. What, if any, relationship does Government's Exhibit 42 have to Government's Exhibit 42-A?

A. Exhibit No. 42 is check No. 3722 for $1,159.07. It was issued in payment of the typed amount on the Shotwell Manufacturing Company invoice.

By Mr. Lockley: Exhibit No. 42-A is a Shotwell invoice to Eatsum for Cardinal chocolates at 37⅓ cents a pound, invoice price $1,182.72, an overage of 18¾ cents, totaling $594.00—a total invoice plus overage of $1,776.72.

Government's Exhibit No. 42 is an Eatsum check to Shotwell, endorsed by them in the amount of $1,159.07 showing on its face that it was in payment of invoice No. 81505. That invoice bears an additional number 72994A which is also written on the check and less the two per cent discount, it amounts to $1,159.07.

2063 By Mr. Lockley:

Q. Now Miss Feldman, I show you Government's Exhibit in evidence No. 43, a check to cash, and ask if you have seen that before.

A. I have.

Q. Is that recorded on the cash disbursements book of the Eatsum sole proprietorship?

A. It is.

Q. And where?

A It appears on page 89 of the cash disbursements book for May, 1945, as of the date of May 3rd.

Q. What line?

A. Line 11.

Q. What is the entry?

A. Cash, Shotwell Manufacturing Company, $2,403.00.

Q. Is that likewise recorded on the accounts payable ledger sheet, Exhibit 6-A?

A. It is.

Q. In what amount?

A. $2,403.00.

Q. Now I show you Government's Exhibit 42-A and Government's Exhibit 41-A and ask if there is any relationship between those two exhibits and check, Ex-

2064 hibit No. 43.

A. There is.

Q. What is it?

A. Check No. 3665 for $2,403.00 represents the payment of the overage for Exhibits Nos. 42-A and—

By the Court: Again, please?

By the Witness: For Exhibit Nos. 42-A and 41-A.

By Mr. McConnell:

Q. What is the amount of the overage on Exhibit 41-A?

A. The amount of overage on Government's Exhibit 41-A is $1,809.00.

Q. What is the amount of the overage on Government's Exhibit 42-A?

A. $594.00.

Q. Does that add up to $2,403.00?

A. Yes, it does.

Q. Is that the amount of the check, Government's Exhibit No. 43?

A. That is right, sir.

Q. Do you have a cash authorization slip for Government's Exhibit No. 43?

A. Was that the check?

2065 Q. Yes.

A. There should be one.

Q. Was one prepared at the time?

A. Yes.

Q. Do you know what it is now?

A. No, I don't.

Q. Are you able to tell whether, after payment of the $2,403.00 check there was any balance remaining due on the overages to The Shotwell Manufacturing Company according to your records?

A. That cleaned up the overages to a certain point but there was still some due at the time that this payment was made.

Q. To what point, if you know?

A. The check is for $2,403.00, which cleared up the overages for all invoices to the end of April.

By the Court: 1945?

By the Witness: That is right.

By Mr. O'Brien: Well, is Miss Feldman looking at the records now? Is it from the records that that statement was made?

By the Witness: It could be made either way, sir.

By Mr. Lockley:

2066 Q. From what record are you now testifying?

A. I was looking at my work sheets, but it can also be made from the record on the ledger sheet.

Q. That ledger sheet is Government's Exhibit 6-A?

A. That is correct.

Q. Can you make that statement from an examination of Government's Exhibit 6-A?

A. I can.

Q. I show you Government's Exhibit for identification 44-A, B, C, and D, and ask if you have seen those before.

A. I have.

Q. Were those records received in the ordinary course of business?

A. They were.

Q. Are they a part of the books and records of the Eatsum sole proprietorship?

A. Yes, sir.

Q. With respect to the penciled notations, were they made under your supervision and direction?

A. They were.

Q. They were made at what time?

A. Within a short period of time after the in-
2067 voices were received in the office.

Q. Do those invoices bear any paid stamp on them?

A. They don't.

Q. Are those records true and correct to the best of your knowledge?

A. They were.

Q. I show you Government's Exhibit for identification No. 44 and ask you if you have seen that before.

A. I have.

Q. Do you know in whose handwriting it is?

A. My own.

Q. Is that a record made in the ordinary course of business?

A. Yes, sir.

Q. Is it true and correct—was it true and correct at the time it was prepared?

A. Yes, sir.

Q. Is it a part of the books and records of the Eatsum Food Products Company?

A. Yes, sir.

By Mr. Lockley: I offer Government's Exhibits 44 and 44-A, B, C and D in evidence.

2068 By Mr. McConnell: I object to the penciled memoranda on Government's Exhibits 44-A, B, C and D for the reasons I have already given.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 44, 44-A, 44-B, 44-C and 44-D.)

2069 By Mr. Lockley:

Q. Miss Feldman, will you examine the purchase book, and tell me if Government's Exhibits 44-A through

D, inclusive are recorded therein?

A. They are.

Q. In the amount of the invoice, or the invoice plus the overage?

A. The invoice plus the overage.

Q. And are they also recorded in the accounts payable ledger sheet of The Shotwell Manufacturing Company?

A. Yes, they are.

Q. And in what amounts?

A. The amounts of the invoice plus the overage.

Q. All right; I show you Government's Exhibit No. 44, and ask if that is recorded in the accounts payable, or in the cash disbursements book?

A. It is.

Q. Also recorded in the accounts payable ledger sheet of The Shotwell Manufacturing Company?

A. It is.

Q. What does that check reflect?

A. This check reflects the payment to The Shotwell Manufacturing Company of the amounts typed on the invoice.

2070 By Mr. Lockley: Government's Exhibit No. 44-A is an invoice of Shotwell to Eatsum Food for Cardinal chocolates at 37⅓ cents, for an invoice price of $2,867.20.

By the Court: Ten cents?

By Mr. Lockley: Twenty cents. $2,867.20—an overage of 18¾ cents a pound, totaling $1,440.00, a total invoice plus overage of $4,307.20.

Government's Exhibit 44-B is an invoice for two items, Cardinal chocolates at 37⅓ cents for invoice price of $1,236.48; spice buttons at 8¼ cents for invoice price of $1,200.38. The total invoice is $2,436.86. Cardinal chocolates overage of 18¾ cents amounts to $621.00; spice buttons overage of ten cents, amounts to $1,455.00—making a total invoice plus overage of $4,512.86.

Government's Exhibit 44-C is an invoice of Shotwell to Eatsum for Cardinal chocolates at 37½ cents a pound for $976.64, and 18¾ cents overage amounting to
2071 $490.50, for a total invoice plus overage of $1,467.14.

Government's Exhibit 44-D is an invoice for Cardinal chocolates and spice buttons, Cardinal chocolates

at 37⅓ cents—$1,890.56 and spice buttons at 8¼ cents—invoice amount $1,249.88.

By the Court: Forty-nine dollars?

By Mr. Lockley: Yes.

By the Court: And eight cents?

By Mr. Lockley: 88 cents.

The total invoice price is $3,140.44. The overage on Cardinal chocolates is 18¾ cents, amounting to $949.50. The overage on spice buttons is ten cents, amounting to $1,515.00. The total invoice plus overage is $5,604.94.

According to my computations, the overage amount alone is $2,464.50.

Government's Exhibit 44 is a check to The Shotwell Manufacturing Company in the amount of $9,232.72, endorsed by the Shotwell Manufacturing Company.

By the Court: May I see Government's Exhibit 44-D and Exhibit 44, please?

2072 By Mr. Lockley: Here they are, your Honor.

By Mr. Lockley:

Q. Now Miss Feldman, I show you Government's Exhibit No. 45 in evidence, a check to cash in the amount of $6,459.75, and ask you whose signature appears thereon.

A. Mine.

Q. When did you write that?

A. On May 9th.

Q. What year?

A. 1945.

Q. At whose instructions?

A. Mr. Lubben's.

Q. Well, what did you do with it after you had written it?

A. I gave it to Miss Seiderer to take to the bank to get the cash for it.

Q. Do you know what she did with the cash after that?

A. Probably gave it to me or Mr. Lubben.

Q. If she gave it to you, what would you have done with it?

A. I would have given it to Mr. Lubben.

2073 Q. Will you look in the cash disbursements book and tell me if Government's Exhibit 45 is recorded therein?

A. It is.

Q. What is the nature of that entry?

A. The entry reads on that May 9th "Cash to the Shotwell Manufacturing Company, $6,459.75."

Q. What is the amount of the check?

A. $6,459.75.

Q. What is the line and page of the entry you refer to?

A. That is page 91, of cash disbursements, May, 1945, line 26.

Q. Is it recorded in the accounts payable ledger, Government's Exhibit 6-A?

A. It is.

Q. In what amount?

A. $6,459.75.

Q. What does that reflect?

A. That reflects the payments of the overages of the four invoices.

Q. I show you Government's Exhibits 41-A, B, C and D, and ask you if there is any relationship between
2074 those exhibits and Government's Exhibit 45?

A. Yes, there is.

Q. What is it?

A. Check No. 3752 is a payment for the overages on Exhibits Nos. 44-D, 44-C, 44-B, and 44-A.

Q. When was that check issued?

A. On May 9, 1945.

Q. Were there any more overages due at that point?

A. Yes, there were.

Q. In what amount?

A. That would be the invoices—the overage on the May 9th invoice is $1,505.63.

Q. This check is dated May 9th. Does that indicate that an invoice had been received subsequent to the payment of the check or the issuance of the check?

A. Well, there was an invoice issued on the day that this particular payment was made.

Q. Do I understand that Government's Exhibit No. 45 paid the overages on Exhibits 44-A, B, C, and D? Is that correct?

A. I believe so.

Q. Now I show you Government's Exhibit for
2075 identification 46-A and ask if you have seen that before.

A. I have.

Q. Was that a record made in the ordinary course of business?

A. It was.

Q. Was it a part of the books and records of the Eatsum Food Products Company?

A. It was.

Q. Were the penciled entries thereon made under your supervision and direction?

A. They were.

Q. At what time?

A. A few hours or a day or two after they were received.

Q. Does that invoice bear a paid stamp?

A. It does.

Q. What does that reflect?

A. It represents the payment of the amount typed on the invoice paid to Shotwell Manufacturing Company.

Q. Is that record true and correct to the best of your knowledge?

A. Yes.

2076 Q. I show you Government's Exhibit for identification No. 46 and ask if you have seen that before.

A. I have.

Q. Was that a record made in the ordinary course of the business?

A. Yes.

Q. Was it true and correct to the best of your knowledge?

A. Yes, sir.

Q. Was it made under your supervision and direction?

A. It was.

Q. Was it a part of the books and records of the Eatsum Food Products Company?

A. It is.

By Mr. Lockley: I offer Government's Exhibits 46 and 46-A in evidence.

By Mr. McConnell: I object to the pencilled memoranda on Government's Exhibit 46-A for the reasons I have heretofore stated.

By the Court: The exhibits may be received.

2077 (Said documents were received in evidence by the Court and marked Government's Exhibits 46 and 46-A.)

By Mr. Lockley:

Q. Miss Feldman, with respect to Government's Ex-

hibit 46-A, is that recorded in the purchase journal of the Eatsum Food Products Company?

A. It is.

2078 Q. In what amount?

A. $1,505.63.

Q. Is that the amount plus the overage?

A. It is.

Q. Is it recorded in the accounts payable ledger sheet of the Shotwell Manufacturing Company?

A. Yes.

Q. In what amount?

A. $1,505.63.

Q. That is the invoice plus the overage?

A. That is correct.

Q. I show you Government's Exhibit No. 46 and ask if that is recorded in the cash disbursements journal?

A. It is.

Q. To what account?

A. Shotwell Manufacturing Company.

Q. Is it likewise recorded in the accounts payable ledger sheet of the Shotwell Manufacturing Company?

A. It is.

Q. What does that reflect?

A. The payment of the amount typed on the invoice paid to Shotwell Manufacturing Company.

2079 By Mr. Lockley: Government's Exhibit No. 46-A is a Shotwell invoice to Eatsum Food Products for spice—for spice buttons at 8¼ cents a pound, $680.63; 10 cents a pound overage, $825.00—a total of $1,505.63.

Government's Exhibit No. 46 is a check to Shotwell from the Eatsum Food Products, endorsed by Shotwell in the amount of $667.00, dated May 17, 1945.

By the Court: What is the date again?

By Mr. Lockley: May 17, 1945. It shows that it was drawn in payment of invoice 84104 which is Government's Exhibit No. 46-A.

By Mr. Lockley:

Q. Miss Feldman, I show you Government's Exhibits 47-A and 47-B and ask if you have seen those before?

A. I have.

Q. Are those records made in the ordinary course of business?

A. That is right.

Q. Are they a part of the books and records of the Eatsum sole proprietorship?

A. They were.

2080 Q. Were they kept under your supervision and direction?

A. They were.

Q. Were the penciled notations made under your supervision and direction?

A. They were.

Q. At about what time?

A. Within a few hours or a day or two after the invoice was received.

Q. Were they true and correct at the time they were prepared?

A. They were.

Q. What do the "Paid" stamps thereon reflect?

A. They reflect payment to the Shotwell Manufacturing Company of the items that were typed on the invoice.

Q. I show you Government's Exhibit No. 47 and ask if you have seen that before?

A. I have.

Q. Is that a record made in the ordinary course of business?

A. It is.

Q. Was it made under your supervision and direction?

2081 A. Yes, sir.

Q. Do you recognize the handwriting?

A. It is a payroll—it is the accounts payable clerk.

Q. Is is true and correct to the best of your knowledge?

A. Yes, sir.

By Mr. Lockley: I offer Government's Exhibits 47, 47-A and 47-B in evidence.

By Mr. McConnell: I object to the penciled memoranda on Government Exhibits 47-A and B for the same reasons I have heretofore given.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 47, 47-A and 47-B.)

By Mr. Lockley:

Q. With respect to Government's Exhibit 47-A and

Government's Exhibit 47-B in evidence, are those recorded on the purchase book of the Eatsum sole proprietorship?

2082 A. They are.

Q. And in what amounts?

A. The amount typed on the invoice plus the overage.

Q. And are they recorded in the accounts payable ledger sheet of the Shotwell Manufacturing Company?

A. They are.

Q. In what amount?

A. In the amount of the invoice plus the overage.

Q. Government's Exhibit No. 47, is that recorded on the cash disbursements book of the Eatsum Food Products Company?

A. It is.

Q. To whose account?

A. Shotwell Manufacturing Company.

Q. Is it also recorded on the accounts payable ledger sheet of the Shotwell Manufacturing Company?

A. It is.

Q. Is there any relationship between Government's Exhibits Nos. 47 and 47-A and B?

A. Yes, there is.

Q. What is it?

A. Government's Exhibit No. 47 is the payment in the amounts typed on the invoices, to Shotwell Manu-

2083 facturing Company.

By Mr. Lockley: Government's Exhibit 47-A is an invoice to Eatsum from Shotwell for spice buttons and gum drops. Spice buttons were at 8¼ cents a pound, invoice price of $581.63. Gum drops at 7¾ cents a pound, invoice price of $1,134.60. Spice buttons overage at 10 cents amounts to $705.00. Gum drops overage at 10 cents amounts to $1,464.00. The total invoice price is $1,716.23. The total invoice plus premium is $3,885.00.

Government's Exhibit No. 47-B is an invoice for gum drops at 7¾ cents, amounting to $1,132.28, plus a 10 cent overage amounting to $1,461.00—a total of $2,593.28.

Government's Exhibit No. 47 is a check from Eatsum to Shotwell endorsed by them, in the amount of $2,791.54 showing on its face that it was drawn for invoices 84901, which is Government's Exhibit 47-B and 86658 which

is Government's Exhibit 47-A.

2084 By Mr. Lockley:

Q. Now, Miss Feldman, I show you Government's Exhibit 48 in evidence, and ask if you have seen that before?

A. I have.

Q. And whose signature appears thereon?

A. It is my handwriting; it is my signature.

Q. Did you have any authority to draw checks on the bank account of the Eatsum Food Products Company?

A. I did.

Q. And at whose direction did you draw that check?

A. Mr. Lubben's.

Q. Was the cash authorization slip issued at the time the check was drawn?

A. Definitely.

Q. Do you know where it is?

A. No, I don't.

Q. Will you look in the accounts—or, will you look in the cash disbursements book and tell me if that check is recorded therein?

A. It is.

Q. What is that entry?

A. I am sorry. What is it?

Q. What is the entry?

2085 A. The entry is Check No. 3936, dated May 25th, cash, Shotwell Manufacturing Company, $4,455.00.

Q. Was it also recorded in the accounts payable ledger sheet of the Shotwell Manufacturing Company?

A. It is.

Q. In what amount?

A. $4,455.00.

Q. And what date?

A. May 25th.

Q. What year?

A. 1945.

Q. Now I ask you if there is any relationship between Government's Exhibit 48 and Exhibits 46-A and 47-A and 47-B?

A. Yes, there is.

Q. What is the overage on Government's Exhibit 46-A?

A. The overage on Government's Exhibit 46-A is $825.00.

Q. What is the overage on Government's Exhibit 47-A?

A. 47-A is the total of $2,169.00.

Q. And Government's Exhibit 47-B?

A. $1,461.00.

2086 Q. What is the total of those overages?

A. $4,455.00.

Q. What is the amount of the check, Government's Exhibit 48?

A. $4,455.00.

Q. I show you Government's Exhibit for Identification No. 49-A, and ask if you have seen that before?

A. I have.

Q. Is that a record made and received in the ordinary course of business?

A. Yes, sir.

Q. Is it a part of the books and records of the Eatsum Food Products Company?

A. It is.

Q. With respect to the penciled notations thereon, were they made under your supervision and direction?

A. They were.

Q. About what time were they made?

A. Within several hours or a day after the invoice was received.

Q. Were they true and correct to the best of your knowledge?

A. They were.

Q. Is there a "Paid" stamp on that invoice?

2087 A. There is.

Q. What does it denote?

A. It shows The Shotwell Manufacturing Company received a check for the amount typed on the invoice.

Q. I show you Government's Exhibit for Identification No. 49, and ask if you have seen that before?

A. I have.

Q. Whose signature appears thereon?

A. Mine.

Q. Is that a record made in the ordinary course of business?

A. Yes, sir.

Q. And was it part of the books and records of the Eatsum Food Products Company?

A. It is.

Q. Was it true and correct at the time it was prepared?

A. Yes, sir.

Q. I show you Government's Exhibit No. 55-C, and ask if you have seen that before?

A. I have.

Q. In whose handwriting is it?

A. My own.

2088 Q. Do you know when it was prepared?

A. That must have been prepared in June of 1945.

Q. Was that the record made and kept by you in the ordinary course of business?

A. Yes, sir.

Q. Was it a part of the books and records of the Eatsum Food Products Company?

A. Yes, sir.

Q. What does it purport to be?

A. That is a rough recap sheet of the overages due at the time.

Q. And what time is that?

A. At the time this was made up. I believe it covers part of June. This is about June of 1945.

Q. About June, 1945.

A. Yes.

By Mr. Lockley: I offer Government's Exhibits 49, 49-A, and 55-C in evidence.

By Mr. McConnell: I object to the penciled memorandum on Government's Exhibit 49-A for the reasons I stated, and I object to Government's Exhibit 49-B.

2089 There is no proper foundation laid—it is Government's Exhibit 55-C, rather. No foundation has been laid.

By the Court: The exhibits may be received in evidence.

By Mr. O'Brien: I also object to Government's Exhibit 55-C, if the Court please, on the ground there is not a sufficient foundation.

By the Court: I understand that this Government's Exhibit 55-C is in your handwriting, Miss Feldman?

By the Witness: Yes.

By the Court: You contend that you made it some time in June, 1945?

By the Witness: That is correct, yes, sir.

By the Court: And you retained it as part of the books and records?

By the Witness: Yes.

By the Court: It may be received.

(Said documents were received in evidence by the Court, and marked Government's Exhibit 49, 49-A, and 55-C.)

2090 By Mr. Lockley:

Q. Miss Feldman, with respect to Government's Exhibit 49-A, is that recorded—

By the Court: 49?

By Mr. Lockley:

Q. 49-A. Is that recorded in the purchase journal?

A. It is.

Q. In what amount?

A. $2,365.20.

Q. Is that the amount of the invoice plus the overage?

A. Yes, sir.

Q. Is it also recorded in the accounts payable ledger?

A. Yes, sir.

Q. In what amount?

A. $2,365.20.

Q. With respect to Government's Exhibit No. 49, is that recorded in the cash disbursements book?

A. It is.

Q. In what amount?

A. Well—

Q. I mean, to what account?

A. Shotwell Manufacturing Company.

2091 By Mr. Lockley: Government's Exhibit No. 49-A is an invoice for spice buttons at eight and one-quarter cents, amounting to $1,069.20—ten cents overage, $1,296.00 for a total of $2,365.20.

Government's Exhibit No. 49 is a check from Eatsum to Shotwell, endorsed by them, in the amount of $1,047.82, which shows on its face that it was in payment of Invoice 88523, less two percent discount, which is Government's Exhibit No. 49-A.

By the Court: Let me see Government Exhibit 49-A.

2092 By Mr. Lockley:

Q. Now, Miss Feldman at what point did the

Eatsum sole proprietorship cease its existence and the Eatsum partnership begin?

A. As of June 1, 1945.

Q. Do the books and records of the sole proprietorship reflect entries up to June 1, 1945?

A. The last entry on the books would be as of May 31st.

Q. I show you Government's Exhibits, in evidence, 50-A, 51-A and 51-B, which are accounting copies of invoices from The Shotwell Manufacturing Company to the Eatsum Food Products Company, and I ask if those are recorded in the purchase journal of the Eatsum sole proprietorship.

A. Yes, sir; they are.

Q. And in what amounts?

A. The amounts shown on the green accounting copies, plus the overage.

Q. That is the amount recorded in the purchase journal?

A. That's correct.

By the Court: Which exhibits are they again, please?

2093 By Mr. Lockley: 50-A is an invoice showing—

By the Court: Just give me the numbers first. I have a record of it.

By Mr. Lockley: 50-A.

By the Court: Yes:

By Mr. Lockley: 51-A and 51-B.

By the Court: She says they are recorded in the accounts payable register?

By Mr. Lockley: In the purchase journal, I understood Miss Feldman.

By the Court: Oh.

By Mr. Lockley:

Q. Are they also in the accounts payable ledger?

A. I believe two of them are, and one was entered on the old single proprietorship books that we continued after June 1st in order to clean up all the transactions. This invoice appears on the books after June 1st for the old Eatsum single proprietorship.

Q. That's Exhibit 50-A?

A. That's right. 51-A and 51-B appear on the books

of the single proprietorship prior to June 1st, 2094 1945.

Q. All right. With respect to 51-A, the invoice price is $12,096.00. What is the amount of that invoice as recorded on the purchase journal of the Eatsum sole proprietorship?

A. $18,171.00.

Q. 51-B is an invoice in the amount of $1,055.55, dated May 31st. How does that appear?

A. As $2,417.55.

By the Court: Well, are we in the partnership now or are you now speaking of the records of the proprietorship?

By the Witness: No, I am still speaking of the records of the single ownership, because after the partnership was formed the single ownership continued its books for a short period of time.

By Mr. Lockley:

Q. With respect to invoice No. 51-A, there is a photostatic copy of a check in evidence in the amount of $12,088.52. Is that recorded on the accounts payable ledger or the cash disbursements book?

A. Not on the one that I have.

2095 Q. That is dated June 11.

A. That would be on the old Eatsum account, as we called it, during the life of the partnership.

Q. So anything after June 1 would not be recorded?

A. That's correct.

Q. Now, I show you Government's Exhibit, in evidence, No. 51, and Exhibits 51-A and 51-B, and ask if you have seen those before?

A. Yes, I have seen these before.

Q. 51-A is a check. Whose signature does it bear? 51, I mean.

A. That is my signature.

Q. Does that have any relation to Exhibit 51-A and Exhibit 51-B?

A. Yes, it does. It represents the payment of the amount typed on the invoices to Shotwell Manufacturing Company.

Q. And I show you Exhibit 50 and 50-A. Whose signature does Exhibit 50 bear?

A. That bears my signature.

Q. And do Exhibits 50 and 50-A have any relationship?

A. Yes, Exhibit 50 is in payment of invoice 2096 marked Exhibit 50-A.

Q. In what amount?

A. The amount typed on the invoice.

Q. And what is that?

A. $4,916.10.

Q. All right. And I show you Exhibits 52-A and 52-B, and Exhibit 52. Have you seen Exhibit 52 before?

A. I have.

Q. And what is that?

A. That is a check drawn on the partnership check account for the amounts typed on the invoices from Shotwell.

Q. And does that check have any relationship to Exhibits 52-A and 52-B?

A. That's right it covers the amounts typed on the invoices.

Q. I show you Exhibit 53, and ask if you have seen that before?

A. I have.

Q. Do you know whose handwriting it is?

A. It is the accounts payable clerk's.

Q. Who signed it?

A. Mr. Lubben.

Q. Does that have any relationship to Exhibit 53-A?

2097 A. It does.

Q. And what is it?

A. The Exhibit No. 53 is in payment for the amount typed on the Shotwell invoice marked Exhibit 53-A.

By Mr. Kirby: I didn't hear that answer. Will you read it?

(Question read by the reporter as above recorded.)

By Mr. Lockley:

Q. I show you Exhibit No. 54, and ask if you have seen that before?

A. I have.

Q. Do you know whose handwriting it is?

A. The accounts payable clerk.

Q. And who signed it?

A. Mr. Lubben.

2098 Q. And does that have any relationship to Exhibit 54-A?

A. It does.

Q. And what is it?

A. Exhibit No. 54 is in payment of the amount typed on the Shotwell invoice marked Exhibit 54-A.

By the Court: What is the amount of invoice, 54-A; will you tell me?

By the Witness: The amount is $1,165.00—

By the Court: Again.

By the Witness: $1,165.73.

By the Court: And the amount of the check, 54?

By the Witness: Check 54 is $1,142.42.

By the Court: $1,142.42?

By the Witness: That's right.

By the Court: Thank you.

By Mr. Lockley: Would your Honor like me to read off the amounts of these checks?

By the Court: No, I have it on my notes, but you may read it for the benefit of the jury.

I understand you are now referring to certain exhibits that were identified by Mr. Lubben, and heretofore 2099 received.

By Mr. Lockley: By previous witnesses. The accounting copies were identified by Mrs. Morrill and the photostatic copies of these checks were identified by the young man from Manufacturers Trust Company.

By the Court: All right. I have, for my records, the notations that I need. I don't know whether you think it is necessary to further clarify it by calling it to the attention of the jury, what you have been asking the witness.

Of course, it is very difficult to follow the testimony, and I appreciate that when we are talking about books and records, and the jury haven't been in a position to keep notes, that it is not too simple to follow it.

I take it that after this testimony is in that the Government intends to present a summary of it in a way that will be more easily understood. Am I right in that?

By Mr. Lockley: We hope it will make it easy, 2100 your Honor. We will try.

By Mr. O'Brien: I think it is helpful that the record show—helpful to us—what the item is, as Mr. Lockley has been doing.

By Mr. Lockley: I will run through these quickly.

Exhibit 50-A is an invoice for citrus drops and gum drops showing an amount of $4,916.10.

50 is a check from Eatsum to Shotwell in the amount of $4,817.78, and showing on its face that it was issued in payment of invoice 87659, which is Exhibit 50-A.

2101 Exhibit 51-A is for Cardinal chocolates, in the amount of $12,096.00; 51-B for $1,055.55.

Exhibit 51 is a check from Eatsum to Shotwell for $12,888.52, showing on its face that it was issued for invoices number 89123 and 88586, which were exhibits 51-B and 51-A, respectively.

Exhibit 52-A is for spice buttons, in the invoice amount of $1,252.35; and Exhibit 52-B is for Cardinal chocolates in the amount of $10,375.68.

Exhibit 52 is a check from Eatsum to Shotwell in the amount of $11,395.47, and it shows it was issued for invoices 90598, which is Exhibit 52-A, and 90631, which is Exhibit 52-B.

Exhibit 53-A is an invoice, spice buttons, $35,031.83—

By the Court: How much?

By Mr. Lockley: $3,531.83.

Exhibit 53 is a check from Eatsum to Shotwell in the amount of $3,461.19, and shows on its face that it

2102 was issued for invoice number 94002, which is Exhibit 53-A.

And Exhibit 54-A is an invoice for $1,165.73.

Exhibit 54 is a check from Eatsum to Shotwell for $1,142.42, showing on its face that it was issued for invoice 94986, which is Exhibit 54-A; less 2 per cent discount on those invoices.

By Mr. McConnell: If the Court please, as long as we are clarifying this, when these documents were offered and received I think the statement was made that they were all on the Shotwell books and were all included in the income tax.

By Mr. Lockley: There is no question about that. These are checks to Shotwell. These are invoices received from Shotwell. These are Shotwell's accounting copies.

By Mr. Lockley:

Q. Now, Miss Feldman, I show you Government's Exhibit 55-B in evidence, and ask if you have seen that before?

A. I have.

Q. And what is it?

2103 A. It is a recap sheet for Cardinal, spice buttons and gum drops.

Q. And can you relate it to any of these invoices which I have just introduced in evidence?

Will your work sheets help you on that?

A. Yes, but I can fix them up from here.

By Mr. O'Brien: Is the reference to the work sheet on the basis of existing records already in evidence?

2104 By Mr. Lockley: With reference to the invoices and checks which are already in evidence, and the settlement sheet, which is already in evidence.

By the Witness:

A. This sheet refers to—

By the Court: A little louder, please.

By the Witness:

A. This recap sheet refers to Exhibits Nos. 51-A, 51-B and 49-A.

By Mr. Lockley:

Q. All right. And how do you know that?

A. Exhibit No. 49-A calls for twelve thousand—

By the Court: 49 is not in evidence, is it?

By Mr. Lockley: 49?

By the Witness: 49-A.

By Mr. Lockley: I had thought so.

By the Court: Well, supposing we check that up between now and tomorrow morning.

By Mr. Lockley: It was put in at the same time as 55-C. They all went in together. It is in, your Honor.

By the Court: Well, you can check that between

2105 now and tomorrow morning.

By Mr. Lockley: We will check it with the record.

By the Court: We will be in recess, members of the jury, until ten o'clock tomorrow morning.

By the Marshal: Will the audience please remain standing while the jury files out.

This honorable court will recess until tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken in the above-entitled cause to Friday, September 25, 1953, at 10:00 o'clock a.m.)

• • (Caption—52 C R 143) • •

2106 Chicago, Illinois, Friday, September 25, 1953, 10:00 o'clock A.M.

Court met pursuant to adjournment.

Present:
Mr. Edward J. Calihan, KJR.,
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby,

And thereupon the following further proceedings were had herein, in Chambers, outside the presence and hearing of the jury:—

By Mr. O'Brien: Judge, I got up early this morning, got in to work, and having enough troubles, I didn't read the papers. Tribune, was called to my attention about
2107 twenty minutes ago. I don't know where it came from. I haven't talked to the paper. It is headed, "Tell 1.1 Million Tax Dodge in Shotwell Case."

Then the article itself refers to a deficiency assessment against Mr. Cain. And it is so tied in that it does seem patent to me that anybody on the jury who may have seen this article would, or could be prejudiced by it to a point that it would be very hard, if not impossible, to cure by instruction, or direction of any sort.

Now, I mean it literally when I say I just heard of it fifteen minutes ago.

I pulled out one of the books to see what I ought to do about it, and I have just glanced at a section in the Federal Encyclopedia on newspaper articles, but I have had no chance to read the case or cases.

The reason I refer to that is because apparently the cases indicate a condition that would not only be an article which could be or is prejudice, but one which the jurors, or some of them, did see, and I would—not having read the cases, do not know what the proper procedure is
2108 for ascertaining whether they saw it or didn't see it,—we all wanted to call it to the Court's attention at an early moment, and make a motion for a mistrial, based on that article, which I would like to have put in the record, for the purpose of this collateral motion, not

for the jury, but to record it here with this motion as our Exhibit A of this day.

I would like an opportunity to see if there is anything that I should do formally about it, because, frankly, I don't know.

2109 By Mr. Lockley: Well, your Honor, I am in the same position as Mr. O'Brien is in with respect to former knowledge of the article, until such time as it appeared in the newspaper.

I think you will notice that it bears a Washington, D. C., date line, and that it relates entirely to a civil matter which is not connected with the criminal matter which is now on trial.

Now, as I understand, from reading the newspapers, and over which, of course, we have no control, that was brought about as much by the action of the defendants as by the action of the government. As I understand it, what happened is that the defendants filed a petition in the Tax Court for a review of a deficiency determination by the Commissioner of Internal Revenue. It was that action on their part which brought to light the existence of the claimed deficiency and which, in turn, promoted the preparation of that newsaper article.

I hardly feel that they are in a position to complain now that something which they did may have redounded to their own disadvantage.

In any event, I have neither looked up the law, but I believe that before an article of that sort is the basis for a mistrial it has to be of an inflammatory nature

2110 or at least more than a mere casual and objective reporting of a news story which, in some way, relates to one of the defendants and which is all that article appears to be.

By the Court: I will deny the motion for a mistrial. If counsel desires to warn the jury to disregard the article and to call to their attention that it refers to a civil matter and has nothing to do with the Shotwell case, and the headlines may appear somewhat confusing for that reason, I, of course, will be glad to do so.

By Mr. Lockley: Isn't the jury under instructions

not to read newspaper articles in any event?

By the Court: Yes, I will—

By Mr. McConnell: I would like to have such instruction made on behalf of the company. Now, what Mr. Lockley says—

By the Court: I didn't hear you, Mr. McConnell.

By Mr. McConnell: Pardon me. I would like to have such a statement made by the Court on behalf of the Shotwell Company.

Now, this appears to be a matter between Cain—or Cain and Culhane. It has nothing to do with Shotwell at all. But they have a statement in the headline that it is Shotwell. That is the part that bothers me. This
2111 certainly wasn't originated by Shotwell. Shotwell has no interest in it. The corporation has no interest in it. Whether Cain has a tax liability or not is no concern of the corporation. But it leads the jury to believe that it is in some way hooked up with Shotwell.

And I think that the Court should instruct the jury that it doesn't concern the Shotwell Company at all, even by the terms of the article, even though the headline says so.

By Mr. O'Brien: Well, I wanted to add some sort of a connective remark first. Mr. Lockley mentioned the defendants as being the people who are involved in that petition.

2112 By Mr. Lockley: I stand corrected. I glanced at it very casually. I believe Mr. McConnell is right. It just does refer to Mr. Cain.

By Mr. O'Brien: That is true.

Now, second, on the basis of my limited present knowledge as to what is a proper motion, I feel that I may not have advanced it as completely as might be required by the cases, Judge.

For example, it may be under these cases that if I wanted to make the motion complete, and have a sufficient basis, so that your ruling would mean something, the jury would have to be asked—the jurors would have to be asked whether any of them read that article.

I don't like to ask them that question, unless it is required under the cases. And, therefore, I also don't like to give the matter prominence at this moment by any instruction or direction to the jury to disregard the article, or that it doesn't apply to Shotwell, and so on.

But I would like time, during the noon recess, to see whether we have to request your Honor to ask the jurors a question about it, or whether we don't. I just don't know.

2113 By Mr. Lockley: I think, for the record, it also ought to be brought out that that article was not on the front page. I believe that it was on one of the inside pages. Perhaps we can establish exactly where, from an examination of the paper itself.

By the Court: Yes, that is my recollection.

By Mr. O'Brien: Well, I certainly will agree that it is not on the front page.

By Mr. Lockey: I think we ought to know what prominence the paper gave the story, if that is any criterion for determining—there it is. It is on page 15.

By Mr. O'Brien: Right opposite the editorial page.

By Mr. Lockley: Opposite the editorial page.

By Mr. O'Brien: May I have this marked at this time Defendants' Exhibit A, your Honor, so as to identify it as being the article that we have been talking about.

By the Court: Surely.

2114 By Mr. Lockley: You don't want this part.

By Mr. O'Brien: I think the two together. No matter how you look at it, it is fair to put them both in, because they have a separate article here about the case itself.

By the Court: Mr. McConnell, what is your suggestion now, in view of the position taken by Mr. O'Brien. He informs the court that he doesn't desire the court at this time, at least, to make any reference to the newspaper article, or to emphasize it until he is further informed as to just what steps he should take, if any. What have you to say about that?

By Mr. McConnell: Well, of course, I represent the corporation, and regardless of Mr. O'Brien's position,

I have to protect my record here for the corporation. And this refers to Shotwell Manufacturing Company, and has nothing to do with Shotwell Manufacturing Company.

While it may emphasize the article, nevertheless, I haven't any doubt at all that either the jurors have read the article, or will be advised of it. And we just have to take the facts of life as we know them.

2115 The only way I know that it can be remedied is to point out to the jurors that the article does not concern The Shotwell Manufacturing Company.

By Mr. Lockley: I doubt if there is any basis for assuming that the jurors are going to do something that the Judge has expressly instructed them not to do.

By Mr. McConnell: I know, but here is something that has happened.

By Mr. Lockley: And I also think the defendants ought to either decide upon one particular course of action, so if there is error to one, there is error as to all, or if there is no error as to one, there is no error as to all.

We can hardly take two different courses of action with respect to all of the defendants.

By Mr. McConnell: You have sued four different defendants, and I am representing one. I have to make my record, as I see it.

By the Court: We will proceed.

By Mr. Lockley: May I say one thing for the record while we are here?

By Mr. O'Brien: Incidentally, I don't recall any instruction. I could be wrong, because—

2116 By Mr. McConnell: Nothing about newspapers.

By Mr. O'Brien: Nothing about reading or not reading the newspapers. If there was such a direction, I don't recall it.

By the Court: I don't know that I have made any such instruction to the jury, and I haven't been so requested by any of the parties.

By Mr. Lockley: I just wanted, on the record at this time, your Honor, to inform counsel that at the noon recess yesterday, I became aware for the first time of the existence of two letters, one dated February 8, 1946, and

one February 15, 1947, written by officers of The Shotwell Manufacturing Company to Busby and Oury, and which the Government may seek to introduce in evidence, and I wish to make them available to counsel at this time for inspection.

(Documents handed to counsel.)

(Whereupon the newspaper article herein above referred to was marked Defendants' Exhibit A, of this date, and is attached hereto and made a part hereof, and is in words and figures as follows:—)

2117

TELL 1.1 MILLION
TAX DODGE IN
SHOTWELL CASE

Amount Unreported by
Cain, U. S. Says
By Philip Warden

Washington, Sept. 24—Byron A. Cain, president of the Shotwell Manufacturing company, failed to report $1,115,062 in personal income during 1947, 1948, and 1949 for tax purposes, the bureau of internal revenue claimed, it was revealed today.

The Shotwell company and three individual defendants, including Cain, are on trial in federal District court in Chicago on charges of evading $286,607 in income taxes in 1945 and 1946.

In petitions filed in the United States tax court here on June 1 and 3, and late last week, Cain revealed that the government is seeking $880,788 in additional taxes from him and his wife, Sally, and $440,393 in fraud penalties from them, for a total of $1,321,181.

Seek Additional Taxes

In addition, Cain, as a stockholder of Cain & Culhane, Inc., 4545 Broadway, Chicago, also has been named in government actions seeking additional taxes of $48,414 for 1947, $50,687 for 1948, and $61,638 for 1949. Fraud penalties of $80,369 also are sought.

Cain's petitions, which cleared the Tax court's recording system today, revealed that he reported a net income

of $54,845 in 1947. The government says he should have reported $416,833.

In 1948, Cain and his wife reported a $67,772 income and their petitions contest the bureau of internal revenue's claim that they should have reported a net of $451,837.

Report $59,055 in 1949

Their 1949 income, according to their petitions, was reported as $59,055. The government contends it was $428,064.

Cain & Culhane, Inc., reported a net income of $30,259 in 1947. The government said it should have reported $147,608. For 1948, its tax return reported a net income of $6,153 and the government says it should have been $136,500. For 1949, the return listed $28,478. The bureau claims its income was $179,394.

The Cains and the corporation won a motion heard here yesterday demanding that the bureau of internal revenue be required to furnish additional data to substantiate its charges that they had failed to report all their income in the years in question.

WOMAN TELLS OF PAYMENTS IN SHOTWELL CASE

Beatrice Feldman of New York City testified yesterday for the government in the income tax evasion trial of the defunct Shotwell Manufacturing company, candy producers, and three of its former officers, in federal District court.

The defendants are charged with evading payment of $286,607 in income taxes in 1945 and 1946 on more than $500,000 in unreported income. The individual defendants are Frank Huebner, Byron A. Cain, and Harold E. Sullivan.

Miss Feldman was bookkeeper for the government's chief witness, David G. Lubben, 43, former New York City candy broker. She corroborated testimony given by Lubben that he made "overage" or black market payments in cash for candy commodities purchased from the Shotwell company.

2118 (Whereupon the following proceedings were had and taken in open court, in the presence and hearing of the jury:)

By the Clerk: 52 C 143, United States of America vs. The Shotwell Manufacturing Company, et al., case on trial.

By the Court: I hope our juror who had that slight accident this morning is all right.

By a Juror: Yes, sir.

By the Court: You may proceed.

By Mr. Lockley: Your Honor, at the close of the session yesterday, you were inquiring as to whether Government's Exhibit 49 was in evidence. It is. It appears on page 2104 of the transcript.

BEATRICE FELDMAN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Ctd. by Mr. Lockley).

2119 Q. Miss Feldman, at the close of the session yesterday I handed you Exhibit 55-B in evidence and asked you whether that had any relationship to Government's Exhibits 51-A, 51-B and 49-A.

A. They have.

Q. What is that connection?

A. Well, 55-B is a recap sheet that was made up for the three invoices.

Q. Does it contain certain information?

A. It does.

Q. What is that information and how does it relate to each one of the exhibits I have shown you?

A. Well, the first item on the recap sheet reads "Cardinals, 32,400 pound boxes at 18-¾ cents," and Exibit 51-A is for 32,400 boxes of Cardinals.

The second item on the slip is spice buttons, 12,960 pounds at ten cents a pound.

Government's Exhibit 49-A is for 12,960 pounds of spice buttons.

The third item on the recap slip is for gum drops at 13,620 pounds and at ten cents a pound.

2120 Government's Exhibit 51-B is for 13,620 pounds of gum drops.

Q. Is there any other notation on that slip?

A. Yes. There is a notation here that the total overages due to these three amounted to $8,733.00 against which we advanced $20,000.00 in overages, leaving a balance due us of $11,267.00.

Q. I show you Government's Exhibit No. 55, a check for $20,000.00, and I ask you if that has any relationship to that settlement sheet?

A. That is a $20,000.00 prepayment referred to on the settlement sheet.

Q. What is the date of that check?

A. May 25th.

Q. As of May 25th the sole proprietorship was still in existence, was it not?

A. That is correct.

Q. Is that $20,000.00 check reported in the cash disbursements book?

A. It is.

Q. Where?

A. It is reported on page 96 of the cash disbursements book of May, 1945.

2121 Q. What is the nature of the entry?

A. The nature of the entry reads—the entry reads: "Cash, Shotwell Manufacturing Company, $20,000."

Q. Is it also recorded in the accounts payable ledger sheet?

A. It is.

Q. What is that exhibit number?

A. 6-A. No, that is 6-B, I believe.

Q. What is the nature of the entry?

A. It shows a payment on May 25th of $20,000 to Shotwell Manufacturing Company.

Q. Now, I show you Government's Exhibit 55-C, and Government's Exhibit 55-A, and I ask you if those have any relationship to each other?

A. They do.

Q. What is that connection?

A. Well, the items on the white sheet, on the Exhibit 55-C, are also included on 55-A.

Q. Well, what was the purpose of having Exhibits 55-C and 55-A prepared?

A. This was my rough copy of the shipments, to the time I made up this small white sheet, when I made up—

2122 Q. That is, referring to 55-C?

A. Yes. 55-A was a recap sheet that was drawn after this date, which contained both the information of 55-C and some additional information.

Q. And is there any connection between Government's Exhibit 55-A and 55-B?

A. There is.

Q. And what is that?

A. 55-B shows an advance payment of $20,000 against premiums. 55-A also shows a $20,000—

Q. Do you know if that is the same advance payment?

A. Yes, it is.

Q. What did you do with the settlement sheet after you completed typing it?

A. I would give Mr. Lubben the original copy with the cash, so that he would know what he was paying for, and so that he could leave a copy if necessary.

Q. How many copies of the settlement sheet did you make?

A. It was usually an original and duplicate, or an original and two duplicates.

Q. What did you do with the duplicates?

A. The duplicates were attached to the cash au-

2123 thorization slip.

Q. Now, I show you Government's Exhibits 50-A, 52-A, and B, 53-A, 54-A, 51-A, and B, and 49-A, and I ask you if the information contained on Government's Exhibit 55-A is in any way connected with those previously mentioned exhibits?

A. They are.

Q. Will you take each of the entries on 55-A and tell in what way it relates to each of the other exhibits I have handed you?

A. The first item on the recap sheet is for Cardinals.

By the Court: Refer to the exhibit number, please.

By the Witness:

A. On, Exhibit. The first item on Exhibit 55-A calls for Cardinals, May 25th, 32,400 pound boxes.

Invoice No. 88586, Government's Exhibit 51-A, which is dated May 25, calls for 32,400 pound boxes.

Exhibit No. 52-B dated June 6th calls for 27,792 pound boxes of chocolates, Cardinal chocolates.

2124 Exhibit No. 55-A shows a shipment of May 6th—of June 6th, for 27,792 pound boxes.

The second item on Exhibit 55-A calls for spice buttons. The first item is dated May 24th, calls for 12,960 pounds.

2125 Q. Well, in the interest of brevity, Miss Feldman, are all of the invoices reflected on Government's Exhibit 55-A in the same manner that you previously testified?

A. They are, the dates and the weights appear on the recap sheet.

By Mr. O'Brien: You mean all of the invoices you mentioned, Mr. Lockley, I suppose?

By Mr. Lockley: Yes.

By Mr. O'Brien: By exhibit number?

By Mr. Lockley: Yes.

By Mr. Lockley:

Q. Now, Miss Feldman, I show you Government's Exhibit in evidence No. 56 purporting to be a check and Exhibits 56-A and 56-B and ask you if you have seen those before?

A. I have.

Q. Which exhibits have you seen before?

A. I have seen the photostat of the check. I have seen the green copy when I made up my work sheet papers but that was the first time.

Q. Did you see the original of that invoice at the time you were employed at the Eatsum Food Products Com-

2126 pany?

A. Yes, sir, I did.

Q. Is there any relationship between the exhibits I have just handed you—do they bear any relationship to each other?

A. They both appear on the check as payment of them.

Q. That is what I want to know. All right. The check, Government's Exhibit No. 56 is in payment of Government's Exhibits 56-A and 56-B, invoices, is that correct?

A. That is so.

Q. So that likewise that is true of Government's Exhibits 57 and 57-A?

A. That is so.

Q. And is check, Government's Exhibit No. 58, in any way related to Government's Exhibit 58-A, an invoice?

A. It is.

Q. What is the connection?

A. The check pays for the invoice.

By the Court: You mean the face of the invoice?

By the Witness: That is right, the face of the in-
2127 voice. None of these have penciled notations.

By Mr. Lockley:

Q. Is your answer the same with respect to Government's Exhibits 59 and 59-A?

A. Yes, it is.

Q. Is there any connection between Government's Exhibit 50—or 60, rather, and Government's Exhibit 60-A and 60-B, being a check and two invoices?

A. Yes.

Q. What is the relationship?

A. Check No. 1900 paid for both invoices.

Q. Paid for just the invoice price?

A. That is correct.

Q. Is there any relationship between Government's Exhibits 61 and 61-A and 61-B, being a check and two invoices?

A. Yes.

Q. What is the relationship?

A. Government's Exhibit 61 is in payment of the invoice price on these two invoices.

Q. 61-A and 61-B?

A. 61-A and B.

Q. Is there any relationship between Government's
2128 Exhibits 62 and 62A?

A. Yes. Check marked Government's Exhibit 62 is in payment of invoice, 62-A.

Q. All right. Now I show you Government's Exhibit 63-A and ask if you have seen that before?

A. I have.

Q. Do you know who prepared it?

A. I did.

Q. At whose direction?

A. Mr. Lubben's.

2129 Q. How many copies did you make?

A. There was an original. There might have been another duplicate.

Q. What did you do with the original, if you know?

A. The original was given to Mr. Lubben.

Q. Keep your voice up, Miss Feldman.

A. Oh, I am sorry.

Q. Now, I show you Government's Exhibit 63-B in evidence and ask if you have seen that before.

A. I have.

Q. Where did you see it?

A. Mr. Lubben gave it to me.

Q. At what time?

A. Evidently after a visit with Mr. Huebner.

Q. I mean, the time of the year.

By Mr. O'Brien: I move to strike that, the first part.

By Mr. Lockley:

Q. I mean, the time of the year, the date.

By the Court: It may be stricken.

By the Witness:

A. That would be towards the end of the year of 1945.

By Mr. Lockley:

2130 Q. Can you be any more definite?

A. I can. The last item that appears on this, the last date that appears on this slip is November 12, 1945.

Q. And it would be some time after that date?

A. That is correct.

Q. Now, is there any relationship between Government's Exhibits 63-A and 63-B?

By the Court: Mr. Lockley, I appreciate that you have to stand there when you are handing exhibits to the witness, but—

By Mr. Lockley: I was trying to get back over here as fast as I could, your Honor.

By the Witness:

A. Yes, there is a relationship.

By Mr. Lockley:

Q. And will you please describe what the relationship is?

A. My recap sheet includes the items mentioned on the Exhibit 63-B.

Q. What is your recap exhibit?

A. 63-A.

Q. Does your recap sheet, 63-A, include addi-
2131 tional items that are not on 63-B?

A. It does.

Q. Do you know the purpose for which Mr. Lubben gave you Government's Exhibit 63-B?

By Mr. O'Brien: I object to that.

By Mr. McConnell: I object.

By the Court: I didn't follow your question.

By Mr. Lockley: I asked if she knew the purpose for which Mr. Lubben gave her Government's Exhibit 63-B.

By the Court: I suppose that obviously calls for a conclusion.

By Mr. Lockley:

Q. Do you recognize the handwriting on the bottom of the sheet?

A. I do.

By the Court: Which exhibit is it?

By Mr. Lockley: 63-B.

By Mr. Lockley:

Q. Whose is it?

A. That is Mr. Lubben's handwriting.

Q. Will you read it?

A. "Miss Feldman: These were Huebner's last
2132 figures."

By Mr. McConnell: I object to the reading of the document.

By the Court: The exhibit is in evidence.

By Mr. Lockley:

Q. Miss Feldman, I show you Government's Exhibits 56-A and B, 57-A, 59-A, 60-A and B, 61-A and B, and 62-A, and I ask you if those exhibits which are invoices are in any way related to Government's Exhibit 63-A. Will you describe the connection on each one of those, Miss Feldman, as you examine it, so that we might save a little time.

A. All right. My recap sheet shows four classifications of chocolates, chocolate nut meats, chocolate covered nut meats, cardinals and spice buttons.

The sheet also shows the date of the shipment, the invoice number and the poundage on each shipment.

Q. Does it also show the overage amounts per unit and the—

2133 A. It does. As a matter of fact, there were two classifications of nut meats. One was chocolate nut meats at 42 cents billed price and chocolate covered nut meats at 48 cents.

On the 42-cent item, there was a ten-cent overage. On the 48-cent item, there was a 15-cent overage.

Exhibit No. 62-A calls for 67,482 pounds of chocolate covered nut meats at 42 cents a pound.

On Exhibit 63-A, on the chocolate nut meats at 42 cents, there appears an item, November 10th, invoice No. 123399 for 67,482 pounds.

There is another item on invoice—on Exhibit 62-A calling for 9,960 pounds of spice buttons.

On Exhibit 63-A under date of November 10th, invoice No. 123399, there appears 9,960 pounds of spice buttons.

Exhibit 61-A calls for 40,536 pounds of assorted—of Cardinal assorted chocolates, 7,774 pounds of chocolate covered nut meats at a 48-cent billing price, and 32,637 pounds at a 42-cent billing price.

On Exhibit 63-A under Cardinal assorted chocolates 2133 there is a notation, November 17th, two classifications of nut meats. One was chocolate nut meats at 42 cents billed price and chocolate covered nut meats at 48 cents.

On the 42-cent item, there was a ten-cent overage. On the 48-cent item, there was a 15-cent overage.

Exhibit No. 62-A calls for 67,482 pounds of chocolate covered nut meats at 42 cents a pound.

On Exhibit 63-A, on the chocolate nut meats at 42 cents, there appears an item, November 10th, invoice No. 123399 for 67,482 pounds.

There is another item on invoice—on Exhibit 62-A calling for 9,960 pounds of spice buttons.

On Exhibit 63-A under date of November 10th, invoice No. 123399, there appears 9,960 pounds of spice buttons.

Exhibit 61-A calls for 40,536 pounds of assorted—of Cardinal assorted chocolates, 7,774 pounds of chocolate covered nut meats at a 48-cent billing price, and 32,637 pounds at a 42-cent billing price.

On Exhibit 63-A under Cardinal assorted chocolates there is a notation, November 17th, invoice No. 124206—40,536 pounds of Cardinals.

Under chocolate covered nut meats at 48 cents a pound there is a notation, November 17th, invoice No. 124206—7,774 pounds.

Under chocolate covered nut meats at 42 cents a billing price, there is a notation, November 17th, invoice No. 124206—32,637 pounds.

Exhibit 61-B calls for 19,680 pounds of spice buttons, 19,274 pounds of chocolate covered nuts at 48 cents billed price and 24,610 chocolate covered nuts at 42 cents billed price.

Exhibit No. 63-A bears the following items: Under spice buttons, dated November 24th, invoice No. 125386—19,680 pounds.

Under chocolate covered nuts at 48 cents a pound appears a notation, November 24th, invoice No. 125386—19,274 pounds.

And under chocolate covered—under chocolate nut meats at 42 cents, there appears the notation invoice of November 24th, invoice No. 125386 for 24,610 pounds.

Exhibit No. 60-A calls for chocolate nut meats,
2135 27,347 pounds at a 42-cent billing price; chocolate covered nut meats, 17,848 pounds at a 48-cent billing price and spice buttons, 32,010 pounds.

2136 Exhibit 63-A contains the following information: Chocolate nut meats at 42 cents billing price bears a notation August 27th, invoice number 120655—27,347 pounds. Chocolate covered nut meats at a billing price of 48 cents bears a notation, October 27th, invoice number 120655—17,848 pounds.

Under spice buttons, October 27th, invoice number 120655—32,010 pounds.

Exhibit No. 60-B calls for 30,000 assorted—Cardinal assorted chocolates. And Exhibit No. 63-A, under date of November 12th, invoice number 123402—30,000 pounds of Cardinals.

Exhibit No. 59-A calls for 59,856 pounds of Cardinal assorted chocolates.

On Exhibit 63-A there appears a notation, November 2nd, invoice number 112518—59,856 pounds of Cardinals.

Exhibit 58-A calls for 36,000 Cardinal chocolates. On 63-A the notation appears as October 20th, invoice number 119874—36,000 Cardinals.

Exhibit 57-A calls for 30,000 Cardinal chocolates.

Exhibit 63-A bears a notation, October 12th, 2137 invoice number 117892—30,000 Cardinal chocolates.

Exhibit 56-A calls for 8,119 bulk chocolate nut meats at a billing price of 48 cents.

Exhibit 63-A calls for—shows the date of September 29th, invoice number 114184—8,119 pounds of chocolate covered nut meats at a 48 cent billing price.

Q. If there a total on Government's Exhibit No. 63-A?

A. There is.

Q. What is that total?

A. $66,148.35.

Q. Do you know if that was recorded in the books of the Eatsum partnership?

A. I have no way of determining that, sir.

Q. Do you know what the total represents?

A. That represents the total overages due to Shotwell as of November 27, 1945.

Q. That would be on the shipments listed on that Government's Exhibit 63-A that you hold in your hand?

A. Yes, sir.

Q. Are there any further notations on Government's Exhibit 63-A relating to payments?

A. There are.

2138 Q. What are they?

A. One notation reads "Less advance of $30,000.00. Balance due $36,148.35."

Q. I show you Government's Exhibit No. 63, a ledger sheet of the Manufacturers Trust Company with an entry, $36,148.35, and ask if you recall having drawn such a check?

A. Yes, I would have.

Q. Do you recall to whom that check was made payable?

A. I don't. Probably cash.

By Mr. McConnell: I object to what it probably was and move that it be stricken.

By the Court: It may stand.

By Mr. Lockley:

Q. Do you have any recollection? Do you have any present recollection?

A. No, I don't.

2139 By the Court: What is the date of that entry on the ledger sheet of the Manufacturers Trust?

By Mr. Lockley: November 27, 1945.

By Mr. Lockley:

Q. Miss Feldman, what is the date of Exhibit 63-A, the settlement sheet?

A. November 27, 1945.

Q. Now, Miss Feldman, from the invoice and checks which you have seen and testified from, are you able to state the amount of overages recorded on the books of the Eatsum sole proprietorship and the partnership, during the year 1945—

By Mr. O'Brien: I will object.

By Mr. Lockley:

Q. —as paid to the Shotwell Manufacturing Company?

By Mr. O'Brien: I object to that part of the question which includes the books of the partnership. As I remember it, the witness just said that she couldn't tell us whether certain payments or transactions were recorded on the partnership books. I have no objection to a

2140 recap of, or summary of her figures on the book overages on the proprietorship, but I do object to the part of the question which includes the partnership books.

By the Court: Well, what books do you have reference to when you refer to the partnership books?

By Mr. Lockley: I have reference, your Honor, only to the exhibits which she had seen during the period of the partnership. There are no books in evidence for that period of time.

Perhaps I should restate my question in this way:

By Mr. Lockley:

Q. Are you able to tell us from your examination of the books of the sole proprietorship, and the other items in evidence which you have seen, including the checks to cash, and the settlement sheets, the amounts which are recorded as having been paid to The Shotwell Manufacturing Company during the year 1945?

A. I think I can give you that. For the single proprietorship, the amount paid out in overages to Shotwell appears at $105,473.88.

2141 By the Court: That includes the year 1945 only?

By the Witness: That is only 1945, for the single ownership. For the partnership, for the period from June 1—December 31, 1945, the amount—

By Mr. Kirby: If the Court please, I am not aware that this lady has identified even scraps of paper later than the 27th of November, but she now presumes to bring us to the end of December. And I object.

By the Court: Well, I am not too clear as to the date she refers to—when you state the date of December 31st.

By the Witness: Your Honor—

By Mr. Kirby: Excuse me, your Honor.

2142 By the Court: She can answer my question.

By the Witness: I used the date of December 31st only because it signifies the close of the year. The last sheet was the one that I was just shown for $66,148.35. If you wish, I will amend the date to read November 27, 1945.

By Mr. Lockley:

Q. All right. Will you answer the question then?

By Mr. Kirby: Well, I am confused. It is, of course, a grievous and serious matter, and if we might have a new question, so that I could again tell whether an objection would stand to that, I would appreciate that.

By the Court: Well, I think the question still stands, except that it is amended to read from June 1, 1945, to November 27, 1945.

By Mr. Kirby: Is that the way the government proposes the question then, with that amendment?

By Mr. Lockley: Yes, I will make that amendment, Mr. Kirby.

2143 By the Witness:

A. The amount of overages paid out from the partnership up to November 27th, 1945, was $71,672.35.

By Mr. Lockley:

Q. Does that relate to shipments up to November 27th; is that correct?

A. That relates to shipments to November—covering and including the shipment of November 24th.

By Mr. O'Brien: Excuse me, Mr. Lockley. Does that also include the payment on November 27th?

By the Witness: Yes, it does.

By Mr. Lockley:

Q. Now, will you give us the total of the two figures?

A. The total is $177,146.23.

By Mr. McConnell: If the Court please, I don't like to be in conflict with my colleague, but I would like to know if there is anything else down to the end of the year, for the record.

By Mr. Lockley: We are coming to it. We have gotten to November 27th now.

2144 By Mr. Lockley:

Q. Miss Feldman, I show you Government's Exhibit 63-A again, a settlement sheet, and I ask you if there is an item of advance on that settlement sheet?

A. Yes, there is.

2145 Q. And what is the amount of the advance?

A. $30,000.00.

Q. And do you know at what time that advance would have been made?

A. I would be unable to tell without the records.

Q. Would it have been made prior to or subsequent to the preparation of the settlement sheet?

A. That would—

By Mr. O'Brien: I object to the question. The lady says she is unable to tell when the advance was made.

By the Court: I so understood her answer.

By Mr. McConnell: He keeps referring to this as a settlement sheet. I don't understand that any foundation has been laid that this sheet was used to settle between Shotwell and the corporation, or proprietorship or partnership. If you want to call it a recap, all right, but certainly there is no showing that we sat down and settled on this basis. At least the corporation didn't.

By the Court: Well, I think it has been referred 2146 to as the recap sheet. Mr. Lubben may have referred to it as a settlement sheet. I don't remember.

By Mr. Lockley:

Q. Well, Miss Feldman, do you know what this sheet, 63-A, and similar sheets, is usually referred to as; is there any particular designation for it?

A. We called them several things. We have called them recap sheets, settlement sheets, overage sheets. There is no one particular way of referring to them.

Q. But any one of those terms has reference to the same type of record?

A. That is correct.

Q. All right, now I show you Government's Exhibit No. 64 and 64-A and B, and ask you if you can state if there is any relationship between those exhibits which consist of a check and two invoices, respectively.

A. Exhibit No. 64 is the payment of the two invoices, Exhibits Nos. 64-A and 64-B.

Q. In what amount?

A. The check is for $13,384.73.

Q. And I show you Government's Exhibit No. 65 and 65-A, B and C, and ask you if there is any
2147 relationship between those exhibits, which are a check and three invoices, respectively.

A. Yes, there is a relationship.

Q. And what is it?

A. Exhibit No. 65 is for the payment of the three invoices.

Q. And is that just the invoice amount, as shown on the face of the invoice?

A. Just the invoice amount.

Q. And what is the amount?

A. The total amount is—

Q. On the check.

A. $25,865.87.

2148 Q. I show you Exhibit 66 and 66-A, and B, and C, and ask if there is any relationship between those exhibits consisting of a check and three invoices?

A. There is.

Q. And what is that relationship?

A. Exhibit No. 66 is in payment of the three invoices.

Q. Of the face amount of the invoices?

A. Of the face amount of the invoices.

Q. And what is the amount?

A. $13,091.45.

Q. I show you Government Exhibits 67 and 67-A and B, and ask if there is any relationship between those documents, consisting of a check and two invoices?

A. There is.

Q. And what is it?

A. Exhibit No. 67 is in payment of the two invoices attached.

Q. Of the face amount of the invoices?

A. Face amount of the invoice.
Q. And what is the amount?
A. $13,603.79.
2149 Q. And I show you Exhibit 68 and Exhibit 68-A, a check and an invoice and ask you if there is any relationship between those two exhibits?
A. There is.
Q. And what is it?
A. Exhibit No. 68 is in payment of the attached invoice.
Q. Of the face amount?
A. The face amount.
Q. And what is the amount?
A. The check is for $18,119.46.
Q. And I show you Exhibits 69 and 69-A, a check and an invoice, and ask if there is any connection between those two exhibits?
A. Exhibit No. 69 is in payment of the face of the invoice attached.
Q. In what amount?
A. This is $11,565.72.
Q. All right. I show you Exhibit 70 and 70-A, check and an invoice, and ask if there is any relationship between those two documents?
A. There is.
Q. And what is it?
A. Exhibit 70 is in payment of the face amount of the invoice attached.
2150 Q. In what amount?
A. $13,967.59.
Q. I show you Exhibits 71 and 71-A, a check and an invoice, and ask if there is any relationship between them?
A. There is.
Q. And what is it?
A. Exhibit No. 71 is in payment of the face amount of the invoice attached.
Q. And what is the amount?
A. $10,370.26.
Q. I show you Exhibit 72 and Exhibit 72-A, and ask if there is any relationship between those exhibits?
A. There is.
Q. And what is that?
A. Exhibit No. 72 is in payment of the face amount of the invoice attached.

A. $5,717.95.

Q. I show you Government Exhibit 14-C, and I ask if you have seen that before?

A. I have.

Q. Do you know who prepared it?

2151 A. I did.

Q. When?

A. February 6, 1946.

Q. At whose direction?

A. Mr. Lubben's.

Q. And what did you do with it after you prepared it?

A. I gave it to Mr. Lubben.

Q. Now, is there any relationship between Exhibit 14-C—will you describe what that is?

A. It is a recap sheet for shipments from November 30 up to and including January 17, 1946.

Q. Is there any relationship between that exhibit, 14-C, the settlement sheet, and Exhibits 64-A and B; 65-A, B, and C; 66-A, B, C; 67-A, B; 68-A; 69-A; 70-A, and 71-A?

A. Yes, there is a relationship.

Q. Now, have you compared Exhibits 64-A and B; 65-A, B, and C; 66-A, B, and C; 67-A, and B; 68-A; 70-A, and 71-A; with Exhibit 14-C?

A. I have.

Q. And are each of the exhibits I have enumerated reflected in Exhibit 14-C?

A. They are.

2152 Q. And what is the nature of the information contained on 14-C?

A. It shows the item received, the date, and the poundage, and the overage.

2153 Q. Any other information; the item, the date and the poundage; and what is the nature of the items?

A. Cardinals, spice buttons, chocolate covered nuts, billed at 42 cents; and chocolate covered nuts at 48 cents.

Q. Any further information?

A. Yes, the total weight of each classification of candy, multiplied by the overage, to get the actual extension for the item.

Q. All right. And what is the total amount?

A. $41,682.10.

By the Court: Was that the overage?

By the Witness: That is the total amount of the overage, sir.

By Mr. Lockley:

Q. I show you Government's Exhibits 14, 14-A and 14-B, and ask if you have seen them before?

A. I have.

Q. And when was that?

A. When Mr. Lubben returned and gave these to me.

Q. Do you know who prepared them; do you recognize the handwriting?

A. Mr. Lubben prepared these.

2154 Q. And what did you do with them after he had returned them to you?

A. I voided the checks in the check book.

Q. Were those checks in the same condition then that they are at the present time?

A. They are.

Q. That is to say, did they have the names cut out at the time they were returned to you?

A. I received them with the names cut out.

Q. Will you total those three checks for me, please?

A. $41,682.10.

Q. Will you compare that with the total on Exhibit 14-C?

A. It is the same as the total on Exhibit 14-C.

Q. I show you Exhibit 73-A and ask you if you have seen that before?

A. Yes, I have seen this before.

2155 Q. Do you know who prepared it?

A. I must have, because of the information contained hereon.

Q. Do you recognize the handwriting on it?

A. There are some figures here in Mr. Lubben's handwriting.

Q. Now, is Exhibit 73 in any way reflected to Exhibit 14-C, both of them being settlement sheets?

A. Yes, there is a relationship.

Q. And what is it?

A. Settlement sheet, 73-A, contains exactly the same items as Exhibit 14-C, with one difference. There is an additional shipment shown on 73—73-A, that is—dated February 28, 13,892 pounds chocolate covered nuts.

By Mr. O'Brien: 73-A or C?

By the Witness: That's 73-A.

By Mr. Lockley:

Q. The difference is in the shipment of February 28th?

A. That is correct, the 13,892 pounds of chocolate covered nuts.

Q. And do you have an invoice in your hand for
2156 that shipment of chocolate covered nuts; if so, will you give us the information from it and the exhibit number?

A. Yes, the invoice covering that shipment of February 28th is Exhibit No. 72-A.

Q. And what is the amount of shipment or the weight of the shipment?

A. 13,892 pounds of chocolate covered nuts at 42 cents.

Q. Now, I show you Government's Exhibit No. 73 and ask if you have seen that before, or the original.

A. Yes.

Q. Do you know who wrote it?

A. No. This was written after the corporation was formed. I was not there at the time.

By Mr. Kirby: I didn't hear that.

By Mr. Lockley:

Q. You don't know?

A. I say this was written after the corporation was formed. I was not there at the time.

Q. I ask you to compare that exhibit, No. 73, with Exhibit No. 73-A, and tell me if there is any relationship.

A. There is.

2157 Q. And what is it?

A. There is a notation on the recap sheet of $35,536.00. Exhibit No. 73 is $35,536.00.

Q. I also show you the reverse of Exhibit 14-C and ask you if you recognize the handwriting on it.

A. That is Mr. Lubben's handwriting.

By Mr. O'Brien: What is 73-C, Mr. Lockley?

By Mr. Lockley: Just a second. I don't think there is one.

By Mr. O'Brien: I am just confused between 73-A and C.

By Mr. Lockley: 73-A is an invoice—I am sorry. 73-A is that settlement sheet, correct?

By Mr. Krane: Yes.

By Mr. Lockley: And 73 is a check for $35,536.00. There is no 73-C, Mr. O'Brien.

By Mr. O'Brien: Oh.

By Mr. Lockley: 14-C.

If your Honor please, I have reached a stopping point, if you wish to take the morning recess now.

2158 By the Court: All right. Take a recess for ten minutes.

By the Marshal: This honorable court will now recess for ten minutes. Everybody remain standing until the jury gets in the jury room, please.

(Short recess.)

By Mr. Lockley:

Q. Miss Feldman, I show you Government's Exhibit for identification No. 74 and ask if that is a record kept by the General Confections in the ordinary course of business.

A. It is.

Q. Do you know from whom it was received?

A. Shotwell Manufacturing Company.

Q. I show you Exhibit No. 74—

By the Court: 74?

By Mr. Lockley: The first one was 74-A, your Honor, in case I was wrong. This is Exhibit 74.

By Mr. Lockley:

Q. Is that a record kept in the ordinary course of business?

A. It is.

2159 Q. And as part of the books and records of the General Confections?

A. It is.

Q. Is it true and correct, to the best of your knowledge?

A. Yes.

By Mr. Lockley: I offer Exhibits Nos. 74 and 74-A.

By Mr. McConnell: No objection.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 74 and 74-A.)

By Mr. Lockley: May I have your indulgence for just a moment? I believe we may be able to shorten this by stipulation.

2160 By Mr. Lockley: If your Honor please, counsel for the government and counsel for the defendants have stipulated that the following exhibits may be introduced into evidence:

Government's Exhibit 74, which is a check for $1,130.14.

By Mr. Kirby: If the Court please, I would like to make plain the basis of the stipulation, and that is that these are all on the books of Shotwell. They are all recorded and taxes have been paid on them. There is no question about anything on these transactions at all.

By the Court: Very well.

By Mr. Lockley: Government's Exhibit 74, a General Confections check to Shotwell for $1,130.14.

Government's Exhibit 74-A, an invoice from Shotwell to General Confections showing the same amount.

By the Court: I assume it is stipulated that the check is in payment of the face of the invoice?

2161 By Mr. Lockley: Yes, your Honor.

By Mr. Kirby: That is right. They all match out. They are all shown on the books. There is no controversy. The taxes were paid on them.

By Mr. Lockley: Government's Exhibit 75-A is an invoice from Shotwell to General Confections for $1,523.52 and Government's Exhibit 75 is a check from General Confections to Shotwell for $1,493.05 which is less 2 per cent discount.

Government's Exhibit 76 is a check from General Confections to Shotwell for four thousand—

By the Court: Is that 76 or 76-A?

By Mr. Lockley: Perhaps I better take them in logical sequence. I will take the invoices first in every case.

Government's Exhibit 76-A is an invoice from Shotwell to General Confections for $4,501.56.

Government's Exhibit 76 is a check from General to Shotwell for $4,411.53. It is the invoice price less 2 per cent discount.

2162 77-A is an invoice from Shotwell to General Confections for $1,627.50.

Government's Exhibit 77 is a check from General to Shotwell in the amount of $1,594.95, which is the invoice amount less 2 per cent discount.

By the Court: Read the amount of the check again, please.

By Mr. Lockley: $1,594.95.

Government's Exhibit 78-A is an invoice from Shotwell to General Confections for $1,732.50.

Government's Exhibit 78 is a check from General to Shotwell for $1,697.85, which is the amount of the invoice less 2 per cent discount.

Government's Exhibit 79-A is an invoice from Shotwell to General Confections for $3,148.65.

Government's Exhibit 79 is a check from General Confections to Shotwell in the amount of $3,085.68, which is the invoice less 2 per cent discount.

2163 Government's Exhibit 80-A is an invoice from Shotwell to General for $4,528.13.

Government's Exhibit 80 is a check from General to Shotwell for $4,437.57, which is the invoice price with 2 per cent discount.

Exhibit 81-A is an invoice from Shotwell to General for $6,094.35.

Government's Exhibit 81 is a check from General to Shotwell for $5,972.46, which is the amount of the invoice less 2 per cent discount.

Government's Exhibit 82-A is an invoice from Shotwell to General for $1,640.93.

Exhibit 82 is a check from General to Shotwell for $1,608.11, which is less the 2 per cent discount.

2164 Government's Exhibit 83-A is an invoice from Shotwell to General Confections for $1,741.33.

Government's Exhibit 83 is a check from General to Shotwell for $1,706.60, which is the amount of the invoice less two percent discount.

Exhibit 84-A is an invoice for $3,429.30 plus freight charges, making a total of $3,513.51.

Government's Exhibit 84 is a check from General to Shotwell for $3,444.92, which is less the two percent discount.

Government's Exhibit 85-A is an invoice for $5,409.60 from Shotwell to General, and Exhibit 85 is a check from General to Shotwell, for $5,301.41, which is the invoice less two percent discount.

Government's Exhibit 86-A is an invoice of Shotwell to General for $4,677.74, and Exhibit 86 is a check from General to Shotwell for $4,584.15, which is the invoice less two percent discount.

Government's Exhibit 87-A is invoice for $6,720.00,
2165 from Shotwell to General.

Exhibit 87 is a check from General to Shotwell for $6,585.60, which is the invoice less two percent discount.

Government's Exhibit 88-A is an invoice from Shotwell to General for $5,448.24, Exhibit 88 is a check from General to Shotwell for $5,339.28, which is the invoice less two percent discount.

Government's Exhibit 89-A is an invoice from General to Shotwell—I mean, from Shotwell to General for $8,010.24, and Exhibit 89 is a check from General to Shotwell for $7,850.04, which is the invoice less two percent discount.

Government's Exhibit 90-A is an invoice from General, —or from Shotwell to General for $4,085.76.

Government's Exhibit 90 is a check from General to Shotwell for $4,004.04, which is the invoice less two percent discount.

Government's Exhibit 91-A is an invoice from Shotwell to General for $6,000.20, And Government's Exhibit 91 is
a check from General to Shotwell for $5,880.20, which
2166 is the amount of the invoice less two percent discount.

By Mr. Lockley:

Q. Now, Miss Feldman—

By Mr. McConnell: Why don't you read all of them, Mr. Lockley, and we will be through with them. You have some more.

By Mr. Lockley: We have some more. Do you want me to read them now?

By Mr. McConnell: Yes.

By Mr. Lockley: All right.

By the Court: The exhibits referred to may be received in evidence.

(Said documents were received in evidence by the court, and marked Government's Exhibits 74, 74-A, 75, 75-A, 76, 76-A, 77, 77-A, 78, 78-A, 79, 79-A, 80, 80-A, 81, 81-A, 82, 82-A, 83, 83-A, 84, 84-A, 85, 85-A, 86, 86-A, 87, 87-A, 88, 88-A, 89, 89-A, 90, 90-A, 91, 91-A.)

By Mr. Lockley: Counsel for the Government, and counsel for the defendants likewise stipulate that the

following exhibits may be received in evidence with-
2167 out objection—

By the Court: Very well.

By Mr. Lockley: Government's Exhibit 103-A, an invoice from Shotwell to General Confections for $2,300.40.

Government's Exhibit 103, a check from General to Shotwell for $2,254.39.

By the Court: $2,664.—

By Mr. Lockley: $2,254.39, which is the invoice less the two percent discount.

2168 Government's Exhibit 104-A, an invoice for $2,656.80.

Government's Exhibit 104, a check from General to Shotwell for $2,603.66 which is less the 2 per cent discount.

Government's Exhibit 105-A, an invoice from Shotwell to General for $2,484.00.

Exhibit 105, a check from General to Shotwell for $2,434.32, which is less the 2 per cent discount.

Government's Exhibit 106-A, an invoice from Shotwell to General for $3,600.00.

Exhibit 106, a check from General to Shotwell for $3,528.00 which is less 2 per cent discount.

Government's Exhibit 107-A, an invoice for $3,697.20 from Shotwell to General, and Exhibit 107, a check from General to Shotwell for $3,623.26, which is less the 2 per cent discount.

Government's Exhibit 108-A, an invoice for $2,678.40 from Shotwell to General and Exhibit 108, a check from
General to Shotwell for $2,624.83, which is less the 2
2169 per cent discount.

Government's Exhibit 109-A an invoice for $2,387.60 from Shotwell to General and Exhibit 109, a check from General to Shotwell for $2,319.85, which is less the 2 per cent discount.

Government's Exhibit 110-A, an invoice for $2,520.00 from Shotwell to General. Exhibit 110, a check from General to Shotwell for $2,469.60 which is less the 2 per cent discount.

Government's Exhibit 111-A, an invoice for $1,638.00, and Exhibit 111-B, an invoice for $4,140.00.

By the Court: Wait a minute. 111-A is an invoice. What is the check number?

By Mr. Lockley: There are two invoices there, your Honor.

By the Court: Oh.

By Mr. Lockley: The first is for $1,638.00. That is 111-A. And 111-B is $4,100.40. Exhibit 111 is a check from General to Shotwell for $5,738.40.

(Handing documents to counsel.)

2170 By Mr. McConnell: There is no objection to those.

By Mr. O'Brien: What is the series number?

By Mr. Lockley: Do you want the exhibit numbers?

By Mr. O'Brien: Yes, please.

By Mr. Lockley: They go from 113 to 119.

By Mr. Kirby: Give me the second group.

By Mr. Lockley: Counsel for the government and counsel for the defendants likewise stipulate the following exhibits may be received in evidence without objection—

By the Court: Very well.

By Mr. Kirby: And incidentally, it is plain, I am sure, but it is for the same reason that we stipulated before—it is all paid for. The taxes are paid for.

By the Court: Yes.

2171 By Mr. Lockley: Government's Exhibit 113-A,—

By the Court: You skipped 112?

By Mr. Lockley: Yes, your Honor. That is another matter.

By the Court: Go ahead.

By Mr. Lockley: Government's Exhibit 113-A is an invoice—perhaps I can save time if I say these are all Shotwell invoices to the General Confections and the checks are all from General Confections to The Shotwell Manufacturing Company.

By the Court: Yes.

By Mr. Lockley: Government's Exhibit 113-A is an invoice for $1,202.40. Exhibit 113 is a check for $15,631.55.

Government's Exhibit 113-B is another invoice for $14,748.16. Exhibit 113 paid Exhibits 113-A and B.

Government's Exhibit 114-A is an invoice for $16,000.00 and Government's Exhibit 114-B is an invoice for $2,040.00. Exhibit 114 is a check for $17,697.20.

Government's Exhibit 115-A is an invoice for $15,
2172 877.12. Exhibit 115 is a check for $15,559.58.

Government's Exhibit 116-A is an invoice for $14,757.12. Exhibit 116 is a check for $14,461.98.

Government's Exhibit 117-A is an invoice for $8,377.60. Exhibit 117 is a check for $8,210.05.

Government's Exhibit 118-A is an invoice for $2,404.80. Exhibit 118 is a check for $2,356.70.

Government's Exhibit 119-A is an invoice for $1,202.40. Exhibit 119 is a check for $1,178.35.

In every instance where the amount of the check and the amount of the invoice do not coincide, it is because of the two per cent discount having been taken.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 103, 103-A, 104, 104-A, 105, 105-A, 106, 106-A, 107, 107-A, 108,
2173 108-A, 109, 109-A, 110, 110-A, 111, 111-A, 111-B, 113, 113-A, 113-B, 114, 114-A, 114-B, 115, 115-A, 116, 116-A, 117, 117-A, 118, 118-A, 119, 119-A.)

2174 (Handing documents to counsel.)

By Mr. McConnell: No objection.

By Mr. Lockley: If your Honor, please, it is likewise stipulated between the counsel for the Government and for the defendants that the following exhibits may be received in evidence without objection:

121-C, an invoice for $408.00. Government's Exhibit 121-D, an invoice for $4,069.47. Exhibit 121-E, an invoice for $18,672.00.

By the Court: Is that E?

By Mr. Lockley: E.

By the Court: A, B, and then you jumped to E?

By Mr. Lockley: No, your Honor, A and B are checks which I have not yet come to. The invoices are C, D and E. This is invoice 121-E, $18,672.64.

Government's Exhibit 121-F is an invoice showing a correction and a balance due Shotwell of $175.11 on account of an incorrect billing.

Exhibit 121 is a check from General Confections to
2175 Shotwell for $8,000.00.

Exhibit 121-A is another check for $8,000.00, and Exhibit 121-B is a check for $7,325.22.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 121, 121-A, 121-B, 121-C, 121-D, 121-E and 121-F.)

(Handing documents to counsel.)

By Mr. Lockley: It is stipulated between counsel for the Government and counsel for the defendants that the

following exhibits may be introduced in evidence without objection—Exhibit 123-A.

By the Court: 123?

By Mr. Lockley: 123-A, an invoice for $636.16. 123, a check for $623.44.

Government's Exhibit 125-A, an invoice for $1,202.40. 125-B, an invoice for $2,404.80 and Exhibit 125-C, an invoice for $1,202.40.

2176 Government's Exhibit 125 is a check for $4,809.60.

By the Court: The exhibits may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 123, 123-A, 125, 125-A, 125-B, 125-C.)

By Mr. Lockley: Is there any objection to the invoices?

By Mr. McConnell: No objection to the invoices.

By Mr. Lockley: It is stipulated that the following exhibits may be admitted in evidence without objection—Exhibit 127, an invoice for $19,676.16. Exhibit 128, an invoice for $6,653.18. Exhibit 129, an invoice for $7,757.43.

Government's Exhibit 130 is an invoice for $4,489.93. Government's Exhibit 131 is an invoice for $3,175.20 and 132 is an invoice for $3,360.52.

By Mr. McConnell: Are you offering these?

2177 By Mr. Lockley: If you have no objection.

By Mr. McConnell: We have no objection as to those, as to the foundation. We object to these checks on the ground that they are all in 1947, which is outside of the indictment period. He has to lay a foundation for the admission of the checks.

By Mr. Lockley: Well, I will develop later on, your Honor, that these checks were issued in payment of certain invoices and shipments which were made during the year 1946. The checks were written in 1947.

By the Court: Very well.

By Mr. Lockley: I will do that when I come to it.

(Said documents were received in evidence by the Court and marked Government's Exhibits 127, 128, 129, 130, 131, and 132.)

2178 By Mr. Lockley:

Q. Miss Feldman, will you examine Government's Exhibit 74, and 74-A, 75, and 75-A, 76, and 76-A, 77 and 77-A, 78 and 78-A, 79, and 79-A, 80 and 80-A, 81 and 81-A,

82, and 82-A, 83, and 83-A, 84, and 84-A, 85, and 85-A, 86 and 86-A, 87 and 87-A, 88 and 88-A, 89 and 89-A, 90 and 90-A, 91 and 91-A, and tell me if those exhibits have any relation to each other?

A. They have.

Q. What is that relationship?

A. The checks are all payments of the invoice amount.

Q. And the invoices are all exhibits with the letter "A" following the exhibit number, is that correct?

A. That is so.

Q. And the checks are all the numbers without the letters following?

A. That is so.

Q. Now I show you Government's Exhibit in evidence, 101, and ask you if you can state if that has any connection to Exhibits 74-A to 91-A, inclusive?

2179 By Mr. O'Brien: Is Exhibit 101 in evidence, Mr. Lockley?

By Mr. Lockley: Yes, sir.

By Mr. O'Brien: What is it, a recap sheet?

By Mr. Lockley: It is a recap sheet.

By Mr. McConnell: Haven't you work sheets you can use to shorten this up?

By Mr. Lockley: Well—

Q. Can you?

A. Yes, sir, the work sheet will show it.

Q. Refer to your work sheets and maybe you can tell us quicker that way.

2180 A. There is a relationship.

Q. Will you describe it?

A. With the exception of 88-A, 84-A, 85-A, 75-A and 76-A, all the other invoices appear on the recap sheet.

Q. And in what manner do they appear?

By the Court: When you speak of the recap sheet you should refer to it by Exhibit number.

By the Witness: I am sorry, sir. It is Exhibit—they appear on Exhibit 101.

By Mr. Lockley:

Q. And Exhibit 101 is a recap sheet?

A. That is correct.

Q. Now, in what manner do they appear?

A. There is a notation as to gum work and Cardinals, all Shotwell shipments, and under gum work appears a notation: March 25, 496 cases of gum drops, 14,880 pounds.

Q. And that is Government's Exhibit 74-A?
A. That refers to 74-A.
Q. All right.
A. Government's Exhibit 75-A appears on Exhibit
2181 No. 101 as April 12th, 700 cases of gum drops, 21,000 pounds.
Exhibit No. 78-A appears on Exhibit 101 as 21,000 pounds of spice strings.
Q. Will you check Exhibit No. 75-A and see if you are correct on that number.
A. 75?
Q. On the 2100 pounds.
A. No, 75-A is not included on this recap sheet.
Q. All right. Well, you said one of them was 75-A.
A. I am sorry.
Q. What is the correct number of that exhibit?
A. Spice strings is 78-A.
Q. And the one before that?
A. 77-A.
Q. All right. That's it.
A. 77-A appears on Exhibit No. 101 as 21,000 pounds of spice strings.
Q. Well, to shorten it, can you state that with the exception of those exhibits you enumerated, 75-A, 76-A, 84-A, 85 and 88-A—
By the Court: Will you read them again, a little more slowly?
2182 By Mr. Lockley:
Q. —75-A, 76-A, 84-A, 85-A and 88-A, that each one of the exhibits from 74-A to 91-A, inclusive, are reflected on Exhibit 101?
A. That is so.
Q. Now, what is the nature of the information contained on Exhibit 101?
A. The date of the shipment, the number of cartons, the name of the item, the weight, the overage per pound, and the total amount due on overages for each item.
Q. And is that information, as contained on 101, does it correspond to the similar information contained on Exhibits 74-A to 91-A, inclusive, with the exception of 75-A, 76-A, 84-A, 85-A and 88-A?
A. It does.
By Mr. Kirby: And with the exception of the overage. You mean that, Mr. Lockley?

By Mr. Lockley: No, I did not mean that.
By Mr. Lockley:
Q. What was the purpose for the preparation of Exhibit 101, if you know?
A. There was going to be a payment made on the overages due for this group of shipments.
2183 Q. And what is the significance of the figures with the dollar marks in front of them?
By Mr. O'Brien: Just a minute. I would like to move to strike the answer that there was going to be a payment. You mean there was going to be a check drawn for cash.
By the Court: Well, I don't think she is to draw any conclusions from exhibits. She may read the exhibit, if that is what you have in mind, but I don't understand that she prepared it.
Or did you prepare it?
By the Witness: This is Lubben's handwriting.
By Mr. Lockley:
Q. Do you recognize that handwriting?
A. Mr. Lubben's.
Q. Mr. Lubben's handwriting. Now, I show you Government's Exhibit 102. Have you ever seen that before?
A. Yes.
Q. And is that also a settlement sheet?
A. It is.
Q. And does that have any relationship to Gov-
2184 ernment's Exhibit 74-A to 91-A?
A. It has.
Q. What information does it contain?
By Mr. Kirby: If the Court please, I would like to inquire—at the moment. I am under the impression that this young lady was not working for General Confections at this time. Now, am I right or wrong about that?
By Mr. Lockley: That is a record kept in the ordinary course of business.
By Mr. Kirby: Excuse me.
By the Court: Wait a minute. Let's find out.
By Mr. Kirby: I don't mean to be interrupting, but I don't think she was even working there at this time, was she?
2185 By Mr. Lockley:
Q. Do you know the date of that settlement sheet, Exhibit 102?
A. Yes.

Q. And what is it?

A. May 15th.

Q. May 15th. And were you working for General Confections at that period of time?

A. I was not.

By Mr. Kirby: I move to strike all her responses with respect to Exhibit 102, and also all of her responses with respect to Exhibit 100, because she wasn't working there during the period of Exhibit 100, either.

By the Court: Well, 101 and 102 are in evidence. She hasn't presumed to lay any foundation for those exhibits.

By Mr. Kirby: But she was explaining how they were made up. And she wasn't even there.

By Mr. Lockley: These are records which are kept in the ordinary course of business, your Honor.

2186 By the Court: I assume that there has been a foundation laid for them.

By Mr. Kirby: But we don't want it adorned by the proof of this lady who wasn't there. That's why I object to it.

By Mr. Lockley: It isn't necessary for her to be there, your Honor. Under Section 1732, Title 28, United States Code—

By the Court: She was asked if there was any relationship between Exhibit 101 and Exhibits 74-A to 91-A, inclusive, except certain exhibits. She pointed out that there was that connection by having a notation of similar invoices as appear on the Exhibit 101. So I understood.

By Mr. O'Brien: We have no objection to that.

By the Court: I don't know just what Mr. Kirby is referring to then.

By Mr. McConnell: I object to it.

By Mr. Kirby: So do I.

By Mr. McConnell: She isn't supposed to be an expert on books.

By the Court: I will overrule the objection.

2187 By Mr. Kirby: And I want to apologize to the Court. I sat her for five minutes and listened to her testimony before I remembered she wasn't there.

By the Court: I see no objection to her calling—I see no objection to her statement that the same invoice numbers as reflected in these various exhibits appear on Exhibit 101. That is all she did.

By Mr. O'Brien: There was one statement she made, though, Judge, which I asked be stricken and I didn't hear your Honor rule. Miss Feldman said, "We were about to pay certain overages," and I ask that be stricken.

By the Court: Well, I don't remember that statement. If that statement was made about during the time she was not employed there, then it may be stricken.

2188 By Mr. Lockley:

Q. Now, Miss Feldman, will you look at Exhibit 102 and tell me the amount in dollars?

A. $33,567.

Q. Will you read from that exhibit sheet, from that Exhibit 102, how that amount was paid?

By Mr. Kirby: If the Court please, I object. That relates to a period when I am under the impression she was not there, and the document will speak for itself.

By the Court: Well, if it appears on the exhibit, she may read from it.

By Mr. Lockley: May I read from it, your Honor? It is in evidence.

By the Court: Yes.

She can read it, or counsel can read it. Anyone can read it if it is in evidence.

By Mr. Lockley: Exhibit 102 is what is commonly called a settlement or recap sheet, headed "Shotwell shipments", with a column, gum work, and the dates from March 25 to April 30, the column of description, gum drops, spice drops, the amount of each shipment in 2189 pounds, the column 10 cents a pound, and a total extension in dollars amounting to $19,518.00.

Another column headed "Cardinals" showing shipments from April 10 to May 6, the number of dozen, the figure $2.25 a dozen, and the total amount, $14,049.00. Total gum work, $19,518.00; total Cardinals, $14,049.00; for a total of $33,567.00, less payments paid to Frank on way to farm, $1,488.00; paid to Frank in Chicago, $14,000.00; paid to Miss Krasne, or Mr. Krasne, for Mr. Cain, $1,450.00; paid to Frank by Hankermyer, $8,450.00, total twenty-three thousand—I am sorry—$25,388.00; $33,567.00, from which is subtracted $25,388.00, and the figure is $8,179.00 balance, paid to Frank by Heitmann.

This cleans up allowances on all shipments to May 15.

By Mr. Lockley:

Q. Now, Miss Feldman, I show you Government's Exhibits 103, 103-A, 104, 104-A, 105, 105-A, 106, 106-A, 107, 107-A, 108, 108-A, 109, 109-A, 110, 110-A, 111, 111-A, and 111-B, and ask if those exhibits bear any relationship
2190 to each other?

Use your work sheets, if necessary.

By the Court: Those are not in evidence.

By Mr. Lockley: They were just stipulated in evidence.

By the Court: Just now?

By Mr. Lockley: Yes, sir. Those were part of them.

By the Court: I am sorry. Yes, that's right.

2191 By the Witness:

A. Yes, they do bear a relationship.

By Mr. Lockley:

Q. What is the relationship?

A. The checks offered in evidence are in payment of the invoice amount on the attached invoices.

Q. I show you Government's Exhibit No. 112, in evidence, and ask you if that bears any relationship to Exhibits 103-A to 111-B, inclusive, which are the invoices?

By Mr. Kirby: If the Court please, I wonder if we might not be informed before he proceeds to ask this young lady about that whether it is not true that she was not in the employ of General Confections during the periods of each of the invoices to which he is now directing her attention.

By the Court: Yes, you may.

By Mr. Lockley:

Q. Miss Feldman, when did you begin your employment with the General Confections?

A. Around August 1 of 1946.

Q. And I call your attention to Exhibit No. 112,
2192 do you know when that was made up?

A. I don't—after July 11.

Q. And how are you able to tell that?

A. Well, the last date on this recap slip appears as July 11.

Q. And what was your position in the General Confections when you began your work around August 1?

A. Office manager and head bookkeeper.

Q. And as such did you have charge of the files and the books and records of the General Confections Company?

A. I did.

Q. Did you find those invoices and those checks and that Exhibit 112 in those files when you arrived?

A. I did.

Q. And were they a part of the regularly kept books and records of the General Confections?

A. They were.

By Mr. O'Brien: Well, that is disputed. And I don't think there is any evidence to show that they were part of the regular records, within the meaning of the Federal Shop Book rule.

2193 By the Court: Which exhibits are you referring to when asking that question?

By Mr. Lockley: Specifically to 112, a recap sheet.

By Mr. O'Brien: It is a recap sheet and not part of the regular books and records, as defined by Mr. Lubben.

By Mr. Lockley:

Q. Miss Feldman, what was the general practice of the General Confections in keeping a record of overages?

By Mr. Kirby: I wish to object to that question specifically because Exhibit 112, to which reference is being made, and each of the invoices on it, are dated for a period which it now appears was not a period of this young lady's service. She was not there.

By the Court: Yes, I think you will have to lay further foundation for Exhibit 112.

Well, I think it is about adjournment time.

2194 Before we adjourn, members of the jury, I wanted to make this statement to you, that my attention has been called to a news item in one of the morning papers regarding some civil tax litigation involving one of the defendants in this case.

Now, those proceedings are in the United States Tax Court in Washington, D. C., and are of a civil nature.

Now, the headline of the article makes reference to the Shotwell case. Of course, the tax litigation referred to in the article is in no way connected with the Shotwell case or the Shotwell Company.

If any of you have read the article, you will completely disregard the same and remove from your mind any inference or suggestion that the civil tax litigation in Washington involving one of the defendants is in any way connected with this case.

And in that connection I ask you not to read any news items which might appear in any of the newspapers
2195 regarding the proceedings in this case. This case must be decided on the evidence you hear in the court room and nothing else. And in order that you may in no way be influenced by news reports of these court proceedings I ask you to refrain from reading any news articles of the case during the time that you are serving as jurors.

We will be in recess now until two o'clock.

By Mr. O'Brien: Your Honor, may I interrupt at this point to make a motion in that connection?

By the Court: Well, I think that is all that I will state now to the jurors. You may make your motion subsequently.

By Mr. O'Brien: Yes, sir.

By the Marshal: This honorable court will now recess until two o'clock this afternoon.

Everybody will kindly remain standing until the jury is in the jury room.

(Whereupon a recess was taken to 2:00 o'clock p. m. of the same day, being Friday, September 25, 1953.)

2196 * * (Caption—No. 52 CR 143) * *

Chicago, Illinois,
Friday, September 25, 1953,
2:00 o'clock P. M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley
Mr. Vincent O'Brien
Mr. Thomas C. McConnell
Mr. William T. Kirby

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:—

By the Marshal: This Honorable Court will now resume its session.

By the Court: You may proceed.

2197 BEATRICE FELDMAN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Continued)

By Mr. Lockley: If your Honor please, I would now like to read from the recap sheet, Government's Exhibit 112, and from the invoice which that Government Exhibit—

By the Court: I don't follow you, Mr. Lockley.

By Mr. Lockley: I would now like to read from the recap sheet which is Government's Exhibit 112, and show the relationship between that recap sheet, and the Government's Exhibits 102- to 111-B, respectively.

By the Court: Very well.

By Mr. Lockley: Government's Exhibit 112 is headed, "The Shotwell Manufacturing Company", with five columns headed, respectively, "Invoice Number", "Date", "Item", "Weight", and "Cost".

The first line on Government's Exhibit 112 is C219517. The date is 6/18/46. 1,000 cases jells; weight, 30,000.

2198 Cost, $3,600.00.

That is in agreement with the information contained on Government's Exhibit 106-A, which has the same invoice number, the same date, the same description of items, the same weight and the same cost.

In the interest of brevity, the same will be true of the other invoices.

The second line on Exhibit 112 is C220289. Date 6/20/46. 690 cases of jell jells. Weight, 20,700. Cost, $2,484.00.

That information is likewise contained on Government's Exhibit 105-A.

Third line is C220591. The date is 6/25/46. 738 cases jell jells. Weight, 22,140. Cost, $2,656.80, which is the information contained on Exhibit 104-A, an invoice.

2199 The fourth line of Government's Exhibit 112 is C221149. The date is 6/28/46. 369 cases Jell Jells. Weight, 19,170. Cost, $2,300.40. It agrees in every respect with the information on Government's Exhibit 103-A, an invoice.

The fifth line is invoice number C221448. The date is 7/2/46. 1,027 cases of Jell Jells. Weight, 30,810. Cost,

$3,697.20—which is the amount and other information shown on Government's Exhibit 107-A, an invoice.

The sixth line of Government's Exhibit 112 is invoice number C222035, dated 7/5/46. Item, 744 Cases of Jell Jells. Weight, 22,320. Cost, $2,678.40—which information is likewise contained on Government's Exhibit 108-A.

By the Court: Perhaps you can summarize your statement by making some general statement which applies to the remaining invoices as they may be related to Government's Exhibit 112.

By Mr. Lockley: Government's Exhibit 109-A and
2200 110-A and 111-B are likewise contained in a columnar fashion on Government's Exhibit 112 and are exactly the same information. There is a total weight of all items of $242,190.00.

By the Court: Will you state that again, please?

By Mr. Lockley: Pardon me, sir. It is 242,190 pounds.

By Mr. Lockley:

Q. Miss Feldman, I ask if you know on the books of the General Confections Company, what was the amount of overage that was charged on items listed on Government's Exhibit 112?

By Mr. Kirby: If the Court please, I object because this all relates to a period when the lady was not there.

By the Court: Well, if the books are in evidence, why she may answer the question.

By Mr. Lockley: I am sorry, sir. The books are not in evidence. We have no books for that period.

By Mr. Kirby: No.

2201 By the Court: I don't know that you have laid any foundation for the admission of secondary evidence.

By Mr. Lockley: These items are in evidence. I will withdraw the question then.

By Mr. Kirby: If the Court please, I will further call your attention—

By the Court: There is nothing before the Court now.

By Mr. Kirby: Excuse me. I wanted to say that he was reading from Exhibit 112 the dollar amount on there which is the invoice amount and not the overage amount. It is just a recap of invoices.

By the Court: I make no comment about it.

By Mr. Kirby: Oh, but he didn't read the whole thing.

By Mr. Lockley: I read all of it. Would you like to examine it?

By Mr. Kirby: I think under Court order you are required to give a copy anyway.

By Mr. Lockley: Yes. Didn't I read all of it?

2202 By Mr. Kirby: Well, the 3600 on the first item is in the invoice item as to which we stipulated. There is no controversy. It was paid. There is no tax due on it. There is no argument. The same thing is true as to each of the dollar amounts on that exhibit, your Honor.

2203 By Mr. Lockley:

Q. Miss Feldman, I show you Exhibits 113 and 113-A and B and 114 and 114-A and B, 115, 115-A, 116, 116-A, 117, 117-A, 118, 118-A, 119 and 119-A. Are there any more that I have handed you?

A. No.

Q. Will you examine Government's Exhibits 113, 114, 115, 116, 117, 118 and 119, and tell me if they bear any relation to Government's Exhibits 113-A and B, 114-A and B, 115-A, 116-A, 117-A, 118-A, 119-A?

By Mr. Kirby: If the Court please, I object to the question on the ground that the transactions as to which he is now interrogating the witness occurred during a period when she was not there.

By Mr. Lockley:

Q. Miss Feldman, are you able to tell from the information appearing on those invoices the dates upon which they were paid?

A. Yes.

By the Court: The dates upon which—

By Mr. Lockley: The invoice amounts were paid.

By the Witness:

2204 A. Yes. They were paid on August 1st and September 3rd, both of those dates.

Q. On August 1st and September 3rd?

A. That is right.

Q. Were you employed by the General Confections on August 1st and on September 3rd?

A. I was.

Q. Will you—

By Mr. Kirby: If the Court please, the invoices that he asks about—the shipments into this company occurred prior to the time, as I understand it, that she came back to work with them, the shipments.

By the Court: He just asked her whether she was there when the invoices were paid.

By Mr. Kirby: Yes, but I originally arose to object when he was asking her about the shipments.

By Mr. Lockley: I didn't ask about the shipments. What I asked was do those checks—

By the Court: Go ahead.

By Mr. Lockley:

2205 Q. Do those checks have any relationship to those invoices I have handed you, being invoices 113-A to 119-A, inclusive?

By Mr. McConnell: I thought we agreed that the checks paid the invoices.

By the Court: You may answer.

By the Witness: The relation—there is a relationship.

By Mr. Lockley:

Q. What is it?

A. The checks pay the typed amounts on the invoices.

2206 Q. All right. I show you Exhibit 120 in evidence and ask you if you have seen it before?

A. I have.

Q. And do you know who prepared it?

A. I did.

Q. Is it in your handwriting?

A. It is.

Q. Do you know when you prepared it?

A. It was prepared—part of this was prepared some time after August 14th, and the balance after December 17.

Q. And with respect to the part that was prepared after August 14, what does it relate to?

A. It relates to a group of shipments that were made between July 22nd and August 14th.

Q. And what are those shipments?

A. They are shipments of gelatin jells, Cardinals, special chocolate liquor and Coronet mix.

Q. And do they bear any relation to Exhibits 113-A to 119-A, inclusive?

A. They do.

Q. What is it?

A. The invoices, which are Exhibits 113-A to

2207 119-A, are contained on this sheet.

Q. And is there any other information contained on that sheet with respect to those invoices?

A. There is.

Q. What is it?

A. The amount that appears as typed on the invoice, the item, the weight for the item, and the overage due on each item.

Q. And what is the overage due on each item, as shown by that Exhibit 120?

A. $1,002.00 for gelatin jells, $1,503.00 for Coronet mix, and $27,005.63 for Cardinals.

Q. And is there a total amount shown due by that Exhibit 120?

A. There is.

Q. What is it?

A. $29,510.63.

By the Court: Do you have the total amount of overages which are said to be noted on Exhibit 120?

By the Witness: Well, there is another part to this, your Honor.

By the Court: Can you give it to me?

By Mr. Lockley:

Q. Does that total of $29,510.63 relate only to the 2208 part of the entry made—

A. At the top of—the top part of the sheet.

Q. —about August 14?

A. That's right.

Q. Then what was the purpose of the balance of the sheet?

A. That was the rough recap of the shipments between November 6, and December 17.

Q. All right.

Will you just put that exhibit down beside you for a moment?

Now, I show you Exhibits 121 and 121-A, B, C, D, E, and F, and ask you if you know if they bear any relationship to each other?

By the Court: It already appears, doesn't it, that they bear a relationship with the checks, that they paid the face amount of the invoice? That is in evidence.

By Mr. Lockley: All right, sir.

By Mr. McConnell: We agreed to that, sir.

By Mr. Lockley:

Q. I show you Government's Exhibit in evidence 122-A, and Exhibit 122-C, and ask you if you have seen those before?

A. I have.

2209 Q. And what are they?

A. 122-C is the rough copy that I kept of ship-

ments from Shotwell.

Q. For what period?

A. From September 5th to October 26th.

Q. And do any of the invoices, 121-C, D, E and F, appear thereon?

A. They do.

Q. And which ones are they?

A. 121-C, 121-D, 121-E.

Q. Is that all?

A. That's right.

Q. And what exhibit does that appear on?

A. It appears on Exhibit No. 122-C.

Q. And what is Exhibit 122-A?

A. 122-A is a recap sheet.

Q. And what information does it contain?

A. It is dated 9/10/46, contains a record of a shipment of 25,000 pounds of liquor at fourteen eighty and —it was 25,000 pounds of liquor at fourteen eighty, $3,700,00; and September 24th an item of 50,016 boxes of Cardinals, at 18¾ cents. The extension is $9,378.00.

Q. Is there a total on that?

2210 A. There is a total.

Q. What is it?

A. $13,078.00.

Q. And there is a total on Exhibit 122-C?

A. No, there is not.

Q. I show you Government's Exhibit in evidence 122-D and ask you if you have seen that before?

A. I have.

Q. And when was that?

A. October 7th, 1946.

Q. Do you know the handwriting?

A. It is my own.

Q. And when did you prepare it?

A. On October 7th.

Q. And at whose direction?

A. Mr. Lubben's.

Q. And what does that purport to be?

A. That is a payment of cash to Shotwell for $12,235.00.

Q. You don't mean it is a payment of cash. That isn't what the exhibit is.

A. Well, this is a cash authorization.

Q. A cash authorization slip?

A. That's correct.

2211 Q. Was that a part of the records of the company?

A. It is.

Q. And what was done with relation to that cash authorization slip?

A. It was posted in the purchase book, and then from there to the accounts payable ledger.

Q. And anything else; what was the purpose of the cash authorization slip?

A. Well, this called for the issuance of a check to cash for the purposes of payment.

2212 Q. I show you Government's Exhibit 122 and ask you if that has any relation to the cash authorization slip.

A. Yes, it has.

Q. And what is it?

A. This is a cash check for $12,235.00, issued by Mr. Lubben.

A. And does that bear any relation to Exhibits 121-C, D, E and F, or to 122-A and B?

A. Yes.

Q. And what is it?

A. That is a payment of the overages on Exhibits 121-D and 121-E.

By the Court: A little slower, please.

By the Witness: 121-D and 121-E.

By Mr. O'Brien: I object again, your Honor, to the characterizations that those papers are for payment. The check was drawn to get proceeds of cash to Mr. Lubben. And that is all she knows about it.

By the Court: Yes.

By Mr. O'Brien: She has no right to talk of payment.

By the Court: That's true.

2213 By Mr. Lockley:

Q. You don't mean it reflects a payment of overage; what you mean is that the records of the General Confections so indicated, but you don't know whether such a payment was actually made?

A. No.

By the Court: The exhibits are 121-D and 121-E.

By the Witness: That's right.

By Mr. Lockley:

Q. Do you know for what purpose the check was issued?

A. The check was issued to get cash to pay for these overages.

Q. I show you Government's Exhibit 123 and 123-A, which it has been stipulated are an invoice and a check in payment of the invoice amount, and I ask you what is the nature of the shipment on 123-A.

A. That is a shipment of Cardinal chocolates.

Q. How much?

A. 1,704 pounds.

Q. I show you Government's Exhibit 124-A, in evidence, and ask you if you have seen that before.

2214 A. I have.

Q. And what is it?

A. It is a cash authorization slip.

Q. Do you know in whose handwriting?

A. My own.

Q. And when did you prepare it?

A. On November 7, 1946.

Q. And at whose authorization or direction?

A. Mr. Lubben's.

Q. And what was the purpose of it?

A. That was to show that a check was to be issued to cash to pay Shotwell for overages.

By Mr. O'Brien: I make the same objection, your Honor.

By the Court: I think she can testify that, according to the records reflected in the book, the check was drawn for that purpose. That's as far as she states.

By Mr. Lockley: That's as far as the exhibit states.

2215 I will read Exhibit 124-A. It says:

General Confections, Inc., 11/7/46, pay to cash, Shotwell, amount $2,323.50.

By the Court: How much?

By Mr. Lockley: $2,323.50.

By the Court: Well, which exhibit are you reading from?

By Mr. Lockley: This is 124-A, the cash authorization slip.

By the Court: I thought that was $319.50.

By Mr. Lockley: No, your Honor, that was the invoice.

By Mr. Lockley:

Q. Am I correct?

A. No, the invoice is $636.16.

Q. Well, will you describe the meaning of the rest of the writing on that cash authorization slip, Miss Feldman?

By the Court: You mean -124-A?

By Mr. Lockley: Yes, your Honor.

By Mr. Lockley:

Q. There are some other entries?

A. That's correct.

2216 Q. Can you identify them?

A. It shows that $2,004.00 was entered on the purchase book on page 77, line 13, and that the balance of $319.50 was entered on the purchase book on page 85-A.

There is a notation here that on November 7, 1946, a check, No. 1521, was drawn for $2,004.00, and on November 23, 1946, check No. 1523 for $319.50 was drawn.

Q. All right. I show you check No. 1623, Exhibit No. 124, for $319.50 and ask you if that bears any relation to cash authorization slip, Exhibit No. 124-A?

A. There seems to be a difference in check numbers here.

By the Court: I don't hear you.

By the Witness: I said there seems to be a difference in check numbers here.

By Mr. Lockley:

Q. I show you Exhibit No. 126, in evidence, a check for $2,004.00, and ask you if that bears any relation to Exhibit No. 124-A?

A. Well, that seems to be the payment for the $2,004.00.

2217 Q. And what do the two checks total?

A. Twenty-three hundred twenty-three, fifty.

Q. Now, Miss Feldman, I show you Exhibits 125 and 125-A, B and C. It is stipulated that 125 is a check which paid the invoice amounts of A, B and C. I also show you Exhibit No. 126-B, and ask you if you have seen that before?

A. I have.

Q. Do you know in whose handwriting it appears?

A. My own.

Q. Do you know when it was written?
A. As the invoices came in.
Q. At whose direction?
A. These records were kept at Mr. Lubben's direction.
Q. And what is the information contained on it?
A. The information contained on here shows the invoice number, the date, the number of cases, the total weight and the invoice price.
2218 Q. And is that the same information which is contained on Exhibits 125-A, B, and C?
A. Yes, it is.
Q. Is there any other information on that slip?
A. I seem to—without having extended it—have shown that the amount due on overages was $2,004.00.
Q. I show you Exhibits 126-A, and 126-C, and ask you if you have seen those before?
A. I have.
Q. And what are they?
A. They are the recap sheets that were made up from these rough notations.
Q. Well, will you describe by exhibit number what you refer to?
A. Well, Exhibit No. 126-A and 126-B, are duplicates of one another, which were made up after 126-B was made up.
Q. And 126-B is in handwriting?
A. 126-B is in my handwriting. 126-A and C, are the typed copies.
Q. What information do 126-A and C contain?
A. They contain the information on 126-B, as to the number of pounds of Coronet mix that were shipped
2219 on the three invoices, and the extension for the $2,004.00, which was due.
Q. All right.
I show you Government's Exhibit No. 126-D and ask if you have seen that before?
A. I have.
Q. Do you know in whose handwriting it is?
A. My own.
Q. And do you know when it was prepared?
A. I'd say on November 7, 1946.
Q. And at whose direction?
A. Mr. Lubben's.

Q. And what is Exhibit 126-D?

A. That is a cash authorization for $2,004.00 covering the three invoices on 126-B.

Q. And what are those three invoices?

A. Those are the three invoices for Coronet mix, and their invoice numbers—

Q. Give the exhibit numbers.

A. Yes. They are Exhibits Numbers 125-A, 125-B and 125-C.

Q. Will you give me the invoice numbers, please?

A. The invoice numbers are 181796, 181797, and 181798.

2220 By Mr. Lockley: May I read to the jury 126-D, which is cash authorization slip headed General Confections, Inc., pay to cash (Shotwell Manufacturing) amount $2,004.00; No. 187198, 5010; 187197, 120; 187196, 5010; total 20,040 pounds at 10 cents. Date paid, 11-7-46. Check No. 1615.

By Mr. Lockley:

Q. I show you Exhibit 126 and ask you if you have seen that before.

A. I have.

Q. And what is that check number?

A. 1615.

Q. And what is the amount?

A. $2,004.00.

Q. And does that bear any relationship to Exhibit 126-D, the cash authorization slip?

A. It does. This is the check that was issued for the authorization slip.

Q. Was that transaction, if you know, entered on the books of the General Confections Corporation?

A. It was. It was entered in the purchase book, 2221 line 13.

Q. How do you know that?

A. There is a notation here as to where it was entered.

Q. Now, Miss Feldman, I show you Exhibits 127 to 132, inclusive, which are invoices of the Shotwell Manufacturing Company. And I also show you Exhibit No. 120. And I call your attention to the notations contained on the bottom of that slip and I ask you if the lower portion of Exhibit 120 bears any relation to Exhibits 127 to 132.

A. It does.
Q. And what is it?
A. This is a rough recap of Exhibits Nos. 127 to 132.
Q. And what information is contained in that rough recap?
A. The date, the invoice number, the invoice price, the item, and the amount due on overage.
Q. And is there a total of the amount due on overages?
A. There is.
Q. And what is it?
A. $17,448.00.

2222 By Mr. Lockley:

Q. I show you Government's Exhibit 133-A and ask if you have seen that before.
A. I have.
Q. Do you know in whose handwriting it appears?
A. My own.
Q. When was it prepared?
A. December 4, 1946.
Q. At whose direction?
A. Mr. Lubben's.
Q. Does that bear any relationship to the lower portion of Government's Exhibit 120?
A. It does.
Q. What is the relationship?
A. Cash authorization slip which was Exhibit No. 133-A reads 75,660 pounds of drops at 10 cents, $7,566.00, and 52,704 Cardinals at 18¾ cents, $9,842.00—a total of $17,408.00. These figures are a copy of the ones appearing on this sheet.
Q. What sheet?
A. On Exhibit No. 120.
Q. I show you Government's Exhibit 133 in evidence and ask if you have seen that before.

2223 A. I have.

Q. Does that bear any relationship to Exhibit 120 and to Exhibits 127 to 132?
A. It does.
Q. What is it?
A. This is a check to cash that was drawn for $17,190.25 which represents the amount due on the overages.

Q. That check is for how much again?
A. $17,190.25.
Q. If you know, is there any explanation for the difference in that amount of the item and the previous amount of $17,405.00 that you testified to?
A. There seems to be an adjustment of some kind but there is no way of my checking it.
Q. Will you tell us, are you able to tell?
A. No.
Q. Is there any information on the cash authorization slip that will help you on that?
A. No, there is none.
Q. I show you Government's Exhibit for identification No. 133-B and ask if you have seen that before.
A. I have.
2224 Q. What is it? What does it purport to be?
A. This is the stub of the check book that we were using in December of 1946.
Q. Was that record kept by you?
A. Under my supervision or by me. My handwriting appears on it.
Q. Your handwriting appears there?
A. Yes.
Q. Was that made in the ordinary course of business?
A. Yes, sir.
Q. Was it true and correct to the best of your knowledge?
A. Yes, it was.
By Mr. Lockley: I offer in evidence Government's Exhibit 133-B consisting of only one page. You may detach it if you so desire.
By Mr. McConnell: I object to it. It is self-serving, so far as Shotwell is concerned.
By Mr. Lockley: Let the record show that Government's Exhibit 113-B was detached from the balance
2225 of the check in open court.
I offer Government's Exhibit 133-B in evidence, your Honor.
By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 133-B.)

By Mr. Lockley:
Q. I call your attention to the notation on Exhibit

133-B appearing under the date 12-4 and ask if that is in your handwriting.

A. It is.

Q. And what does it say?

A. It says, "December 4th, Shotwell Manufacturing Company. Cash, $17,190.25."

2226 Q. What, if any, if you know, was the purpose of making such an entry on Government's Exhibit 133-B?

A. The reason for that was that we had not given Mr. Lubben our own company check for this item. He issued a check in Chicago for this amount, and put the words "General Confections, Inc." on the face of it, and then cashed it here in Chicago, and we picked it up when he told us about it afterwards.

By the Court: May I see that?

By Mr. McConnell: May we have the Exhibit number in the record now as to what she was referring to, the check that was cashed in Chicago?

By the Witness: There is no number on that check, sir.

By Mr. Lockley: The exhibit is 133.

By the Witness: The exhibit number, yes.

By the Court: This is Mr. Lubben's personal check?

By the Witness: He used a blank check for the purpose of issuing this.

2227 By Mr. McConnell: May I ask a question on that, if the Court please?

By the Court: I am sorry?

By Mr. McConnell: Could I ask a question on that?

By the Court: Yes.

Cross Examination by Mr. McConnell:

Q. On that memoranda that was made on the check stub, did you get your information as to the $17,000 cash from Mr. Lubben?

A. I made up a recap sheet for that, if I am not mistaken.

Q. And where did you get your information to make that entry?

A. From the figures that I had.

Q. Did you get it from Mr. Lubben?

A. The figures for the recap sheet, sir?

Q. No. The check stub, I am talking about.

A. I made up a recap sheet, sir.

Q. I am not talking about the recap sheet. I am talking about a check stub.

A. The amount of the check drawn?

Q. Yes.

2228 A. I would have gotten that from Mr. Lubben.

Q. Then you don't know anything about it except what he told you at that time, is that right?

A. I know the overages were due at that time, and I had a recap sheet for $17,448.00.

Q. You don't know anything about the payment of cash, is what I am talking about, except what Mr. Lubben told you?

A. No.

Direct Examination (Continued) by Mr. Lockley:

Q. Miss Feldman, are you able to state from the exhibits which have been presented to you today, the amount of the overages as shown by those exhibits which were due the Shotwell Manufacturing Company in the year 1946?

By Mr. Kirby: If the Court please, this covers a period of time when the lady was not there, and had no personal knowledge of it, and I object to the question.

By the Court: Well, insofar as the books and records are in evidence, she may testify as to what they disclose.

By Mr. Kirby: Well, the expression "books"—

2229 By the Court: Well, I say books and records or documents.

By Mr. Kirby: The memoranda, she didn't prepare it, you see.

By Mr. Lockley: I used the term exhibits, Mr. Kirby.

By the Court: Yes, perhaps that would be a better term. If she is testifying entirely from the exhibits which have been received in evidence, then she may answer the question.

By the Witness: The figure I have is 162—

By the Court: Again, please?

By the Witness: The figure I have is 162,116.68.

By the Court: Well, you state is the total amount of overages, according to the exhibits which were due The Shotwell Company for the entire year 1946?

By the Witness: That is correct.

2230 By Mr. Lockley:

Q. Your answer refers only to the exhibits which are presently in evidence?

A. That is correct.

Q. Now, Miss Feldman, I show you Government's Exhibits 10-A and 10-B, 10-C, 10-D, 10-E and 10-F, that you have previously identified as a portion of the records of the Reserve Trading Company and I also show you Shotwell Manufacturing Company invoice Exhibit No. 157 and I ask if you can tell me if that is recorded on the purchase book of the Reserve Trading Company?

A. It is.

Q And is it recorded elsewhere in those books?

A. It is.

Q. Where?

A. It is recorded on the accounts payable ledger sheet of the Shotwell Manufacturing Company.

Q. In what amount?

A. $30,796.98.

Q. Is that the face amount of the invoice?

A. That is.

Q. I show you three checks, Exhibits Nos. 157-A, 157-B and 157-C and I ask if those are the checks which

2231 were used in payment of the invoice amount?

A. They are.

Q. Are they recorded in the cash disbursements book of the Reserve Trading Company?

A. They are.

Q. Are they also recorded in the accounts payable ledger sheet of the Shotwell Manufacturing Company with the Reserve Trading Company?

A. They are.

Q I now show you Government's Exhibit 158-B and ask if you have seen that before?

A. I have.

Q. What is that?

A. It is a cash authorization slip for the Reserve Trading Corporation for $35,929.81.

Q. Does it contain any further information?

A. It does.

Q. What is it?

A. It reads, Overage on syrup purchased the rate, 7 cents a pound on their invoice number 191554. I have

already given them $10,000.00 so all we are giving them now is $25,929.81."

Q. Is invoice number 191554 Exhibit 157?

A. It is.

2232 Q. Now, what was the purpose of that cash authorization slip in so far as your bookkeeping is concerned?

A. The purpose was to have a record to enter on the purchase book.

Q. And is such a record entered?

A. It is.

Q. Where is it?

A. It is entered on page 7 of the October—wait a minute—it is entered on page 8, Exhibit 10-A, of the October purchases for 1946, Reserve Trading.

Q. In what amount?

A. $35,929.81.

Q. Is there any description?

A. It reads "October 17th, Shotwell Manufacturing Company."

Q. What is the amount again?

A. $35,929.81.

Q. All right. I show you Government's Exhibits 158 and 158-A being checks for $25,929.81, and $10,000.00, respectively, and ask if you have seen those before?

A. I have.

Q. Do they bear any relationship to Government's
2233 Exhibit 158-B, the cash authorization slip?

A. They do.

Q. How do you know that?

A. On the cash authorization slip I have a memo "Date paid, October 17, 1946, check No. 1194."

Q. And is one of those checks No. 1194?

A. It is.

Q. And what exhibit number is it?

A. Exhibit No. 158-A in the amount of $25,929.81.

Q. Are those recorded in the cash disbursements book?

A. They are.

Q. What is the nature of the entry?

A. It reads "Cash, $25,929.81".

Q. Is there any description other than that?

A. No.

2234 Q. Are they recorded in the accounts payable ledger sheet of The Shotwell Manufacturing Com-

pany with Reserve Trading?

A. They are.

Q. In what amount?

A. $25,929.81 and $10,000.00.

Q. In two separate entries?

A. That is right.

Q. All right. May I have those, please?

By Mr. O'Brien: What sheet is that, Mr. Lockley? What ledger sheet is it?

By Mr. Lockley:

Q. Will you give the exhibit number?

A. It is 10-C.

By Mr. O'Brien: 10-C. That is the ledger sheet?

By the Witness: That is the accounts payable ledger sheet of Shotwell.

By Mr. Lockley:

Q. I show you Government's Exhibit 159 which is an invoice of The Shotwell Manufacturing Company, and ask if that is recorded in the accounts,—or rather, in the purchase ledger of the Reserve Trading Com-

2235 pany.

A. It is.

Q. Is it also recorded in the accounts payable ledger?

A. It is.

Q. In what amount?

A. $11,268.60.

Q. I show you two sheets, Government's Exhibit 159-A and 159-B for $6,000.00 and $5,268.60, respectively, and ask if those checks bear any relationship to that entry.

A. These checks are the payments for the invoice amount.

Q. I think I failed to ask you, Miss Feldman, what that invoice is for.

A. The one I am holding now?

Q. Yes.

A. Corn syrup.

Q. Do you recall what the invoice Government's Exhibit 157 was for?

A. I believe it was corn syrup.

Q. All right. I show you Government's Exhibit 160-C purporting to be a cash authorization slip and ask if you have seen that before.

2236 A. I have.

Q. Do you know the handwriting?

A. It is my own.

Q. When did you prepare it?

A. It is dated October 18, 1946.

Q. Would that be about the date it was prepared?

A. Yes. It was probably made up and dated the same as the invoice which it applied to.

Q. All right. I show you Government's Exhibit 160-A and ask if you have seen that before.

A. I have.

Q. What is it?

A. This is a recap sheet that was made up on November 8th showing the overage due on the corn syrup referred to in invoice No. 187191.

Q. I call your attention to the fact that on the date there appears to be a zero struck over a one, or a one over a zero. Are you able to state whether that is an October or a November date?

A. That is a November date.

Q. Now with respect to the cash authorization slip, what information was contained thereon? That is Exhibit—

A. 166.

2237 Q. 160-C.

A. 160-C. It is dated October 18, 1946 and it reads: "Paid to Shotwell"—"Paid in cash, Shotwell Manufacturing, $13,146.70." And the explanation reads "Difference between cost price of 187,810 pounds at 13 cents, dollar and cents value, $24,415.30 and billed price of 187,810 pounds at six cents,"—extension of "11,268.60." And the difference between the two is $13,146.70, and there is a notation on here that on November 7, 1946, check No. 1210 was issued to this amount.

Q. Is Exhibit 160 a check for $13,146.70, the check referred to?

A. It is.

Q. And is that check recorded in the cash disbursements book of Reserve Trading Company?

A. It is.

2238 Q. What is the nature of the entry?

A. It reads "Cash, Shotwell, $13,146.70."

Q. Is it recorded in the accounts payable ledger sheet of the Shotwell Manufacturing Company with Reserve Trading?

A. It is.

Q. What is the nature of that entry?

A. It reads "November 7th, $13,146.70."

Q. Now, on the basis of the exhibits which you have examined, are you able to state the amounts as shown on those books and exhibits that was due the Shotwell Manufacturing Company from the Reserve Trading Company in 1946 on overages?

A. Where is the authorization slip? The amount paid on overages was $49,076.51.

Q. Now, Miss Feldman, I show you Government's Exhibit No. 155, a bill of lading and ask if you have seen that before?

By Mr. O'Brien: 155?

By Mr. Lockley:

Q. 155.

A. I have.

Q. Do you know whether or not an invoice was received by the General Confections Corporation on
2239 that particular shipment?

A. There was not.

Q. Do you know—

By Mr. Kirby: Is this from memory?

By Mr. Lockley:

Q. Are you able to state?

A. I have seen these as to the time that I worked there.

Q. Are you able to state whether any record of such shipment was made on the books of General Confections?

A. I usually issued checks. That is, we issued cash authorizations for some of these and billed shipments, say for all of them, as a matter of fact.

Q. Well, normally, your practice was to receive an invoice so you would know the amount due. How did you know the amount due on these particular shipments without an invoice?

By Mr. Kirby: I must object, if the Court please. I don't believe we can handle it in general language like groups of shipments. I think we should stick to particular documents.

2240 By Mr. Lockley: I am asking about the shipments, Mr. Kirby.

By the Court: I think you should refer to the bill of lading, Exhibit 155.

By Mr. Kirby: He was getting a plural on there, Judge.

By the Court: Well—

By Mr. Lockley:

Q. Do you know what record, if any, you had?

By the Court: With respect to the bill of lading.

By Mr. Lockley:

Q. With respect to that bill of lading.

A. If this was received at our factory, we would have a receiving ticket showing the number of cases arriving, when it arrived, and what item it was. That was the basis on which we could figure the weight of the total shipment, the amount that was ordinarily paid if we received an invoice plus the amount of the overage.

By Mr. Kirby: I move to strike the answer on the ground that it is a very general answer describing the general practice and is not in response to the ques-
2241 tion with respect to this particular exhibit.

By the Court: The answer may stand.

By Mr. Lockley:

Q. I show you Government's Exhibit 155-A and ask you if that is a receiving ticket of the nature you have just described?

A. It is.

Q. Does it have any relationship to the bill of lading, Government's Exhibit 155?

A. This is a receiving ticket for the bill of lading, Exhibit No. 155.

Q. Are you able to state from an examination of either the bill of lading or the receiving ticket the amount recorded on the books of the company with respect to that shipment, either overages or regular price or both?

A. The billing price on a car, mixed, was ordinarily 24 cents a pound and there would be 10 cents a pound overage. According to this notation, there were 10,050 pounds received as net weight.

By Mr. O'Brien: Well, what record does she have? I think the question was as to the record.

2242 By Mr. Lockley: She has a receiving ticket and a bill of lading from which she says she can determine the amounts.

By Mr. Lockley:

Q. Are you able to determine that amount, Miss Feldman?

By Mr. O'Brien: I object to the determination of an amount unless there is some testimony of knowledge as to what was done in this particular case.

By the Court: Well, I am not acquainted, Mr. Lockley, with what you are asking her. Now are you asking her with respect to this particular shipment?

By Mr. Lockley: Yes, your Honor, this particular shipment.

By the Court: The bill of lading, Exhibit 155, and the receiving ticket, Exhibit 155-A?

By Mr. Lockley: Yes, sir, and her personal knowledge of the amounts shown on the books of the company which she had supervision and direction over. I want her to tell me, if she can, what was the amount shown
2243 on the books of the company as due and owing on that particular shipment.

By the Court: Due and owing Shotwell?

By Mr. Lockley: That is right.

By Mr. Kirby: It is plain that nothing—

By the Court: If she has a recollection, is that it?

By Mr. Lockley: If she has a recollection, yes, your Honor.

By Mr. Kirby: I object to that procedure.

By Mr. McConnell: I object to it. There is no better foundation than the books and records.

By the Court: Are you referring to books and records of the General Confections Company?

By Mr. Lockley: Yes.

By Mr. McConnell: There were such books, I understand.

By Mr. Lockley: I wish you would find them for me, Mr. Kirby—I mean, Mr. McConnell.

By the Court: I am not too clear about the posi-
2244 tion the government has with respect to these books. Have you, as yet, made any showing as to what happened to the books?

By Mr. O'Brien: No.

By Mr. McConnell: Yes, there is a showing made. They were in the hands of the receiver down in New Jersey and no showing—

By Mr. Lockley: I made a showing to Miss Feldman as to the last time she saw them.

By the Court: I don't know that that is a showing.

I think in the absence of a more definite showing as to what happened to the books, I sustain the objection.

By Mr. Lockley: I beg your indulgence a moment, your Honor.

You may cross examine.

By the Court: Well, perhaps we should take our recess now. We will recess for ten minutes.

(Recess taken.)

2245 By the Marshal: This Honorable Court will now resume its session.

Cross Examination.

By Mr. Kirby: May it please the Court, I am going to undertake to start the cross examination of this young lady, but there may be some delays.

May I ask if the good men of the Government will give me the same kind of help in assembling some of these documents as they were able to give Mr. Lockley, to keep these exhibits in the proper order.

It will take a little time to do it. Beyond that, I hope not to waste the Court's or the Jury's time.

By Mr. Lockley: I think you will find they are in the same order as I used them, Mr. Kirby.

By Mr. Kirby: I may not use them in exactly the same order, you see.

By Mr. Kirby:

Q. Mr. McConnell arose from his chair, Miss Feldman, to inquire of you with respect to a check and asked you whether Mr. Lubben hadn't told you that that is what he did with the money, and that is the only way you 2246 knew about it? That was the check in December, 1946.

Do you remember Mr. McConnell asking you that?

A. Yes, sir.

Q. Am I correct in thinking that the check we are talking about is this one on December 4th for $17,190.25, which is Government's Exhibit 133?

A. I think this is the one.

Q. Do I recall that you responded to Mr. McConnell that you had made a recap sheet yourself, and you knew that that was the amount due?

A. Do you have any recap sheet there, sir?

Q. Do you recall whether that is the response you made to Mr. McConnell that you knew from your own recap sheet that that was the amount due?

A. I believe that that was what I said.

Q. Am I correct in believing that the recap sheet to which wou were referring is Government's Exhibit 120, which I would ask you to find for me if you can—I have a photostat of it only.

2247 By Mr. Kirby:

Q. While they are looking for that, may I inquire whether the ledger, or the check stub which reflects that check, $17,190.25, is this Exhibit 133-B?

A. That's correct.

Q. Now, to get back to the recap sheet which you said gave you independent knowledge of it, is that this Exhibit 120?

A. It is.

Q. And would you be kind enough to tell me the total which you say, from the recap sheet, was due to overages?

Now, I am asking you to look at your recap sheet.

A. According to this recap, the total due was $17,448.00.

Q. Now, I think you said there was an unexplained difference there in the amount of the check, but, nevertheless, that is the recap sheet that gave you the independent knowledge that that check was in the right amount, isn't it?

A. That's correct.

Q. Now, let me ask you: What is the date of 2248 the shipment on that recap sheet, which is the last shipment on it?

A. According to this, December 17.

Q. Now, that is thirteen days after the date of that hand-made check that Lubben made out in Chicago, isn't it?

A. That is so.

Q. And that shipment, which was fourteen days after that, is shown by Government Exhibit 133; isn't it?

A. It is.

Q. What is the date of the next latest shipment shown on your recap sheet, Miss Feldman?

A. December 10.

Q. Now, that shipment which was made six days later than the hand-made check made in Chicago, is represented by Exhibit 131; am I correct in that?

A. Yes.

Q. Miss Feldman, I have not had the benefit of any information in this instant cross examination that produces your laughter. What is funny about it?

A. I was laughing at the fly buzzing around my head.

Q. I hope I am not—

2249 By the Court: She has given you an answer. Why labor it?

By Mr. Kirby:

Q. Ma'am, may I inquire now, as Mr. McConnell did bef[illegible] isn't it a fact that at the time that check was mad[illegible] out, you did not have a recap sheet in that amount?

A. May I recall an incident that occurred at the time that this payment was made sir?

2250 Q. Excuse me. No. Wait a minute now. I don't mean to be rude to you, but could you have had that recap sheet on the date that the check was made out?

A. I could have had the information, sir.

Q. Could you have had the recap sheet?

A. I may not have had the recap sheet, but I could have had the information.

Q. Now, what would you tell me is your present memory as to whether you did or didn't have the recap sheet on December 4th?

A. I might not have had the recap sheet, but I still say I might have known of the invoices involved.

Q. I am afraid you are forcing me to press the point. What is your present memory as to whether you did or did not have that recap sheet on December 4th, the date of the check?

A. This is only one sheet that was made up. There are other records that were available at the time this was made up. If you can produce those, sir, I would be very happy to answer your question.

By Mr. Kirby: Would the Court be good enough 2251 to strike the answer on the ground that she is not responding to my question as to whether she had this recap sheet.

By the Court: Which portion? Read the answer and tell me what you object to.

By Mr. Kirby: My question was a very simple one: Did she have that recap sheet which she has in her hand at the time the check was made out?

By the Court: I think she said no, didn't she?

By Mr. Kirby: All right.

By the Witness: I believe I did, sir.

By Mr. Kirby: Thank you.

By Mr. Kirby:

Q. Now, you said that this cash authorization slip, which is Exhibit 133-A, was made out on December 4, 1946, did you?

A. If the record shows that; yes, sir.

2252 Q. Excuse me, ma'am. I am asking you about your testimony. That is in your handwriting, isn't it?

A. It is.

Q. It is dated December 4th, isn't it?

A. Yes.

Q. Did you make it out on December 4th?

A. I may have.

Q. Do you know whether you did or not?

A. I don't know whether I dated it December 4th on the day I made it out or if I dated it December 4th to take care of the issuance of the check on that date.

Q. Possibly you made it out after the check was made out; is that what you mean?

A. It might be.

By Mr. Kirby: Do you know where 159, 159-A and B, 160-C and A are?

I don't mean to bother you. You have been busy. Maybe Mr. Krane can help.

By Mr. Lockley: They are all here. It is just a matter of finding them.

By Mr. Kirby: There is another cash authorization. What about 160-C?

By Mr. Kirby:

2253 Q. One of the last things about which you were questioned was a November '46, or possibly, October, '46, question about some corn syrup; do you recall that?

A. Yes, sir.

Q. And do you recall that Mr. Lockley handed you Exhibit 160-A and asked you what the date of that was?

A. I said November 8th.

Q. And is that the date on which the memorandum was made up?

A. May I see the memorandum? Are you referring to this one?

Q. Yes.

A. That is the date of the memorandum, sir.

Q. That is, however, that the cash authorization is dated October 18th of 1946?

A. That is so.

Q. Is that so?

A. That is so.

Q. So that you made the cash authorization up in one month and the summary in the next, is that right?

A. That is so, sir.

2254 Q. And am I correct in thinking that you made the check out about three weeks after the date of the cash authorization?

A. That's correct, sir.

Q. Are there any other records with respect to the date on which that check was authorized, other than those we have there now?

A. This authorization slip, if that is what you are referring to, was made up because we knew that the 6 cents was due on the corn syrup, sir.

Q. And you paid it when, you say?

A. I paid it on November 7th.

Q. Of 1946?

A. That's right.

Q. And then you made up that memo?

A. The October 18th memorandum?

Q. No, no. The little memoranda there. I thought you said it was November 8th.

A. November 8th.

Q. So that is the order of the matter?

A. Yes, sir.

2255 Q. Three weeks later the check, and a week after that—

A. Yes.

Q. —the memo?

A. Yes. The check was made one day, and the memo was made the following day, when the check was evidently given to Lubben, or the cash was given to him to take with him. I don't know.

Q. It was a check that went to him?

A. Was it cashed in New York, do you know?

Q. In any event, it would always be a check to cash wouldn't it?

A. Yes, sir.

Q. And in any event it always would be that the check would be cashed, and the cash would be turned over to Mr. Lubben?

A. Not in all instances. Sometimes these checks were cashed in Chicago, and the cash was turned over to Mr. Lubben there, not in New York City.

Q. Well, in New York or Chicago, but he got the cash?

A. That's right.

Q. Now, on the back of a number of these checks I notice an endorsement of Mr. Urban. Do you know a Mr. Urban?

2256 A. Certainly.

Q. You people did black market business with Mr. Urban?

A. We paid him overages, if that is what you mean.

Q. You paid him cash?

A. That's correct.

Q. But do you know whether this cash was paid to him or not, of your own knowledge now?

A. Yes, I was present when cash was paid to him.

Q. This cash?

A. This cash was paid to who, Mr. Urban?

Q. My question is: Do you know of your own knowledge whether this cash was paid to Mr. Urban or not?

A. I beg your pardon, sir. Mr. Urban is not concerned in that transaction, except that he okayed the check to cash it, if that is what you are referring to, and if it is a check cashed in Chicago.

Q. Are you arguing with me?

A. No.

Q. Are you telling me—

2257 By the Court: She doesn't contend that she was present at any time when—

By Mr. Kirby: No.

By the Court: —when the cash proceeds of these checks were turned over to anybody.

By Mr. Kirby: Well, the Court is precisely right, and if the young lady would answer me as directly as the Court summarizes it, I would be delighted.

By the Court: She hasn't indicated to the contrary.

By Mr. Kirby: But she wants to argue with me in a partison way, I submit, your Honor.

By the Witness: I beg your pardon, sir.

2258 By Mr. Kirby:

Q. Miss Feldman, I want to go to some more general matters. I will undertake over the intervening weekend to get some of these in some order so that I won't delay you too much with questions. But did you have in the proprietorship period a complete set of books; is that what I understand?

A. Are you speaking of the sole ownership or the partnership?

Q. The proprietorship, the sole ownership.

A. There was a complete set of books.

Q. And are all of those books here?

A. In the single ownership; yes, sir.

Q. Yes. In the partnership—do you mean every single book of the proprietorship is here; are you sure of that?

A. In so far as I know; yes, sir.

Q. Now, in the partnership did you have a complete set of books?

A. Yes, sir; we did.

Q. And am I correct in thinking that none of those are here?

A. There was one, I believe, I identified the other day as being the general ledger.

2259 Q. Other than that are there any others of them here?

A. No.

Q. In the General Confections, which was Mr. Lubben's company, did you have a complete set of books?

A. We did, sir.

Q. And are they all here?

A. They are not, sir.

Q. Which ones are missing?

A. I believe the cash disbursements, the accounts payable ledger, the purchase book and, I believe, the sales book are missing.

Q. All right. Now, the cash disbursement book, that is the book in which these various checks would be entered, is that right?

A. Yes, sir.

Q. That is the bound book in which these checks to cash that you have been talking about would be entered?

A. What bound book, sir?

Q. Well, it's—

A. It's a ledger, if that is what you are referring to, yes.

2260 Q. Yes. Now, that isn't here, is it?

A. No, it is not.

Q. All right. Now, these checks to cash that you talk about, that were cashed by Mr. Lubben, the only material that we have with respect to them then is either these cash authorization slips or these recap slips, is that true?

A. That is so.

Q. Now, then, let's go to the next book that you say is missing, the accounts payable ledger. Now, that is the book in which Shotwell's account with the company would appear, isn't it?

A. That's true.

Q. That is the book in which, if there were a payment to Shotwell, there would be an entry, is that true?

A. Yes, sir.

Q. And that is missing?

A. Yes, sir.

Q. Now, the next book that you said was missing was the purchases book, is that right?

A. Yes, sir.

Q. Now, when the material came into General Confections it would be entered in the purchase book?

2261 A. That is so, sir.

Q. And I notice on some of these slips of paper that you have that there are references to a P-85, or something like that.

A. That is so.

Q. That means purchase book, doesn't it?

A. That's right.

Q. So that these purchases from Shotwell would be posted in the purchases book, is that right?

A. That is so.

2262 Q. And that book is missing?

A. Yes, sir.

Q. Let's take these cash authorization slips then, which we say they are, and how many cash authorization slips, Miss Feldman—

Well, let me put it to you this way: Am I correct in believing that you have done, at the request of the Government, some preparation of schedules or work sheets or something in advance of the period when you testified here?

A. It was not at the request of the Government. I made it up because I could see that we were going to get into a long detailed discussion.

Q. Well, I don't think that is unusual for a witness to do that, Miss Feldman, at all.

A. No, I don't think so, either.

Q. I don't mean to criticize you for it.

A. No, I don't think you did, sir.

Q. But can you tell me how many checks to cash are involved in your testimony?

A. How many checks to cash are involved in my testimony?

Q. Yes.

A. Sir, I would be unable to tell you because in
2263 certain instances the supporting documents are not available, and all I can do is testify to the total, but not to the method of payment.

Q. Well, you and I are in exact agreement on that, but I wanted to ask you a series of questions that would make that very plain, and I am just going to ask you to indulge me while I do it.

How many checks to cash have you testified to; do you know?

A. Offhand, no. I would have to check these items.

Q. Well, you indicated that some of the stuff didn't exist to support. How many cash authorizations do you have, those little cash authorization slips?

A. The ones that are available at present, you mean?

Q. Yes.

A. I don't know if I marked that here, but I will check, sir.

Q. Well, suppose we do this, Miss Feldman—I have already, I am afraid, brought disappointment to everybody's heart by indicating that we will still be questioning you on Monday—would you be good enough over
2264 the recess, Miss Feldman, to check these checks to cash that you have talked about here, and then how many cash authorizations you have with respect to those, which ones you do, and which ones you don't have a cash authorization for; would you check that, then I can ask you that simple question, and you can answer it. Do you understand what I want?

By Mr. Lockley: Your Honor, I have no objection to Miss Feldman making such a computation, if she de-

sires to. But I would like to point out that they are all setting right here on the table, available to counsel at all times, and they have many people that they can put to work counting them.

2265 By Mr. Kirby: Well, I will accede to my brother's objection.

By Mr. Lockley: I am not objecting. I am just pointing out that it is there available without the necessity of putting Miss Feldman to work. If she wants to do it, that is up to her. I have no control over it.

By Mr. Kirby:

Q. The first check to cash that I remember hearing you speak about is Exhibit 27, which was cashed by Frieda Seiderer, and the money given to Mr. Lubben, as I recall it. Do you have a cash authorization slip for that? The date of that was January 19, 1945.

By Mr. Lockley: Well, your Honor, obviously Miss Feldman doesn't have those. They are in evidence. They are right here. They can be readily determined by an examination of the matters in evidence themselves. Now, I suppose Miss Feldman can walk down—

By the Court: I suppose you can pick them out and show them to the witness. Has she identified Ex-

2266 hibit 27?

By Mr. Kirby: Yes, she did. And she said she didn't have a cash authorization for it, as I recall. I can't pick up a cash authorization and show it to her because I don't believe it exists, Judge.

By the Court: Well, do you have a cash authorization slip attached to each check when they are available?

By Mr. Lockley: Yes, your Honor. When they are available they are all right here, associated together, the checks, the invoices and the cash authorization slips that go together.

By the Court: Then if a cash authorization slip is not attached to 27, does that mean there is no cash authorization slip?

By Mr. Lockley: Precisely, there is none at this moment.

By the Court: 27-A is a memo of some kind, apparently. That is not a cash authorization slip.

By Mr. Lockley: It is a settlement sheet, your Honor.

2267 By the Court: Oh.

By Mr. Kirby:

Q. Miss Feldman, the only thing that would be posted to the book would be the cash authorization slip, isn't that right?

A. Which period are you speaking of now, sir?

Q. I am starting in the proprietorship, ma'am.

A. For the cash check?

Q. Yes, ma'am.

A. The pencil notations on the invoices that were received from you would be also posted to the books.

Q. They would be posted to the accounts payable?

A. That's right.

Q. And to the purchases?

A. That's right.

Q. But not to the cash disbursements?

A. No, but the check from the cash disbursements would.

Q. The only thing that would be posted to the cash disbursements book would be the cash authorization, isn't that right?

A. No, that would be the check that would be posted to the cash disbursements book, not the author-

2268 ization.

Q. But then the only supporting document then, if I can put it that way, for that posting of that check would be the cash authorization?

A. The check required no supporting document, sir, because if the check was posted through the cash disbursements book it would show the fact that it was a cash check that was paid to someone, with the name shown, and from there it would be posted directly to the accounts payable account, and there would be no authorization required, actually. The authorization was for my benefit, for my protection, because I signed these checks and the accountants insisted that there be a cash authorization slip for every cash item that was drawn.

By Mr. Kirby: Will you read the last thing she said.

(Record read.)

By Mr. Kirby:

Q. I will take it up right there. The accountant insisted that there be a cash authorization slip for every cash check that was drawn?

A. That is so.

2269 Q. Was there a cash authorization slip for every cash check that was drawn?

A. Yes, sir; there was.

Q. Is there a cash authorization slip for the check introduced in evidence as Government's Exhibit 27?

By Mr. Lockley: We are going back over the same ground, your Honor. I think I have already stated—

By the Court: If she knows, she may answer.

By the Witness:

A. If there was none attached to the check I was shown, then there isn't any. At present, that is.

By Mr. Kirby:

Q. Well, the last time you saw the cash authorization slips, they were in the hands of Mr. Lubben? This is the proprietorship now.

A. I don't know whether they were or not. They may have been in an accountant's office.

Q. The next one that you testified about was Government's Exhibit 28. Was there a cash authorization sheet on that?

2270 A. May I see it, sir? May I see the check, please?

By Mr. Lockley: You are wasting your time. I I can tell you there isn't one.

By Mr. Kirby: Well, I never think I am wasting my time when I do what a woman tells me to do, but I will take your statement that it doesn't exist.

By Mr. Kirby:

Q. May I inquire, Miss Feldman,—maybe Mr. Lockley can answer—is there a cash authorization for the check for $22,124.13, which is Government's Exhibit 40-D?

By Mr. Krane: No. There is one for 40-A, and there is one for 40-B.

By Mr. Kirby: May we stipulate that there is no cash authorization slip for the check in the amount of $22,-124.13, in evidence?

By Mr. Krane: Yes, there is a cash authorization slip for the $18,000 check, and the $15,000 check.

By Mr. Lockley: Apparently not.

By Mr. Kirby: How can I get along with these fel-

2271 lows? They don't answer my questions. $22,124.13; do you have a cash authorization slip?

By the Court: It's 94, isn't it?

By Mr. Kirby: It is Exhibit 40-D.

By Mr. Lockley: Apparently not.

By Mr. Kirby: Thank you. There is a check of $2,-403.00, which she testified to, which is Government's Exhibit 43. Is there a cash authorization slip for that?

By Mr. Lockley: Not at the moment.

By Mr. Kirby: Am I to understand it will be offered later?

By Mr. Lockley: If we ever find it.

By Mr. Kirby:

Q. You mentioned a check for $6,459.75. Is there a cash authorization for that?

By the Court: Which exhibit?

By Mr. Kirby: Exhibit 45, your Honor.

By Mr. Lockley: I think we can agree there isn't.

By Mr. Kirby: There is not.

Which was the last one?

By Mr. Lockley: 45.

2272 By Mr. Kirby: There is a check to cash in the amount of $4,455.00, which is Exhibit 48. Is there a cash authorization slip for that?

By Mr. Lockley: Do you want me to testify again, Mr. Kirby?

If so, I will say there is not.

By Mr. Kirby: Thank you.

There is a check for $20,000, which is Exhibit 55. Is there a cash authorization slip for that?

2273 By Mr. Krane: That is a settlement sheet.

By Mr. Lockley: No cash authorization slip.

By Mr. Kirby:

Q. That concludes the period of the proprietorship. Now, then, during the period of the partnership, Miss Feldman, do you recall seeing any cash authorization slips in evidence?

A. I don't know, sir.

By Mr. Kirby: Maybe Mr. Lockley can help us on that, too.

By Mr. Lockley: I think you are aware, Mr. Kirby, that we don't have the partnership books.

By Mr. Kirby: Then the answer is that there are no cash authorization slips for any of the checks to cash in the partnership period, is that correct?

By Mr. Krane: At the present time, in the possession of the government.

By Mr. Kirby: Yes. Thank you.

By Mr. Kirby:

Q. Now, then, I will go to the period of the General Confections. And could you tell us, Miss Feldman,

2274 what cash authorization slips exist for any of the checks to cash in that period?

A. I don't know that I have those marked, either.

Q. Miss Feldman, another place where you indicated that there existed some notations as to overages was on the face of the invoices during the proprietorship period; is that true?

A. Yes, sir.

Q. Isn't it a fact, ma'am, that there are no such notations on the face of any of the invoices in the period of the partnership or in the period of General Confections?

A. I cannot say that about the partnership, because I don't know whether we changed that method of handling overage payments at the time we started the partnership or there was a change instituted after the partnership had been in effect a while.

Q. But, in any event, you are certain of the General Confections invoices, and you are certain that they are not marked up; is that true?

A. As far as I know, they are not, sir.

Q. Now, when the invoices in the period of General Confections were posted, they were posted to the accounts payable, Shotwell, is that correct?

2275 A. That's right.

Q. And in what amount were they posted?

A. For the amount typed on the invoice.

Q. They were not posted on the ledgers, that is, the accounts payable of Shotwell did not bear entries of overages, did it?

A. It did later on, in the cash—from the cash authorization sheets.

By Mr. Kirby: Would you read my question?

(Question read.)

By the Witness:

A. It did bear entries of overages.

By Mr. Kirby:

Q. The account payable?

A. Certainly.

Q. Of Shotwell?

A. Yes.

2276 Q. Concurrently with each invoice?

A. No, from the cash authorization slip, which was used as a posting device.

Q. All right. Then we are back to that cash authorization slip as a posting device for both the cash disburse-

ments book, and the accounts payable ledger now, is that right?

A. The accounts payable ledger, and purchase book, right.

Q. Then that's three places it would be posted, am I correct, the accounts payable, the purchases, and the cash disbursements?

A. The cash disbursements book had nothing to do with the cash authorization slips. The cash disbursements record comes from your check stubs.

Q. The same information would be in all three places, isn't that right?

A. Yes, if you put it that way, yes.

Q. And am I correct in believing that the cash authorization slips reflected what you were told by Mr. Lubben as to what he did with the money?

A. If you put it that way, sir, yes.

Q. Now, I want to go back to the period of the
2277 proprietorship, where you did say that the books were here. Now, you would get an invoice from Shotwell, and you would mark it up and enter it in the increased amount in the accounts payable, is that true?

A. Yes, sir.

Q. And then you would take that same invoice, mark it up, and enter it in the purchases at the increased amount, is that true?

A. Yes, sir.

Q. So that you had charges shown on your books and goods in dollar amount received on your books, larger than the face amount of the Shotwell invoices, isn't that right?

A. That is true, sir.

Q. That is, if the Shotwell invoices come to a certain height, you now had in dollar amount a larger amount posted on your books, isn't that right?

A. Yes, sir.

Q. You were then in a position to take out of your company that larger amount, were you not, Ma'am?

A. What do you mean, in a position to take out
2278 of the company?

Q. Withdraw from the company?

A. Yes, we would be in a position to withdraw overage payments.

Q. The larger amount?

A. The difference between the amounts already paid and the amount that appeared on our book.

Q. And you could withdraw this larger amount you had built up on the books by one check that went to Shotwell, and by another check to cash that went to Dave Lubben, couldn't you?

A. Yes, sir.

Q. And Dave Lubben got the cash, didn't he?

A. For payment to someone else, yes.

Q. That's what he said.

A. Well, it held true in other cases, I don't know why not in this one.

Q. You mean there was a general pattern in your company, that you would put up high the amount of money which you could withdraw, and then pull it out with a check to a specific person, and a check to cash; was that a general practice?

A. No, Mr. Kirby.

2279 Q. That was not a general practice?

A. That was not the practice. The practice was to pay overages, not to withdraw cash.

Q. But am I correct, Ma'am, when I say that the effect of marking up the invoices, and posting them to the accounts payable and to the purchases book, in the larger amount, was to make it possible to withdraw from the company a larger amount than you could have if you only posted the invoices?

A. The implication is that the money was withdrawn illegally.

Q. Excuse me. The implication is for the Judge and the Jury.

By the Court: You are arguing with her.

By Mr. Lockley: I object.

By the Court: You are trying to inject an implication, and it isn't within the bounds of cross examination.

2280 By Mr. Kirby:

Q. Ma'am, besides the transactions that you and I have discussed with respect to cash checks, am I correct in believing that you, at these various companies, also kept track of certain cash box—cash boxes?

A. I did not keep track of cash boxes as such, sir.

Q. Did you keep any records with respect to cash boxes at all?

By Mr. Lockley: I object, your Honor. This is beyond the scope of the direct examination. There was no reference made to cash boxes.

By the Court: She may answer.

By Mr. Lockley: I am sorry, your Honor, I didn't hear your ruling.

By the Court: I said she may answer.

By Mr. Lockley: Thank you.

By the Witness:

A. I kept no record with respect to the actual cash box, sir.

By Mr. Kirby:

Q. Did you keep any record at all of money going
2281 in and out of the cash boxes?

A. No, I did not.

Q. Did you personally handle any of the money in or out of the cash boxes.

A. I don't believe so.

By Mr. Kirby: Do you have those cash box summaries that show the amounts charged to Miss Feldman personally?

I don't find them, Joe. I will defer that question. I don't readily find the sheet that I wanted to show the young lady. I will withdraw the question and go back to these checks to cash.

2282 By Mr. Kirby:

Q. Miss Feldman, checks to cash you say were to be supported by a cash authorization slip?

A. Yes, sir.

Q. According to the instructions of your accountants?

A. That is so.

Q. And did those accountants include a man by the name of Bercu, Bernard Bercu?

A. Yes, sir.

Q. And did it also include a firm of accountants known as Sproul Scholz & Company?

A. Yes, sir.

Q. And was there a Joe Myer with Sproul Scholz & Company?

A. Joe Myer?

Q. Yes.

A. I know someone by the name of Joe. If his last name was Myer, I am not sure.

Q. And when checks to cash were issued did you, in fact, make out cash authorization slips?

A. I did.

Q. Was that true in every case?

A. Yes, sir.

2283 Q. Is that true in the period of General Confections, ma'am?

A. From the time I got there, yes.

Q. You came there about August 1st?

A. That is so.

Q. And were you there at the time of the making of the audit for the period of July 1, 1946, to October 31, 1946?

A. I must have been.

Q. Do you recall for that period there were checks drawn to cash by General Confections and examined by the auditors totaling 131 checks of an amount of $286,506.13 in cash; do you recall that?

By Mr. Lockley: There is no such evidence, your Honor. I object to the testimony by counsel.

By the Court: She may answer.

By the Witness: Would you mind repeating that, please?

(Question read.)

By the Witness:

A. I don't know what the amount was, sir, but if there was cash checks in that amount, there were cash authorizations for them.

2284 By Mr. Kirby:

Q. Do you recall that there was $84,620.00 worth of checks in that period as to which there was no cash authorization and as to which the accountants had to ask for some sort of an explanation; is that true or false?

A. No, I don't recall that, sir.

Q. Do you believe it could be true?

A. Does the certified report they submitted say so?

Q. Well, I would like to know, Miss Feldman, in the light of your answer that you always supported the checks, whether you say that that statement—

2285 A. I say there were cash authorizations but if Sproul & Scholz made that statement, I would like to see that in the certified report that they put in for that period. And then maybe I am wrong.

Q. Thank you. May I inquire whether in the period next following, the next accounting period,—which I will concede, your Honor, does run into '47, but, nevertheless, includes some of the critical months in issue here—there were cash checks in the amount of $145,875.91, of which $71,725.77 was unsupported by cash authorization slips?

By Mr. Lockley: I object, your Honor, unless counsel can establish the number of checks, and the amount of them in 1946. In fact, he hasn't even given us the date that was—

By the Court: I assume you will have to make it more definite, so that we can limit it to 1946.

By Mr. Kirby: Well, the accounting periods went over, and I don't dare cut the accountants' work up, Judge.

2286 Perhaps I should withdraw the question.

By the Court: Otherwise she isn't in position to answer the question, because you are going outside the indictment period.

By Mr. Kirby: It is the only way I could reach that period, because it is bracketed, you see.

By Mr. Kirby:

Q. Miss Feldman, did you know of an account in the partnership which was called Loans and Exchanges?

A. I imagine so.

By Mr. Kirby: A check for $36,148.35, there was a photostat on that. Do you know where that is, Sam? It was a photostat.

By Mr. Lockley: Isn't that Manufacturers Trust Company?

By Mr. Kirby: What?

By Mr. Lockley: Wasn't that on the Manufacturers Trust Company ledger sheet?

By Mr. Kirby: Perhaps it was. That was Exhibit 94.

2287 By Mr. Kirby:

Q. Miss Feldman, do you recall testifying with respect to a recap sheet which is marked Exhibit 63-A?

A. I do.

2288 Q. And also a sheet which is marked 63-B?

A. Yes, sir.

Q. Now, that 63-B has some material on it that is in Mr. Lubben's handwriting, doesn't it?

A. That is so.

Q. And what does it say?

A. "Miss Feldman, these were Huebner's last figures. D."

Q. Now, actually, the figures that are on that 63-B are simply the quantities of the then recent shipments, isn't that all?

A. That is all that appears on here, sir.

Q. No overage on that.

A. I am afraid that I can't say, sir. I don't know that—no, there was no overage.

Q. You don't see any overage on 63-B is what I meant.

A. No. I am agreeing with you that there is no overage on it.

Q. It does just show that there were some shipments made from Shotwell, that is all it shows?

A. That's correct.

Q. And those shipments were made?

2289 A. But you wouldn't send us a statement this way, would you?

Q. Is that a statement; is there any dollar amount on it?

A. No, but it is a record of shipments, isn't it?

Q. Ma'am, the question was: Were those shipments made?

A. Yes, they were made.

Q. Thank you.

Now, 63-A is a recap sheet which you prepared, is that right?

A. Yes, sir.

Q. And it says that there was a thirty thousand advance, is that right?

A. Yes, sir.

Q. Now, you didn't identify any check for that?

A. No, I did not, as far as I recall.

Q. There is a balance then shown on your recap sheet of $36,148.35?

A. Yes, sir.

Q. And did you identify a check having cleared your bank account by Exhibit 63 on November 27, in the amount of $36,148.35?

A. Yes, sir.

2290 Q. I show you a document which is marked Defendants' Exhibit 21-A and ask you if you have ever

seen that document before.

A. It is not my recording.

Q. I didn't ask you that.

By the Court: I didn't hear you. I am sorry.

By Mr. Kirby: She said it wasn't her writing. Indeed it is not. I am sure it is true.

By Mr. Kirby:

Q. Did you ever see that before, ma'am?

A. I may have.

Q. Well, it purports to be on the printed work sheet paper of Bernard Bercu & Company.

A. That is so.

Q. Was he an auditor of the company at that time?

A. That is right.

Q. And is that item $36,148.35—

By Mr. Lockley: I object, your Honor, to testifying from these until they have been introduced in evi-
2291 dence. They are not introduced in evidence.

By the Court: He has a right to interrogate regarding the instrument, in so far as it may be pertinent in laying a foundation for it or otherwise.

By Mr. Lockley: As I understand it, she said she wasn't even sure she has seen it before, and now he is questioning her.

By Mr. O'Brien: She said she may have seen it.

By the Court: It is within the scope of the cross examination.

By Mr. Kirby:

Q. Does that item of $36,148.35 appear there?

A. It does.

By the Court: Wait, now. You can't do that, counsel. You can't get into the record by such a question—if you want to ask her what she knows about it or questions that go to the authenticity of it or the foundation, good and well, but you are now seeking to get into the record something by merely having her read an instrument
2292 which is not in evidence. That is not right.

By Mr. Lockley: If your Honor please, I move that the answer be stricken and the question.

By Mr. Kirby: I have conceived and I know that these questions are difficult and I may be in error on them, but I conceive, your Honor, that where on cross examination I must test the witness's answer by reference— I mean, I must test the witness's testimony by

referring to a document. Couldn't I reasonably be permitted to ask if that item is on that sheet?

By the Court: No.

By Mr. Kirby: To key it to it?

By the Court: No, I don't think you are permitted to do it on cross examination. You may ask her whether or not that entry is correct or whether or not she has any knowledge of it but merely having her read from a document not in evidence is improper cross examination.

By Mr. Kirby:

2293 Q. I will inquire of Miss Feldman whether she knows whether the entry on that check, on that document, is correct or not.

A. I would have no way of checking it, sir.

Q. I show you another document which is marked 21-B and ask you if you know in whose handwriting that document appears.

A. I believe I do.

Q. Whose?

A. It looks like Arthur Hausman.

Q. Arthur Hausman was also an accountant that was working at the time of the partnership?

A. He was working for Mr. Louis J. Roth.

Q. And he was working there at the time at least that this $36,000.00 check was involved, is that right, November of 1945?

A. Yes, I believe so.

Q. He posted the same way on the loans and exchanges account as Bercu did, didn't he?

By Mr. Lockley: I object to the conclusion.

By the Court: Well, if she knows, she may answer.

By the Witness:

2294 A. I don't know, sir. I have no way of checking this.

By Mr. Kirby:

Q. The captions on the sheets don't help you?

A. I don't know whether this is a transcript of the record on the books or whether this is a record that they made up from some other source.

Q. I show you a document which is marked 21-C and ask if you know in whose handwriting that is.

A. Mr. Hausman's.

Q. I show you a document which is marked 21-D and ask you if you know in whose handwriting that is.

A. Mr. Hausman's.

Q. The document 21-E, I will show you that and ask you in whose handwriting that is.

A. Mr. Hausman's.

2295 Q. Now, Miss Feldman, isn't it a fact that that $36,148.35 was continuously from November of 1945 at least until the last paper you have there, the close of the partnership, in March, 1946, charged to Lubben personally?

By the Court: You mean on the books?

By Mr. Lockley: I object, your Honor, to her testifying to those work sheets.

By the Court: Is it on the books?

By Mr. Kirby: Yes. They are take-offs on the books.

By the Court: On exhibits you have shown here?

By Mr. Kirby: Yes.

By the Court: Oh, no. You can't. You haven't established any foundation for it. On these exhibits, you have to call somebody who can identify it and be able to testify as to the authenticity. No. I will sustain the objection.

By Mr. Kirby:

Q. I will ask Miss Feldman then, solely from your own knowledge, Miss Feldman, is it not true that that $36,148.35 was on the books of the partnership

2296 charged against Lubben personally?

A. No, because we had a special account with "David G. Lubben, Special Account" for all moneys withdrawn from the company by him.

Q. The name of it was what?

A. David G. Lubben Special Account.

Q. And this account which shows as "DGL", whose is that?

A. That is Mr. Lubben, but—

By Mr. Lockley: I object again to counsel reading from these documents.

By the Court: Well, if she knows to whom that refers, she may answer.

By Mr. Kirby:

Q. Do you know whose account "DGL" is?

A. Yes, sir.

Q. Is that Lubben?

A. "DGL" is an abbreviation of Mr. Lubben's initials.
Q. Thank you.
By Mr. Kirby: I think we do have some journal sheets here. Don't you have some general ledger sheets of the partnership?
By Mr. Lockley: It is not in evidence. It is identi-
2297 fied. It has never been offered.
By Mr. Kirby: Did you identify it with a number, Mr. Lockley?
By Mr. Lockley: I believe there is a number on it.
By Mr. Kirby:
Q. Oh, yes. I show you a document which is marked Government's Exhibit 9-A for identification and ask you if you have ever seen that before?
A. I identified this previously.
Q. What is it?
A. It is a general ledger for the Eatsum Food Products partnership for a period June 1, 1945, to May 31, 1946.
Q. In that general ledger is there a loans and exchanges account?
A. There is.
Q. In that loans and exchanges account, do you find some postings in November, ma'am, of 1945?
A. Yes.
Q. One particularly of $55,736.31?
A. I do.
By Mr. Lockley: Well, your Honor, that ledger
2298 sheet is not in evidence. The government had it identified but we haven't offered it.
By Mr. O'Brien: We are identifying it for—
By the Court: Do you want to offer it?
By Mr. Lockley: If you offer it, all right.
By Mr. Kirby:
Q. Do you know, Miss Feldman, whether included in that total of $55,736.31 is that check of $36,148.35? Do you know?
By Mr. Lockley: Well, I object again, your Honor.
By the Court: Well, it is for the purpose of laying a foundation?
By Mr. Kirby: That's all.
By the Court: She may answer.
By the Witness:
A. I have no way of telling from this entry, Mr. Kirby.

By Mr. Kirby:

Q. Can you say against whom that is charged?

A. That is just debited to the loans and exchanges account. It is not charged against anyone here.

2299 Q. So that your looking at these books and these other sheets that I have shown you which have been marked as exhibits for identification only, does not tell you whether that is or is not charged, that $36,148.00 check, against Lubben personally?

A. I am sorry. I missed the beginning of that question.

(Whereupon the question was read.)

By the Witness:

A. I don't understand. Are you asking me whether the sheets you showed me previously show whether that is owed?

Q. What I am asking you is, does what I have shown you in any way refresh your memory about that thirty-six thousand dollar transaction?

A. No, unless I have my own record here. How can I know that this figure reflects the other item?

Q. All right. Thank you.

By Mr. Kirby: If the Court please, there are a number of other transactions that I do intend to go into with this lady, and I am sure I would save everybody's time if I got them in a little better order.

2300 I won't pretend that I am a fool about these things. I do understand them, I hope, and I am slow, and I think we could save time if we adjourned now.

By the Court: All right.

Well, members of the jury, we will be at recess until Monday morning at ten o'clock, and I want to remind you again of the admonition I have given you not to talk to anybody about the case, nor to permit anyone to talk to you about it, and I want to remind you that if anyone does that, you speak to the Court about it.

I also remind you again about the statement I made to you at the noon hour. You should refrain from reading any newspaper articles pertaining to this case during the time you are serving on the jury.

We will be at recess until ten o'clock Monday morning.

By the Marshal: This Honorable Court will now ad-

journ until ten o'clock Monday morning. Kindly remain standing until the jury leaves the jury box.

2301 (Whereupon an adjournment was taken in the above entitled cause to Monday, September 28, 1953, at the hour of 10:00 o'clock A.M.)

* * (Caption — No. 52 CR 143) * *

Monday, September 28, 1953
9:55 o'clock A.M.

2302-2311 * * *

2312 (Whereupon the following proceedings were had and taken in open court, in the presence and hearing of the jury:)

By the Clerk: 52 CR 143, United States of America vs. The Shotwell Manufacturing Company, et al. Case on trial.

By the Court: You may proceed.

BEATRICE FELDMAN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination (Ctd.)

By Mr. Kirby:

Q. Miss Feldman, on Friday, do you recall I asked you some questions about a cash box? Do you remember that subject was touched upon?

A. Yes.

Q. And at page 2280 of the record there appear some questions and answers and I will read them and ask you whether you remember being asked those questions and making these answers:

"Q. Ma'am, besides the transactions that you and
2313 and I have discussed with respect to cash checks, am I correct in believing that you, at these various companies, also kept track of certain cash box—cash boxes?

"A. I did not keep track of cash boxes as such, sir.

"Q. Did you keep any records with respect to cash boxes at all?

"A. I kept no record with respect to the actual cash box, sir.

"Q. Did you keep any record at all of money going in and out of the cash boxes?

"A. No, I did not.

"Q. Did you personally handle any of the money in or out of the cash boxes?

"A. I don't believe so."

Do you remember those questions being asked and you giving those answers?

A. I think so.

Q. I call your attention particularly to the month of August in 1945 and ask you whether you included that month within your period when you say you did not handle cash in and out of the cash box. Did you?

2314 A. What cash box are you referring to?

Q. I asked you the other day about any cash boxes.

A. I handled no cash box.

Q. And I asked you if you handled any money in and out of the cash box and I read you your answer and does your answer apply to August of 1945?

A. Sir, if I did not handle the cash box, I would not handle the moneys coming in and out of it.

Q. All right. In August of 1945, did you handle a cash check which was cashed and the money given to you in the amount of $25,000.00?

A. Do you have such a check, sir?

Q. Well, I do, but I am inquiring if you remember it.

A. I wouldn't—sir, at this time I wouldn't know what checks were issued in August of 1945.

Q. Well, did you put such an amount from a single check, of $25,000.00, in the cash box?

A. I never handled the cash box, so I could not have put a check, deposited $25,000.00—I could not have cashed it and put the cash in the cash box.

Q. The same thing would be true if I asked you about a group of checks that found their way into the cash box in August, 1945, totaling about $60,000.00.

2315 You didn't handle that total either?

A. Sir, I did not handle the cash box.

By Mr. Kirby: Will the Reporter please mark this as Defendants' Exhibit 27 for identification.

(Said document was marked Defendants' Exhibit 27 for identification.)

By Mr. Lockley: Is that Defendants' Exhibit 27?

By Mr. Kirby: Yes.

2316 By Mr. Kirby:

Q. Miss Feldman, I show you a document which is marked Defendants' Exhibit 27 for identification and ask you if that isn't the handwriting of the accountant Hausman?

A. That is true. That is Mr. Hausman's handwriting.

Q. And was he doing accounting work during that period of August, 1945?

A. He was, for Mr. Roth.

Q. I ask you to please look at the entries with respect to the receipts in the cash box with your name on them in the upper left hand corner.

A. I am looking at them, sir.

By the Court: I did not hear you.

By the Witness: I say, I am looking at them.

By Mr. Kirby:

Q. Now that you have looked at those matters in August of 1945, Miss Feldman, do you believe it is still correct that you did not handle any money in and out of that cash box?

A. Sir, I have stated repeatedly before that I did not handle the cash box. I still stand by that answer.

2317 The fact that my name appears next to these signatures does not mean that I handled the cash box.

Q. Well, ma'am, did you handle that cash?

A. Yes. If I cashed the check or one of the girls went to the bank and cashed the check and gave the money to me, I handled the cash, but I did not handle the cash box.

Q. My question the other day, and I thought I was making it plain, was whether you handled the cash box and then whether you handled any cash in or out of the cash box. Now, do you say—I will leave out the word "now", so I won't argue. Do you tell me that you did handle the cash, or some of it, in and out of the cash box?

A. My answer would still be no, sir.

Q. Well, is it still no that the checks to cash there charged to you on that sheet, you did not handle?

A. Did I endorse these checks?

Q. (Continuing) And put them in the cash box?

A. Did I cash these checks, sir?

Q. I understand you did, ma'am.

A. I don't know. I haven't seen these checks.

2318 Q. There are some $60,000.00 worth in one month and you surely can remember whether you did or didn't handle $60,000.00 in and out of that cash box.

A. I did not handle that cash box, Mr. Kirby. I have handled at least a half a million dollars in cash but you cannot tell me that I handled cash in and out of the cash box.

2319 Q. This sheet I gave you, Mr. Krane gave me, of the Government, and it purports to have some reference to a cash box, doesn't it?

A. Is that what this record is part of?

Q. If you look at it, isn't that what it purports to be, Ma'am?

By Mr. Lockley: I object, your Honor. This sheet isn't in evidence. It hasn't been identified in any way.

By the Court: I will sustain the objection.

By Mr. Kirby:

Q. Ma'am, do you recognize ever having seen a sheet like that exhibit before?

A. I probably did see it.

Q. Does that sheet bear any relation to a cash box?

A. Evidently, sir. Oh, yes, definitely.

Q. Do both sides of the entries on the sheet bear relation to a cash box?

A. Yes, sir, but I do know I did not handle this. I stated this at various hearings: This had nothing to do with anything that I handled.

2320 Q. That includes, Ma'am, the group of entries that bear your name on the upper left hand side?

A. I was requested to issue a check. I did so on a cash authorization. The fact that the money was put into the cash box, does not mean I handled the money for the cash box as such. The fact that my name appears on here, and also the fact that the money was originally obtained from the box, does not mean I handled it personally.

Q. Excuse me. Is your answer that you did not handle it personally?

A. I did not handle the cash box personally.

Q. How about those checks that are referred to there, that cash?

A. Sir, have I endorsed all of these checks? May I see them, please?

Q. Can you tell me?

A. I don't know, sir. I have handled over a half a million dollars. I have handled over a half a million dollars in cash during the course of those businesses.

Q. A half million dollars in cash? What did you do with the half million dollars in cash, Ma'am?

A. The cashed checks to pay—

2321 By Mr. Lockley: Your Honor, I object. I think the question is much too general.

By the Court: The objection is sustained. It is too broad and goes into matters that can't have any possible reference to the issues in this law suit.

By Mr. Kirby: I call the Court's attention to the great importance of the cash, and the accounting for it, because there wasn't a single check—

By the Court: I have sustained the objection.

By Mr. Kirby:

Q. Ma'am, would you tell me what you mean by your statement that you handled a half a million dollars in cash? What do you mean by that?

A. Mr. Kirby, I believe that an examination of our books and checks shows there were numerous amounts of checks issued to cash which I, or my assistant, took to the bank. I don't know the sum total of the checks. I am fairly sure they total a half a million dollars over a period of three years, if not more.

Q. And were they turned over to Mr. Lubben?

2322 By Mr. Lockley: Well, now, I object to that, too. It seems to me there has been no evidence of that.

By the Court: Yes. We have one law suit here.

By Mr. Lockley: It is a conclusion.

By the Court: I will sustain the objection. We are not going to explore all of the various cash activities of this concern over a period of two years which has no reference to the issues in this law suit.

2323 By Mr. Kirby:

Q. When I was questioning you on Friday about

cash and checks to cash, these questions and these answers appear on page 2278—after reviewing the way the books were kept in the proprietorship, I then came to these questions:

"Q. And you could withdraw this larger amount you had built up on the books by one check that went to Shotwell, and by another check to cash that went to Dave Lubben, couldn't you?

"A. Yes, sir.

"Q. And Dave Lubben got the cash, didn't he?

"A. For payment to someone else, yes.

"Q. That's what he said.

"A. Well, it held true in other cases, I don't know why not in this one."

And then I asked you this question:

"Q. But am I correct, ma'am, when I say that the effect of marking up the invoices, and posting them to the accounts payable and to the purchases book, in the larger amount, was to make it possible
2324 to withdraw from the company a larger amount that you could have if you only posted the invoices?"

And your answer was:

"A. The implication is that the money was withdrawn illegally."

Now, did you?

By Mr. Lockley: Now that question was objected to and the objection was sustained.

By Mr. Kirby: Well, the next question was—"Excuse me. The implication is for the Judge and the jury."

And the Court then said with reference to that last question that I was arguing with her but there was no objection to the question and the answer which I read, Mr. Lockley.

Now, did you make those responses to those questions?

A. I did.

Q. Now when you said:

"Well, it held true in other cases," you were referring to a practice of cashing checks to cash and then charging them on the cash disbursements book to suppliers,
2325 Shotwell and other suppliers of your company?

A. No, sir, I was not.

Q. Well, what did you mean when you said, "Well, it held true in other cases?"

A. I had—

Q. Didn't you follow the pattern you followed with respect to Shotwell?

A. Certainly, sir, but I saw the payments made to other people.

Q. All payments?

A. Not all of them, but I have seen payments made to other people.

Q. Well, the pattern then—am I correct in believing that you say the pattern was also the same with other suppliers, namely to draw a check to cash, turn the money over to Lubben, sometimes you saw the money go to people but it was a check to cash and then it would be marked on the cash disbursements against the supplier, is that right?

A. If that was the purpose for which the cash was being used, yes, sir.

Q. Was the $500,000.00 in cash you are talking about, ma'am, cash so connected with that practice of keeping books with respect to suppliers?

A. Mr. Kirby, I also drew cash checks for varying
2326 amounts for payroll, which was also a cash check.
I drew cash to pay for other items. It wasn't only for overages to suppliers. We sometimes had to purchase other items for full amount of cash where we could not put an overage.

Q. And those were transactions, for example, in corn?

A. I did not handle the corn, Mr. Kirby.

Q. You did not handle the corn box?

A. I did not handle the corn box and I did not handle corn.

Q. Let us get back to this question of the practice, limiting it now, for the moment, to suppliers of candy, to Lubben's companies. As I understand it, you did follow a practice with Shotwell and with the others of making a check to cash, cashing the check—the money would go to Lubben and you saw some of it go to some of the suppliers. You never saw any of it go to the Shotwell people, did you?

By Mr. Lockley: How many questions are you asking, Mr. Kirby?

By Mr. Kirby:

Q. I just happened to ask, did you ever see any
2327 money paid to the Shotwell people yourself?

A. I never said that. I did not, sir.

2328 Q. All right. You say you have seen it paid to some of the other suppliers?

A. That is correct.

Q. All right. But the practice you are talking about was a practice of making the checks to cash, and charging that check to the cash disbursements book against the supplier, is that right.

A. When we withdrew it for that purpose, yes.

Q. And the cash disbursements book would show that it was a check to cash, but that it was charged against the supplier, is that right?

A. That is correct, sir.

Q. And the effect of that then on the books was to charge that cash, that currency, against Shotwell, or against the supplier, is that true?

A. Where it was withdrawn for payment of overages, yes.

Q. Now did that money that is charged against the supplier, Shotwell, or to other suppliers, did that money go into the cash box?

A. Sir, I told you I handled no cash boxes.

Q. Do you know whether the money went into the cash box or not?

A. Sir, the cash box that you have reference to, if 2329 I am not mistaken, is the one for the corn. That occurred in the partnership period. It did not occur in the single ownership. There was no cash box in the single ownership, so the question does not apply, so far as I can see.

Q. There was no cash box in the single ownership at all?

A. No, not that I ever heard of.

Q. You didn't hear Mr. Lubben's testimony that there was?

A. A cash box in the single ownership?

Q. Yes.

A. He may have been mistaken. I don't know of any.

By the Court: I think he said a petty cash box, didn't he?

By Mr. Kirby: No, sir. We showed some substantial amounts.

Q. Well, were the entries as to a cash check or a cash disbursements book charged against the supplier,

and do you know whether that cash did go into the cash box?

By Mr. Lockley: Well, your Honor, I object. He has asked that question .

2330 By the Court: You would have to be more definite as to the period, Mr. Kirby. You are indefinite as to the period covered. We have a proprietorship, a partnership, and we have the regime of General Confections.

By Mr. Kirby: Well, if the Court will indulge me a second through the proprietorship, and the partnership, and the corporation, so far as the defendant Shotwell Company is concerned, it was never different. It was simply a check to cash, charged on the disbursements book.

By the Court: Well, there may be a difference in the reference to the so-called cash box.

By Mr. Kirby: I was attempting to test the validity of the entries which purport to show this money for cash checks went to the suppliers. I was asking the young lady as to the contrary—it didn't go into the cash box.

By Mr. Kirby:

Q. How about that, Miss Feldman, did it go into the cash box, or don't you know?

A. Which period are you referring to?

2331 Q. Well, I will ask you about the sole proprietorship. That is the period you got the book for, isn't it?

A. We had no cash box, to the best of my knowledge, at any time during the life of the single ownership.

Q. And when did the life of a single ownership end?

A. On June 1, 1945.

2332 Q. So the transactions of April of 1945 were in the sole proprietorship?

A. That is correct, sir.

Q. Would you be good enough then to tell me whether the entries to the cash disbursements book of the sole proprietorship of cash checks—could you locate that for me?

A. I believe so.

Q. Would you be kind enough to take a look at that book for the period in April of 1945 and I will ask you about certain transactions.

By Mr. Lockley: Do you want the purchase book?

By Mr. Kirby: No. The cash disbursements book.

By Mr. Kirby:

Q. Now, that cash disbursement book, that is the book in which you would enter a check to cash and then say it went to one or the other of the suppliers if it was an overage check, is that right, ma'am?

A. That is correct?

Q. That would be the same book, as far as Shotwell is concerned and other suppliers?

A. That is correct.

2333 Q. Was a man by the name of Joseph Eiger a supplier?

A. Offhand, I wouldn't know, sir.

Q. Did you ever hear of a Joseph Eiger?

A. The name sounds familiar. Do you have a ledger sheet for him, sir?

Q. Well, I think you will find him under that. I will get you specific reference on that. Would you have no memory of the man as you sit there now?

A. No.

Q. How about Blue Ribbon Trucking? Did they supply material sometimes?

A. Blue Ribbon Trucking is a trucking firm that hauled our merchandise in and out.

Q. Did they ever supply you materials?

A. I believe there were times we paid them for merchandise.

Q. Sugar?

A. Yes.

Q. Black—black market?

A. If you want to call it that, yes.

Q. How about National Process Foods, were they a supplier?

A. Yes, sir.

2334 Q. Were overages charged against them?

By Mr. Lockley: I object, your Honor. This is beyond the scope of the direct examination. There has been no testimony by this witness as to any payments on direct, to anybody else.

By the Court: It goes to the general method of keeping books. If that is what he has reference to, I see no objection to it.

By Mr. Kirby: That is exactly it, sir.

What was that last question?

(Question read.)

By the Witness:

A. By National Process?

By Mr. Kirby:

Q. Yes.

A. I believe so.

Q. Did you know a Two Star Confectioners?

A. I did.

Q. Were overages charged against them?

A. Definitely.

Q. Did you know a Sam Gertz?

A. I did.

2335 Q. Were overages charged against him?

A. Yes, sir.

Q. Now, when you would charge overages against them in that cash disbursements book, your pattern was the same as with Shotwell?

A. Yes, sir.

Q. And then from the cash disbursements book you would charge—I maybe shouldn't say from because I don't think that is exactly accurate—I will rephrase the question.

You also charged overages against them on the accounts payable ledger?

A. Yes, sir.

Q. In the same manner as with Shotwell?

A. I believe that on Two Star it was a little bit different. They were making a number of shipments on which they never submitted bills.

Q. Different than Shotwell?

A. No. Shotwell did the same thing except that Two Star followed that pattern for a much longer time.

Q. It was consistent with them? It was a consistent pattern with Two Star?

A. Yes.

2336 Q. Where is that located?

A. In Boston.

Q. Is that Morley Kramer's company?

A. It is.

Q. All right. Now, then, you have the cash disbursements book there and do you see a check on April the 5th of 1945, check No. 3300 to cash entered in there?

A. 3300?

Q. That is the number of the check, yes.

A. Yes.

Q. A check in the amount of $8,581.87?

A. Yes.

2337 Q. Now does that show that check went to Joseph Eiger?

A. It does.

Q. Now you asked me if there was a Joseph Eiger posted on the books. You see there now that there is?

A. Yes, sir.

Q. Was that cash entry made in the period of the proprietorship?

A. It was.

Q. When you were keeping the books?

A. Yes, sir.

Q. You would have made out a cash authorization on that, I assume?

A. Yes, sir.

Q. You would have shown that it went to Eiger?

A. Yes, sir.

Q. On the basis of information supplied to you by Lubben?

A. Yes, sir.

Q. Now do you know whether it is a fact or not that that $8,561.87 went into a cash box and not to Mr. Eiger?

A. Sir, I have already told you I know of no cash
2338 box during the life of the partnership—the single ownership.

Q. So it could not have gone into a cash box, in so far as you are concerned?

A. In so far as I know, no.

Q. Would you find a check on the 16th of the same month which is No. 3427? Do you find it?

A. I have it.

Q. And is that in the amount of $4.900.00?

A. It is.

Q. Is it charged as having gone to Blue Ribbon, one of your suppliers?

A. It went to Blue Ribbon.

Q. Your answer would be on any question as to whether that went into the cash box, that so far as you know, it could not have?

A. Sir, may I add something, please? These cash authorizations, if there was no bill at all for an invoice, had a receiving ticket attached so could never have gone into the cash box.

Q. Now on the 18th of that same month, will you take a look at check No. 3440. That is a check to cash, isn't it?

A. Yes, sir.

2339 Q. It is a small check, $135.00, but it was charged against National Process Foods, one of your suppliers, was it?

A. Yes, sir.

Q. As an overage?

A. Yes, sir. I don't know whether—yes, it would have been an overage. I am sorry.

Q. Charged against them?

A. Yes, sir.

Q. Not against the cash box?

A. No.

Q. Would you see a check there on the next day, No. 3457, to cash?

A. Yes, sir.

Q. Is that in the amount of $2,632.66?

A. Yes, sir.

Q. That is charged as having gone, although it is a cash check, to Two-Star Confections?

A. That is right.

Q. As overage?

A. Yes, sir.

Q. Not into a cash box?

A. That is correct, sir.

Q. Now on the next month, on the 9th, do you

2340 find a check No. 3736?

By Mr. Lockley: Is this May 9th?

By Mr. Kirby: Yes, Mr. Lockley, 1945.

Q. It is during the period of the proprietorship and I am asking about these particularly because these are the only books I can ask you about, really.

By the Witness:

A. Yes.

By Mr. Lockley: All right. I only asked you what the month was.

By Mr. Kirby:

Q. And that is a check to cash?

A. Yes, sir.

Q. In the amount of $4,788.00?

A. That is correct.

Q. And it is said to have been paid to Sam Gertz as overage?

A. That is correct.

Q. And not to a cash box?

A. That is so.

2341 Q. On the 27th of the same month, do you find a check, 3562?

A. Yes.

Q. That is the check to cash in the amount of $4,000?

A. That is so.

Q. That is shown as having gone to Two Star Confections as overage?

A. That is correct.

Q. And not into a cash box?

A. Mr. Kirby, there was no cash box at that time.

Q. Thank you. Now, Ma'am, as I understood your testimony, another book in which you would enter these payments, or these overages would be the accounts payable ledger?

A. That is so.

Q. Now the accounts payable ledger—well, let us take the largest number of the checks in there, and not go through all of them.

Could you look at the accounts payable ledger with respect to that $8,561.87 check to cash, which is charged off against Eiger?

By Mr. Lockley: Just a moment, please, Mr.
2342 Kirby. Only the two ledger sheets relating to The Shotwell Manufacturing Company in the accounts payable ledger book are in evidence.

By Mr. Kirby: Have you got the balance of it?

By Mr. Lockley: Yes. It is here, the balance of it, and it has been identified, but not introduced.

By Mr. Kirby: What exhibit number did you give to it when you had it identified?

By Mr. Lockley: Government's Exhibit 6.

By Mr. Kirby:

Q. I show you Government's Exhibit 6 for identification, and ask you if you would find the accounts payable ledger card for Joseph Eiger?

A. No. It doesn't seem to be in here.

By Mr. Lockley: I have just been advised by Mr. Krane that not all of the accounts receivable ledger—

the accounts payable ledger sheets are not in that book. Some of them have been deleted with respect to certain purchases of suppliers.

By Mr. Kirby: I will ask her about some others then.

2343 By Mr. Lockley: Maybe in the independent files of the individuals, the name would appear on the sheet.

By Mr. Kirby: All right.

Q. Do you have one in there for Blue Ribbon?

A. Yes, I have.

Q. Do you find a $4,900 charge there on the 16th of April of 1945?

A. I don't. Wait a minute.

By Mr. Lockley: Your Honor—

By the Witness: How much? For $4,900?

By Mr. Kirby:

Q. Yes.

A. Yes, I do. It is right here.

Q. And is that the same item and the same date as the check to cash that I asked you about, No. 3427, dated the 16th of April, 1945, in the amount of $4,900?

By Mr. Lockley: Your Honor, I object.

By the Court: Mr. Lockley desires to make an objection.

By Mr. Lockley: I make my objection, your Honor, to the fact that this is going beyond the scope of the

2344 direct examination, and it is immaterial to the issues.

By the Court: Well, is this entire record now in evidence?

By Mr. Lockley: No, sir, it is not. None of that is in evidence, with the exception of the two papers, the sheets which are now on the table by Mr. Kirby, and which relates to The Shotwell Manufacturing Company.

By Mr. Kirby: They identified the whole of them as being here and available for cross examination, which I am trying to do.

By the Court: Well, it is desirable from time to time to keep our law suit within proper bounds, and you are now interrogating about other matters that haven't any reference to the issues in this law-suit.

By Mr. Kirby: Well, if your Honor please—

By the Court: What is the purpose of your inquiry?

By Mr. Kirby: If the Court please, having in mind the great weight that the Judge holds with the jury,
2345 I think it has a great deal to do with the law suit, and I must respectfully urge upon you—

By the Court: I fail to see your purpose. Is it to determine the validity of the slips?

By Mr. Kirby: Yes, and this is—

By Mr. Lockley: Your Honor—

By Mr. Kirby: She says this is the precise pattern that prevailed as to the others, and I am tracing it down with her to see whether it can be tested. I think it can be.

By the Court: As to whether the overages that were paid to other suppliers were listed in the book, in the same manner as she contends it was listed with reference to Shotwell Manufacturing Company.

By Mr. Kirby: That is right, and then we can show what happened to that money.

2346 By the Court: Well, are we going to trace every entry that may have been referred, or that may have referred to an overage as to Tom, Dick and Harry, who were suppliers?

By Mr. Kirby: No, no; but certainly I ask to be permitted to show that comparable entries can be shown to be wrong.

By Mr. Lockley: Well, your Honor, I wish to point out—

By the Court: We have to determine whether a particular supplier received an overage which the books indicate he didn't receive.

By Mr. Kirby: Well, if they kept the books the same way with respect to the man as to whom we are now directing the question, I think it would be proper for me to show that the entries with respect to him are false so that would buttress our own proof that the entries with respect to Shotwell are false.

By the Court: You mean, we are going to try out the question as to whether or not a particular sup-
2347 plier received the overage that the books indicate was paid to him?

By Mr. Kirby: No. We don't have to do that, but this is a foundation for impeachment of these very books that are offered by the government.

By Mr. Lockley: May I state, your Honor, that these books are, of course, merely corroborative evidence of the direct testimony of Mr. Lubben.

By Mr. Kirby: No, no.

By Mr. Lockley: That certain amounts—please, Mr. Kirby, may I make my statement? That these amounts were paid to the Shotwell Manufacturing Company. The books only reflect the recording of these amounts. Now, what those books reflect with respect to anybody else is certainly not binding or in any way controlling on the Shotwell Manufacturing Company.

By the Court: I assume counsel has a right to make reasonable inquiry as to whether or not the same matter was carried out as to overages with other suppliers, when other suppliers were paid overages. To that
2348 extent, I assume this is a proper inquiry.

By Mr. Lockley: He has already asked that and Miss Feldman has stated that there were exceptions to the manner in which such recordings were made, depending upon the company and the practice.

By Mr. O'Brien: I object to counsel testifying. Miss Feldman didn't say any such thing.

By Mr. Lockley: That is my recollection, Counsel. Will you please read the question?

(Question read.)

By the Witness:

A. That is the same check.

By Mr. Kirby:

Q. And it is charged as an overage on dextrose?

A. I don't know what that was charged for, sir. Do you have the cash authorization slip for it?

2349 Q. Does it show what it was charged for?

A. No, it does not.

Q. Now, then, do you find a ledger sheet—accounts payable ledger sheet for Two-Star Confections?

A. No, it is not in here.

By Mr. O'Brien: It was our understanding that all of the books of the proprietorship would be available so that we would have them here for cross. Now, I am not interested in the fact that the Government may have withdrawn specific sheets for use in other files and pidgeonholed them somewhere. We would like to have the records here.

By Mr. Lockley: They are here, Mr. O'Brien. And had we had any notice whatsoever that you were going into this collateral issue—

By Mr. O'Brien: We wanted the proprietorship books here.

By Mr. Lockley: We had only introduced two sheets of that proprietorship book. If there is any other portion of it in the hands of the Government I will have
2350 them brought up at the noon recess, if they can be found.

By the Court: They can be introduced the same as other sheets that may be relevant to your lawsuit.

By Mr. O'Brien: We need the books in the court room for the cross examination, your Honor, and not out of the court room. All of the books of the proprietorship are pertinent.

By the Court: Proceed with your examination.

By Mr. Kirby: Will the reporter mark the cash disbursement sheets covering the proprietorship period, starting with April 5, 1945, through May 27, 1945, those being the ones to which Miss Feldman has had her attention called, as an exhibit number with sub letters starting with A.

Miss Feldman, would you find for the reporter, please, the pages we are talking about in April.

By the Witness: Do you want to give me those
2351 check numbers again? It will be much easier.

By Mr. Kirby: The earlier one is April 5th and the latest one is on the 27th of May.

By the Witness: The 5th of April and the 27th of May.

By Mr. Kirby: Yes.

By the Witness: 78 to 96.

By Mr. Kirby: Then we don't want to bother with all those pages.

By the Witness: That is why I thought the check numbers would be helpful.

By Mr. Kirby:

Q. The first check number is 3300.

A. 3300?

Q. Yes.

A. That's page 78.

Q. The next is 3427.

A. 3427, that's page 81.

Q. The next is 3440.
A. 3440, page 81.
Q. The next is 3457.
A. Page 81.
2352 Q. The next is 3736?
A. Page 91.
Q. The next is 3562?
A. Page 84.

By Mr. Kirby: Will the reporter then mark, in the cash disbursements book, as 28-A, page 78; as 28-B, page 81; as 28-C page 91; and as 28-D, page 84.

(Said documents were marked Defendants' Exhibits 28-A to 28-D, inclusive.)

By Mr. Kirby: Will the reporter mark as Defendants' Exhibit 29 for identification the page on the accounts payable ledger of the proprietorship for Blue Ribbon Trucking, on which the entry of April 16, 1945 appears.

(Said document was marked Defendants' Exhibit No. 29 for identification.)

By Mr. Kirby: Will the reporter mark these four checks—I have inquired about six checks, but the Government has not been able to locate more than four for us at the moment, or maybe I should say it is our own fault—this group of four checks Defendants' Exhibits
2353 30, 30-A, 30-B, and 30-C.

(Said documents were marked Defendants' Exhibits 30, 30-A, 30-B, and 30-C, for identification.)

By Mr. Lockley: You are aware that those checks are always available for you, if you go and search for them yourselves, when the Government can't find them.

By Mr. Kirby: That's right.

By Mr. Kirby:

Q. And Miss Feldman, I hand you four checks—four of the six I asked you about—marked in the 30 series, and ask whether you signed them all?
A. I did.
Q. And they are all checks to cash?
A. They are.
Q. And am I correct in believing that they look the same as the checks to cash that you have identified with respect to Shotwell, that is, they have no markings of

any kind other than simply the word "cash" on the face?

A. That is so.

By Mr. Kirby: All right.

2354 Will the reporter mark this Defendants' Exhibit 31 for identification?

(Said document was marked Defendants' Exhibit 31 for identification.)

By Mr. Kirby:

Q. I show you a sheet which is marked Defendants' Exhibit 31, and ask you if that is in the handwriting of the accountant, Hausman?

A. That is.

2355 Q. And was he the accountant, or one of the accountants working in this March and April of '45 period?

A. He was in there making an audit—wait a minute, '45?

Q. Or would that have been something he made up to review what had happened in March and April of '45?

A. This is something he may have made up in review.

Q. All right. Thank you. Had you ever seen that Exhibit 31 before, ma-am?

A. I don't believe so, sir.

Q. It shows all of the checks I asked you about.

A. I didn't check that, sir.

Q. Does it show the check for eighty-five sixty—

By Mr. Lockley: I object. The exhibit is not in evidence. She says she had never seen it before.

By the Court: Well, I assume that may be an appropriate question, in so far as the foundation of the document is concerned.

By Mr. Kirby: Will you read the question.

(Question read.)

2356 By Mr. Kirby:

Q. —$8,561.87?

A. It does.

Q. Does it show the check for forty-nine hundred?

A. Yes.

Q. Does it show the check for $135.00?

A. Yes.

Q. Does it show the check for $2,632.66?

A. It does.

Q. Does it show the check for $4,788.00?
A. Four thousand—yes.
Q. Does it show the check for four thousand?
A. Yes. It also shows these checks were paid out to the vendors.
Q. I will interrogate you about what it shows. Isn't it that statement of currency in a currency box?
A. Is it? I don't know, sir.
Q. Well, young lady, you just started to tell me what it shows, and now I want to ask you—
By Mr. Lockley: I object. He is arguing with the witness. And I recall no such testimony. She said she didn't know what it was. She merely said those particular checks are recorded.
2357 By the Court: The contents of the document are not in evidence.
By Mr. Kirby: Then I ask that her volunteered response be stricken.
By the Court: All right. It will be stricken.
By Mr. Kirby: And we will get to that when it is in evidence.
Is Hausman going to be a witness for you, too, John?
By Mr. Lockley: I will make up my mind on that, Mr. Kirby. You can subpoena him, if you want him.
By Mr. Kirby: Some of this material is in his handwriting. I will have to wait till you use him or don't use him.
By Mr. Kirby:
Q. Now, then, young lady, I am going to another subject.
A. Go ahead.
Q. The amount of cash that you mentioned briefly a while ago was $500,000.00, that you had seen, I think you said, isn't that right?
A. I said that it passed through my hands, if I
2358 remember correctly.
Q. And does that exclude cash connected with the corn box?
A. Sir, I think I have testified on a previous occasion that I had nothing to do with the corn box, that I only heard of it because someone couldn't add. I did not handle a corn box.
Q. All right, ma'am. Then the five hundred thousand doesn't include the corn box; we agree, don't we?

A. That's right.

Q. And you testified in front of the Kefauver Committee, didn't you, that the amount of money that had been in the corn box was approximately $400,000.00?

A. They asked me if I knew how much had been in the corn box and I said I thought that it was that amount. I did not say that I knew because I had counted it that it was in there.

Q. I don't doubt that Mr. Halley had precisely the same difficulty as I am having.

A. Yes.

By Mr. Lockley: I object to this sort of—

By Mr. Kirby: All right.

2359 By Mr. Kirby:

Q. Now, then, you were keeping the books, except for a period in the middle of '46, were you not, for all of Lubbon's enterprises?

A. Yes, sir.

Q. And you were making the various entries in the check books, and handling the bank accounts, and things of that type?

A. Either I or someone under my supervision.

Q. And in the period of the proprietorship, during 1945, would it be true that the checks to cash which you posted, or had, under your supervision, posted to the various accounts would total approximately $383,000.00?

A. I wouldn't know.

2360 Q. Now, in the partnership period from—that was from June of '45 to March of '46, wasn't it?

A. Yes.

Q. In that period did you post checks to cash in the approximate amount of $353,000.00?

A. I have no way of knowing.

Q. Does that amount sound substantially right?

A. No, I would have no way of checking that figure.

Q. Besides that there was the four hundred thousand that you talked about down there.

Now, then, in the General Confections period, from 3-1-46 to 6-1-46, were the checks to cash in that period $323,000, approximately?

A. Mr. Kirby, again I must say I couldn't answer that.

Q. And in the period from July 1, 1946 to October 31, 1946, were the checks to cash of General Confections that

you had posted, or posted under your supervision, $286,000.00 approximately?

A. I have no way of telling that, sir.

Q. And in Reserve Trading were the checks to cash approximately $105,000.00?

A. I have no way of checking that, sir.

Q. Well, ma'am, the total of those amounts is
2361 $1,843,000.00. Now, do you believe that you did handle, or those under your supervision did handle the writing and cashing and the entry of checks to cash in the amount of $1,843,000.00 in the two years of 1945 and 1946?

A. Sir, I have no way of knowing how much the cash checks amounted to. If that is what they total, that is what we entered on the books. That's as far as I can go on that.

Q. But that amount doesn't strike you as being demonstrably false?

A. I had no reason for checking it, so I couldn't tell you if it was false or not.

Q. Now, Mr. Lubben was the president of the General Confections?

A. I believe so.

Q. And did he draw his salary by check or by cash?

A. I don't recall how he drew on the payroll at that

Q. Do you know what his salary was?

A. Not offhand.

2362 Q. Well, would it strike you that for General Confections in 1946 his salary was $10,500—does that sound about right?

By Mr. Lockley: I object, your Honor.

By Mr. Kirby: She kept all these books.

By Mr. Lockley: It is beyond the scope of the direct examination.

By the Court: I suppose the books are the best record, if it appears in the books.

By Mr. Kirby: Well, the cash disbursements books, which would carry these checks, are missing.

By the Court: If she knows, she may answer.

By the Witness: I have no way of telling now what his salary was, sir.

By Mr. Kirby:

Q. Well, let me ask you then, of this million eight

hundred thousand that I have asked you about, in checks that were cashed, became currency—now, that was handled as directed by Lubben?

By the Court: You are assuming something that is not in evidence. She said she can't say whether it is the correct figure or not. Your question assumes it is 2363 a correct figure.

By Mr. Kirby: All right. I will withdraw it.

By Mr. Kirby:

Q. Miss Feldman, whatever the amount of checks to cash, they were cashed, as I understand it, and the directions as to the disposal of the cash were given by Mr. Lubben; isn't that true?

A. That's right, sir.

Q. Now, do you ever recall charging a check to cash, or any of this currency, against Lubben personally as income; do you ever remember doing that?

A. Well, Mr. Kirby, we have an account on the books, which, I think, appeared on all three sets of books, called "D.G.L. Special" into which we put checks or cash—and I am not sure of whether there were checks drawn to cash that we did that with—which Lubben used for personal use, and which we charged to that account.

Q. And how much did that run to, do you know?

A. I have no idea, sir.

Q. Have you got that account here?

A. I don't know. You wouldn't—

2364 By Mr. Kirby: Have you got the account?

By Mr. Lockley: Where would it be, Ma'am, if we have got it?

By Mr. Kirby: I asked her about what was charged to Lubben, and she mentioned an account.

Have you got it?

2365 By Mr. Krane: What period?

By Mr. Kirby: Have you got it for any period?

By Mr. Krane: Mr. Kirby, every book we have, you have examined, and, I believe, made photostats of it. I don't know what you are referring to. If we have it, you have photostats of it.

By Mr. Kirby:

Q. Well, Ma'am, where would I find—

A. It would be in the general ledgers.

Q. For the proprietorship?

A. I believe there was one there. I am not quite certain of that. I know there was one in the partnership, and I believe there was one in General Confections.

By Mr. Kirby: Do we have a general ledger for the proprietorship?

By Mr. Krane: We put all the books we have here, and you will be able to find whatever you want, if it is here. These are all the books that your accountants have gone over for months, so I am sure they are familiar with them.

2366 By Mr. McConnell: Do we have to have this running comment with the moving of the books?

By Mr. Kirby: Well, did you ever make a list, Mr. Fitzgerald or Mr. Lynch, of what books they did have?

By Mr. Fitzgerald: Yes.

By the Court: Wait a minute.

By Mr. Lockley: I object. Mr. Fitzgerald, or Mr. Lynch, are not under oath, and are not testifying.

By the Court: Go ahead with your examination. Haven't you had all of the books of these companies for inspection for many, many months?

By Mr. Kirby: Yes.

By the Court: Well, I am just wondering why you should have this delay then. I assume you know about as much about the books as Mr. Lockley does.

By Mr. Kirby: Well, your Honor, I asked this witness a question— —

By the Court: And she said she doesn't know.

By Mr. Kirby: She said I could find it in a certain 2367 book, and I asked the Government if I might see the book that she referred to. That is all that this—I think—unseemly performance is about. Now that is all. I would like to see the books she told me to look at.

By Mr. Lockley: I object to this performance being characterized as unseemly. The Government has merely handed him all the books which we have in our possession, and which they have had for months.

By Mr. Kirby:

Q. I hand you a document which is marked Government's Exhibit 9 for identification, which is the general ledger for a part of the proprietorship, I believe, isn't it, Ma'am?

A. Yes, it is.

Q. And is that the book you referred me to?

A. Well, I remember seeing it in the partnership general ledger. Whether it is in here or not—

By Mr. Kirby: The next one she is referring me to is the partnership ledger. That is this, isn't it?

2368 I will learn this yet, Judge.

By the Court: Well, we will take our morning recess now, members of the jury.

By the Marshal: This Honorable Court will now recess for ten minutes. Kindly remain standing until the jury files out of the jury box.

(Short recess.)

By Mr. Kirby: Will you mark these Defendants' Exhibits 32 to 35, inclusive, for identification?

(Said documents were marked Defendants' Exhibits 32 to 35, inclusive, for identification.)

By Mr. Lockley: Mr. Kirby, before you begin, I have had the agent find for me the ledger sheets on National Process Food, Joseph Eiger, the Two Star Confectionery, W & N Kramer Gum Products. I guess that is all.. I will make them available at this time.

2369 (Documents handed to counsel.)

By Mr. Kirby: I will ask the reporter to mark those with continued letters in the 29 series.

(Said documents were marked Defendants' Exhibits 29-A to 29H, inclusive, for identification.)

By the Court: You may proceed.

By Mr. Kirby:

Q. I hand you a book, a page which has been marked Defendants' Exhibit 32 for identification, and is that the page to which you had turned at the time of the recess?

A. Yes, I was looking for David G. Lubben Special Account in here, and I don't think—

Q. Is there a David Lubben Special Account in the proprietorship at all?

A. I don't know, sir. If these are all the pages, then evidently there isn't.

Q. Exhibit 32 is his drawing account?

A. That is what it is marked.

Q. Now, can we tell from that which of the drawings charged against Mr. Lubben are checks to cash and

2370 which are not?

A. We would have to check every one of these entries, sir.

Q. In that cash disbursements?
A. That is correct.
Q. So that you couldn't indicate to me with sureness of any cash checks charged against him on that book until you checked the cash disbursements?
A. No, I would be unable to tell from here.
Q. I understand it is about twelve out of the total.
A. I don't know. But I couldn't tell from looking at this.
Q. All right. Now then, is the next account on which Mr. Lubben might have been charged for that cash in this account in the partnership, which is marked Defendants' Exhibit 33, and which is captioned, "David G. Lubben, Special"?
A. That's correct.
Q. And can you tell from that book which of those amounts charged against him were cash check items?
A. No, I would be unable to tell from this sheet.
Q. We would have to check that. Well, there is really no place we could check that if we don't have the checks to cash?
2371 A. We don't have the cash disbursements or the check books, no.
Q. All right. Now, the next place that we could find if there was any of this cash charged against Lubben, would be this sheet which is marked Defendants' Exhibit 35 for identification, is that correct?
A. That is correct.
By Mr. O'Brien: What happened to 34?
By Mr. Kirby: That's right.
By Mr. Kirby:
Q. In the partnership we located another book of Lubben's, which is called "Drawings", I think, and it is marked 34. I meant to call that to your attention. It is just ahead or just behind that other one you found for me.
A. Yes, I see the one you mean.
2372 Q. That's Exhibit 34?
A. That's correct.
Q. That is a drawing account for Mr. Lubben in the partnership?
A. That is so.
Q. Can we tell from that Exhibit 34 whether any of this cash is charged against him there?

A. No, you would be unable to tell from this account, sir.

Q. And in the next period, the period of General Confections, I have handed you an exhibit marked 35, and is that the sheet in the books of General Confections to which we would look to see whether any of this cash was charged to Lubben?

A. It is marked 35, you say?

Q. 35.

A. Yes, I have it here.

Q. And is 35 the right one, ma'am?

A. Yes, that is marked David G. Lubben Special.

Q. And can we tell from that how much of this cash that was charged against Lubben?

A. Not from this sheet you can't.

Q. No. But that is the book—the book you have in your hand now, that covers the General Confections 2373 period up till at least the periods we are interested in here, doesn't it, '45, '46?

A. Yes, it does.

Q. And am I correct in believing that that shows what was charged against Lubben personally in that period?

A. That is so.

Q. And does it show that he put in $15,000.00 net more than he took out?

A. In which book are you referring to now, sir?

Q. Exhibit 35.

A. What was that question again?

By Mr. Kirby: Will you read it?

(Question read.)

By the Witness:

A. Not for the entire sheet, it doesn't, sir.

Oh, wait a minute. Are you referring to this balance?

By Mr. Kirby:

Q. Yes.

A. Oh. Yes, the balance at March 1, 1947, shows that.

Q. Well, to the end of the indictment period, anyway, which is the end of '46, in that General Confections 2374 book, which is where we would find any of these cash things entered, it shows that Lubben put fifteen thousand more in than he took out; isn't that what it shows?

A. That's right.

Q. Thank you. Is there a place in New York called 253 Broadway?

A. There is.

Q. And is that where they work on special investigations on people's income taxes?

A. Yes, sir.

Q. And you have done some work there?

A. Well, they have called me down to ask me questions on innumerable occasions.

Q. With respect to both the Shotwell case and also Mr. Lubben's personal income tax?

By Mr. Lockley: Well, I object to the witness's conclusion, your Honor.

By the Court: Yes, I will sustain the objection.

2375 By Mr. Kirby:

Q. When was the first time that you—you say you were called down; when was the first time you were called down to 253 Broadway, ma'am?

A. In October of 1948.

Q. And were you there with Mr. Lubben?

By Mr. Lockley: Well, your Honor, I object. That is immaterial. It is beyond the scope of the direct examination.

By the Court: Well, she may answer.

By the Witness: I am sorry. What was that question?

(Question read.)

By the Witness:

A. Mr. Lubben was present, if that is what you mean.

By Mr. Kirby:

Q. And was a Mr. Tobias present?

A. He was not.

Q. Do you know a Daniel Tobias?

A. I did not know of him at the time. I have since heard of him.

Q Well, were you there when—by "there" I mean at the General Confections—when Daniel Tobias worked 2376 there or had you left before he arrived?

A. I don't know when he arrived, sir. As far as I know, I have never seen him.

Q. He wasn't there during your time there?

A. No, not as far as I know.

Q. All right. Did you ever work with him, Daniel Tobias, at any time, either at 253 Broadway, or any place else, on these books?

A. In so far as I know, I have never worked with Mr. Tobias, Mr. Kirby.

Q. Now, when you were at 253 Broadway, did you confer then with Mr. Twohig?

A. With Mr. Twohig and Mr. Cordez.

Q. And that was in the fall of 1948?

A. It was in October of 1948.

Q. And when you conferred that first time, was it just the one interrogation or were you there for several days; how long a time was it, ma'am?

A. I believe that at that time I was only there one day. I was in from a vacation from the Coast and they had called me down, and I believe I was there just that one day and I returned to the West Coast.

Q. And when were you there next?

A. Well, sometime after December of 1948.

2377 Q. Do you know about when?

A. I have been there so many times, sir, that I have no record of when I actually went back.

Q. Well, did you go there early in '49 and spend some days there?

A. No, I don't believe so.

Q. Did you ever spend any days there?

By Mr. Lockley: Well, I object, your Honor. I fail to see the materiality. It is beyond the scope of the direct examination.

By the Court: I presume they are preliminary questions.

By the Witness:

A. I have spent a lot of time there, yes.

By Mr. Kirby:

Q. What do you mean by a lot of time? As the Judge indicated, these are preliminary questions, and I am not going to take—

A. There was an occasion when several gentlemen came from Chicago, who were working on this particular matter, and they had me down there in the evenings, and Saturdays and Sundays questioning me.

Q. And about when was that?

2378 A. Oh, that was around—let's see—I believe it was about two years ago.

2379 Q. And that related to things including Shotwell and others?

A. That is correct.

Q. Did it relate to Lubben's income tax?
A. It did not.
Q. Did you come out to Chicago one time?
A. I did.
Q. And was that March 14, 1952?
A. That's correct, sir.
Q. The time of the Grand Jury hearing?
A. That is correct, sir.
Q. You were here for a few hours?
A. I was here for the day, sir.
Q. Have you ever appeared in front of the Grand Jury in connection with Mr. Lubben's taxes?
A. No, never.
Q. He has never been indicted, has he?
A. No, never.
Q. Now, you were the bookkeeper or in charge of the books during this '45 and '46 period, and did you work in connection with the preparation of Mr. Lubben's income tax for this period?
A. I did not.
By Mr. Lockley: Well, I object, your Honor.
2380 By the Court: Yes, I will sustain the objection.
By Mr. Kirby:
Q. Ma'am, what is your present employment?
A. I am an office manager and bookkeeper.
Q. Where?
A. Supera-Vite Color in New York City.
Q. What I meant by "where", it is back in New York; you are not living in California any longer?
A. No, New York City.
Q. Miss Feldman, one of the names that I asked you about last Friday was an account in the partnership General ledger, account 15, called Loans and Exchanges; do you remember that we had some discussion about that?
A. Yes, sir; we touched on it briefly.
By Mr. Kirby: Would you mark that account as Defendants' Exhibit 36 for identification?

(Said document was marked Defendants' Exhibit 36 for identification.)

By Mr. Kirby:
Q. I hand you a document which has been marked for identification Defendants' Exhibit 36; and is that

what you call the Loans and Exchanges account?

2381 A. That's correct, sir.

Q. And that shows that the partnership had some money coming from somebody, doesn't it?

A. That is correct, sir.

Q. Now, does it show who the partnership had the money coming from?

A. It does not.

Q. You kept the record, though?

A. Of what?

Q. That exhibit?

A. I don't follow you, sir.

Q. Well, that exhibit, Ma'am, was it either kept by you directly, or by persons under your supervision?

A. No, in this instance, this was kept by the accountants.

Q. Was that kept, as Mr. Lockley says, in the usual and normal course of business?

A. Yes, sir.

Q. All right. Now, Ma'am, do you know from whom the partnership had that money coming?

A. No.

Q. Are there some sub totals of amounts owed Loans and Exchanges on that exhibit?

A. Yes, sir.

2382 Q. And by the end of that ledger, which is May 31, 1946—I only want to ask you about one figure, and I hope Mr. Lockley will indulge me in this—was the account owed the partnership $113,750.17?

By Mr. Lockley: I regret that I must object, your Honor, as that exhibit is not in evidence.

By Mr. Kirby: Well, Judge, there are some little pencil figures at the side, and unless this lady tells us what that means, it is going to be confusing to everybody.

By the Court: Well, the exhibit is not in evidence. It can't be confusing to anybody if it isn't in evidence.

By Mr. Kirby: Is the objection sustained, your Honor?

By the Court: I will sustain the objection.

By Mr. Kirby:

Q. Miss Feldman, I notice on the left hand side of that exhibit a number of little penciled writings, and so that you can know what I am talking about the

earliest one is 7085421, and then there are some
2383 others that follow; are those subtotals to that date;
is that what that means?

By Mr. Lockley: I object again, your Honor. She has testified she didn't keep that record.

By the Court: She can answer.

By the Witness: I am sorry, would you read the last part of that question?

2384 (Question read.)

By the Witness:

A. Yes, sir; that is so.

By Mr. Kirby:

Q. In other words, the accountants would take that sheet and as they would come to end of a month, or the end of an accounting period, they would strike a little balance and write it in in pencil?

A. That's correct.

Q. And that is what those little figures in pencil to the left of the ink notations mean?

A. That's correct.

Q. And they show the dates as to which they apply, do they, or could you figure that out from where they appear physically on the page?

A. You mean the pencil figure?

Q. Yes.

A. That would be the difference between the debit side and the credit side at any given point.

Q. And you tell the date by seeing where it physically is on the page?

A. Ordinarily.

Q. That's right. And does it show such carges—let me ask it this way, and withdraw that question.

2385 Does it show that throughout the period of that exhibit the partnership was owed money by somebody?

By Mr. Lockley: I object, your Honor. The exhibit is not in evidence. It is beyond the scope of the direct examination.

By the Court: Yes, I will sustain the objection.

By Mr. Kirby:

Q. Were the charges—no, I will withdraw that.

Now, when the partnership ended, so far as Mr. Lubben's immediate connection with it was concerned, do I understand that you stayed with the partnership for a while and handled the books?

A. That's correct, sir.

Q. And does that include the period of April 30, 1946, to May 31, 1946?

A. That's correct, sir.

Q. And does it include the latest of the periods shown on that sheet?

A. Yes, sir.

Q. And you had custody of that sheet up until at least the date of the latest entry?

A. Yes, sir.

2386 Q. Did you ever confer with the auditors about that Loans and Exchanges account?

A. I may have, sir.

Q. Did you ever confer with them about charging that Loans and Exchanges account against Lubben?

A. There would have been no reason to.

Q. The answer was that he wasn't connected with it; is that what you mean?

A. I don't see any reason why Loans and Exchanges account would have to be charged to Lubben.

Q. Did you ever confer with the auditors about charging that against Shotwell?

A. I did not, sir.

Q. Do you know whether that account, or any part of it, was finally charged against Shotwell?

A. Sir, I have no way of telling that. I was not there when the books were actually closed.

Q. But at least you didn't make a charge against Shotwell?

A. I did not, no.

Q. And that record was under your supervision in November of '45, was it?

A. No, it was posted by the accountant at that time.

Q. But your general supervision over the records 2387 included that date of November, '45?

A. That's true.

Q. Was any part of that, do you know, ever charged as advances to Shotwell?

A. I have no way of telling, sir.

Q. Well, it doesn't appear to be so charged from that book, does it?

A. No, from Loans and Exchanges I could not say, sir.

By Mr. Kirby: What did she say last?

(Record read.)

By Mr. Kirby:

Q. Was that what you said, ma'am?

A. Yes.

Q. All right. Now, I want to go to another subject. As I understand it, Miss Feldman, you say that in the proprietorship you would post purchases into a purchases book?

A. This is the single ownership you are speaking of?

Q. Yes.

A. Yes.

Q. And do I understand that you say that you posted the purchases, in the case of Shotwell, at least, for
2388 the amount of the invoice plus an added amount?

A. Yes.

Q. Did you maintain an inventory of your purchases?

A. Yes, we had an inventory.

Q. And was that kept accurately?

A. It would have to be, sir, since we were manufacturing.

Q. And did it reflect all of your inventories?

A. Yes, sir.

2389 Q. Was there ever a situation in the single ownership where you had left as much as $50,000 out of your inventory?

A. That I had left $50,000 out of—wait a minute, sir. First of all, I don't believe I kept inventories in the single ownership. I think the accountants did.

Q. Well, you posted the inventories to the books, kept some book records of inventories?

A. No, I don't believe it was handled in that manner, sir. I think the accountants kept a check on that.

Q. Where did you keep a record of your inventories?

A. First of all, most of our shipments at the very beginning were drop shipments, sir, and the ones that we did get, we had repackaged. We didn't own our plant in the single ownership until some time late in the year, I believe, when it was really starting to operate.

Q. Well, Ma'am, whenever you did it, you kept inventory records of some kind, didn't you?

A. Sir, at this moment I am at a loss to tell you
2390 what kind I kept. I haven't thought of it in years.

Q. Let me ask, were they accurate or not accurate?

A. They would have to be accurate, otherwise, the accountant would let us hear about it.

Q. Did the accountant ever let you hear about fifty thousand that was left off the inventories by Mr. Lubben in the single ownership?

A. In the single ownership?

Q. Yes.

A. Not insofar as I can remember at this time, sir.

By Mr. Kirby: Would you mark this Defendants' Exhibit 37 for identification?

(Said document was marked Defendants' Exhibit 37 for identification.)

2391 By Mr. Kirby:

Q. I hand you a document marked Exhibit 37 for identification and ask you if you know in whose handwriting that is?

A. This is Mr. Hausman's.

Q. The accountant?

A. That is correct.

Q. Now, will you look at the back and particularly with reference to any questions as to unrecorded inventories—

By Mr. Lockley: For what period of time, Mr. Kirby?

By Mr. Kirby: It is in the single ownership.

By Mr. Lockley: Why, I don't believe there has been any testimony that Mr. Hausman worked for the single ownership.

By Mr. Kirby: No. I think the testimony is that he came in and reviewed the setup of the books in the single ownership, so, he was a pretty good expert on what they showed. He did it eight years ago.

By Mr. Kirby:

Q. Now that you have looked at that exhibit, let

2392 me inquire, did the accountants ever talk to you about an item of $50,000.00 left off the inventory?

A. This is the first time I have ever seen this, sir

Q. Did they ever take up with you the question of whether the books were being kept to leave items totaling as much as $50,000.00 off in order to reduce Mr. Lubben's cash liability? Did they ever discuss that with you?

By Mr. Lockley: I object to the conclusion in the question, your Honor; the first portion of the question I certainly have no objection to but I object to the latter part.

By the Court: She may answer.

By the Witness: Will you please read the question again?

(Question read.)

By the Witness:

A. Sir, we entered our books—we entered in the books as we got our invoices which we paid out our moneys. Any changes for taxes would have to be on accountant's work sheet papers and not on our books.

2393 By M. Kirby :

Q. As to whether or not such changes for tax purposes were made, you didn't do it, somebody else did?

A. No. I had nothing to do with the preparation of those taxes.

Q. Ma'am, I only have one final thing I want to ask you about and I will apologize in advance and indeed I perhaps should seek the guidance of the Court—the witness Moran—you know a Moran that is a brother-in-law of Lubben's?

A. Yes, I know Jimmy Moran.

Q. He testified here and he testified with respect to—he said he cashed four checks for $5,000.00 each one day at Chicago and then he said he took the money out to the plant and gave it to the Shotwell people. Of course, you weren't here, but were you keeping the books—or let me ask it this way: You did examine the bank statements as they came back to General Confections, didn't you?

A. Yes, and both the accountants.

Q. Yes, and you can read them and interpret them for us, can't you?

A. That is correct, sir.

2394 Q. Well, Mr. Moran testified that this happened in the summer of 1946. He remembered he was in shirt sleeves. I would like to hand you the bank statements of General Confections for the period starting in April of 1946 when it opened up and going through to the 1st of November of 1946 when it was too cold to walk around in shirt sleeves and I ask you if you can find any four checks for $5,000.00 clearing that bank account ever during that period?

By Mr. Lockley: Well, your Honor, I object. There

has been no testimony that that was a General Confections check.

By Mr. O'Brien: Oh, yes.

By Mr. Kirby: Oh, yes. Both Lubben and Moran—

By Mr. Lockley: It was charged against General Confections but there was no evidence it was from Mr. Lubben's personal bank account or from General Confections' account or from any other account.

By Mr. Kirby: We asked him.

By the Court: I don't remember that. Well, she may answer the question.

By Mr. Lockley: Are those exhibits which you
2395 have handed the witness in evidence?

By Mr. Kirby: I will have them marked.

By Mr. Lockley: Have they been identified?

By Mr. Kirby: I will have them marked.

By Mr. Lockley: I object to any testimony, your Honor. No proper foundation has been laid.

By the Court: I will sustain the objection.

By Mr. Kirby: I am asking her—well, let me have them marked.

Would you please mark these Defendants' Exhibits 38-A through 38-M for identification.

(Said documents were marked Defendants' Exhibits 38-A through 38-M both inclusive, for identification.)

By Mr. Kirby:

Q. I show you a series of bank statements which have been marked Defendants' Exhibits 38 in series and ask you if that is the type of ledger sheet that the Manufacturers Trust Company would send to General Confections each month?

A. Yes, sir.

2396 Q. You have seen them and audited them many times, I suppose?

A. Yes, sir.

Q. Will you look through those and point out to me if you find them, any instance where there are four checks for $5,000.00 clearing on the same or succeeding days?

A. No, sir, I can't find them.

Q. Thank you. I have no more questions.

By Mr. Kirby: These exhibits should be marked 38-A through 38-M for identification.

Cross Examination by Mr. O'Brien.

Q. Miss Feldman, all of these exhibits which Mr. Kirby had identified this morning; that is Defendants' Exhibits 28-A, B, C and D, that series, which I think were the ledger sheets of Two-Star and on those other companies, those were all records regularly kept and maintained by the proprietorship, were they not?

A. Yes, sir.

Q. And Exhibit 29 for identification, a sheet from the accounts payable ledger, is also a record regularly kept and maintained?

2397 A. Sir, any of the ledger sheets mentioned, they were.

Q. And the same is true, is it not, of Defendants' Exhibit 31 for identification which was the Hausman work sheet made in June of 1945?

A. I am sorry. What was the beginning of that question?

By Mr. O'Brien: Will you please read it to the witness.

(Whereupon the question was read.)

By the Witness:

A. No, that is not true, sir, because Mr. Hausman was working for Mr. Roth and when Mr. Giglio thought of coming in as a partner, Mr. Roth had Mr. Hausman come in and make an audit of the books for the previous year, but they were not part of our regular record.

Q. I see, but that was due to the fact that that was made in June. As I understood you, that sheet was made in June of 1945 and pertained to March and April of the same year?

A. Yes, but Mr. Roth had sent Mr. Hausman in to make an audit of our books prior to the time that they became partners in the business.

2398 Q. Perhaps I should ask you: Did he make this one, this sheet before or after the partnership commenced?

A. I wouldn't know that, sir.

Q. And the Defendants' Exhibits 32, 33, 34 and 35 for identification, all of which were the books of the various companies, showing or which might show accounts to which charges may have been made with Mr. Lubben in the proprietorship, the partnership, General

Confections, those were all sheets regularly made in the due course of the businesses of those companies?

A. As part of the general ledger, yes.

Q. And the same is true of account No. 15, the partnership ledger pertaining to the loans and exchange account?

A. Yes, sir.

Q. I think you said to Mr. Kirby and to the jury that you had witnessed payments made to other people on occasion, that is, other suppliers?

A. That is so.

Q. Do you now remember who the suppliers were?

By Mr. Lockley: Well, your Honor—

By Mr. O'Brien: I haven't asked their names. I
2399 am merely testing her memory.

By the Court: Do you recall?

By the Witness: Yes, I recall some of them.

By Mr. O'Brien:

Q. Do you remember how many?

A. Three or four, perhaps four.

Q. Would you say that there were more than two?

A. Yes, sir.

Q. That you witnessed?

A. Yes, sir.

Q. Were you not asked about that on your deposition and did you not answer there were two?

A. I believe at the deposition I mentioned the people to whom I had seen the money given.

2400 Q. Yes. Do you now remember the amount which you witnessed paid?

A. No, sir.

Q. You did not remember at the time of the deposition either, did you?

A. No, sir.

Q. So I take it, what you meant is that on the occasions which you had in mind, some representative of the supplier was present and you saw Mr. Lubben give him some money?

A. That isn't what I meant, sir.

Q. What did you mean?

A. There was a specific amount given to the supplier, not the representative of the supplier.

Q. Well—

A. And it was for a particular recap sheet. Which one, I couldn't tell you that at this time, sir.

Q. Did you deliver it or did Mr. Lubben deliver it?

A. Mr. Lubben would have handed them the money in my presence for the recap sheet which I drew up at the time this individual was present.

Q. How do you know the amount of the recap sheet?

2401 A. If there was a check or cash when I drew up the recap sheet and I drew up the recap sheet for the exact amount of the check and I handed it to Mr. Lubben, well, he in turn gave it to a third party, it had to be the same amount.

Q. You mean, he handed them the cash?

A. The cash, the check—if I went to the bank or if my assistant went there and I went and I collected it and found it corresponded with the face of the check, I turned around and handed it to Mr. Lubben and Mr. Lubben turned around and handed it to a third party, why, it had to be correct.

Q. Who were the suppliers with whom you say that occurred?

By Mr. Lockley: I object to that.

By the Court: I don't think we need to go into that. It hasn't any possible bearing on this lawsuit.

By Mr. O'Brien: I think, with all due respect to the Court, I think it has.

By the Court: I will sustain the objection.

By Mr. O'Brien: This lawsuit has to do with the disbursement of the money.

By the Court: I will sustain the objection.

2402 By Mr. O'Brien: Yes, sir. I note an exception.

By Mr. O'Brien:

Q. What is Mr. Moran's first name?

A. Well, I have known him as Jimmie or maybe James.

Q. Did he work for Mr. Lubben?

A. He did not, sir.

Q. Did he work for any of the companies?

A. Yes, he did.

Q. Which companies?

A. Not for the companies we were running, no.

Q. Which company?

A. Well, I knew he was working for Haberkorn.

Q. He had no employment with Eatsum or General Confections?

A. No, sir.
Q. At any time?
A. No, sir.
Q. At any time that you are acquainted with?
A. No, sir.

By the Court: If you want to go into the questions as to the names of the suppliers to whom she said money
2403 was paid to, in so far as it may refer to the validity of the books, I think then it is a proper question.

In other words, if you want to find out whether or not that supplier is listed in the books as the one to whom overages were due, I think that maybe it is a proper matter for you to explore, if that is what you had in mind.

By Mr. O'Brien: Well, the situation there, your Honor, is that there is a considerable ambiguity as to what constitutes the books and in my notion, it is that the books consist of these ledger sheets and things like that, but in this record there are other papers and it has been testified to that a pattern of conduct flowed out of the combination of those things, sometimes loosely referred to as the books. It is said, I take it, that that pattern obtained in the case of these suppliers. Miss Feldman said it and certainly meant to give the inference it must have been so because she witnessed that it happened on these occasions.

2404 Now, that is very material and I have the right to lay a basis for the impeachment of the witness as to that statement through those suppliers and for that purpose, I want their names.

By Mr. O'Brien:

Q. Now who were the auditors during the proprietorship, Miss Feldman?
A. The single ownership, you mean?
Q. Well, you call it a single ownership. Without need for duplicating the question, I am sure that whenever we refer to the proprietorship—
A. You mean single ownership.
Q. You mean single ownership.
A. The auditors were Bernard Berey & Company.
Q. Yes, and when you call it a single ownership, is it your impression that no one other than Mr. Lubben ever had an interest in the single ownership?

A. That is correct, sir.

2405 Q. Now, before you were called to the stand to testify on direct, did you have any conversation with anyone concerning what Mr. Lubben's testimony had been?

A. I understand that it was not proper to discuss such things, Mr. O'Brien.

Q. I don't know whether that is so or not, but whether proper or improper, did you have such a conversation?

A. I had no conversations about his testimony.

Q. What is Mr. Roth's first name?

A. Mr. Roth?

Q. Yes.

A. Louis J.

Q. And Hausman?

A. Arthur.

Q. Are they both licensed accountants?

A. Licensed? You mean certified?

Q. Yes.

A. Mr. Louis J. Roth is not certified.

Q. Mr. Hausman is?

A. So far as I know, yes, sir.

Q. Are you speaking of the classifications in New York State?

A. Yes, insofar as I know them, sir.

2406 Q. Do they have it classified as certified public accountant, and public accountant?

A. That I don't know, sir. I believe if they are not certified, they are just a public accountant.

Q. Was Mr. Roth a public accountant?

A. Yes, sir.

Q. Now, when you were at the partnership during that liquidation period of some months, I think, were the books and records there in your custody?

A. In my custody.

Q. Were they still there physically in that office at the time you left the partnership and went to General Confections?

A. Yes, sir. The complete set of books were there.

Q. And during that time, I take it, Mr. Bereu was still doing the auditing?

A. During the liquidation period of the partnership?

Q. Yes.

A. No, he was not.
Q. Who was?
A. Mr. Roth was.
Q. And Mr. Hausman or not?
2407 A. No, Mr. Hausman had discontinued working for Mr. Roth.
Q. Was Mr. Starr there?
A. On and off, yes
Q. For Mr. Roth?
A. Yes, sir.
Q. How many commercial banking accounts did the proprietorship maintain?
A. We had an account with Manufacturers Trust Company.
Q. Is that true also of the partnership?
A. Yes, sir.
Q. And General Confections?
A. Yes, sir.
Q. It is also true, is it not, that you may have had some payroll account, or a subsidiary account in some other banks during the periods of these different entities?
A. No. We had a payroll account at the Corn Exchange Bank in the Bronx.
Q. That is, outside of the payroll account in the Corn Exchange Bank in the Bronx, not any of these companies maintained a bank account except at the Manufacturers Trust Company?
A. General Confections did.
2408 Q. Where?
A. I believe there was one—somewhere in Jersey.
Q. There were two General Confections, were there not?
A. Yes. There was one while I was working there, and Mr. Lubben later started another firm under the name of General Confections.
Q. The other one was after the receivership?
A. Yes, sir.
Q. Now when you say that General Confections had some account other than the Manufacturers Trust, do you mean the first or the second of the General Confections?
A. Now you have me confused. I know there was an account in Jersey. I don't know which company it was for right now, sir.
Q. Would that appear in the books and records of General Confections?

A. I think so.

Q. What sort of a record would reflect the depositor for the company?

A. I believe it would appear in the cash receipts book. There would be a column for that particular bank.

2409 Q. But you can't remember the name?

A. Offhand, I don't remember which one. Garfield Trust, I think.

2410 Q. Was that in New York City?

A. No. In Jersey.

Q. Hillsdale?

A. Sir, I am afraid that I don't know.

Q. Well, on the occasions when you drew or anybody under your direction drew checks to cash and sent them to the bank to procure the money, it would be given to Mr. Lubben—were they always sent to the Manufacturers Trust Company?

A. They were, because they were just a block away from the office at the time of the partnership.

Q. At the time you moved over to Jersey, did you still maintain that account?

A. Yes, I believe the account was still maintained in Manufacturers Trust.

By Mr. Lockley: Will you establish a date for these various accounts, Mr. O'Brien.

By Mr. O'Brien: I didn't think it of particular interest, the time, or I would have been more specific.

By Mr. O'Brien:

Q. Do you recall when it was when you moved the plant to Jersey from the Bronx?

A. We moved the plant to Jersey at the end of

2411 June or the beginning of July of 1947.

Q. I see. That is beyond the time that we are interested in here. So that all during the year 1946 the plant was up at the Bronx?

A. That is correct, sir.

Q. And the same is true during 1945?

A. Yes, sir.

Q. So it is true then that all of the cash checks to which I have just referred were taken to the Manufacturers Trust to be cashed?

A. They may have been taken to another branch of Manufacturers Trust.

Q. Oh, indeed, because they do have various branches throughout the city?

A. Throughout the city, yes.

Q. But whichever branch it was, it was the same bank, the Manufacturers Trust?

A. So far as I can recall right now, it would have been.

Q. Do you remember whether Mr. Bercu audited your invoices, your sales and your purchases?

A. When he audited them?

Q. Do you remember that he did?

A. Yes, sir.

Q. And did he check the books of original entry?

2412 A. Yes, Sir.

Q. Who was doing the posting to the general ledger at the time that you came?

A. Mr. Bercu.

Q. Did he continue to do the posting after you came?

A. Yes, sir.

Q. All the way through?

A. Yes, sir.

Q. Neither you nor any of the folks under you did the posting to the general ledger?

A. The first posting to the general ledger that was not done by the accountants, I believe it was done either—from what I notice in the general ledger here, some time in May of 1946—I think that was the first time that my handwriting appears on the general ledger.

Q. So that during substantially all of the proprietorship period, the postings to the general ledger were made by or under Mr. Bercu?

A. That is correct.

Q. Now did that practice continue throughout the partnership also?

A. Yes, sir.

2413 Q. And in the partnership, did you or your assistants do the posting?

A. No. The accountants did the posting in the partnership.

Q. But the records—the number and kind of books which were maintained by the partnership were precisely the same as in the case of the proprietorship, were they not?

A. Yes, sir.

Q. And there in the partnership they were also audited in the same way by Mr. Bercu or his folks?

A. Well, we had two accountants auditing them then.

Q. Well, nevertheless, Mr. Bercu audited them independently, did he not?

A. He audited them independently and then Mr. Roth audited them independently.

Q. Now on the deposition, Miss Feldman, do you remember my asking you this question:

"Q. Did you have anything to do with the preparation or maintenance of any record of company transactions other than the records which you have already described?"

Do you remember that after some delay you an-
2414 swered that question—

By Mr. Lockley: May I have the page number. Mr. O'Brien?

By Mr. O'Brien: Yes. It is page—starting the record at page 28.

By Mr. O'Brien:

Q. And you answered that you maintained a personal record?

A. That is correct.

Q. And by that, you were referring to the memoranda and the recap sheets, were you not?

A. That is correct, sir.

Q. Now those memoranda, starting—let us take the proprietorship. The memoranda were made by you in your own handwriting, were they not?

A. Yes, sir.

Q. And that is the paper on which you would ordinarily show the date of the shipment, the weight, the item, the overage per pound, or whatever it was that the unit consisted of?

A. That is correct, more or less.

Q. And then you would extend that out in terms of dollars to reach a total with reference to the particular memoranda that you were making at the time?
2415 A. Yes, sir.

Q. Now then, how long after that was it that you would pay the invoices by check in the typed amount or printed amount?

A. There was no specific way of doing it. We could issue a check before we paid the overages. In a good many cases we issued after we paid the overages.

Q. Well, I wasn't talking about the recap sheet now, Miss Feldman.

A. You are speaking—

Q. Am I to assume—withdraw that.

Am I to assume that you paid the overages at the time you prepared these longhand memoranda?

A. No. Those memoranda were kept as a running total. At one particular point when Mr. Lubben would say he was going to pay for overages I would stop the memoranda at that point and make up an overage sheet.

A. All right. Then you said, if I can get it a little more exactly, you have an invoice coming in from a supplier?

A. Yes, sir.

Q. And if overage had been indicated, you would 2416 mark that on the face of the invoice?

A. Yes, sir.

Q. And then somehow you would pass the invoice through and post it to purchases?

A. Yes, sir.

Q. Now would you, at the same time, do anything with respect to the payment of that by check or would you wait until the first of the month or the tenth of the month, or whenever it was?

A. You are speaking of the typed amount on the face of the invoice?

Q. Yes.

A. As I said before, there was no definite way of doing it. Some of these invoices called for certain types of terms. If we had the money to pay within the terms, we would pay them within ten days. We might pay them the day we got the invoice. It depended on what our financial situation was at the time.

By M. O'Bhien: All right.

By the Court: We will be at recess until two o'clock this afternoon.

By the Marshal: We will be at recess until two o'clock this afternoon. Kindly remain standing until the 2417 jury files out of the jury box.

(Whereupon an adjournment was taken in the above entitled cause to 2:00 o'clock of the same day, being Monday, September 28, 1953.)

2418

• • (Caption—No. 52 CR 143) • •

Chicago, Illinois,
Monday, September 28, 1953
2:00 o'clock P.M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley.
Mr. Vincent O'Brien
Mr. Thomas C. McConnell
Mr. William T. Kirby

And Thereupon the following proceedings were had herein, in the presence and hearing of the Jury:

2419 BEATRICE FELDMAN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and testified further as follows:

Cross Examination (Continued) By Mr. O'Brien.

Q. Miss Feldman, I was speaking this morning about the memoranda or recap sheets which, I think, you said became a part of the record when the checks for the overages were drawn and posted. Did you do the posting of those checks, or were those also posted by the auditors?

A. You are referring to the proprietorship now, I gather.

Q. Yes.

A. The actual posting of the check from the bank—from the check book to the cash disbursements book would not necessarily have been done by me. And it also follows that the posting from the cash disbursements book to the accounts payable ledger sheet would not necessarily have been done by me.

Q. No, I appreciate that, although I am a little confused. Maybe I misunderstand just what it is that the

auditors were posting.

2420 A. The cash disbursements book and your cash receipts book, and your sales and purchases, and your general journal are what we call the books of original entry. The postings from those books, the totals, at the end of the month, are the postings that go into the general ledger. Those are the postings that were made by the accountants.

Q. I see.

A. From the books of original entry to the general ledger.

Q. So that the cash checks, when charged to cash disbursements and into the accounts payable ledger may have been posted by the regular bookkeeping staff of the company?

A. Bookkeeping staff of the accountant, did you say?

Q. No, of the company.

A. The postings in the books of original entry, yes, were made by the bookkeepers of the company.

Q. And that would include the accounts payable ledger and the cash book?

A. Yes.

Q. The cash authorization slips, were those also made in longhand?

A. Sometimes they were typed, sometimes in long-

2421 hand.

Q. Generally in longhand?

A. I would say so.

Q. During the time that you were with the companies did anyone other than you or Mr. Lubben draw cash authorization slips?

A. Yes, there may have been instances when others did draw cash authorization slips.

Q. While you were with the company?

A. Yes.

Q. If you stated on your deposition that during that time nobody but you and Mr. Lubben drew cash disbursements . . . cash authorization slips, were you incorrect?

A. I don't recall what I said in my deposition, sir, but if I said that, it was with the intent that the only one who signed the cash authorization slips was Mr. Lubben.

Q. Well, I want to be sure of that. At page 44 of the deposition I asked you:

"Question: Was the cash authorization slip likewise made in longhand?

"Answer: Yes.

"Question: Who made those?

2422 "Answer: Sometimes I, sometimes Mr. Lubben.

"Question: Anyone else?

"Answer: Possibly. Well, there possibly would have been some made up by someone else for the period that I was not working for General Confections, if there were any of those made at that time.

"Question: I mean the time that you were there.

"Answer: During the time that I was there, nobody except Mr. Lubben and myself."

A. Now, are you speaking of cash authorization in general, sir, or cash authorizations for overages?

2423 Q. Well, I am speaking of the same ones you were talking of on deposition which, I take it, were those which had to do with the pattern of payments that you were there describing.

A. Well, let me answer it this way. I believe that on the cash authorizations for the overages, on those accounts that kept a record as described, the cash authorizations were issued by myself or Mr. Lubben. There were other occasions where there might have been cash authorizations issued by Mr. Hankermyer.

Q. Having to do with the same things?

A. I don't believe so, sir.

Q. And then from time to time you would gather the memoranda sheets which you had made and would recap those in typewriting on a typewritten sheet, would you not?

A. That would be the usual procedure.

Q. And I believe you said—by the way, how many typewritten sheets would you commonly make?

A. There was a duplicate, an original, and possibly a third duplicate—a third copy. It would have been an original and two copies.

Q. And one of those would be retained for the

2424 file?

A. That is so.

Q. And when that was done you would destroy your longhand memoranda?

A. Sometimes, sometimes not. Most—I'd say more times than not, I did.

Q. What is your best recollection at the moment as to whether they were always destroyed?

A. Well, sir, from the exhibits that I have seen here, it is evident I couldn't have destroyed all of them, because some of them are here as exhibits.

Q. Is that the reason why you now say that there were some instances in which they were not destroyed?

A. Sir, at this moment I have no recollection of whether I took every single slip and tore it up or not.

Q. That was the common practice?

A. It would be usual, yes.

Q. Do you recall that on the deposition, page 46, I asked this question:

"When they were typed up your longhand entries were destroyed."

2425 And your answering: "Yes."

A. Yes, as a general procedure it would be.

Q. I am asking you now, Miss Feldman, merely if you remember these questions and answers.

A. If you say so, sir.

Q. That question and the answer: "Yes." do you recall that?

A. I don't recall it, but if you are reading from the deposition, sir—

Q. And do you recall being asked:

"Q. Were they all destroyed at one time or on separate occasions?

"A. You mean for all the different slips that I made up?

"Q. Yes.

"A. No. When I typed up the slip, if I found that my typing figures added up and multiplied and agreed with what I had on my pencil notation there was no point in keeping the pencil notation.

"Q. So after each such time you would destroy the pencil notation?

"A. That's right."

Do you recall making those answers?

A. If that is in the deposition; yes, sir.

2426 Q. Were there some instances in which these checks would be drawn without a recap sheet?

A. Yes, sir.

Q. And some in which they would be drawn without a cash authorization?

A. Yes, sir.

Q. That would be uncommon, would it not?

A. That would be when there was a prepayment of an overage being made, and if Mr. Lubben issued the checks in Chicago, I would have no way of knowing what he issued until he came back.

Q. I say, that would be relatively uncommon?

A. Truthfully, I don't recall at this time how often that could have happened, as to whether it was relatively uncommon or not.

Q. Do you recall at page 47 of your deposition answering:

"There may have been one or two occasions when Mr. Lubben gave me a disposition against overages where he might have drawn a check for a round figure, where, of course, I had no computation."

"Question: Well, that would be very rarely, one or two instances?

"Answer: It probably was several instances along 2427 the line.

"Question: That was not the common practice?

"Answer: No."

Did you make those answers?

A. Mr. O'Brien, are you asking me—

Q. I just want to know if you made the answers.

A. Yes, sir, and I would also like to know whether you are referring to Shotwell in particular, or just general practice?

Q. I am referring to the practice.

A. Well, we paid overages to other people on which Mr. Lubben presumably paid out round amounts.

Q. Miss Feldman, I don't desire to argue, or to call for an explanation. I just want to get accurately what the practice was, and you have told me at the inception of this line of examination that you didn't know whether it was uncommon or common, and so I have read you what you told me last year on the deposition, and I have merely asked you to state whether you made those answers.

A. I stated that it was done at times at the time, right?

Q. Did you also state it was not the common
2428 practice?

A. No, because there was a recap sheet, and there was no need for it.

Q. I didn't ask you why. I simply asked you whether you said that.

A. Yes, sir, if that is what the deposition reads, I said that.

Q. All right.

On the corn syrup, or corn box of the partnership, I think you have said that you had nothing to do with the keeping of the account of that box?

A. That is correct, sir.

Q. It is true, is it not, that you had at least one occasion to take off car numbers and to make a check of the cars and bills of lading at Mr. Lubben's request, didn't you?

A. I made a list of all the cars that had come in to be—well, let me put it this way.

I made a list of all the cars that were shipped in on the corn ideal. All I did was list the cars, the dates it came in on, what it weighed, the loss in barreling, and the amount that was actually sold, and if I am not mistaken, I may have put the invoice price on there, but
2429 that is all I had to with that schedule.

Q. All right. All I mean, Miss Feldman, is that aside from that one occasion, you had nothing at all to do with the accounting or auditing of the corn box?

A. There was one occasion where I had to help the gentleman check his figures.

2430 Q. That was Loperfido, or whatever his name was?

A. That is correct.

Q. So that you knew an account was being kept?

A. I knew that there was a cash box, yes, sir.

Q. Now is it your understanding that Mr. Bercu or his staff audited the recap sheets and the entries to the accounts payable ledger in respect to the overages?

A. It is my understanding that all the accountants did so.

Q. So that during the period of time of the partnership at least, those items would somehow be reflected on the audit reports of the accountants?

A. That is correct, sir.

Q. Now what was the situation in that respect during the partnership?

A. I am sorry. I don't follow you, sir.

Q. Were the accountants, that is, the Bercu accountants also auditing the same instruments and the same accounts payable ledger during the partnership time?

A. They audited everything that Mr. Roth did,
2431 with the exception of the corn box.

Q. You are not sure then whether their audit took into account the corn box transactions during the partnership?

A. I don't recall whether Mr. Bercu even knew about the corn box. I know that Mr. Roth did.

Q. And was there also a candy box, to your knowledge, in the partnership?

A. No.

Q. The only one that you know of is the corn box?

A. That is correct, sir.

Q. Now, as I understand it, your direct testimony, Mr. Lubben told you when you came into the proprietorship that there were over-ceiling transactions in candy?

A. I don't know what the ceiling price was. He told me that there were overages being paid.

Q. Well, I don't want to quibble about the term, whether it was over the ceiling or not, although as I recall your testimony here, Miss Feldman, you said that they were over-ceiling items, but whether the term over-ceiling or overages, Mr. Lubben did tell you that
2432 there were such transactions and that they were to be reflected on the books which you were to keep?

A. That is correct.

Q. And did he tell you that was to be done according to the system prescribed by Mr. Bercu?

A. I don't recall how he told me to do it, but we would—

Q. Well, let me remind you that you testified on direct here that Mr. Bercu instructed you in the system.

A. Mr. Bercu instructed me that all of the over-ceiling payments or overage payments would be reflected on the books of the company.

Q. Did Mr. Bercu tell you that the purchases were being made by Lubben in dual form and that you would receive an invoice at a price and that you were to add to that amount the amount which Mr. Lubben said was overage?

A. I don't know whether I originally got that information from Mr. Bercu or Mr. Lubben, Mr. O'Brien.

Q. Well, the answer is you don't recall whether he told you that?

A. I don't recall him telling me on that specific
2433 thing.

Q. Did Mr. Bercu tell you that you were to enter the invoice as a total amount as adjusted in purchases?

A. I imagine he would have.

Q. And in the accounts payable record?

A. Yes, sir.

Q. Did he tell you that one check was to be drawn to the order of the vendor for the amount of the invoices, the printed amount?

2434 Q. Did he tell you that that check was to be posted to the debit of the accounts payable?

A. He didn't have to tell me to make a debit for a check that was paid out.

Q. Well, Miss Feldman, I am not interested in what he did tell you. I just would like to have your best recollection as to whether he told you the things I am asking you about.

A. Mr. O'Brien, after the passage of nine years, it would be a little difficult to tell you exactly what he told me.

Q. I realize that, but I want your best present recollection. If you can't say—

A. Mr. O'Brien, I would be unable to tell you that.

Q. Very well. Did Mr. Bercu tell you that as part of that system you were to draw another check simultaneously to cash for the balance of the invoice?

A. Again, I cannot answer that, Mr. O'Brien.

Q. That is fine. You just tell me. I have been speaking of the inception of the matter in the proprietorship. Now ask you whether, when the partnership was formed, Mr. Bercu didn't tell you the same thing about the system?

2435 A. I think I testified earlier, Mr. O'Brien, that I was not sure of how it was handled in the partnership, that there were changes made due to the fact that Mr. Roth was now in the picture.

Q. I appreciate that, but that is hardly my question, Miss Feldman, because you also said that a change occurred at some date—just how far along the line, you

couldn't say, but I am asking you now whether at the inception, the very beginning of the partnership, Mr. Bercu did not give you the same instructions in respect to the system by which these things were to be handled?

A. I couldn't tell you that, Mr. O'Brien.

Q. All right. When you got over to General Confections after the liquidation, was Mr. Bercu there or was someone else there?

A. No. Mr. Bercu was not there at the time.

Q. Going back then to the proprietorship, do you know, speaking of suppliers generally, what the system was in respect of the simultaneous checks, one for the printed amount of the invoice and one for cash?

A. That didn't necessarily follow, sir.

Q. Were there instances as to suppliers in which
2436 the checks were drawn simultaneously?

A. There may have been.

Q. Where would that be reflected, on the cash disbursements book or the accounts payable ledger, or both?

A. Both places.

By Mr. O'Brien: Would you let me see those again for the general proprietorship, the two books?

I wouldn't know one from the other.

By Mr. O'Brien:

Q. Do you know?

A. Yes. That is the accounts payable and this is your cash disbursements (Indicating).

By Mr. O'Brien: Thank you.

2437 Q. Miss Feldman, let's take the cash book, I think that you have, and look at Gum Products Company—right from the start of the proprietorship, look at Gum Products, look for Two Star, Eiger, Mike Cohen, and also Gertz, and Close, and see if there are any entries—

Let me ask you, would there be checks for the printed amount of the invoice likewise appearing in this book?

A. Yes, sir.

Q. See if there are any entries with respect to the people I have named in which the one check follows the other, or where there are two checks set down, one for the printed invoice, and one for the overage?

A. Would you repeat the names of the individuals that you are interested in, please?

Q. Gum Products, Two Star Confections?
A. Yes.
Q. Eiger?
A. Yes.
Q. Mike Cohen?
A. Yes.
Q. Gertz, and Close, or Urban?
A. Do you want me to start January 1st with
2438 that, '45?
Q. Well, I would think so. I am not looking for any particular one, just see how it looks on that page. You might see a National Process Foods enroute?
A. Here is a check, Close and Company. It is the natural payment—it is in payment of actual invoices, I assume.
Q. Yes.
A. But there is no cash check following it.
Q. I am interested in those in which the two appear together.
A. One here for National Process Foods. You have a check to National Process Foods for $1,906.60, and a check for cash to National Process Foods for $662.64.
Q. Well, that is illustrative of what I mean.
A. That's right.
Q. But without taking the Court's time, I think we can pursue the others ourselves and bring them out later. But on that book, that cash book, in the case that you last mentioned, the two checks show at or about the same time, do they not?
A. That's correct.
2439 Q. Now, can you tell me whether, to your knowledge, there is any place in that book in which that is true as to Shotwell, on any one item?
A. I wouldn't know, sir. I would have to check every book for cash disbursements, for the three years, or two years in question.
Q. Independently of the book, do you have any recollection of any occasion on which checks—or simultaneous checks were drawn on a Shotwell invoice?
A. No way of determining that right now, and I have no recollection, Mr. O'Brien.
Q. That was the only question.
A. I have no recollection.

Q. I appreciate that we can and have checked the books.

A. Yes.

Q. But I want to see what you have to say.

A. Yes. That I don't recall, sir.

Q. Now, when the checks were cashed, you or Miss Seiderer, or whoever else was handling it, gave the money to Mr. Lubben?

A. As far as I know, yes.

2440 Q. And is it correct to say that thereafter Mr. Lubben never presented any receipt or evidence of payment?

A. In reference to overages, no.

Q. Now, you said this morning that in the case of Two-Star there was a fairly consistent practice of recording as purchases items for which there was no invoice?

A. That is so.

Q. And I think you said that in such cases the supporting paper would be a cash authorization slip with either the delivery papers or the receiving papers on the goods?

A. That is correct, sir.

Q. And was that true, also, to your present recollection, in the case of Purams & Company?

A. That was an overage, sir, if I recall correctly.

By Mr. Lockley: Will you speak up, Miss Lubben.

By the Witness:

A. I say, if I recall correctly, that was an overage payment, not an unbilled shipment.

By Mr. O'Brien:

Q. Not to get too far off the record, Miss Feld-

2441 man, but I hardly think you rate with Mr. Lubben, yet. You haven't been here six days, and you won't be. But on Purams you say that was an overage?

A. I believe that was an additional amount we were paying them at one time there for Jordan almonds.

Q. Were you paying overages to Two-Star also?

A. Oh, yes, sir.

Q. Well, then, there is no distinction in that respect, but the thing in common that I am trying to reach is that you recorded items of Purams in your purchase record without a supporting invoice from Purams, isn't that so?

A. Without a supporting invoice?

Q. Yes.
A. No, there were invoices from Purams.
Q. All right. Now, how about Gum Products and Eiger, do you recall —
A. Who?
Q. Gum Products of Boston and Eiger, Joe Eiger.
A. Joe Eiger, as I said this morning, I don't recall.
Q. All right. Well, the one you best recall is Two-Star?
2442 A. Two-Star and one or two others.
Q. And isn't it a fact that on the Two-Star items you had a sheet of yellow paper, a sort of a carbon copy of an invoice?
A. A carbon copy of an invoice?
Q. Yes, just an ordinary scratch paper, with the typewritten part carried through. Do you recall the use of those?
A. That I made?
Q. No, I don't say you made it.
A. That's what I am trying to find out, because the paper doesn't sound familiar.
Q. Do you have any present recollection of such slips, or carbons, being attached to your cash authorization sheet and to the receiving or shipping ticket?
A. I can recall a receiving ticket being attached, which would be a white sheet.
Q. Right.
A. I can recall slips from—well, they were about four inches high and about eight inches long, from one of the trucking companies, which I believe made up part of that record.
Q. As far as your present recollection goes, a
2443 yellow sheet.
A. A yellow sheet—
Q. Well, if you had only the cash authorization slip, and the delivery or shipping ticket, did you consider that good accounting support for the entries which you made?
By Mr. Lockley: I object, your Honor. It is purely an opinion.
By the Court: She may answer.
By the Witness:
A. Sir, if I received merchandise, and I have the trucking receipt to show that I got it, and I have a re-

ceiving ticket to show that it went into inventory, and I am paying for the merchandise, I don't see how else I could get it on the books unless I made out a cash authorization slip.

By Mr. O'Brien:

Q. That hardly answers my question.

A. To me it was good accounting practice.

Q. I merely wanted your own opinion as to whether that was good accounting practice.

2444 A. If it was the only way to get it on the books it was good accounting practice. I was accounting for the goods that came into inventory.

Q. Where was the invoice, if you know?

A. The invoice for the merchandise that came in from Two Star?

Q. Yes.

A. There was never an invoice issued for that.

Q. Did you make any inquiry about it at the time?

A. Mr. O'Brien, my understanding when this—when we got these shipments of nut crunch from Two Star Confections was the fact that there would be no invoice issued for this, that we were paying for the entire amount of the original price, plus whatever the overage was, in cash.

Q. We are speaking of the proprietorship now?

A. Yes, sir.

Q. And if the original invoice was carried in support of a payout from the cash box of the proprietorship, it is my impression that you have no knowledge of that, you know nothing about the operation of a cash box.

By Mr. Lockley: I object, your Honor. That is 2445 assuming facts which are not in evidence.

By the Court: Well, she may answer.

By the Witness:

A. Mr. O'Brien, I think I said earlier in the day that I know of no cash box in the single ownership.

By Mr. O'Brien:

Q. I think my question shows that I know you said that. I am merely—

Will you read the question so that I get it exactly. I would like an answer to that.

(Question read.)

By the Witness:

A. I don't know how to answer that for you, Mr.

O'Brien. I wouldn't know that there was an invoice and I wouldn't know that there was a cash box, so how—
By Mr. O'Brien:
Q. All right. You did say just a bit ago that the only box that you knew of in the partnership was the corn box?
A. That's correct, sir.
Q. And did you not give a statement in writing to the government last—which does not bear a date—did
2446 you not give a statement to the government for use in the preparation of this case?
A. Yes, sir.
Q. Do you recall that?
A. I do.
Q. When was it, Miss Feldman, when was it that you gave a statement?
By the Court: Isn't the date on the statement?
By Mr. O'Brien: No, I am sorry, Judge, it isn't.
By the Witness: I think the statement was given two years ago.
By Mr. O'Brien: Well, it was given about two years ago, the 18th of December, '52.
By Mr. Lockley: '51.
By Mr. O'Brien: '51.
By Mr. O'Brien:
Q. Well, did you not state at that time, Miss Feldman, that during the period of the Eatsum partnership two strong boxes were used for currency in connection with cash transactions?
A. I did, sir. I had found out about it when I was at 253.
2447 Q. Well, in your statement you were speaking of what you knew right along, were you not?
A. In that particular instance?
Q. Yes.
2448 A. I don't believe I was, sir.
Q. All right. Well, then, as of the present time, at least, you do know or believe that there were two cash boxes?
A. I have seen a recap sheet of a box. I believe the recap sheet says Box No. 2 on it.
Q. What was Box No. 1?
A. Well, one was the corn box, and one was a candy box, about which—neither one of which I actually handled.

Q. Is it fair to say that you had nothing to do with the keeping of either box, or with the auditing of the contents, outside of that one incident in which you helped out Lopofido?

A. That is correct, sir.

Q. And you had no participation in the taking of the audits of those boxes?

A. No, sir; I did not.

Q. So that when and if such audits exist, they are not your figures?

A. No, sir; they are not.

Q. Now, I want to go back to the proprietorship, and to check one thing, on which I suppose you can't be of much help.

2449 Do you have any knowledge as to whether the profits of the proprietorship cash box were carried into the proprietorship books so as to be reflected as income somewhere along the line?

A. Those partnership books were never—

Q. The proprietorship?

A. The single proprietorship?

Q. Yes, Ma'am.

A. But there was no cash box then.

Q. Well, I appreciate that you have said it, but I want to ask you directly whether you have any knowledge one way or the other as to any of the profits of the proprietorship cash box being carried into the proprietorship books?

A. Since I did not prepare the statement, I would not have made the closing entries, sir.

Q. That is my belief, too.

A. Yes, that's correct.

Q. And how about the cash box on General Confections; did you have some familiarity with that?

A. I knew of it.

Q. But again I take it you had nothing to do with the auditing of the contents?

A. Well, when I came up there, there was never
2450 a cash box used after that time.

Q. Well, granting that that is so, did you have anything to do with the auditing of the box that had been used?

A. No, I was not there at the time, sir.

Q. And from your position as bookkeeper and office

manager, you would have occasion to observe if the profits of any such box were deposited to the account of the company, would you not?

A. Yes, sir.

Q. And from your knowledge, can you state whether or not there were any deposits to the account of the company, either proprietorship, or General Confections, of profits of a cash box?

A. Just a minute, sir.

Q. To your knowledge?

A. We are talking of a cash box in General Confections. How can I answer the question with relation to the proprietorship?

Q. Well, let's split it up. Let's take General Confections first.

Do you have any knowledge of profit from a cash box coming to your attention for deposit to the company's account on the books?

A. I believe there were notations made on sheets
2451 that existed in the black book that such monies were deposited in the books of General Confections.

Q. Are those notations which you saw at some time?

A. Yes, sir.

Q. Did you first see them only after the event?

A. After the event, sir.

Q. You had nothing to do with the making of it?

A. No, sir.

Q. You were not there at the time, or had no responsibility at the time for what was done with them?

A. No, sir.

Q. And it was merely in reviewing the matter, perhaps at the Revenue, or two years ago, that you noticed that?

By Mr. Lockley: Why not ask her when she did notice it?

By Mr. O'Brien: All right. Sure, I just want to get the fact.

By Mr. O'Brien:

Q. When did you notice it?

A. I saw those when I came up there. I knew of those sheets after I got there.

2452 Q. At General Confections?

A. Yes, sir.

Q. You observed it, and that is all you had to do with it? You took no action about it?

A. Well, the accountants had taken care of that.

Q. Well, I am not interested in who did what, except you. Did you do anything?

A. I had no reason to do anything about them, sir.

Q. I still don't want to know whether you had a reason. I just want to know whether you did anything about it?

A. What could I do about it?

By the Court: Just answer directly whether you did or not.

By the Witness: No, as far as I know, I did nothing about it.

By Mr. O'Brien:

Q. The answer, I think, Miss Feldman—although I shouldn't instruct you—the answer in that case is no?

A. I just said that.

2453 By Mr. O'Brien:

Q. Now, the same is true of the proprietorship, if I understand you correctly. Since you knew nothing about a cash box, you can't tell us whether the profit, if any, was carried into the proprietorship books?

A. I have no way of telling that, sir.

Q. Do you happen to know—well, of course, you wouldn't know, but is there any book you could look at quickly to tell us what the total of the cash sales was in the proprietorship and General Confections during the years 1945 and 1946?

A. I don't believe those records are available, sir.

Q. They would be for the proprietorship, would they not?

A. They would be for the proprietorship but they would not be available for the partnership.

Q. Pardon me.

By the Witness: Would you please read that last question again?

(Question read.)

By the Witness:

A. We should be able to tell what the cash sales
2454 were for the single ownership. I don't know what—

By Mr. O'Brien:

Q. Is there a separate account on cash sales, Miss Feldman?

A. There would have been, yes.

Q. I won't stop to look now, but that is where I should look?

A. Yes. There would have been, yes.

Q. And on General Confections, is that record available, the ledger, showing the cash sales?

A. That would be the accounts receivable. I don't know whether those are available, sir.

Q. All right. Now, I take it going to the partnership again—

A. Yes.

Q. —that as to the partnership, you are unable to tell us whether any amounts of cash which were withdrawn from the cash box or boxes by Mr. Lubben were charged to him on the books of the partnership itself?

A. I am afraid I couldn't answer that one, sir.

Q. And when Mr. Lubben testified that his IOU's in the box were charged to him on the books, and that you could tell us more about it because he knew
2455 nothing of bookkeeping, is it true that you can tell us more about it or do you know nothing about the cash box transactions?

A. Just one moment, sir. First of all, you are talking of what, IOU's?

Q. Yes.

A. And then you want to know if they were picked up off the books?

Q. Right.

A. You would have to ask the accountant that, sir.

Q. Does that mean you cannot tell us?

A. No. My own recollection right now, I couldn't tell you.

Q. Is there any record that you know of that you could refer to to be able to tell us whether items taken from the box 1 or 2 of the partnership by Mr. Lubben were charged to him on the partnership books?

A. If the books were available I could tell you that but right now, not having them, I couldn't do so.

Q. Well, then tell me this: Conceding you had nothing to do with it, is it not your understanding that a separate account was kept of the ins and outs of the partnership cash boxes?

2456 A. A separate account?

Q. Yes.

A. I don't follow you, Mr. O'Brien.

Q. What was the account that you helped Loperfido work out?

A. That was when he had to figure at one given point and I don't know when this occurred—he found that when he was multiplying the amount of pounds that he had sold in corn syrup by the overage he had gotten, he could not get it to come out right so he asked me to please check his computations to see what the answer was.

Q. And it was Loperfido. Did he have before him and before you an account which he was keeping on the contents of the box?

A. He was working from shipment papers.

By Mr. O'Brien: Have you got that account?

By Mr. O'Brien:

Q. Well, you see some papers. The papers that he was working on had nothing to do with the books and records that you were keeping, did they?

A. No, because those were papers he had made computations on. I don't know what that was.

2457 Q. That is what I want to get clear. And if you look at Defendants' Exhibit 14-B for identification, I will ask you to state whether it was a record similar to that.

A. I wouldn't know, sir.

Q. Looking at this instrument while you have it, Miss Feldman, can you tell us what handwritings appear on it?

A. Mr. Lubben's.

By the Court: Speak up, Miss Feldman.

By the Witness:

A. Mr. Lubben's and someone else's is on there.

By Mr. O'Brien:

Q. Is that Hankermyer's?

A. That could be. I am not sure of that.

Q. I notice in paragraph six of this same statement, Miss Feldman, the one given to the Government—well, I think I have been over that. I will withdraw that. That is something that has to do with the cash box.

Can you tell us how much General Confections, how much money General Confections owed Shotwell on its invoices, that is an open account, at ceiling prices for

2458 the shipments at the date of December 4, 1946 when that check for $17,190.00 was drawn and on Decem-

ber 20, 1946, the date that check was paid. Do you recall the check that I mean, Miss Feldman?

A. No, sir, I don't know which one you are referring to.

Q. Is there, among the records that are here, Miss Feldman—can you tell me whether there is a record which would show the balance due Shotwell and those dates in December of 1946?

A. No, we don't have the ledger sheet for that period, sir.

Q. Well, there is in evidence here Government's Exhibit 200, a series of Shotwell ledger sheets which indicate to me that there were substantial balances on those dates. You are a bookkeeper. Will you take a look and see if you can tell from that Government's exhibit what the balance due Shotwell was as of December 4, 1946.

A. According to this sheet, it would be $5,686.—

By the Court: I don't hear you, Miss Feldman.

By the Witness:

A. $5,686.11.

2459 By Mr. O'Brien:

Q. And then as of December 20th?

A. Well, that would be as of December 11th. There is no 20th entry on here. Oh, wait a minute. This is confused. Well, as it appears on here, at the 20th of December, the balance was $8,349.08.

A. Thank you. The check which I was mentioning, Miss Feldman, is Government's Exhibit 133. I think you have seen it before.

A. Oh, yes.

By the Court: 183?

By Mr. O'Brien: 133, Judge.

By Mr. O'Brien:

Q. It didn't seem right to me, Miss Feldman. I think I misdirected your attention. Will you look through 1944 instead of 1946. Would you look at the 1946 sheet there and tell us what the balances were?

A. As of what date, sir?

Q. As of December 4th and December 20, 1946.

By the Court: 1946?

By Mr. O'Brien: 1946, yes, sir.

By the Witness:

A. As of December 4th? $38,480.00.

2460 By Mr. O'Brien:

Q. And December 20th?

A. Forty-five thousand—

By the Court: How much?

By the Witness:

A. $45,015.72.

By the Court: Exhibit 200 is admitted?

By Mr. O'Brien: Yes, sir. It was, Exhibit 200.

By Mr. O'Brien:

Q. You testified on direct, I believe, Miss Feldman, that as of May 31, 1945, there was an overpayment to Shotwell of the overages so that the proprietorship had a credit, do you recall that—I forgot the amount, but it is Exhibit—withdraw that question.

Can you tell us from any record you had before you on direct how the balance stood with Shotwell as of May 31, 1945 on this so-called overage?

A. I think the ledger sheets are here.

2461 Q. Now which ledger can you tell that from?

A. The accounts payable ledger sheet for Shotwell.

By Mr. Krane: Exhibit 6-A and 13?

By Mr. Lockley: Here it is.

By Mr. O'Brien:

Q. There are a couple of sheets here. Did you find anything in that book?

A. No. These are the ones (indicating).

By Mr. O'Brien: Now would you read the question?

(Question read by the reporter.)

By the Witness:

A. Well, according to this ledger sheet, there is a $20,000 payment made against overages on the 25th of May.

By Mr. O'Brien:

Q. Leaving a balance of what?

A. May I have a pencil, please?

Q. No, no.

By the Court: I am sorry. I did not hear you.

By Mr. O'Brien: She asked for a pencil.

By the Witness: A pencil and paper, please.

2462 By Mr. O'Brien:

Q. Without a pencil and paper.

A. May I refer to these sheets that I made up?

Q. No. I am not interested in that.

A. I would have to have a pencil and paper then.

Q. The fact is, Miss Feldman, you can't tell by looking at that ledger sheet what the balance is as to overages of any given date, can you?

By Mr. Lockley: Well—

By Mr. O'Brien:

Q. By just looking?

A. Yes, I can, sir. I would have to compute the difference because the account is keyed off.

Q. I don't mean computation. I mean, you can't gain it from looking at the sheet itself?

A. Well, not if I enter a total amount for the overage plus—for the amount typed on the invoice plus the overage.

Q. Well all I want to know is can you tell me right out of hand without a pencil and paper, looking at that sheet, what the overage balance was?

A. The overage balance was—

2463 Q. Well, without making any mental computation.

A. I will tell you—

By the Court: You mean, is it written down there?

By Mr. O'Brien: That is exactly what I mean.

By the Witness:

A. All right. The overage was due on 12,960 spice buttons—32,400 pounds of Cardinals, 13,620 pounds of gum drops. If you take the overage on those three items and subtract it from the $20,000, you have the amount of overage that you prepaid.

By Mr. O'Brien:

Q. All right. My question is not directed to a computation, Miss Feldman.

May I have them, please?

A. Yes.

By the Court: We will take our afternoon recess now for ten minutes.

By the Marshal: This Honorable Court will now recess for ten minutes. Kindly remain standing until the jury is in the jury room.

(Short recess.)

By Mr. O'Brien: Will you mark these exhibits, De-
2464 fendants' Exhibits 39, 40, 41 and 42 for identification?

(Said documents were marked Defendants' Exhibits 39, 40, 41 and 42 for identification.)

By the Marshal: This Honorable Court will now resume its session.

By Mr. O'Brien:

Q. I was talking about the ledger sheets, Government's Exhibit 6-A. In fact, there is only one sheet.

A. Yes, sir.

Q. The pencil figures on that sheet were not made at the time, were they, Miss Feldman?

A. At what time?

Q. At the time that the ink postings were made?

A. You mean for the item and the overage?

Q. Yes.

A. I believe they were, sir.

Q. Do you know?

A. Well, if it is the item that was on the invoice it would have had to have been, unless someone—

By the Court: A little louder, please.

By the Witness: Unless someone went back and
2465 entered them at a later date.

By Mr. O'Brien:

Q. Yes, of course.

Now, are those your figures, the pencil figures?

A. I don't believe those are. May I see that again?

Q. Surely.

A. No, these are not mine.

2466 Q. All I was interested in, Miss Feldman, was this and not in a computation—but the reason I asked you the question is that when you were testifying on direct for Mr. Lockley, I thought that you were referring to recap sheets or to some side computations which you had made for convenience during the trial here and you said that you could state the balance equally as well from the ledger sheet itself and it was for that reason that I wanted you to tell me right out of hand the balance, without making the computation, and as I understand it, you cannot do that without a computation?

A. You are referring now to the amount due on the balance for the overages on the prepayment of the $20,000.00?

Q. That is right.

A. As I said, if I had taken the items and multiplied them and subtracted from 20, that is it.

Q. That is what I want to know.

A. I think the answer I gave at the time was, at a given point we had keyed off amounts so that your debits and credits for both your checks to Shotwell and your overage payments evened out.

Q. Well, the only point which I wanted to make is
2467 that you could not take any date—that is, I could not call your attention to every date on this sheet and have you tell me what the balance is for such date?

A. There was only one overage payment open on there, I believe.

Q. Well, whether open or not, if I pick the date August 16th, can you tell me right off what the overage balance was?

A. No, because the amount is keyed up to that point.

Q. I don't want to know why. I just wanted to know whether you could do it or not.

Now, look at it again and using the pencil figures or the key-offs, tell us whether it is true that you had a black market credit, according to that sheet, of some $11,000.00 on it as of May 31st?

A. I don't have the May sheet here, sir.

Q. Well, I am sorry. Perhaps this—

A. Thank you. A black market credit of $11,000.00 did you say?

Q. Yes.

By the Court: With whom?

By Mr. O'Brien:

2468 Q. With Shotwell.

A. I would still have to compute the overage of the Cardinals to give you that $11,000.00 figure.

Q. Let me call your attention to the computation already made on the Exhibit B, your statement to the government, and see if that won't save time because I don't think the authenticity of this is questioned.

By Mr. Lockley: I would just like to point out that is not in evidence, Mr. O'Brien.

By Mr. O'Brien: That is true. I am just saving time. Miss Feldman has already computed it.

By the Witness:

A. It is $11.205.38, I believe, on this one.

By Mr. O'Brien:

Q. Now, can you tell me the state of the open account between Shotwell and the company as of that date on their

invoices for the printed amounts, the ceiling prices?

A. Yes, sir. We owed for two shipments at that time.

Q. I mean in dollars, what was it?

2469 A. In dollars, $13,151.55.

Q. You still owed Shotwell that?

A. That is correct.

Q. According to this record?

A. That is correct.

2470 Q. Now you testified, Miss Feldman, that when you came to General Confections, which I think was in August of 1946, you found that they had been pursuing the same pattern or practice that had been in effect in the partnership. Do you recall that?

A. I don't recall, sir.

Q. Well, let us put it this way: You said that when you got to General Confections you resumed the proprietorship procedure?

A. Did I say—Did I put it that way? I don't recall what I said at the time.

Q. Well, let us start this way: What is the fact—when you got to General Confections, which was some three or four months after it had commenced to operate, what procedure did you find was being followed in respect of overages?

A. They were not entering the overage amounts on the invoice.

Q. Well, that was the same as the practice at the partnership but different from the practice in the proprietorship, was it not?

A. It was different from the practice of the proprietorship. As to the partnership, as I told you,

2471 I don't have anything available to check with so far.

Q. Did you learn that they had a cash box—as soon as you came there did you learn that General Confections was employing a cash box?

A. I don't know when I learned that they had been employing one, sir.

Q. Well, you did learn it?

A. I did learn it, yes, sir.

Q. And after your arrival, did you continue to maintain a cash box or was the practice abandoned?

A. There was no cash box after I came there.

Q. If there was a cash box or the equivalent, you knew nothing about it?

A. I know nothing of a cash box after I came to work there, sir.

Q. Now, can you tell us why you did not continue to mark up the invoices as you had done in the case of the proprietorship?

A. Frankly, sir, at this date I could not tell you why.

Q. Do you recall whether Mr. Lubben asked you not to?

A. I don't know, sir.

2472 Q. According to your best recollection, did Mr. Lubben, during your experience with the companies, have anything to do with the books as to the total postings or making of original entries?

A. Not as far as I know, sir. There would be no occasion for him to work on the books.

Q You assumed the responsibility for the books?

A. That is correct, sir.

By Mr. O'Brien: May I have Government's Exhibit 65, please, Chuck?

2473 Q. I show you Government's Exhibit 63-B, and I will ask you to state whether you have seen that before, whether you have any recollection of seeing it before?

A. I have already stated that I have, sir, previously.

Q. And under what circumstances did you first see it?

A. This would have been given to me by Mr. Lubben.

Q. Well, now you state that as though it is possible that that occurred. Do you have some independent recollection that Mr. Lubben did give it to you?

A. He would have had to have given it to me, because the notation on the slip is addressed to me.

Q. Is that all you can tell us about the occasion?

A. As to when he actually handed it to me?

Q. Yes.

A. No, sir; I couldn't tell you anything more about it.

Q. Independently of the notation on the exhibit, Miss Feldman, you have an independent recollection as to the circumstances under which Mr. Lubben gave you this, if he did?

2474 A. I am sorry. I don't understand you, sir.

By Mr. O'Brien: Will you read the question?

(Question read by the reporter.)

By the Witness:

A. My answer was that I don't understand.

By Mr. O'Brien:

Q. Well, it is somewhat ambiguous. When I say the notation, Miss Feldman, I am referring to the endorsement in Mr. Lubben's handwriting. Ignore the endorsement in Mr. Lubben's handwriting, and tell me whether you have any independent recollection of receiving this document from Mr. Lubben?

A. Well, I know that he gave it to me, sir. The notation is addressed to me. But anything else I don't think I can tell you about it.

Q. Well, I take it—to shorten it—that the only reason that you can state he gave it to you or you think he gave it to you, is because it must be so since this notation is contained upon it, is that right?

A. That's right.

Q. Do you have any personal knowledge as to where it came from?

2475 A. I didn't see it handed to him, if that is what you mean, sir.

Q. I didn't hear you.

A. I didn't see it handed to him, if that is what you mean, sir.

Q. Well, do you have any other personal knowledge as to where it came from, independently of what Mr. Lubben says on the instrument?

A. All I can tell from that, sir, is that it is written on a Shotwell piece of paper, it bears certain notations, and therefore he may have told me it came from Shotwell, independently of the notation, and he may not have. I would be inclined to think he did, because those figures on there check with some other items.

2476 Q. Miss Feldman, I think we can conjecture about it, too, but we must come to you to get any facts independently and outside of this document. Now, have you any to contribute or is that all you know?

A. Mr. O'Brien, all I know is he gave it to me. When, or how, at what time of the day, I don't know.

Q. Now, on the resale of the candies, Miss Feldman, is it true that the proprietorship resold for an invoiced price?

A. Yes, sir.

Q. Were there some times that it sold for the invoice price, and invoice price and cash?

A. In the proprietorship?

Q. Yes, to your knowledge.

A. Well as far as I can recall, sir.

Q. And in the partnership what is your recollection?

A. Well, I know that it was sold for an invoice price plus cash, but that was on corn syrup.

Q. I am speaking of candy.

A. Of candy, I don't know, sir.

Q. And in General Confections?

A. Yes, I know that they sold for an invoice price plus cash.

2477 Q. And sometimes that invoice, and sometimes that invoice only?

A. Well, I don't follow you again, sir.

Q. I think maybe you misunderstand. What I am trying to ask you is whether on the resale of the various candies to your customers—

A. Yes.

Q. —you always sold on an invoice for some stated price?

A. Yes, sir; as far as I know.

Q. Did you sometimes sell on an invoice and for cash, also?

A. Yes, sir.

By Mr. Lockley: This is General Confections?

By Mr. O'Brien: I would gather that is so from what Miss Feldman said a while ago.

By Mr. O'Brien:

Q. But in the partnership you would say that there were sales on invoice only and not for invoice plus cash to Eatsum?

A. I said that there were sales plus cash on the partnership and I think that most of them consisted of 2478 the corn syrup.

Q. Well, I am inquiring, if you please—

A. Yes.

Q. —only on candies, Miss Feldman.

A. On candies, offhand, I don't know, sir.

Q. Now, yesterday, or on your direct sometime, you identified Government's Exhibits 75 to 91-A. And calling your attention to 7-A, I ask you to note the ink endorsement that the goods be billed at 16 cents?

A. Yes, sir.

Q. What is the significance of that?

A. That was the price at which it was sold to the customer.

Q. To your customer?

A. That's right.

Q. And the same notation appears on 78-A. It means the same thing, does it not?

A. I would assume so.

Q. And on 80-A, 16 cents?

A. I would assume so.

Q. The same thing. And the same with 81-A. Now, as to the remaining invoices within that group of exhibits, do you have any present knowledge as to the
2479 resale basis, there being no such notation on the face?

A. No, sir.

Q. These are all Geenral Confections items, Miss Feldman?

A. Yes.

Q. And I ask you to tell me where would we find, on the General Confections record, a record of the resale prices of the goods received on these invoices?

A. In the sales book. You wouldn't actually have a resale price, you would have the resale—the total of the invoice.

Q. What is the difference?

2480 A. Well, you have to divide the price charged the customer by the number of pounds to get the amount per pound that was charged.

Q. Were they grouped in those postings or were they—I see. You probably had more than one customer for each of these invoices.

A. It could have been one or more than one. And they could have been shipped at different times.

Q. Right. And you would have to take the price and divide it by the number of units to see what the unit price or resale price was?

A. That is correct, sir.

Q. And I take it the same is true in the case of the other goods shown in the Shotwell invoices contained in the series 103 to 119. Those are Government Exhibits 103 to 119.

A. If they are notations as to sales price; and if not, it would also hold true the same way.

Q. Right. Now, asking about 125-A specifically, 125-A bears an ink endorsement, 28 cents a pound, does it not?

A. That is correct.

Q. Is that in Mr. Lubben's handwriting?

2481 A. Yes, sir.

Q. And does it pertain to the resale price?

A. I would say so.

Q. On your direct testimony you gave us a computation made in relation to the Government's Exhibits in evidence here as to total overages, do you recall that, I think for the proprietorship and for the others, and for different periods. It isn't important now just which it was. But whenever you gave those totals on overages you were figuring that the unbilled shipments carried an overage, were you not?

A. What unbilled shipments, sir?

2482 By Mr. Lockley: I object, your Honor, on the ground that was not covered in the question asked of Miss Feldman. The question asked of Miss Feldman with respect to the year 1946 related only to the over invoice amounts, and to the corn syrup. There was nothing asked on unbilled shipments, as to the amounts.

By Mr. O'Brien: Well, I think that is true, but, admittedly, Miss Feldman was asked as to the total overages, comprehended within the limits of the question, was she not?

By Mr. Lockley: But that didn't include unbilled shipments, Mr. O'Brien.

By Mr. O'Brien:

Q. Well, did it not, Miss Feldman, include overages on unbilled shipments?

A. No, sir; it did not.

Q. All right. So that in any statement that you have made to such a total, you have not included anything as to unbilled shipments, whether the ceiling price or overages?

A. No, sir, I did not.

Q. Now, I would like you again, in the interest 2483 of getting through here without a pencil to look at Exhibit O to your statement to the Government, and tell me whether the computation of the two percent discount was applied against the total, or full price?

By Mr. Lockley: Well, if your Honor please, I object on the ground that that is beyond the scope of the direct examination.

By the Court: I don't just follow the question, Mr. O'Brien. Are you now referring to some other date that was attached to the statement that she made?

By Mr. O'Brien: Yes, sir. The document that I have handed the witness is a copy of a schedule that the Government gave me, and I would like to verify the impression I have, that the discount is figured against the total price.

By Mr. Lockley: Well, this is concerning a matter, your Honor, about which we did not question Miss Feldman on direct examination.

By Mr. O'Brien: Well, if it doesn't show that, I am not interested. But if it does, I will discuss the matter with the Court.

2484 By the Court: She may answer.

By the Witness:

A. The computation on the cash discount here was not mine. That was Mr. Mammel's. My computation is the $27,000 check, and the $322.67 journal entry.

By Mr. O'Brien:

Q. Is there a difference?

A. Yes, there is a difference. In the discount there is a difference.

By Mr. Lockley: Well, if your Honor please, may I object again on the ground that this is a matter that was not gone into on her direct examination. It is cross examination on a matter which we entirely avoided during the course of the direct examination.

By the Court: I am somewhat of a loss, not having seen the statement. I am not entirely clear as to what Mr. O'Brien is interrogating about.

2485 By Mr. Lockley: The document she holds in her hand has not been identified and not been introduced in evidence.

By the Court: Well, how is it germane to the direct? Let me ask you that.

By Mr. O'Brien: There are so many things bouncing around, Judge, that I better pick out something that will somewhat define things to address myself to first.

I am impressed with these objections that the questions are not confined to the direct. I think that I am entitled, generally speaking, to a considerable latitude on that and do not have to confine myself literally to the letter of Mr. Lockley's direct.

No. 2, there was testimony here concerning the subject-matter of discounts by a government witness and I am merely trying to ascertain from the bookkeeper who knows the facts what the fact is.

By the Court: I assume that you may inquire, now that the books are in evidence, as to what the facts are.

2486 By Mr. Lockley: I have no objection to the inquiry as to discounts. But he is picking out a particular set of transactions which the defense objected to when the government tried to bring out any evidence through Miss Feldman on direct examination, namely, the so-called unbilled shipments. When we attempted to show her the bills of lading you recall there was objection to it.

By the Court: When you speak of unbilled shipments, I confess that I am not clear. Unbilled shipments as between Shotwell and General Confections, or what?

By Mr. Lockley: Yes, your Honor. It is the shipments which were evidenced by the bills of lading and for which no invoices were given.

By the Court: You call those unbilled shipments where there was no invoice then?

By Mr. Lockley: That's correct, your Honor. And on those Miss Feldman was not permitted to testify on her direct examination, at the objection of the defendants.

2487 If he wants to go into a matter—

By Mr. O'Brien: I won't pursue it further.

By Mr. O'Brien:

Q. In figuring your total overages, however, Miss Feldman, you did consider that there were overages on the corn syrup items?

By the Court: I take it you are referring to overages as between—which company and Shotwell?

By Mr. O'Brien: In that case it was Shotwell and General Confections because, as far as the record shows, there were no other shipments of corn syrup.

By the Witness: You are referring to the corn syrup that was entered on the Reserve Trading books?

By Mr. O'Brien:

Q. Yes.

A. I don't know—yes, I did give a figure for the Reserve Trading total of unbilled shipments—of the Reserve Trading overages on corn syrup. I am sorry.

Q. So that your totals do impute or include an overage in respect of the corn syrup shipments?

2488 A. Yes, I included a total for the two corn syrup shipments.

2489 Q. In the record of 1094 Mr. Lubben testified that he couldn't say whether the $67,000.00 item shown on Defendants' Exhibit 13 went into the proprietorship account, and he thought that you might help with that. Will you look at Defendants' Exhibit 13, which purports to be a bank statement of Eatsum Food Products, and find that item of $67,000.00.

A. Yes, sir.

Q. Do you yourself know whether that check was credited to the account of Eatsum Food Products?

A. Now wait. There were two bank accounts at that time that reflected the $67,000.00 item. There is an old Eatsum and a new Eatsum. There was a deposit in the new Eatsum—

Q. I am speaking of the old Eatsum.

A. Certainly.

Q. And it does reflect a credit to the account of the old Eatsum.

A. Anything that appears on the bank statement appears on the books.

By the Court: You refer to the old Eatsum. Do you mean the old Eatsum that existed before the proprietorship?

2490 By Mr. O'Brien: I think not, what Miss Feldman calls the single ownership.

By Mr. O'Brien:

Q. Right?

A. Yes, that was at the time of the formation of the partnership. The partnership account was the new Eatsum and the single proprietorship account was old Eatsum. So the $67,000.00 was drawn out of the new Eatsum and put in the old Eatsum.

Q. Right. That's all I wanted to know. Will you look at the documents marked Defendants' Exhibits 15-A to 15-J, respectively; and tell me, if you can, in whose handwriting they are.

A. Part of this is in Mr. Hausman's handwriting.

2491 Q. Referring to the first two?

A. No, part of this is not his on the first page. The top half is Mr. Hausman's. The bottom half, I don't know.

Q. All right. Take the next one.

A. The next sheet is Mr. Hausman's. The third sheet is Mr. Hausman's and someone else's.

Q. And the last?

A. That was Mr. Loperfido's handwriting.

Q. Mr. Loperfido is the next in order?

A. That's right.

Q. Then you have three left?

A. These are all Mr. Loperfido's handwriting, as far as I can see.

Q. Now, you are referring to—

A. Except for the balances at the far end, and I don't know whose they are.

Q. All right. Just let me see what we have been talking about here. The ones in Loperfido's handwriting are Exhibits 15-A, B, C, D, E, F and G, are they not, with the exception of the parts that you have excepted, and you don't know whose handwriting those are in, the other parts are in?

A. That's right.

2492 Q. Now, the sheets which you say are Mr. Hausman's handwriting, as far as you can identify the handwriting, are 15-J—rather H, I and J?

A. That's correct, sir.

Q. Are the Loperfido sheets the same as those which he had when you were assisting him in the manner you described?

A. Just one moment. These are the sheets I made out, that I described earlier as having made a list of cars.

Q. These are the cars?

A. That's right. That is the list of cars of corn syrup that came in.

Q. So that the typewritten part—where I am confused is because you said these were Mr.—

A. Mr. Loperfido's handwriting. I typed the typing on it.

Q. But the typewritten part—and the tape, I suppose, you ran off?

A. The typewritten part?

Q. Is this the tape for the typewritten part?

A. I don't know.

No, the tape is not for the typewritten part.

2493 Q. O. K. The typewritten parts you ran off and the pencil or longhand figures, rather, are his?

A. The longhand figures are his. I didn't run those tapes.

Q. Now, it is true, is it not, that all of the companies during your connection with them were factoring accounts with General Commercial Acceptance Corporation?

A. Yes, sir.

Q. Are you able to tell us, Miss Feldman, whether—withdraw that.

Is it true that they were advancing—

By the Court: Factoring isn't too well known to everybody and I don't know that it has been fully explained.

By Mr. O'Brien: I think you are right.

By Mr. O'Brien:

Q. Would you state briefly, Miss Feldman, what the factoring operations consisted of, for the benefit of the jury?

A. Well, we needed money, since we didn't have too much, so we would prepare a schedule of accounts receivable every day, and we would turn that over to the factorer. In fact, we were selling it to him. He

2494 would give us 80 per cent of the value of those accounts receivable, less a certain interest and finance charge, and he would keep a 20 per cent balance as a reserve. When we received the checks from these customers whose accounts we had assigned we would send the checks to General Commercial Acceptance and they would return to us 20 per cent of the face value of the check.

I think that covers it.

2495 Q. What you said just applies to your accounts receivable?

A. That is correct, sir.

Q. But it is also true, is it not, Miss Feldman, that sometimes you procured advances against inventory items?

A. Yes, sir, that is correct.

Q. For example, if you purchased chocolate, sugar, nuts, or sometimes candy, you would also borrow from General Commercial eighty per cent of the cost?

A. I don't know what they gave us on that, sir, offhand, whether it was eighty per cent or not.

Q. Whatever the percentage was.

A. Yes, sir. They gave us a percentage and we paid it.

Q. They gave you a percentage and withheld the rest and either they would pay the supplier or they would give you the money to pay the supplier?

A. Yes, and they kept track of the merchandise.

Q. Now with that much background on it, I would like to ask whether you know whether General Commercial Acceptance Corporation lent you the money
2496 against the full cost of the goods as shown by your books or against the printed invoice prices of the goods.

A. I imagine and I am not sure of this, that it would be on the invoice price plus the overage because that would be the figure carried on the inventory.

Q. Do you remember—well, I better ask it this way: Did you yourself have anything to do with the transactions with that company? Were there occasions when you handled that?

A. I spoke of Mr. Blumberg, is that what you mean?

Q. Would you sometimes deliver the invoices or pick up or exchange the papers that were involved?

A. You are speaking of loans on inventory now?

Q. Yes, I am.

A. There would be one form. I know the form, but I just couldn't describe it.

Q. We I couldn't either, but there was a form?

A. There was a form, yes, in connection with every invoice.

Q. And would you not deposit with them in the
2497 first instance the invoice that was involved?

A. No, sir, not necessarily.

Q. Would they not obtain from you a trust receipt for that invoice when they gave it back to you?

A I don't know what you mean by "trust receipt."

Q. Well, you spoke of forms. Refreshing your recollection, was there not a printed form of trust receipt which you executed at the time you turned over the invoice by virtue of which they gave you back the invoice and let you carry it away until the transaction was paid off?

A. It wouldn't always have to do with the invoice, sir. We would sign—there was some form of note, if I am not mistaken.

Q. Yes, there was.

A. It was a form of note and this large sheet that carried the details of transactions. In many cases we turned over warehouse receipts to them, not the invoice.

Q. Yes, but without burdening your recollection with the particular forms, the important thing is that you believe that the borrowings were made against the full price?

A. I believe so, sir.

2498 Q. After you left General Confections, did you go out to California, Miss Feldman, as I understand?

A. I did.

Q. And following that, did you at any time go back to work for Mr. Lubben, or any of his companies?

A. I didn't work for them. There was an occasion when he had General Confections in New Jersey, I believe, when I was over there on a Saturday once in a while, and I posted up his books.

Q. When was that, approximately?

By Mr. Lockley: Well, your Honor. I object. I think this is going beyond the scope of the direct examination. It is obviously past 1946.

By the Court: She may answer.

By the Witness: It would have been in 1949.

By Mr. O'Brien:

Q. And was that the first time that you went back?

A. Well, I came back to New York in December of 1948, and I don't think this was until some time in the summer, or fall, or perhaps the winter of 1949. I don't know.

2499 Q. Well, at any rate, you wouldn't have been back before—

A. No.

Q. —to work with Mr. Lubben or any of his companies?

A. No.

Q. Did any of your work at that time involve any attention to the books and records with which we are concerned here?

A. I don't know what books I worked on at the time, Mr. O'Brien.

Q. All right.

By Mr. O'Brien: Will you mark this Defendants' Exhibit 43 for identification?

(Said document was marked Defendants' Exhibit 43 for identification.)

By the Court: Are you jumping?

By Mr. O'Brien: I am.

By the Court: The last I have—

By Mr. O'Brien: Just let it go for a minute. Forget it for a minute, if you will, Judge.

By Mr. O'Brien:

Q. Miss Feldman, looking at the document marked Defendants' Exhibits 39, 40 and 41 for identification, 2500 can you tell me in whose handwriting they are?

A. This is mine, this too is mine, and this too is mine.

Q. All three are in your handwriting?

A. Yes, sir.

Q. Those are records which were made and maintained in the regular course of the business of the company?

A. I don't know what these were made for, sir. I don't know why these were made.

Q. Will you look at Defendants' Exhibit 42, and tell me in whose handwriting that is, again?

A. I don't know, sir.

Q. You don't know?

A. No. It may be Frank Loperfido's. I am not sure.

Q. Now that brings me to Defendants' Exhibit 43 for identification. Will you look at the handwriting on that sheet and tell me if you know whose it is?

A. I don't know whose it is, sir.

Q. You do not?

A. No.

Q. While you were at General Confections, Miss 2501 Feldman, starting in August of 1946, I think the accountants, the outside accounts were Sproul and Scholz, were they not?

A. That is correct, sir.

Q. Do you have any recollection now as to the man that you worked with out of that office?

A. Well, there was Mr. Scholz. I believe Mr. Kirby asked me yesterday about a Joe Meyers. I couldn't recall the last name, but there was a Joe.

Q. I think you did say that. I had forgotten.

Now, do you have any present recollection of their coming to you from time to time during the course of their work and the audit and audit reports of General Confections and asking for explanations as to these cash checks?

A. Sir, if they did—

Q. As to these cash checks drawn for Mr. Lubben?

A. I don't recall anything like that. In most cases, when authorizations for merchandise had come in, they had receiving tickets.

Q. I just want to find out what if anything you know about it, Miss Feldman. Did any of those accountants come to you and tell you they could not find any support for the charges on those checks and ask you to exhibit 2502 evidence?

A. Sir, I don't recall anything like that.

2503 By Mr. Lockley: I didn't hear your answer, Miss Feldman.

By the Witness: I said, sir, I don't recall anything like that.

By Mr. O'Brien:

Q. Do you remember—I should state it this way: Do you yourself know whether they made any such inquiries of Mr. Lubben?

A. I don't know, sir.

Q. You do not know?

A. No.

By Mr. O'Brien: I think that is all, your Honor.

By the Court: Well, it is about adjournment time. Are you going to have any cross examination, Mr. McConnell?

By Mr. McConnell: I only have a few questions.

By the Court: Is it your desire to start now, or do you suggest we adjourn?

By Mr. McConnell: Does the young lady wish to go back to New York? I don't want to keep her here.

By the Witness: I would like to go back to New 2504 York, Mr. McConnell.

By Mr. McConnell: I only have several questions.

By the Court: If you want to utilize seven or eight minutes, all right.

By Mr. McConnell: I will ask her two or three questions and we will let her go.

Cross Examination by Mr. McConnell.

Q. Miss Feldman, did I understand in your testimony that you say that the postings to the general ledger were not made by you but by the auditors?

A. That is correct, sir.

Q. And we have talked a lot here about postings. Can you briefly tell us what you mean by that? What is a posting?

A. Well, at the end of the month in all of the books of original entry there is an analysis made whereby all the debits and all the credits are shown in this analysis and the debits must equal the credits. From this point, the accountants would take their figures and post those amounts to the proper accounts in the general ledger.

Q. And those are not original entries; those are
2505 entries made from books of original entry, are they not?

A. That is correct, sir.

Q. But it is a final entry summarizing the transactions which are recorded in other books?

A. Yes, sir.

Q. Now as I understood it, the ledger that we have here, the books from which those entries were posted, are not here, is that correct?

A. That is correct, sir.

Q. And I take it that the auditors didn't work under your supervision?

A. No, sir, they did not.

Q. They were working on their own. They were auditing your work, though, am I not right?

A. That is correct, sir.

Q. So when you said that the books and records were kept in the usual course of business, you weren't testifying of your own knowledge, so far as the ledgers themselves were concerned, were you?

A. I would assume if I close the books of original entry that they would post those amounts to the general ledger. You keep the general ledger as a part of a double entry bookkeeping system.

2506 Q. But you are assuming that. It wasn't done under your supervision?

A. No, sir, it was not.

Q. That was merely an assumption on your part, that the auditors did do it that way?

A. Yes, sir.

Q. Now as I understand your testimony, you had no conversation with anybody from Shotwell which authorized you to raise the face amount of the invoices which covered candy shipments, gum drops, and so forth?

A. That is an odd question to ask me because when an invoice reaches an office, you do with it as you please. I had no authorization.

Q. I realize that. You never had any conversation with anybody from Shotwell?

A. I never did, no.

Q. I didn't say that you did. You didn't say it?

A. No, I did not.

Q. It is not your position that you had any authority from anyone directly from Shotwell to raise the invoices?

A. When the invoices come to my office—

Q. Just answer my question.

2507 A. You are asking me a question and I am answering it. When the invoices come to my office, they are my property and when I enter them, when I post them, Shotwell can't tell me not to.

Q. You did that on your own, didn't you?

A. What?

Q. You did that on your own?

A. What?

Q. Raise those invoices.

A. I did that on instructions. I was told to do it.

Q. From whom?

A. From Mr. Lubben.

Q. You didn't get any instructions from Shotwell, did you?

A. I didn't need any instructions from Shotwell. I didn't need any instructions from Shotwell.

Q. You didn't get any from them, did you?

By the Court: Just answer the question, Miss Feldman.

By the Witness: No, I didn't get any instructions from Shotwell.

By Mr. McConnell:

Q. Now you say you got your instructions from
2508 Mr. Lubben, and I understood you to say that you didn't have any receipts for the payments which Mr. Lubben made, but you did have Mr. Lubben's word that he had made the payments, is that correct?

A. Yes, sir.

Q. So that the basis of your records—I am not questioning you, you personally as to whether you entered the records or not—the basis of your records was whether or not Mr. Lubben had properly and correctly reported to you payments, is that correct?

A. That is correct, sir.

Q. So that when you testified in response to Mr. Lockley's question that these records were true and accurate, the only information you had on that was what you received from Mr. Lubben, wasn't it?

A. Well, they were true and accurate according to the information received.

Q. From Mr. Lubben?

A. That is correct.

Q. You were not testifying from your own knowledge on those transactions?

A. That he had paid the cash to Shotwell?

Q. Yes.

2509 A. No, sir.

By Mr. McConnell: That's all.

2510 *Redirect Examination by Mr. Lockley.*

I beg your indulgence for the remaining few seconds, your Honor. I would like to let Miss Feldman go, but I still have a few questions on redirect examination that I would like to ask her.

By the Court: All right.

By Mr. Lockley:

Q. Miss Feldman, I show you two exhibits, 77-A, and 78-A, that were also displayed by Mr. O'Brien, and which say on them, "Biiled at 16 cents", or invoiced for 16 cents.

Now, to whom were those invoices directed?

A. Imperial Candy Company of Youngstown.

Q. That is the General Confections, is it?

A. Well, they were billed to General Confections, and they were drop shipped.

Q. Did General Confections resell them?

A. They did.

Q. Do you know how much General Confections resold them for?

A. They were invoiced at 16 cents.

Q. Was there any further price that General Confections received over and above the 16 cents billing price?

2511 A. I believe there was on Imperial Candy.

By the Court: A little louder, please.

By the Witness:

A, I say, I believe there was on Imperial Candy.

By Mr. Lockley:

Q. Do you know where Imperial Candy was located?

A. Youngstown, Ohio.

Q. And Mr. O'Brien, I believe, also asked you about factoring and he asked you whether you were loaned the money by the factors on the full price.

Now, did you receive money borrowed from these factors on the purchase price you paid for material, or on the sale price for which you sold it?

A. When we were factoring accounts receivable, we were getting the money on the sales price of the item.

Q. So that the amount you got back from a factor was 80 percent of the amount you sold it for, is that correct?

A. In those instances, yes.

Q. Not the amount that you paid for it?

A. That is correct.

By Mr. O'Brien: I talked about the inventory

2512 price.

By Mr. Lockley:

Q. All right. What about the inventory?

A. I testified to the fact that I thought the loans on the inventory were made on the invoice price plus the overage. I said I believed that was so. I was not sure.

Q. Those were secured, were they, in any way, those loans?

A. When the merchandise was in the warehouse, we turned the warehouse receipts over to the finance company, or the factor company, and they would reduce it as we paid them for certain amounts coming out of the warehouse.

Q. Well, what was the measure of the amount of money that you could get from the factor; was it the amount you paid for the material, was it the market value on it, or was it the amount you expected to sell it for; or do you know?

A. The amount we paid for it.

Q. The amount you paid for on the inventory, and the amount you sold for when you factored your accounts receivable, is that it?

A. That is right.

Q. Is there anything else? You were also asked
2513 about this $67,000 check, the Defendants' Exhibit 13, I believe. Do you know anything further about that transaction?

A. That was one of Mr. Louis J. Roth's brainstorms. Instead of depositing the money for the partnership—for the purchase of an interest in the business into the old account, and then transferring it to the new when the partnership was opened, they put the $67,000, which item represented part of Mr. Lubben's investment in the new company, plus Mr. Giglio's investment in the new company, they then withdrew it to pay up the bills that were due on Eatsum Food Products single ownership. The entry was handled very poorly, and I think that is where the confusion arises.

Q. Does it reflect Mr. Lubben got $60,000 for the sale of Eatsum?

A. No, sir.

Q. Do you know how much he did get?

A. I believe it was half that.

By Mr. McConnell: I object to that. The records will be the best evidence.

By Mr. Lockley: I asked her if she knows. You
2514 were questioning the validity of the records.

That is all, your Honor, and I thank you.

By the Court: We will recess until ten o'clock tomorrow morning, members of the jury.

(Witness excused.)

By the Marshal: This Honorable Court will now recess until ten o'clock tomorrow morning. Kindly remain standing until the jury gets into the jury room.

(Whereupon an adjournment was taken in the above entitled cause to the following day, being Tuesday, September 29, 1953, at the hour of 10:00 o'clock a.m.)

2515

(Caption—No. 52 CR 143)

Before Nordbye, J. and J.

Chicago, Illinois
Tuesday, September 29, 1953
10:00 o'clock A.M.

Court met pursuant to adjournment.

Present:
Mr. Edward J. Calihan, Jr.,
Mr. John Lockley,
Mr. Vincent O'Brien,
Mr. Thomas McConnell,
Mr. William T. Kirby

And Thereupon the following further proceedings were had herein, in Chambers, out of the presence and hearing of the Jury:—

By the Court: Mr. Lockley, you didn't want to be heard on this order, did you?

By Mr. Lockley: I think perhaps for the record, I ought to be heard. I am informed by Mr. Krane that
2516 he has not taken any statement from Mr. Rock, Mr. Sproul, or Mr. Stone. Nor, to the best of his knowledge, does the Government have any statements from them which relate in any way to the Shotwell case.

By the Court: Well, be that as it may, I will sign the order, and if you haven't any statements, I don't suppose there is any compliance with them. I have already signed it.

By Mr. Lockley: So far as I can see, it is the same as all the other orders so I have no objection to giving them statements, but they just don't exist.

By Mr. O'Brien: I am afraid if I ever had any standing with Judge Nordbye, I am losing it; I have so many motions, Judge.

I will tell you, Mr. Lubben spoke of a passport and it was applied for and issued in 1948.

By the Court: This isn't for the record—

(Discussion off the record.)

By the Court: Go ahead.

By Mr. O'Brien: Well, we checked the passport.
2517 We had a lawyer in Washington inquiring into it, and he reports to me there was a passport applied for,

both in 1945 and in 1948. I want to get a copy of the passport, and under their regulations or requirements, where it is for use in a case, you may have it, but it takes an order of a Judge; that it would be, to use their expression, in the interest of justice in the case.

There is no regulation, Ed. There is no regulation in the books, and no provision such as you have in the United States Attorney's office, or the Attorney General, or the Secretary of the Treasury for this channel or approach to it.

That is the motion.

By Mr. Lockley: The 1945 one was in connection with a trip he had made down to Cuba for the purchase of Cuban candy. As I recall his testimony, it was that he applied for a passport in 1948.

By Mr. O'Brien: That is right.

By Mr. Lockley: I don't recall if he said such a passport was issued.

2518 By the Court: I don't think he said it was issued. I thought he said it was applied for.

By Mr. O'Brien: He said it was issued and he said he had the passport but did not bring it here.

By the Court: Well, that may be. That may be.

By Mr. O'Brien: But this I may say, athough it isn't necessary, but the mere fact that it comes here doesn't make it admissible, unless I am incorrect in my recollection. All I want to do is satisfy their requirements for getting it here. I am not asking counsel to agree that it is competent for—

By Mr. Lockley: I have no objection to it, your Honor, if you have to sign the order.

By the Court: Well, you say there aren't any departmental regulations that we have to observe in order to obtain it?

By Mr. O'Brien: That is right. We looked them up last night, Judge, because if there were any such, we would want to do it. I had Mr. Wattling look it up.

2519 By Mr. Lockley: There are state department regulations, I presume.

By Mr. O'Brien: Not applicable to the procuring of papers. They simply say if you have a court matter and there is an order and it is in the interest of justice, the Secretary or the assistant will either give you a copy, or make a statement about it.

By the Court: You don't say anything about the payment of the required fee for the passport here. You merely order the Secretary of State to issue a certified copy.

By Mr. O'Brien: Well, that is true, Judge.

By the Court: Don't you think it should contain that?

By Mr. O'Brien: I will put it in the order, and it will look better.

By the Court: It may be somewhat presumptuous for us to order the Secretary of State to do something without—

By Mr. O'Brien: I think you are right. I see what you mean. If I say, "Upon payment of any required fee."—

2520 By the Court: Or something like that.

By Mr. O'Brien: —that would take care of it, Judge, "Upon payment of any required fee."

By the Court: That is all right.

By Mr. O'Brien: Now, I want to leave the written motion on the mistrial, and to tell your Honor, pursuant to our talk yesterday, to draw a further statement to the jury. We, all three of us, working, could not contrive any better statement than the Court has already made, if the thing can be remedied at all.

I do not think that the matter which I suggested yesterday be additionally stated—well, when you try to write it out, in any way effective, you just cannot.

And so, we would like to file the motion. We needn't take the time, unless you want to, to discuss it now.

I understand that Mr. Lockley hopes to finish today. If that is true, we would have a gap at the end there, at which we could discuss this, and discuss a couple of pending motions, oral motions that I have.

2521 You remember that one was to strike some of Mr. Lubben's testimony, and I said that I would like to be advised before Mr. Lockley finished, so that I could remind both of you again; and the Court said, "Well, that would be all right." Even if you had finished, it could be taken up without being technical about that.

So my thought would be, if we leave this until there is time to think about it and go forward and then pick it up when we get a gap between your case and ours. It will be all right.

2522 By Mr. Lockley: I think it is more than likely that that is going to come tomorrow. If we finish today, it will be fast work, as I review the case.

By Mr. O'Brien: Whether it be today or tomorrow, I was only speaking from what I heard last night as to the possibility of your finishing.

By Mr. Lockley: Yes. Before we finish, there is the matter that we discussed in Minneapolis regarding re-offering Mr. Lubben. Mr. Bookman is in town. He can be reached at the Midland Hotel.

By Mr. O'Brien: May I talk to my people about that?

By Mr. Lockley: Yes. I wonder if we can arrive at some sort of understanding as to what the next move is going to be.

By Mr. O'Brien: Yes. I will do it at noon and advise you after lunch.

Will that procedure be all right, Judge? We will take it up later, the mistrial motion.

By the Court: That will be all right.

2523 (Whereupon the following proceedings were had in the hearing and presence of the jury.)

HOWARD ROESER, a witness called herein on behalf of the Government having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Will you give your name for the record, Mr. Roeser?

A. My name is Howard Roeser, R-o-e-s-e-r.

Q. And what is your address?

A. 5850 North Kostner, Chicago.

Q. And directing your attention to about the year 1942, where were you employed at that time?

A. In 1942, the latter part of '42, I was employed by The Shotwell Manufacturing Company.

Q. And where were you employed prior to that?

A. With Busby & Oury.

Q. And who are they?

A. A CPA firm in Chicago, public accountants.

Q. Were you doing any work at Shotwell Manufacturing Company for Busby & Oury?

A. Yes, sir.

2524 Q. And what was the nature of that work?

A. The nature of that work was systems and audit work.

Q. Can you describe a little more fully what you mean by systems?

A. Yes, attempting to make a study of the cost procedure in the Shotwell plant at that time and, if possible, to make any changes or recommendations for a better cost system.

Q. And then you went to work for The Shotwell Manufacturing Company?

A. Yes, sir.

Q. And that was when?

A. I believe August of 1942.

Q. And what were your duties then?

A. As a cost accountant.

Q. And did you remain with The Shotwell Manufacturing Company?

A. Yes, sir.

Q. And were you with them in the year 1945?

A. Yes, sir.

Q. What was your duty at that time?

A. In 1945 I was in charge—I was comptroller of the company and in charge of the general books of
2525 the company.

Q. And what are the duties of a comptroller?

A. The comptroller is responsible for the maintenance of the books and the preparation of operating and financial statements and operation of the general office.

Q. Would you say you were in charge of the bookkeeping operations of the company?

A. Yes, sir.

Q. Were you under the supervision of anyone else at that time?

A. Well, under the supervision of the executives above me, which would be the president of the company, vice president, and so forth.

Q. Did you in any manner help or assist in the preparation of the tax returns?

A. No, sir; I did not directly assist in the preparation of the tax returns.

Q. Who did that?

A. The public accounting firm, Busby & Oury.

Q. Now, do you know a man named David Lubben?

A. Yes, sir.

2526 Q. When did you first meet him?

A. I am not exactly sure of the exact time. Mr.

Lubben was a broker for the Shotwell Manufacturing Company—I believe that was the first time I met him, and my guess on the time would be 1944, possibly '45.

Q. And did you have any subsequent meetings with him?

A. Prior to that?

Q. No, later.

A. Oh, yes. Yes.

Q. And at any of those meetings was there any money that you saw pass hands?

A. I am not sure the way you mean that.

By Mr. McConnell: I think we should have the time and place fixed, and not have just a conclusion.

By the Court: Yes. I suppose he can answer that yes or no and then you can proceed further.

By Mr. Lockley:

Q. Can you answer that question yes or no?

A. A qualified yes. A qualified yes.

Q. All right. When?

2527 A. I'd say in the latter part of 1945 or the first part of '46.

Q. And where did this occur?

A. At the company offices.

Q. That's the Shotwell Company?

A. Yes, sir.

Q. And who was present?

A. Well, it is rather hard to distinguish who was present. They were the executive group of Shotwell.

By Mr. Kirby: Now, I object to that. The question is who all was present. I think that it is important that if he isn't sure that he say so.

By the Court: Yes. State the names of those who were present.

By Mr. Lockley:

Q. Can you recall the first such meeting or circumstance and name who was present at that time?

A. No, sir, I cannot truthfully or fully say at the first meeting who was present. I really couldn't remember that.

Q. Were there more than one meeting?

A. Mr. Lubben came to the Shotwell Company offices more than once; yes, sir.

2528 Q. Did he ever bring any currency with him when he came?

By Mr. McConnell: I object to leading the witness. If we are going to have currency transactions, we should have—

By the Court: He may answer that question. You may answer.

By the Witness:

A. Did he ever bring currency; you mean money?

By Mr. Lockley:

Q. Yes.

A. Yes, he did.

Q. Now, I want you to direct your attention to the first such meeting, if you can, when he brought currency with him; do you recall when that was?

A. No, sir.

May I answer this, we will say, in my way?

By the Court: Yes.

By the Witness:

A. I am not sure that the first time that Mr. Lubben came to Shotwell that I was there or saw him. I mean, the first time that he ever came there. There was a first time when I saw Mr. Lubben in the company office.

2529 By Mr. Lockley:

Q. That is what I want you to tell us about, the first time you saw him?

A. It is rather hard to distinguish the first time from any other time. I'd say on the first time he came to the Shotwell office, where I saw him—and it may have been his first time there, I am not sure—was in connection with the conveyance or transportation of currency.

By Mr. McConnell: I couldn't hear that.

By the Witness: Pardon me?

By Mr. McConnell: I am sorry, I didn't hear a word of it. What was the first time?

By Mr. Lockley: Will you read the answer back, Mr. Reporter?

(Record read.)

By Mr. Lockley:

Q. Can you tell us something of the circumstances of that?

2530 By the Court: Let's find out when it was.

By Mr. Lockley: Yes.

By Mr. Lockley:

Q. Are you talking again of the same visit; when was this?

A. I am attempting to; yes, sir. I would say it was in the latter part of 1945.

Q. And who was present?

A. That I couldn't definitely say. It would be conjecture on my part, who was present.

By Mr. McConnell: I object to the conjecture.

By Mr. Lockley:

Q. Well, to the best of your recollection?

A. To the best of my recollection, Mr. Lubben came into the Shotwell Company and visited in Mr. Shotwell's office, which was the executive office of the firm. After his visit in there, he was brought into my office, which was adjacent to this executive office.

Q. By whom?

A. That I do not know exactly. Again it would be conjecture on my part exactly who it would be.

Q. Who occupied Mr. Shotwell's office?

2531 A. Mr. Huebner, Mr. Cain and Mr. Sullivan.

By Mr. Kirby: Now, I object and ask that be stricken, unless it is related to the precise time when this man, Lubben, went in there.

By the Court: Yes, I think so.

By Mr. Kirby: May that answer be stricken?

By the Court: Yes.

By Mr. Lockley:

Q. Who occupied the Shotwell office in 1945 at the time of this occurrence you are relating?

A. The three gentlemen I just named, plus Mr. Shotwell.

By Mr. Kirby: Do you mean who was in the office physically; is that the purpose of the question? If so, I object to it.

By the Witness: I didn't understand the question that way.

By Mr. Kirby: I think it is confusing. I object to the question.

By the Court: Yes. I think we should know who was there, not who ordinarily occupied the office.

By the Witness: I answered on the basis of who

2532 ordinarily occupied the office.

By Mr. McConnell: Then I move to strike the answer.

By the Court: I already granted that motion made by Mr. Kirby.

2533 By Mr. Lockley:

Q. Well, did it ever come to your attention during the year 1945 that The Shotwell Manufacturing Company was receiving over-ceiling payments of currency for its products?

By Mr. O'Brien: I will object to the form of the question, your Honor. It is both leading and I think it assumes facts which are in question here.

If you want, ask him what he knows about it, fix the time and place.

By the Court: Yes, I think so.

You have one incident now that he has mentioned, the latter part of '45. Can't we conclude with that?

By Mr. Lockley:

Q. In the latter part of 1945, then, Mr. Roeser, this incident that you are referring to, can you tell us further what happened at that time?

A. Yes, sir. In this particular thing that you are asking about, Mr. Lubben came into my office, and I am sure that he came in with somebody else bringing him in my office, and a package containing currency was put on my desk.

2534 Q. Do you know how much it was?

A. No, sir; I would have to make a guess because I don't remember what the amount was.

Q. Did you count it?

A. Yes, sir; it was counted in my office.

Q. Well, what is your best recollection?

A. I'd say somewhere around eight thousand or ten thousand dollars. That's conjecture, or a guess, but that is what I believe it was.

Q. And what did you do with it?

By Mr. McConnell: I move to strike out his conjecture or guess. I don't think that we should be guessed into—

By the Court: Was that based on some recollection or what?

By the Witness: About an average, sir.

By the Court: What do you mean by an average? Have you any recollection at all as to how much money was counted out the first time that you saw Lubben bring some money or currency into your office?

By the Witness: Not the exact amount. I wouldn't remember back that far. I know it was a substantial sum.

2535 By the Court: Well, then the eight or ten thousand dollars may be stricken and the substantial sum may stand.

By Mr. Lockley:

Q. Were you instructed by anybody to receive the money?

A. Yes, sir.

Q. And who instructed you?

A. I don't know who did that. Whoever brought Mr. Lubben into my office on that first visit is the one who instructed me to take the money in.

Q. What did you do with the money after you had received it and counted it?

A. After receiving it and counting it, it was put in—I believe it was put in the company vault, in a cash box in the vault.

Q. Was any record made of it?

A. Yes sir.

Q. What was the nature of that record?

A. Well, the record was a personal record of my own, and kept with the money in the cash box. It was on a columnar sheet of paper, an accountant's type, such as you have there.

Q. Was there any explanation given at the time
2536 you received the money as to what it was?

A. No, sir.

Q. You just took the substantial sum of money and put it in the vault?

A. Yes, sir.

Q. What was the exact description of this record that you kept, what sort of a record was it?

A. It was a running record, as it developed later, after the first transaction, into a running record of receipts and disbursements and balance. It was not a true bookkeeping ledger sheet record. It was a work sheet record.

Q. Will you describe the paper it was on?

A. Yes. As I remember it, it was a columnar work sheet, either four or seven columns, that type. I was in the habit of using it; as a matter of fact, still do.

Q. Did it bear such information as dates and amounts?

A. Yes, sir, it did.

2537 Q. Did it bear any other information?

A. No, sir.

Q. Now, you referred to later transactions. Do you recall the second time, any subsequent occurrence of this nature?

A. There was a second time, and there were some after that. I don't recall specifically any dates, or when, but there were additional entries on this memorandum work sheet of mine.

Q. How many times did you receive money?

A. I'd say in the neighborhood of—on the basis of what I am trying to recall, the number of transactions on the sheet, being about, oh, two-thirds of the way down the sheet, I'd say there would be eight or ten transactions of that nature.

Q. Do you recall how much money you received at any one of those occasions?

A. Not specifically; no, sir.

Q. Were they substantial amounts on each occasion?

A. In the neighborhood of this figure I mentioned before. I'd deem that substantial and I'd say they were substantial then.

Q. Was it in the thousands—do you recall who was present at any particular occasion when money was

2538 received by you?

A. Anywhere—you mean during that time?

Q. Any one of those occasions?

By Mr. Kirby: I ask that he fix the time and place.

By Mr. Lockley: I am trying to lay a foundation.

By the Court: You may answer.

By the Witness:

A. When money was received by me, when it was brought into my office I always called for the office manager every time that that party would be there, and in addition to that another party would be there, generally our operating vice president.

Q. Who is the operating vice president?

A. Mr. Huebner.

Q. Mr. Huebner?

A. Yes, sir.

Q. And who is the office manager?

A. Mrs. Morrill.

Q. When did you first learn about over-ceiling payments received by The Shotwell Manufacturing Company?

2539 By Mr. McConnell: There is no evidence that he has learned of them yet.

By the Court: I don't think he has characterized them as such.

By Mr. Lockley: I am sorry.

By Mr. Lockley:

Q. Did it ever come to your attention at any time that moneys in excess of the invoice prices were being received by The Shotwell Manufacturing Company for goods sold?

A. About the time of the cash transactions we have just referred to with Mr. Lubben. The answer is yes.

Q. Yes. And you say that was—

A. I'd say that would be in the latter part of '45, whenever those things started.

Q. And how did that come to your attention?

A. Well, just from general talk in the business, and, of course, things I knew about in the industry at the time.

Q. Did you ever talk to any of the defendants about it?

A. In what way do you mean; directly ask them about it? No.

2540 Q. Did you ever have any discussion with any one of the defendants, Mr. Cain, Mr. Sullivan, or Mr. Huebner?

A. Not specifically with either one, but, in general, I would say yes. After all, I did know that over-ceiling payments, or something of that nature, whatever you call it, were going to be made. I knew that.

By Mr. Kirby: I object to the generality of the statement. It doesn't fix the time and place, so far as the defendant Sullivan would be concerned.

By the Court: Yes, I think it should be made more definite.

By Mr. Kirby: May the answer be stricken?

By the Court: It may be stricken.

By Mr. Lockley:

Q. Can you be more definite, Mr. Roeser, as to the time and place and the persons present at such time as you learned of these payments?

A. Well, that is quite a long time ago. It is very, very

difficult for me to be specific as to the time.

2541 Q. You say the latter of '45?

A. Yes, sir. I would say that that was—if that is the time when this business occurred.

Q. And do you recall ever having discussed it during that time with any one of the defendants?

A. In and around that time it undoubtedly was discussed; yes, sir.

Q. Well, do you remember a discussion?

A. A specific discussion?

Q. Yes.

A. No, sir.

Q. Well, to go back to this record that you kept, how long did you keep it?

A. For as long as I was in that department of the business as comptroller. I was transferred into another department, sales.

Q. When were you transferred?

A. In the early part of February, I believe it was, of 1946.

Q. And what happened to the record at that time, if you know?

A. It was left right in the cash box.

Q. And who at that time had charge of it, if you know?

2542 A. Well, the office manager, Mrs. Morrill, worked directly under me, and that was just left in her hands. The title comptroller was reassumed by a Mr. Graflund of the company.

Q. You stated that the books and records of the company were kept under your supervision and direction. Do you know whether any of the money recorded on this record of yours was likewise recorded on the books and records of the Shotwell Manufacturing Company?

A. It definitely was not, during the time that I had access and had control of the company books.

Q. Do you know from what records the return for the year 1945 of the corporation was prepared?

A. I would have to answer that with a qualification.

Q. What is that?

A. Well, I was not there when the tax return was prepared. The tax return undoubtedly was prepared from the general ledger, and other supporting ledgers, sub-

ledgers of the corporation. There is no doubt in my mind that that is the way they were prepared.

You will excuse me for answering it that way.

2543 Q. Did you have any part in the preparation of the return?

A. No, sir.

Q. I show you Government's Exhibit—

By Mr. Kirby: I object and ask to have that portion of the witness's answer which is based upon his conclusion, which I think is the entire answer, stricken. He made it plain, I think, to Mr. Lockley, that he was not there when that was prepared.

By the Court: Yes. The motion may be granted and the answer may be stricken.

By Mr. Lockley:

Q. Mr. Boeser, I show you Government's Exhibits 1 and 1-A, purporting to be the Shotwell corporation income and excess profits tax returns for the year 1945, and ask if you have seen those before?

A. Yes, sir; I have. I have signed this one.

Q. Your signature is on both those documents?

A. Yes, sir.

Q. Do you recall whether you were instructed to sign those returns by anyone?

A. No, sir; I don't recall being instructed to sign 2544 by anyone.

Q. Do you recall the circumstances surrounding your signature appearing on those returns?

A. No, sir. I actually was under the impression, prior to some discussions with your department, and others that I hadn't signed it. So I am completely in the dark on that. I believe you understand that.

Q. Is that your signature?

A. That is my signature, yes, sir.

Q. I think you will find a letter attached to one of those returns, and I ask you if that is your signature, too?

A. Yes, sir; that is.

Q. Did you prepare that letter?

A. I don't know whether I prepared this letter or not. It is signed by me, and it has my initials on the lefthand side. I don't know who the J. S. is. It is a form letter type of transmittal of tax return, of this particular tax return.

On the basis the way it is made up I would have to say yes, I am responsible for that letter.

2545 By Mr. Lockley:

Q. If you know, was the money—

By Mr. McConnell: Could I see the letter please?

By Mr. Lockley: Pardon me?

By Mr. McConnell: Could I see the letter, please?

By Mr. Lockley: Certainly.

(Document handed to counsel.)

By Mr. McConnell: Thank you.

By Mr. Lockley:

Q. If you know, was the money that was reported from Lubben, and put in the box, included in that 1945 return that you signed?

A. Did I know that?

Q. If you know, was that money which you received from Lubben and put in the box included as part of the receipts of the company, of the Shotwell Manufacturing Company and reported in the 1945 return?

A. Specifically, I do not know. Again, it would be—I don't believe it was, but I don't know, because I did not check it, I did not check the tax return against the general books of the company.

2546 Q. Well, to your knowledge was any of the money that was put in the vault deposited in the bank account of the company?

A. At what time?

Q. During 1945.

A. No, sir, it was not.

Q. Was it recorded on the books of the company anywhere?

A. In 1945?

Q. Yes.

A. No, sir.

Q. You said Mr. Busby prepared the 1945 return, is that correct?

A. His company did, yes, sir.

Q. Did you tell Mr. Busby at the time the return was being prepared that this money had been received from Mr. Lubben?

A. No, sir. I wasn't on deck at the time either to tell Mr. Busby that, but the answer to that one is, I did not tell Mr. Busby.

Q. Mr. Roeser, you said you subsequently became the sales manager. Is that the correct term?

A. Yes, sir, sales manager of the company.

Q. In February of 1946?

A. Yes, sir.

2547 Q. Did the Shotwell Manufacturing Company at that time have a quota system?

A. Yes, sir.

Q. Can you explain what that quota system was?

A. The quota system was a record made out for allocated merchandise, candy merchandise, to customers of the company on the basis of their purchase in a base period.

Q. What was the base period of time?

A. And then—pardon me?

Q. What was the base period?

A. 1941, 1942 purchases.

Q. All right. Proceed.

A. That is, billings, dollar billings, and then taken at a ratio based upon the Government's, the OPA's allocation of sugar. In other words, 80 percent of that figure, or 60, or whatever the company happened to be getting at that time.

2548 Q. In other words, if a particular purchaser had bought ten per cent of your output in 1941 and 1942 under your quota system, would he be allowed ten per cent of the output in 1945 and 1946? It that roughly the way it worked?

A. Yes, roughly. He would be getting 80 per cent because he would be getting 80 per cent of the sugar. Roughly, that would be the way it worked.

Q. Did Mr. Lubben have such a quota or any of Mr. Lubben's companies, the Eatsum Food Products Company or General Confections?

By Mr. Kirby: If the Court please, I want to object to this: It is obvious from the proof already in the record that Mr. Lubben and his companies were not customers in 1941. Therefore, a quota system would be completely immaterial in so far as he is concerned and I object to it, specifically I object to this question about a quota for Lubben's companies.

By the Court: I will overrule it.

By Mr. Lockley:

Q. Will you answer the question?

A. Yes, sir. In answer to that question, Mr. Lub-
2549 ben was not a customer of the company in 1941, in
1942, and this was not on the quota makeup.

Q. Now—

A. That is to the best of my knowledge.

Q. Do you know if Mr. Lubben did receive shipments in 1945 and 1946?

A. Lubben received—Lubben was the broker for the company in the year we are mentioning now, in 1945. I am almost certain he was a broker by that time and as such, he would be entitled to a quota as a salesman of the company for the territory in which he operated, which happened to be New York, so therefore he got shipments under that quota.

Q. And were those shipments shipped to him directly as a broker?

A. No. No. Definitely not.

Q. Is that the quota shipment for which he received a five per cent commission?

A. Yes, sir.

Q. Did he also get shipments in his individual capacity as a purchaser instead of as a broker?

A. To his companies?

Q. Yes.

A. One or more of them, yes, sir. I believe in
2550 7945—I believe he had some shipments, yes, sir.

Q. Do you know who determined the amount of shipment that Lubben and his companies should get in 1945 and 1946?

A. I definitely do not know who determined that, no, sir.

Q. You were in charge of sales?

A. Yes, sir.

Q. Would that have been your usual function, to make that decision?

A. Yes, sir.

Q. Did you make it?

A. No, sir.

By Mr. Kirby: It wasn't charged to sales in 1945.

By the Witness: He said in 1946 also. Excuse me.

By Mr. Lockley:

Q. Well, do you recall how Mr. Lubben was able to make those purchases?

A. No, sir.

By Mr. McConnell: I object to leading the witness.

By Mr. Lockley:

2551 Q. Who authorized it?

By Mr. McConnell: We are entitled to know the transactions.

By the Court: He said he didn't recall.

By Mr. Lockley:

Q. Do you know the amount of gross sales to Mr. Lubben and his companies in 1945 or 1946?

By Mr. McConnell: Well, the purchases would be the best evidence of that. We have books showing every single shipment and the invoices and all the rest of it.

By Mr. Lockley:

Q. Do you know, Mr. Roeser?

By the Court: He may answer.

By the Witness:

A. Yes, I was told Friday night.

By Mr. McConnell: He was told Friday night—that certainly isn't in evidence in this case.

By the Court: I suppose you are asking him for a yes or no answer?

By Mr. Lockley: That's all, your Honor.

By the Witness:

A. The answer is yes.

2552 By Mr. Lockley:

Q. Will you take those, please?

A. A record—

Q. I am showing you Government's Exhibits 200, 200-A and 200-B and ask if you have seen those before?

A. Well, I undoubtedly have seen these records before.

Q. What are they?

A. This is an accounts receivable record.

By the Court: Of what company?

By the Witness:

A. Of Eatsum Food Products Company. I have seen them at some time while I was in the employ of Shotwell.

2553 By Mr. Lockley:

Q. Will you look at the next sheet, too?

A. Well, the next sheet is a continuation. The next one is General Confections, Incorporated.

Q. What is the next?

A. A continuation, a sheet on General Confections.

There is another sheet of accounts receivable—others. That is not a general accounts receivable sheet,—for Eatsum Food Products.

And, here is one—I don't know whether this was general accounts receivable, or we will say, accounts receivable—other, or some other accounts under David Lubben.

By the Court: Is it a Shotwell Company record?

By the Witness: Yes, sir.

By the Court: A Shotwell record in connection with Lubben or with Eatsum Food Products, dealings with Shotwell, during the years indicated?

By the Witness: Yes, sir.

By Mr. O'Brien: It is already in evidence.

By the Court: My notes weren't clear about it, and I asked that.

2554 By the Witness: Here is the year 1944.

By Mr. Lockley:

Q. From an examination of those exhibits, are you able to tell the amount of sales to Mr. Lubben and those companies during the years 1945 and 1946?

A. Yes, sir, you could tell the sales. They could be added up on here.

Q. Is there any one total figure at any point that will give you the total for each year?

A. No. The balances are not kept that way, because there are disbursements and receipts recorded, you know, or a reducing balance. An average could be struck quickly, or it could be added up.

Q. Well, are you able to say, or do you know whether Mr. Lubben was one of the larger or smaller customers of The Shotwell Manufacturing Company in 1945 and 1946?

A. On the basis of the billings stated in October here, it would make him a good, a very good customer.

Q. You mean by that that there was a larger volume purchased?

2555 A. Yes, sir.

Q. Do you know any customers who received a larger volume?

A. Oh, yes. I would say there were customers—single customer, received a larger volume, yes, sir.

Q. What type of customers were they?

A. Well, right now, tapping in my mind would be like the Woolworth Company, and Kresge.

Q. The so-called—

A. Some of our American stores, and Colonial stores. They were large customers of ours that bought a substantial amount of merchandise.

Q. Snydicated accounts?

A. Woolworth's, and the like. There were syndicates and chains.

Q. What was the nature of Mr. Lubben's account? Was he sold through a broker, or was he—

A. I would have to qualify my answer to you.

Q. Tell us, if you know.

A. If, as a broker—I would assume in the territory, Eatsum Food Products, dealing in Brooklyn, New York, would come under Lubben, as a broker at that time. As such, he would be entitled to a commission on sales
2556 to those companies, provided other arrangements had not been made.

Q. What I want to know is this: Did anyone get a commission on the sales to Lubben as a customer, rather than as a broker?

A. That, I can't answer. I would say yes.

By Mr. McConnell: I object to that. It is an assumption.

By the Witness: I can't answer that one.

By Mr. McConnell: It assumes there were sales to Lubben. The record shows there were sales to three different entities which were not Lubben.

By the Court: The answer may stand.

2557 By Mr. Lockley:

Q. Was Mr. Lubben considered a jobber?

A. No, sir.

Q. He was a broker part of the time?

A. Yes, sir.

Q. And with respect to the purchases that he made—and when I say Lubben, I also mean the General Confections and Eatsum Food Products Company, in what category of customer would he fall?

A. As a manufacturer or re-packer, on the basis of what I know about these companies now.

Q. Well, in that category, was he a large or a small customer?

A. In that category he was a good customer. I would say large, on the basis of these figures here.

Q. Going back a moment to the cash in the vault if you know, did any of the defendants know of the existence of that money?

By Mr. McConnell: I object to having this witness testify to what some defendant knew.

By the Court: He may answer that yes or no and
2558 then if you want to pursue it further after it has been answered, you may.

It may just be a conclusion on his part. Can't you find out whether he talked to any one of these defendants and then determine whether or not any one of these defendants were present during these transactions?

By Mr. Lockley: Strike the last answer.

By Mr. Lockley:

Q. Mr. Roeser, did you ever talk to any one of these defendants about the money that you put in the vault?

A. Yes. Yes, sir. I was instructed by any one—any one of them.

By Mr. Kirby: I object and ask that that be stricken.

By the Court: Tell us who instructed you and we will know who you mean by "any one".

By Mr. Kirby: May that portion be stricken.

By the Court: Let us see what the next answer is. He can answer.

By Mr. Lockley:

Q. You say you were instructed. Now, by whom were you instructed?

2559 By Mr. Kirby: Fix the time and place. Let us have the conversation.

By Mr. Lockley: We are getting it one at a time.

By Mr. McConnell: You say he was instructed. You are assuming he was instructed.

By the Court: He may answer.

By the Witness:

A. Well, it is a little difficult to answer that one directly to you. In the general course of my being in the place, in the Shotwell Candy Company, in the capacity I was there in and always being in contact with Mr. Huebner or Mr. Cain or even Mr. Sullivan, when they came in there always were conversations had. As to the specific conversation, I can't truthfully tell you that I remember any specific one.

By Mr. Lockley:

Q. Well, did you do—

By Mr. Kirby: On the part of defendant Sullivan, so we won't have the record confused, I move that that answer be stricken.

By The Witness:

By the Court: That answer may stand.

2560 By Mr. Lockley:

Q. Did you put the money in the vault on your own?

A. Yes, sir.

Q. You mean nobody instructed you to do that?

By Mr. McConnell: I object to counsel cross examining the witness.

By the Witness: I was told to put it in the vault for safekeeping, or it was given to me for safekeeping.

By Mr. Lockley:

Q. Who told you to put it there?

A. Specifically whom?

Q. Yes.

A. At any—I have—I would have to name any one of four people.

By the Court: Well, if you can't answer that you will have to say so.

By the Witness: All right. I can't answer that specifically.

By Mr. Lockley:

Q. On any of the occasions when Mr. Lubben came into your office with money, was he accompanied by anybody else?

2561 A. Yes, sir, several times I believe he was.

Q. By whom?

A. One time—one time by several fellows.

By Mr. McConnell: What time, now?

2562 By the Witness:

A. I don't know whether it is the first time or the second or the third. Mr. Lubben, as I recall it, had been in my office, I would say, at least two times and each time that he was in my office he was brought in there by someone.

By Mr. Lockley:

Q. Who?

By Mr. McConnell: Judge—

By the Witness:

A. Your Honor, I would have to answer it the same way. I don't know whom specifically. I know it would have to be one of the men above me.

By Mr. Kirby: I object to any more. Mr. Lockley has gone up this street and down this street. He is cross examining the witness, his own witness and I ask that the last volunteered portion be stricken.

By the Court: You say you can't remember which one? You can't remember who came in with Lubben?

By the Witness: That is right. I was in association with these men so often and so closely, and this is,
2563 after all, quite a long time ago and it would be difficult. I was under the direction supervision most of the time of the general manager.

By Mr. McConnell: I make a motion to strike. It is not responsive to the question.

By the Court: The answer may stand.

By Mr. Lockley:

Q. Do you remember if it was any one of the three defendants?

By Mr. Kirby: Your Honor, he has already answered that.

By the Court: He may answer.

By the Witness: I may answer?

By the Court: Yes.

By the Witness: May I ask a question at this stage? Am I permitted to ask a question for clarification?

By the Court: You should answer Mr. Lockley.

By the Witness: I understand, Mr. Lockley—I don't want to particularly name one man if there were several involved and I might name the wrong one. My general
2564 manager was my direct supervisor and most of the directions of my activity around the company came from this gentleman.

By Mr. Kirby: If the Court please—

By Mr. O'Brien: He is talking about the usual practice. Mr. Lockley asked him about five times and he has been cross examining him.

By the Court: I don't know but that Mr. Lockley is seeking an answer by proper direct examination. You may continue.

By Mr. O'Brien: At least he has answered the questions.

By Mr. Kirby: What I object to is the volunteered statement. Beyond and after the time that he said he doesn't know he makes a general explanation. That is the part I object to.

By the Court: Proceed with the examination.

By Mr. Lockley:

Q. Did you answer the question, Mr. Roeser?

A. I don't believe I did answer it directly.

2565 Q. Will you try?

By Mr. O'Brien: What is the question now?

By Mr. Kirby: He said he doesn't know.

By the Court: He doesn't know what the question is.

By Mr. Lockley: Will you read the question back.

(Question read.)

By Mr. O'Brien: Read the answer.

(Answer read.)

By Mr. Lockley:

Q. I don't think you have answered the question yet, Mr. Roeser.

A. No, sir, I haven't. Unless—Mr. Lockley, it is very difficult for me to be specific about this one.

2566 Q. I am not asking you that. I am asking you—

A. In all probability—may I answer it this way? In all probability, Mr. Huebner was the gentleman that brought Mr. Lubben into my office the first time, and we will say some subsequent times.

Q. Not in all probability, but—

By Mr. O'Brien: I move to strike the answer. He either knows, or he doesn't know.

By the Court: No. I think the answer may stand.

By Mr. Lockley:

Q. Do you recall if Mr. Cain ever brought Mr. Lubben into your office?

By Mr. O'Brien: I object to the leading question, and the cross examination of his own witness.

By the Court: The objection is overruled.

By Mr. Lockley:

Q. Do you recall?

A. No, sir.

Q. Did you also dispense any of the money from the box?

2567 A. I was asked to get money from the box, yes sir.

Q. Did you ever turn any of it over to any of the defendants?

A. Yes.
Q. When was that?
A. I would say—when these transactions started, the first occasion would have been then in the last part of 1945.
Q. How long after the money was received by you would it be turned over?
By Mr. McConnell: Let us have the names so we can have something we can cross examine on.
By Mr. Lockley: I am trying to get to that.
By the Court: He may answer.
By the Witness: May I have the question again, please?
(Question read by the reporter.)
By the Witness:
A. Very quickly.
Q. And to whom?
A. Well, generally to the office, Mr. Shotwell's
2568 office, and whoever would be in there at the time and had instructed me to take it out.
Q. I want you to name names, if possible, Mr. Roeser. Who was in Mr. Shotwell's office at the time you took the money in, and when did you take it in?
A. Can this be answered in over the spread of the time that I knew about this?
By Mr. Kirby: I object to that.
By Mr. Lockley:
Q. Can you remember any one occasion at a time?
A. No, sir, I cannot remember one occasion at a time. I didn't pay that much attention to them, and they are a long time ago.
Q. Did you ever give any money to Mr. Huebner?
A. Directly to Mr. Huebner?
Q. Yes.
A. I would say so, over the period of time there, yes.
Q. Do you remember when it was?
A. No, sir.
Q. Do you remember how much it was?
A. No, sir.
Q. Did you ever give any money to Mr. Cain?
2569 A. I don't recall. I don't know.
Q. Did you ever give any money to Mr. Sullivan?
A. I don't believe so.
Q. Was an entry made in the record at the time such withdrawals were made from the box?

A. You are referring not to the books of the company, to this memoranda record?

Q. Yes.

A. Yes, sir.

Q. Was that record made by you?

A. It was in most cases, yes. I was responsible for it.

Q. Do you recall any of the amounts that you recorded in this record as coming in?

A. Not specifically, no.

Q. Can you recall any of the amounts as going out?

A. No, sir.

Q. Was there any other information on the record besides the amount going in and the amount going out, and the date?

A. If there was a balance, yes, that would be on there. That is all.

Q. That is all there was on the record?

2570 A. Yes, sir.

Q. No names?

A. No, sir, not to my knowledge.

2571 Q. You said that you counted the money?

A. I did on a couple of occasions, I verified it, yes.

Q. What did you do on the other occasions?

A. Well, on other occasions the money was either not counted by me or it went in and out immediately without counting.

Q. I don't understand that. What do you mean it went in and out immediately without counting?

A. Well, some money was brought in a package and was never even opened up and went out immediately.

Q. Do you know Mr. Shotwell?

A. Senior? Yes, sir, yes, sir.

Q. Did he come to the plant in 1945 and 1946?

A. Yes, sir, he did.

Q. How frequently?

A. Oh, I wouldn't know how many times—not too frequently.

Q. Well, once a day, once a week, or once a month?

A. Not once a day, no. Perhaps once a week.

Q. How long did he stay?

A. Hours.

Q. Do you know what he did?

A. Yes, sir, I do.

2572 Q. What was that?

A. Generally discussed the business affairs, visited with department heads, things of that nature.

Q. What was his position in 1945 and 1946?

A. I don't know exactly. I am going to say chairman of the board.

By Mr. Lockley: Your witness.

Cross Examination by Mr. McConnell.

Q. Did I understand you to say you signed these tax returns for Shotwell in the years 1945 and 1946?

A. I believe I only saw—is that a 1945 and 1946 return there? I thought one was a copy.

Q. Tell me whether you signed them both or one or which one.

A. I signed the 1945 tax return and I signed the 1945 excess profits tax return. I don't believe I signed the 1946 return. However, I didn't believe I signed the 1945 one either but I did.

Q. Well, I guess you didn't sign the 1946. I don't see your name on there. Will you look and see if you find it on there?

A. The 1946 income tax return was not signed by

2573 me nor the 1946 amended return. That was not signed by me. That is, the income tax return as amended was not signed by me.

Q. The 1945—in 1945, you were comptroller of this company, Shotwell Company?

A. Yes, sir.

Q. And you had charge of all of its books and records?

A. Yes, sir.

Q. You were charged with the duty of putting on its books and records its receipts and disbursements and showing its net income, were you not?

A. Yes, sir.

Q. That was part of your duty in that corporation?

A. Yes, sir.

Q. And you say that along about the latter part of 1945 there was some money that came in there which was put in a cash box?

A. Yes, sir.

Q. Now, what do you mean by the latter part of 1945? Would that be November, October, December, or what time?

A. I would say in October, the start. That is conjecture. I mean, that is what I believe, around
2574 that time.

Q. And you opened up a cash box, is that correct, as comptroller of the company?

A. No, not a company cash box, no. It was a box, a metal box.

Q. In other words, that was not a company box, is that your position?

A. Yes, sir.

Q. And you did not consider that as part of the company funds or the company assets at that time, as comptroller of the company, is that correct?

By Mr. Lockley: I object to what this witness's opinion is.

By Mr. McConnell: He is the comptroller of the company. He signed the tax return.

By Mr. Lockley: It calls for a conclusion of the witness and I object. What he considers it to be is pure conclusion.

By the Court: It may be his conclusion, but I suppose as comptroller he can state whether or not he considered it part of the funds or whether it belonged to the company then.

By Mr. McConnell: Will you please read the ques-
2575 tion to the witness.

(Question read.)

By the Witness:

A. That is correct. There were no billings on the books to indicate that an effort should be made to collect these moneys.

In other words, they were just not on the receivables of the company. There was no accounting there. I was not instructed by anyone that there was any cash coming into the company that would be of a unallocated nature that sometimes occurs in companies where cash is anticipated and you set up accounts in suspense of handling them.

By Mr. Lockley: I move to strike his volunteered answer. It is not responsive.

By Mr. McConnell: He has a right to explain as to why he handled it this way.

By the Court: I think it is responsive.

By Mr. McConnell:

Q. You knew and had charge of the books and records between Shotwell and Mr. Lubben's company at that time, did you not?

A. I had charge of the records of Mr. Lubben's company?

2576 Q. No. The books and records of Shotwell which had to do with the dealings of Mr. Lubben's companies.

A. The accounts receivable? Yes, sir. That is, the record of the company.

Q. At that time in 1945 that was the Eatsum Food Products Company, was it not?

Where are those ledger sheets?

A. I believe the Eatsum Food Products Company was the first concern he had. After that he had General Confections.

2577 Q. Well, in 1945 the company we are talking about is Eatsum Food Products Company down in Brooklyn, New York, isn't it?

A. I am looking at—yes, Eatsum Food Products.

Q. That is the one you said was a big customer, or a large customer that bought a lot of candy from Shotwell, is that right?

A. That is correct.

Q. And you had to do, I suppose—well, I will ask you whether you did have general supervision over the issuance of invoices for the shipment of candies to that company?

Did you have general supervision over the preparation and sending out of those invoices?

A. Yes, sir, as comptroller, I would.

Q. Well, as comptroller, when those invoices were paid and your company received money for the face amount of the invoice, did that close the transaction so far as you were concerned?

A. Paid in full?

Q. Yes.

A. Yes, sir.

Q. So that there was nothing due from Eatsum Food

Products after the face amount of that invoice was
2578 paid, so far as you were concerned, was there?

A. That is correct.

Q. Now this record that you made, did you consider that as a company record, or as your own personal record?

A. May I—this memoranda record that was kept in the file?

Q. I am talking about this memoranda record.

A. I consider that my personal record.

Q. And not part of the records of the corporation at all, is that right?

A. No, sir, that is right.

Q. Are you an accountant?

A. Yes. I am not a CPA.

Q. You are a bookkeeper and accountant, and you understand bookkeeping methods, do you not?

A. I did that, yes, sir.

Q. You do now?

A. I have been away from it.

Q. What are you doing now?

A. I am a salesman. I am a sales manager.

Q. At that time you were a bookkeeper. You were more than a bookkeeper. You were in charge of the books, were you not?

2579 A. I was an accountant.

Q. You were associated with the Busby firm, who were certified public accountants?

A. That is correct.

Q. And you didn't tell them anything about any receipts out there which you handled in the manner which you have described here?

A. No, sir.

Q. Now, why didn't you tell them? You knew they were the auditors for the company, didn't you?

A. I knew they were the auditors for the company. I believe I have answered that in the courtroom just a while ago. I didn't even give it a thought, as I am thinking it out now.

On the other hand, I don't believe I was on deck at the time the books were closed and the statements were going to be prepared, either by the company or by Busby and Oury.

Q. Let me ask you this: You didn't tell the auditors you did sign the tax return for 1945?

A. Yes, sir.

Q. Why didn't you include this money which you say you handled this way in the tax return?

A. Well, the tax return undoubtedly was brought
2580 in by the auditors. I believe the reason I signed it, I probably was the only one of the executive group on hand in the office at the time. I don't remember the circumstances. I am just guessing this out.

Q. Well, let me ask you—

A. It was shoved under my nose, and I was asked to sign it, and having been in the habit of signing returns, I undoubtedly did.

Q. Let me ask you this: Did you consider this money that you are talking about, corporate income, as an accountant?

A. No, sir.

By Mr. Lockley: I object.

By Mr. McConnell:

Q. Well, you didn't put in on the books, did you?

A. I did not put it on the books.

Q. So you knew it wasn't on the books, didn't you?

A. Yes, sir.

2581 Q. You knew the tax return didn't include it?

A. No, sir, I didn't know one way or the other. I didn't even give it a thought. I assumed it was not on the tax return.

Q. You assumed it was not?

A. If I gave it a thought.

Q. Well, did you think it ought to be on the tax return at that time?

By Mr. Lockley: I object, your Honor. He has already stated he didn't give it a thought.

By the Court: He said he didn't give it a thought.

By Mr. McConnell: The question is the intent of the corporation at the time these tax returns were made. Here is the man who made it.

By the Court: First find out if he gave it consideration at all at the time he signed the tax return.

By the Witness:

A. No. Who did the money belong to?

By Mr. McConnell:

Q. You didn't know it belonged to the corpora-
2582 tion, did you?

A. It didn't belong to the corporation on the

basis of the books.

Q. Well, what you knew about the transactions, it didn't belong to the corporation either, did it?

A. No, sir.

Q. And if it didn't belong to the corporation, you didn't consider it as corporate income either, did you?

A. That would be the conclusion. That is true.

Q. You reached that conclusion as an accountant and as a bookkeeper?

A. I would have, yes.

Q. What records of this company did you keep at that time? Did you keep all their books and records?

A. You mean under my direct or personal—

Q. Yes, under your direction as comptroller.

A. The ledger, sub ledger, etc., yes, they were under my direction.

Q. Did you have control and custody of the stock transfer records of the company?

A. No.

Q. Have you seen those records?

A. Oh, I have seen them, yes, sir.

2583 Q. Do you know that there were many stockholders of The Shotwell Manufacturing Company?

A. I did not know all the stockholders of Shotwell, no, sir.

Q. Did you know there were over fifty in 1945?

A. I didn't know how many there were. I knew some of them but not all of them.

Q. You knew there were more stockholders than Mr. Cain, Mr. Sullivan and Mr. Huebner, didn't you?

A. Yes, sir.

Q. Many more?

A. Yes, sir.

By Mr. McConnell: I am going to ask that these documents be marked, the 1945 list marked 44 and the others Defendant's Exhibits 45, 46 and 47.

By Mr. McConnell:

Q. I show you document marked for identification Defendants' Exhibit 44, which purports to be a list of the stockholders of the Shotwell Manufacturing Company for the year 1945, and ask you to examine that list and state whether or not you can tell if you recognize any of the names as shareholders.

A. I recognize the name of Arnold.

2584 By Mr. Lockley: I object to his reading from the document, your Honor. It is not in evidence.

By Mr. O'Brien: He is refreshing his recollection.

By Mr. McConnell: I am identifying it as the list. He is in charge of the books and records of this company.

By Mr. Lockley: As long as he doesn't read from it. You asked him if he recognized the names.

By the Court: He may state if they are listed on there during 1944 and 1945.

By the Witness: Without reading the names off, I know of some of the stockholders that I can name without looking at this.

By Mr. McConnell:

Q. Look at the list and refresh your recollection and tell us if you will, please.

By the Court: You are asking him to refresh his recollection on a portion of an exhibit not in evidence. Let him go ahead.

By Mr. Lockley: Let him exhaust his recollec-

2585 tion before he looks at this list.

By Mr. McConnell: The Court said he could go ahead.

By the Court: Go ahead.

By Mr. McConnell:

Q. All right. Tell us the stockholders you know now.

A. The stockholders I know other than the men you mentioned—

Q. Other than those, yes.

A. Elmer Crane, Emmet Hogan, A. Jones, Stanley Graflund. There is one name I am not sure about. I will leave that out. That's all.

Q. Those are the only ones you knew personally?

A. Yes, or I knew of, that had stock in the company.

2586 Q. Did you look at both? You didn't look at 46, did you? Have you ever seen this stockholder record book?

A. I have seen the stock record books. Yes, it was out for audit.

By Mr. McConnell: You have identified all the books here. Have you got the stock record book of the Shotwell Manufacturing Company?

By Mr. Lockley: I haven't identified the stock record book. If you want to, it is right over there.

By Mr. McConnell: Let me identify the book, will you.

Will you please mark this Defendants' Exhibit 48 for identification.

(Said document was marked Defendants' Exhibit 48 for identification.)

By Mr. McConnell:

Q. Have you ever seen Defendants' Exhibit 48 for identification? I show you a book identified as Defendants' Exhibit 48. Will you tell us whether or not that book is a part of the books and records of the Shotwell Manufacturing Company which you had under your
2587 custody and control?

A. That stock record book was not under my direct custody and control.

Q. Who kept it?

A. The secretary of the company.

Q. And who was that?

A. I believe that was Mr. Graflund at that time—probably all the way through.

Q. Have you ever seen the book before?

A. Yes, I have seen the book.

Q. Well, look at it now. Is it in the same condition now, so far as you know, as when you last saw it?

A. So far as I know, yes, sir.

Q. Now, you told us when you first started with this matter of this tin box—when was the last time you had anything to do with a tin box?

A. Well, excuse me. I would say the latter part of January or the first part of February, somewhere in around that period, January or February of 1946.

By the Court: 1946?

By the Witness: 1946, yes, sir.

By Mr. McConnell:

2588 Q. So what you know about this transaction was embraced within a period of October, 1946, to January or February of 1946, is that correct?

A. I would say so.

Q. What did you do with the box in 1946?

A. Well—

Q. If anything.

A. When I left the position as comptroller and moved

over as sales manager, it was just left right there in the company vault, so far as I was concerned or knew.

Q. Did you know what the balance in it was at that time?

A. I probably did know at that time, yes.

Q. Well, do you have any recollection now?

A. No, sir.

Q. Can you guess any approximate amount? Give us an approximate amount.

A. Yes. I would hazard five or eight thousand dollars.

By Mr. Lockley: I object, your Honor, unless he knows.

By Mr. McConnell: Well, you got an approxima-
2589 tion out of him, my brother, in your direct.

By Mr. Lockley: And you objected to it too.

By the Court: Well, the answer may stand.

By Mr. McConnell:

Q. Approximately five or eight thousand dollars, is that it?

A. I would say so.

Q. Did you ever see any shipments of $400,000.00 around that place while you were there?

A. No, sir.

Q. Coming in from Mr. Lubben at one time or any time or any aggregate of time?

A. No, sir.

Q. Or $200,000.00?

A. No, sir.

By the Court: We will take our recess now. We will suspend now for ten minutes, members of the jury.

By the Marshal: The audience will remain standing while the jury files out.

This Honorable Court will recess for ten minutes.

(Recess taken.)

2590 By Mr. McConnell: I have no more questions, your Honor.

Cross Examination by Mr. O'Brien.

Q. Mr. Roeser, you said there was an occasion when money came in and you didn't stop to put it in the box; do you recall that?

A. Yes, sir; I did say that.

Q. Did you have occasion at any time during your connection with this box to take money to Dr. Doe?

A. Yes, sir, I did take money to Dr. Doe once.

Q. And the money that you took, was that money which came in and was not recorded in the box?

A. I am trying to remember the exact circumstances surrounding it and on the basis of the way the package was already set, it did not come from the box. It came in and went out.

Q. And it came to you and you took it out?

A. It was given to me and I took it out.

Q. Yes, right. And you took it to Dr. Doe?

A. Yes, sir.

Q. Can you state how much money that was?

A. No, sir; I didn't see the money at all.

2591 Q. And where was Dr. Doe's office?

A. It was in the Board of Trade Building.

Q. Was that the only time that you yourself paid money to Dr. Doe?

A. Yes, sir.

Q. Now, I take it that except for an instance of that sort the moneys that came to you were noted on the record or memorandum which you kept as to both date and amount?

A. That's correct.

Q. And that memorandum was a personal memorandum?

A. Yes, sir.

Q. So that you could keep account of your custody of the money?

A. Yes, sir.

Q. And in any instance in which the money was handled so promptly that no custody was required, was it your practice not to record the amount?

A. That's correct, we did not record it.

2592 Q. I think you also said that on occasions you gave them monies, you gave monies to Mr. Huebner; do you recall that?

A. I said something along that line, yes. I don't know the exact—

Q. Well, I don't remember it precisely either, Mr. Roeser.

A. Well, I was pressed to name some particular party, I believe.

Q. Yes.
A. Yes.
Q. Did you know the purpose of the payment to Dr. Doe?
A. Yes, I know what it was for.
Q. What was it?
A. It was for over—
By Mr. Lockley: I object. This is beyond the scope of the direct examination.
By the Court: Well, first I think you will have to lay a foundation as to how—it doesn't appear as to whether he obtained that information from someone in authority, or how he knew, or what he knew about the payment to Doe, outside of being the messenger.
2593 By Mr. O'Brien: I am only asking for his personal knowledge.
By the Court: Well, you are going into something—
By Mr. O'Brien: I will withdraw the question. I will approach it this way.
By Mr. O'Brien:
Q. At that time, late in '45, and early in '46, Mr. Roeser, were you aware of a corn shortage, or rather, did a corn shortage exist?
A. Yes, sir.
Q. And was the payment of the money to Dr. Doe in any way related to that?
By Mr. Lockley: I object, your Honor, unless he lays a better foundation.
By the Court: He may answer yes or no.
By Mr. O'Brien: Read the question.
(Question read by the reporter.)
By the Witness: There wasn't any question in my mind that it did.
By Mr. Lockley: I object, your Honor, to that answer.
By the Court: Yes, the answer may be stricken.
2594 By Mr. O'Brien:
Q. Well, I think that is true. You could answer that yes or no, Mr. Roeser, whether the payment was related to the corn shortage, if you know?
A. Mr. O'Brien, I learned later that—
By Mr. Lockley: I object to what he learned later, your Honor.

By the Witness:

A. Then I will answer—I will have to answer the question as I did, or just say I don't know.

By Mr. O'Brien:

Q. When did the situation as to the shortage of corn first come to your attention?

A. I think that the shortage was showing up in the industry at the end of the summer of 1945.

Q. Now, at the time that you opened the box, or thereafter, and at the time that you paid, or turned over to Mr. Huebner the money which you mentioned, did Mr. Huebner say anything to you about the corn situation?

A. Specifically, as to whether Mr. Huebner said so, I can't answer you directly. The corn shortage was discussed openly in the executive group.

By Mr. Lockley: I object, your Honor, unless he
2595 lays a foundation for a particular conversation.

By the Court: Yes. You have answered the question. The latter portion of the answer may be stricken.

By Mr. O'Brien: I think that is all, your Honor.

By the Court: Mr. Kirby?

By Mr. Kirby: No, I don't have any questions of this witness.

By the Court: Any further direct?

By Mr. Lockley: Yes, your Honor.

Redirect Examination by Mr. Lockley.

Q. Mr. Roeser, you were shown the stock book of the corporation. Do you know who had the controlling interest in the Shotwell Manufacturing Company?

By Mr. McConnell: Well, the books and records will be the best evidence of that.

By the Court: I assume so.

By Mr. Lockley:

Q. I show you Defendants' Exhibit for identification
48 and ask if you can examine that stock book and
2596 tell me who had the controlling interest in the Shotwell Manufacturing Company during 1945?

By Mr. McConnell: Is that book in evidence?

By the Court: No, it hasn't been offered.

By Mr. McConnell: Then I object to his reading from the book.

By the Court: Yes, sustained.

2597 By Mr. Lockley:

Q. Do you know, Mr. Roeser, without reference to the book, who had the controlling interest?

By Mr. McConnell: The Court already sustained an objection that the best evidence is the book.

By the Court: I think so.

By Mr. Lockley:

Q. Now, Mr. Roeser, the Shotwell Manufacturing Company was making shipments to Mr. Lubben and his companies, the Eatsum Company and the General Confections, during 1945, is that so?

A. Yes, sir; they were.

Q. And what was being shipped?

A. Candy. You mean specifically what type of candy?

Q. It was candy?

A. Yes, sir; it was candy.

Q. That's enough. Who manufactured that candy?

A. Shotwell did, the company.

Q. Now, you testified on cross examination that you handled this cash box for the period of about October, '45 to January or February, 1946. Do I understand that there were about eight or ten payments; is that your

2598 testimony, during that period of time?

A. I believe that's——yes, I was trying to remember from the number of entries on this sheet. As my memory holds it now, that—yes, there would have been about eight or ten—let's call them receipts or "in" entries.

Q. And did you testify that there were other instances where money came in and went out without being recorded on the books or on that memorandum?

A. Yes, sir.

Q. What happened to those transactions; was any record made of them?

A. Not to my knowledge.

Q. Do you know from whom the money was received?

A. Specifically, no, but I figured they were from Mr. Lubben.

Q. We only want what you know.

A. All right.

Q. Do you know what happened to it? You said it went out.

A. It went out.

Q. To whom?

A. I don't know.

2599 Q. You don't know?

A. No. Well, just a minute. I did say that I took one package down to Dr. Doe.

Q. I am talking about the others.

A. So that is specifically. There were other conveyances of that type money to Dr. Doe.

Q. Do you know that?

A. Do I know it?

Q. Yes, did you make them?

A. No, sir.

By Mr. McConnell: I object. He is cross examining his own witness.

By the Witness:

A. No, sir; I didn't make it myself nor direct it.

By Mr. Lockley:

Q. Do you know how much money was involved in these payments that came in and went out?

A. No.

Q. You testified that to the best of your knowledge it was nothing like $400,000.00, is that correct?

A. Yes, sir.

Q. But you have also testified that you don't know how much money was in these packages that came in

2600 and went out?

A. That's correct, sir.

Q. Now, Mr. Roeser, what sort of a safeguard did you have to prevent a charge of pilferage of money from this box by yourself?

A. I had none, with the exception of the counting of the money as it went in, where we were given the money to put in the box, or we were asked to take the money out of the box.

I made certain that always at least one party was on hand at the counting. Beyond that point, everybody was wide open. I had no other safeguard. There wasn't any.

Q. Who was the party on hand?

A. Mrs. Morrill, generally.

Q. Was she always present?

A. I'd say that most of the time, yes.

Q. Was there any control as to the figures you put down, on the amounts received, on your memorandum, any way that could be or was checked by anyone else?

A. In a practical way, no, absolutely not, because I don't know if anybody else knew how much came in.

Q. You stated that this money didn't belong to the corporation, in your opinion. Who did it belong to?

2601 A. I don't know. It belonged, as far as—it was over-ceiling payments. That was definitely in violation of the OPA regulations at the time. It came in that way. Actually, who it belonged to, I wouldn't know.

2602 Q. Did you consider it to be your money?

A. No, sir.

Q. Well, you didn't consider it yours, you didn't consider it the corporation's; whose did you consider it to be?

By Mr. McConnell: I think this is cross examination, of his witness.

By Mr. Lockley:

Q. Did you answer my question?

A. No, sir; I did not answer your question. I find it impossible to answer the question truthfully, or directly.

Q. You don't know whose it was?

A. No, sir; I don't know whose it was.

Q. Would it likewise be true that you don't know if it was the corporation's?

A. It was not on the books as a billing to be collected.

Q. Who instructed you not to put it on the books?

A. Nobody instructed me not to put it on the books.

Q. Did anybody instruct you to put it on the books?

A. No, sir.

2603 Q. Did anybody give you instructions in any respect with regard to the money?

A. Yes, I would say that—I would not only say, I was told this money was coming in, and it was to be kept in safekeeping to be disbursed as needed.

Q. And now, by whom were you told?

A. That is one that I have had difficulty answering, because I can't say any specific party. It would have to be the executives above me.

By Mr. McConnell: I object to who it would have to be. If he can't remember who it was, I don't think he has a right to guess about it.

By the Court: Yes, sustained.

By Mr. Lockley:

Q. You testified that you made a trip to Dr Doe's office. When was that?

A. I would say that that was in 1946.

Q. And you were given a package to take down there?

A. Yes, sir.

Q. Did you see what was in the package?

A. No, sir.

Q. Who gave it to you?

A. That I do not know.

2604 Q. Was it a bulky package?

A. It was a large mailing envelope.

Q. Where did you get it?

A. I got it in the company offices.

Q. The Shotwell offices?

A. The Shotwell offices, yes, sir.

Q. Did it come out of this vault?

A. No, sir; not to my knowledge—no, it didn't come out of the vault. That I am sure of.

Q. Did you receive the envelope sealed?

A. Yes.

Q. Then you took it to Dr. Doe?

A. Yes, sir.

Q. And what did you do with it when you got there?

A. I walked into this dentist's office, and asked for Dr. Doe. I was instructed by whoever gave it to me to ask for Dr. Doe. And I handed him the package, and turned right around and walked out.

Q. Did you see it opened?

A. No, sir.

Q. So you don't know what was in it then?

A. No, sir.

Q. You don't know whether it was money or anything else?

2605 A. I assume that it was money. I don't know. No, I did not see what was in the package.

By Mr. Lockley: That is all, your Honor.

By the Court: That is all.

(Witness excused.)

By Mr. Lockley: Mr. Graflund.

STANLEY GRAFLUND, a witness called herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Will you give your full name, Mr. Graflund?
A. Mr. Stanley Graflund.
Q. Where do you live?
A. Wheaton, Illinois.
Q. And where are you employed?
A. I am self employed.
Q. Were you at one time employed by the Shotwell Manufacturing Company?
A. I was.
Q. When were you first employed there?
A. September, 1930.
By the Court: September?
2606 By the Witness: September, 1930.
By Mr. Lockley:
Q. Please keep your voice up, Mr. Graflund.
A. Yes, sir.
Q. And what was your position at that time?
A. I started as a cost accountant.
2607 Q. And did you subsequently have different positions in the company?
A. I did.
Q. What were they?
A. Head of the cost department; purchasing agent; comptroller; secretary; vice president and secretary.
Q. And when did you become comptroller?
A. I originally became comptroller in 1936.
Q. And when did you become vice president and secretary?
A. 1943, I believe it was.
Q. And what were your duties as vice president and secretary?
A. To keep the corporate minute books, stock records, all the duties pertaining to the secretary and extra duties such as attending association meetings, meetings with the public, more or less of a general nature.
Q. After Mr. Roeser left the comptroller's office in 1946?

A. Correct?
Q. What did you do?
A. I then assumed the duties of comptroller again.
Q. Did you also assume that title?
2608 A. No, sir.
Q. Now, did you at any time in the year 1945 have any conversations relating to the receipt of currency, with any one of the defendants?
By Mr. O'Brien: What year?
By Mr. Lockley: 1945.
By the Witness:
A. I would say yes.
By Mr. Lockley:
Q. Are you able to place the time?
A. It would be in the fall of '45.
Q. And who was present at that time?
A. Mr. Huebner I believe.
Q. Anybody else?
A. I don't remember, sir.
Q. And do you remember what the conversation was?
A. Simply that moneys had been received from the purchase of raw corn.
Q. Did he say from whom?
A. From Mr. Lubben.
Q. Now, at that time you were not the comptroller, is that correct?
A. Correct.
Q. Did you personally receive any of this money
2609 during 1945?
A. Mr. Lubben brought in money, which I have placed somewhere in the latter part of '45, which I accepted.
Q. Do you recall whether Mr. Lubben was accompanied by anyone?
A. No, sir; he was not.
Q. He was alone?
A. Yes, sir.
Q. Do you know how much money was turned over to you at that time?
A. No, sir; I don't know.
Q. Did you expect this money?
A. No, sir.
Q. You mean Mr. Lubben just brought it in and handed it to you?

A. No, sir.

Q. Well, can you tell us exactly what transpired then?

A. I received a call from Mr. Huebner stating that Mr. Lubben was going to bring in some money and that I should receive it for the company.

Q. And Mr. Lubben did bring in the money?

A. He did.

Q. Do you know how much?

2610 A. I couldn't tell you the amount; no, sir.

Q. What did you do with it?

A. I had it placed in the company vaults.

Q. Did you make a record of it?

A. Not to my knowledge; no, sir.

Q. Was there any other occasion when Mr. Lubben turned over any money to you?

A. No, sir.

Q. There was only one that you recall?

A. That's right, sir.

Q. When you subsequently became comptroller did you see a record of money?

A. I did.

Q. And can you describe that record?

A. It was a seven column—or a rough work sheet, such as is used by accountants, with ruled lines on it, and this had an opening balance, plus receipts, less withdrawals.

2611 Q. Did it have anything else besides those figures?

A. There were penciled notations of names opposite the withdrawals.

Q. Were there dates?

By Mr. O'Brien: I am not clear, Mr. Lockley.

By Mr. Lockley: Were there any dates on the memorandum.

By Mr. O'Brien: Oh, but I mean did Mr. Graflund say these were his figures or—

By Mr. Lockley: This is the memorandum.

By Mr. O'Brien: —prior figures or current ones?

By the Witness: Will you restate your question, sir?

By Mr. Lockley:

Q. Well, when did you first see this memorandum, Mr. Graflund?

A. I would say the early part of '46.

Q. And were you at that time handling the duties of the comptroller?

A. Yes, sir.

Q. And where was the memorandum?

A. Mrs. Morrill kept the memorandum?

2612 Q. Did you subsequently have occasion to make any entries on it yourself?

A. No, sir.

Q. Well, now did you know what the money Mr. Lubben was turning over to you was for?

A. Yes, sir.

Q. And what was that?

A. For the purchase of raw corn.

Q. Was it in payment of any invoices of Mr. Lubben or any of his companies?

A. No, sir.

Q. Do you recall the denomination of the bills?

A. They were large, fifties, and hundreds, some twenties.

Q. How large a stack was it?

By Mr. O'Brien: What stack are you talking about?

By Mr. Lockley: Of the bills.

By Mr. McConnell: What stack, which one?

By Mr. Lockley: He only testified to one.

By Mr. Lockley:

Q. Am I correct, Mr. Graflund?

2613 A. Yes.

Q. You testified to one?

A. That's correct.

Q. Do you recall how large a stack of bills you received at that time?

A. I'd say about two inches, perhaps an inch and a half to two inches.

Q. Was anybody present besides Mr. Lubben?

A. No, sir.

Q. What did you do with the money, did you count it?

A. I turned the money over to Mrs. Morrill.

Q. Did you count it?

A. No, sir.

Q. You just turned it over to her?

A. Correct.

Q. What did you tell her to do with it?

A. Put it in the vault.

Q. When was the last time you saw this memorandum sheet?

A. Sometime in 1948.

Q. Do you know where it is now?

A. No, sir; I do not.

Q. Do you know if it is still in existence?

2614 A. My knowledge is—the best of my knowledge is, that sheet is no longer in existence?

Q. Did you ever have a conversation with any of the defendants with respect to that memorandum record?

A. I did.

Q. And which one?

By Mr. McConnell: Where and when?

By Mr. Lockley: Give me time.

By Mr. Lockley:

Q. Which one?

A. Mr. Cain.

Q. Where?

A. At the company office.

Q. When?

A. Sometime around in 1948, in the latter part, or thereabouts.

Q. The latter part of 1948?

A. Yes.

Q. Are you able to fix it any more definitely than that?

A. (No response.)

Q. Do you know when Mr. Krane came to the office of the Shotwell Manufacturing Company?

A. Mr. Krane came to the offices, I believe it was

2615 June of 1942.

Q. Well, was the record destroyed, or was the record in existence before or after that?

A. It was after.

Q. It was in existence after that period?

A. That's right.

Q. You said you had a conversation with Mr. Cain?

A. That's correct.

Q. Was that before or after Mr. Krane's appearance?

A. It was after.

Q. And what was this conversation about?

A. The destruction of that record.

Q. Can you tell us what was said?

By Mr. Kirby: I object to this as not competent with respect to the defendant, Sullivan.

By the Court: He may answer.

By Mr. Kirby: May the jury be instructed that it is not competent as to the defendant, Sullivan?

By the Court: That brings up the same question we had before. We will have to thresh out some of those 2616 problems when the Court—

By Mr. Kirby: But I don't need to be making that same objection then.

By the Court: No.

By Mr. Lockley:

Q. Will you tell us what the conversation was at that time?

By Mr. McConnell: I make the objection on behalf of the corporation, as to conversation.

By the Court: I will receive it subject to the objection. Go ahead.

By the Witness:

A. The conversation was simply to destroy the record.

By Mr. Lockley:

Q. Well, who said what?

A. Mr. Cain.

Q. What did Mr. Cain say?

A. "Is that paper still in existence, or that sheet?"

Q. What did you tell him?

A. I told him yes.

2617 Q. What did he say?

A. He said it should be destroyed.

Q. Was there any subsequent conversation, in your presence, relating to that same sheet, with one of the defendants?

A. Yes, sir.

Q. And when was that?

A. Shortly thereafter.

Q. And where?

A. In the company offices.

Q. And who was present?

A. Mrs. Morrill.

Q. And who else?

A. Mr. Cain.

Q. And what was the subject of that conversation?

A. That that sheet should be destroyed.

Q. And who said it?

A. Mr. Cain.

Q. Do you know what subsequently happened to the sheet?

A. Yes, sir.

Q. What?

A. It was destroyed.

Q. Who destroyed it?

2618 A. I believe Mrs. Morrill destroyed it.

Q. Was it destroyed in your presence?

A. No, sir.

By Mr. McConnell: I move to strike it out. He didn't see it destroyed.

By the Court: The statement that Mrs. Morrill destroyed the sheet, that may be stricken.

By Mr. Lockley:

Q. Do you know of any other records relating to this money, other than the one you have just testified to?

A. No, sir.

Q. You testified there was money kept in the vault at the office. Do you know how much was there at any one time?

A. Not in approximate figures; no, sir.

Q. Was money kept at any other place, to your knowledge?

A. Yes, sir.

Q. Where was that?

A. City National Bank vaults.

Q. In the City National Bank vaults?

A. That's right.

2619 Q. Was that on deposit?

A. No, sir.

Q. Where was it in the City National Bank?

A. In the safety deposit box.

Q. In a safety deposit box?

A. That's correct.

Q. Do you know in whose name it was rented?

A. The Shotwell Manufacturing Company.

Q. Do you know how much money was in that vault?

A. Well, the amounts varied from time to time, Mr. Lockley.

Q. Are you able to state at any given time how much there was there?

A. Not with certainty, sir.

Q. Are you able to state the maximum that you knew of at any one time?

A. Seventeen thousand, I would say.
Q. Did you ever get any money out of the bank vault?
A. I did.
Q. Did you receive instructions to do that?
A. I did; yes, sir.
Q. And from whom?
A. From Mr. Huebner.
2620 Q. Do you recall when this was?
A. That occurred at various intervals.
Q. You received instructions on several occasions?
A. Yes, sir.
Q. Always from Mr. Huebner?
A. Yes, sir.
Q. And in what year?
A. 1946.
Q. Did you count the money when you took it out of the vault?
A. Yes, sir.
Q. Are you able to recall the amounts that you took out on the various occasions?
A. Various sums, ranging from two thousand, five thousand.
Q. And do you know what was done with that money?
A. Yes, sir.
Q. Or what did you do with it?
A. I took it to the company offices.
Q. And what did you do with it then?
A. It was placed in the vault.
Q. Placed in the company vault?
A. Correct.
Q. Did you ever put any money in the bank vault?
A. Yes, sir.
2621 Q. And at whose instructions?
A. Mr. Cain, I believe.
By the Court: I didn't hear that.
By the Witness: Mr. Cain.
By Mr. Lockley:
Q. Do you recall when this was?
A. It was more or less of a standing order.
2622 Q. More or less of a standing order. Was there more than one occasion?
A. That is correct.
Q. Did Mr. Cain tell you on each occasion?
A. No, sir.

Q. Did anyone else ever give you any instructions of that nature, to put money in the vault?

A. I don't recall, sir.

Q. Well, about how many trips in all did you make to the bank vault to put money in?

A. I would say three or four.

Q. Do you recall the aggregate amount you put in, the total amount, on those four trips?

A. I don't recall with certainty, sir.

Q. Well, did you make a record on this memorandum sheet of monies put into the bank vault?

A. I did not make the record, sir, the entries.

Q. You didn't make any entries on that sheet, is that correct?

A. Not myself. I didn't do it myself; no, sir.

Q. Do you know if any of the defendants ever put money in that vault?

A. No, sir.

2623 Q. Do you know if they ever put any money in the vault at the office?

A. Not to my knowledge.

Q. Do you know if they ever took any money out?

A. Not to my knowledge, sir.

Q. Do you have any information of payments made by Lubben other than in Chicago?

A. Only hearsay, sir.

By Mr. O'Brien: What was the answer?

By the Witness: Only hearsay.

By Mr. O'Brien: I move to strike it, your Honor.

By Mr. Lockley: He hasn't answered it.

By the Court: Well, it may stand. The answer may stand.

By Mr. Lockley:

Q. Do you recall the gross amount of the receipts as shown on that record, memorandum record?

By Mr. O'Brien: You mean this record kept by Mrs. Morrill?

By Mr. Lockley: Yes.

By the Witness:

A. I would summarize it somewhere in the neighborhood of eighty thousand.

2624 By Mr. Lockley:

Q. Somewhere around eighty thousand was recorded on the memorandum?

A. Yes, sir.

Q. The last time you saw that sheet, was there any balance of cash on hand shown on the memorandum?

A. No, sir.

Q. Do you recall the date of the last entry on the memorandum record?

A. Some time around the end of July, or possibly August of 1948.

By Mr. O'Brien: '48?

By the Witness: '46. I am sorry.

By Mr. Lockley:

Q. Now, during 1946, did you have anything to do with the preparation of the corporate income tax return?

A. I did not prepare the return, sir.

Q. Did you sign it?

A. Yes, sir.

Q. Was the return prepared from the books and records of the company?

A. Yes, sir.

Q. Were those books and records then under your
2625 supervision and control?

A. For what years, sir?

Q. For '46.

A. Yes, sir.

Q. I show you Government Exhibit No. 2, purporting to be the corporate income tax return for 1946, and No. 3, an amended return, and ask if your signature appears thereon?

A. It does.

Q. Do you know if those returns include, in either gross receipts, or net income, the amount of money received by the corporation as shown on that memorandum sheet?

A. They do not.

Q. Did the books and records, other than the memorandum you have testified to, contain any entries with respect to the receipt of money as shown on the memorandum?

A. Not to my knowledge.

Q. Do you have any knowledge of any sales made by the corporation during 1946, when you were comptroller, which were not reported on the books of the company?

A. I do.

2626 Q. When did you learn of them?

A. I learned of one shipment in April of 1946.

Q. April of 1946?
A. Around April of '46, yes, sir.
Q. And how did you learn of it?
A. I was informed by our cost man.
Q. Who was your cost man?
A. Mr. Del Monte.
Q. What was Mr. Del Monte's duty, or function in the office?
A. He was the cost accountant, and he also kept the perpetual inventory records.
Q. Did you have a monthly inventory of finished goods in those records?
A. Yes, sir.
Q. And how was that record kept?
A. I don't understand the question, sir.
Q. What was the nature of the record?
A. It was a running balance showing opening balance, plus production, less shipments, and a new balance for the end of the day.
Q. That was a daily balance, was it?
A. Yes, sir.
Q. Did you also have a monthly balance; was there a monthly balance made?
2627 A. There was a monthly inventory taken to check against the book figures.
Q. What was the purpose of this inventory record?
A. Number one, it was a production control sheet; by it we could gage how many items we had to make, which items were short, which items were long.
Q. Did you also make a physical inventory of goods in the warehouse?
A. Yes, sir.
Q. Well, as an accountant, should the physical inventory compare with the amount in the book inventory at any one time?
A. Yes, sir.
Q. Well, did it ever come to your attention that those two inventories were out of balance?
A. Yes, sir.
Q. When was that?
A. Several times in 1946.
Q. Can you tell us what you did at that time?
A. Well, for the first time, I went to see Mr. Huebner.
Q. You went to see Mr. Huebner?

A. Correct.

2628 Q. When was this?

A. Around in April of '46.

Q. Where was it?

A. In the company offices.

Q. Who was present?

A. Just myself and Mr. Huebner.

Q. And what was said?

A. "What's going on"?

Q. What did you say? What did he say?

A. "The inventory is off balance. What is going on?"

Q. Who said that?

A. I did.

Q. And did Mr. Huebner make a reply?

A. He did.

Q. What was it?

A. He stated that an unbilled shipment was made at the direction of Mr. Byron Cain.

Q. Did you examine the records of The Shotwell Manufacturing Company—

By Mr. O'Brien: I object to the answer. It is a hearsay statement, as far as Cain is concerned.

By the Court: Yes.

2629 By Mr. Lockley: He is quoting the conversation, your Honor.

By the Court: Well, the conversation will be received. It isn't binding on Mr. Cain, though.

By Mr. Lockley:

Q. Now, did you examine the records of The Shotwell Manufacturing Company at that time with respect to these unbilled shipments?

A. I just took Mr. Del Monte's word for it.

2630 Q. Well, do you know whether these shipments were recorded on the books of The Shotwell Manufacturing Company?

A. Not to my knowledge.

Q. Do you know whether, if they were unrecorded on the books, such shipments or the receipts from such shipments would be included in the tax returns?

A. Not to my knowledge.

Q. Do you know how payment was received for such shipments?

A. I assume they were made in cash.

By Mr. McConnell: I object to the assumption.

By Mr. Lockley:

Q. Do you know?

By the Court: The answer may be stricken. You may answer if you know.

By the Witness:

A. No, I don't.

By Mr. Lockley:

Q. After Del Monte told you of this first occasion when the inventories were out of balance, did you learn of any subsequent occasions when the same thing

2631 was true?

A. There were several times; yes, sir.

Q. And are you able to tell when?

A. In succeeding months. I can't pin-point them.

Q. This is in 1946?

A. Yes, sir.

Q. And what did you do on those occasions?

A. Also questioned Mr. Huebner.

Q. You went to Mr. Huebner on each occasion?

A. Yes, sir.

Q. Do you recall who was present at any one of them?

A. No, sir.

Q. Was anyone else present besides you and Mr. Huebner at any one of them?

A. Not to my knowledge.

2632 Q. Do you know how those shipments were handled?

When I say unbilled shipments, I refer to shipments for which no invoice was issued by the company.

Do you know how they were handled with respect to the issuance of bills of lading?

A. A blank bill of lading was provided. There was no invoice.

Q. Will you tell us generally what was the practice of The Shotwell Manufacturing Company in making up an invoice?

By Mr. O'Brien: Well, I am not sure, Mr. Lockley—on that last answer, was the witness conscious of a practice, of his personal knowledge of these un-invoiced shipments. You say blank form was provided, and I don't understand whether you are talking of the practice of the company, or all shipments, or—

By the Witness: No, sir; no sir.

By Mr. O'Brien: —or are you speaking of these specific ones?

By the Witness: These specific ones, that is correct.

By Mr. Lockley:

2633 Q. What was the general practice on shipments where invoices were issued? I mean, what was the office practice?

A. We had a standard form. It had ten copies, of which three were bills of lading, Shotwell Manufacturing Company's name was printed on all copies, and the merchandise was billed out and shipped on this standard form.

Q. Now you had ten coipes?

A. That is correct.

Q. What was the original of this copy?

A. An invoice.

Q. And what happened to it?

A. The invoice would be mailed to the customer after the goods had been shipped.

Q. And then what were the remaining copies? There were three bills of lading?

A. That is correct.

Q. And what else?

A. If my memory serves me, there was a duplicate invoice in some instances, that we had to supply, duplicate invoices to customers. There was an accounting copy from which the postings were made on the general ledger. There was a credit department copy for the use in the credit department.

2634 There was a salesman's commission copy, and there was also another copy we used for posting.

Q. Now which of those documents you have mentioned went to the shipping room?

A. The credit department copy. Oh, pardon me—one more was a shipping copy.

Q. All right. Now, which of those documents went to the shipping room?

A. The shipping copy and the bills of lading.

Q. Do you know what happened to them?

A. They left the shipping room after the shipment was made. They came back to the accounting department.

Q. What did the accounting department do with them?

A. Marked them up with the other invoices which were all held in an unshipped order file.

They were all pulled out and matched together, and then the various copies were sent to their various respective places, such as the accounting department copy went

to the accounting department, the salesman's commission copy would be mailed out to the salesman, and the
2635 credit department copy would go to the credit department.

Q. Were any of these copies the basis for recording on the accounts receivable ledger cards of The Shotwell Manufacturing Company?

A. The accounting copy?

Q. The accounting copy.

A. Yes, sir.

Q. And at what time was that posting made to the accounts receivable ledger card?

A. It might be two or three days after.

Q. Well, would it be at the time that the invoice was prepared, or at such time as the shipment had actually been made?

A. It was always after a shipment was made.

Q. After the bill of lading and the—

A. That is right.

Q. —copy came back from the shipping room and went to the accounting office, at that time an entry was made showing the amount due to the company on the accounts ledger card; is that correct?

A. That is correct, after the goods had been shipped.

Q. Well, now I will show you Government's Ex-
2636 hibits 146, 147, 148, 149, 151, 152, and 155, and ask if you have seen those before?

A. Yes, sir.

Q. In what connection did you see them, briefly?

A. In connection with the working out of the papers for the disclosure.

2637 Q. Do you know whether there were any invoices issued by The Shotwell Manufacturing Company in relation to those bills of lading?

A. No, sir.

By the Court: What did you say?

By Mr. Lockley:

Q. What is your answer?

By the Court: He asked you if you knew and you say no, sir. What do you mean by that?

By the Witness:

A. No, sir. There were no invoices issued.

By Mr. Lockley:

Q. Do you know whether the sales of merchandise

shown by those bills of lading were recorded on The Shotwell Manufacturing Company books?

A. No, sir.

By the Court: No, sir what?

By Mr. Lockley:

Q. No, sir what?

A. They were not recorded.

By Mr. Lockley:

Q. Now, can you state whether the bills of lading showing the ABC Candy Company as shipper, which are

2638 Exhibits 146, 147, 148 and 149—

A. Yes, sir.

Q. —whether those shipments originated at The Shotwell Manufacturing Company?

A. I was told they were.

Q. Well, do you know of your own knowledge?

A. What was—I don't know how to answer it.

By Mr. O'Brien: I can't hear you, Mr. Graflund.

A. I say, I don't know how to answer that question.

By Mr. Lockley:

Q. Let me ask you this, Mr. Erickson—

A. Graflund.

Q. Pardon me. Graflund. I show you Exhibit 149, and I call your attention to some handwriting which refers to 456 citrus drops, 571 gum drops and 7 spice buttons. Do you know—

By Mr. O'Brien: Before you begin—

By Mr. Lockley:

Q. Do you recognize that handwriting, sir?

By Mr. O'Brien: I move to strike his statement that he was told so, unless we get back to it.

By the Court: It may be stricken.

2639 By the Witness: This handwriting, sir?

By Mr. Lockley:

Q. Yes.

A. I would identify it as Mr. Ericson's.

Q. Mr. Ericson. Who is Mr. Ericson?

A. Mr. Ericson was our traffic man.

Q. What does a traffic man do?

A. Well, I may have to take that back. I don't know whether he was traffic man at that time, or superintendent, because he was promoted and I am trying to fix the date.

Q. In any event, did he have charge of the shipping room?

A. He did, yes, sir.

Q. I also call your attention to the handwritten entries on Exhibit 148—600 citrus drops and 400 gum drops and ask you if you recognize that handwriting.

A. It resembles Mr. Erieson's handwriting.

Q. Is the same true of the Exhibit 147 with the word "Cardinal" on it?

A. I wouldn't be prepared to say on that one, sir.

By the Court: I don't hear you, Mr. Graflund.

2640 By the Witness:

A. I wouldn't be prepared to say.

By Mr. Lockley:

Q. How about Exhibit 146?

By Mr. McConnell: Are these documents in evidence?

By Mr. Lockley: Yes.

By Mr. Lockley:

Q. Spice buttons? Do you know?

A. I wouldn't swear to it.

Q. And Mr. Graflund, did The Shotwell Manufacturing Company manufacture spice buttons and Cardinals and citrus drops and gum drops?

A. It did.

Q. Do you know of any other manufacturer who manufactured those articles?

A. Well, spice drops are manufactured by any number. Cardinal chocolates—

Q. Yes?

A. I don't know. There is a—it is a special brand.

Q. It was a special brand?

A. So far as I know to my knowledge.

2641 Q. I also show you a handwritten word "Del Monte" and what appears to be "Okay". Do you recognize that?

A. It looks to me like Mr. Erieson's handwriting.

Q. Like Mr. Erieson's handwriting?

A. Yes.

Q. You testified there was a man named Del Monte who kept the—

A. Cost accounting.

Q. —cost accounting?

A. Yes, sir, that is right.

2642 Q. You said that you were told later on that these shipments were not billed. Was that a conversation with any one of the defendants?

By Mr. O'Brien: Why not ask him who it was with?

By Mr. Lockley: All right.

By Mr. Lockley:

Q. Who was it with, if you know?

A. Well, my conversations originally were with Mr. Del Monte, who informed me there was a shortage—

By Mr. O'Brien: I object. He didn't ask you what you were informed.

By the Court: Yes. I will sustain the objection.

By the Witness: Will you restate the question?

By the Court: You were asked whether or not you had any conversation with any one of the defendants regarding these unbilled shipments.

By the Witness: Mr. Huebner.

By Mr. Lockley:

Q. And those were the conversations you have previously testified to?

2643 A. Yes, sir.

Q. And those were during the year 1946?

A. Yes, sir.

Q. Now, do you know Mr. David Lubben?

A. I do.

Q. Did you ever visit his plant?

A. I did.

Q. How many times?

A. Twice.

Q. When was the first trip?

A. May of 1947.

Q. Were you alone, or did someone accompany you at that time?

A. Mr. Huebner went with me.

Q. Mr. Huebner?

A. Yes, sir.

Q. What did you do? What was the occasion for that trip?

A. To install a cost system for Mr. Lubben in his plant.

Q. Where was Mr. Lubben's plant located at that time?

A. He had two of them, one in the Bronx and one in New Jersey.

2644 Q. This was in May of 1947 that he had two?

A. Yes, sir, to the best of my knowledge.

Q. You installed a cost system?

A. That was our purpose—my purpose.

Q. Did your visit have any connection with a loan of $75,000?
A. The loan had been made or—
Q. The loan had been made?
A. To the best of my knowledge, yes, sir.
Q. Did you have any connection with that loan?
A. No, sir.
Q. Did you examine Mr. Lubben's books at that time?
A. No, sir.
Q. Now, did you make a second trip?
A. Yes, sir.
Q. Who instructed you?
A. Mr. Cain.
Q. And when was this?
A. Some time in the latter part of January of 1948.
Q. Were you alone, or did someone go with you?
A. Mr. Busby accompanied me on that trip.
Q. Who is Mr. Busby?
2645 A. Mr. Busby is the outside auditor.
Q. He is the accountant for Shotwell Manufacturing Company?
A. Outside auditor.
Q. Yes, outside auditor. All right.
Did you have a conversation with Mr. Cain before you left on that trip?
A. I did.
Q. And you say this was in January of 1947?
A. Yes, sir.
Q. January of 1948?
A. 1948.
Q. What was the substance of that conversation? What did he say and what did you say? First, you had better tell us where it was.
A. Well, the conversation was at the company offices, as I recall it.
Q. Now speak up, please, and tell us what the conversation was about.
A. I was to go east to Mr. Lubben's plant. Mr. Lubben was requesting an additional loan from the company, and I was to go east to see about—to examine his books, if any, and see his financial position.
2646 Q. Did you receive any other instructions?
A. Also to pick up whatever papers might be helpful to the company, personal memoranda, or anything else that might be helpful.

Q. Do you recall Mr. Cain's exact language?
A. No, sir, I do not.
Q. He instructed you to pick up whatever personal papers of Mr. Lubben's you could find that might be helpful?
A. That is correct.
Q. Did he tell you to ask Mr. Lubben for those papers?
A. No, sir.
Q. Did he tell you that you should tell Mr. Lubben that you were taking such papers?
A. No, sir.
Q. Did you get such papers?
A. No, sir.
Q. Did Mr. Cain further identify the papers that he required you to bring back with you?
A. No, sir.

By the Court: Well, we will suspend now until two o'clock, ladies and gentlemen of the jury.

2647 By the Marshal: Will the audience please remain standing while the Jury and the Judge leave the room, please.

This Honorable Court will recess until two o'clock this afternoon.

(Whereupon a recess was taken in the above entitled cause until 2:00 o'clock p.m. of the same day, being Tuesday, September 29, 1953.)

2648

• • (Caption—No. 52 CR 143) • •

Chicago, Illinois
Tuesday, September 29, 1953,
2:00 o'clock p. m.

Court met pursuant to recess.

Present:
Mr. Edward J. Calihan, Jr.
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:—

By the Marshal: This honorable court will now resume its session.

2649 STANLEY GRAFLUND, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Ctd.) by Mr. Lockley.

Q. Mr. Graflund, I think I neglected to show you Government's Exhibit No. 1 and 1-A in evidence, purporting to be the corporate income and excess profits tax returns for the year 1945. Have you seen those before?

A. Yes, sir.

Q. Is that your signature that appears thereon?

A. Yes, sir.

Q. Did you have anything to do with the preparation of those returns?

A. No, sir.

Q. Do you know by whom they were prepared?

A. Busby & Oury.

Q. Do you recall the circumstances of your signing those returns?

A. Well, they were signed the 14th day of March.

Q. Was that a part of your duty, to sign the corporate tax returns?

A. Yes, sir.

2650 Q. Had you signed them for other years?

A. Yes, sir.

Q. Can you state whether the 1945 return bears or contains the receipts in cash from Mr. Lubben which you previously testified about?

A. It does not.

By Mr. Lockley: Will you please mark this Government's Exhibit 200-C for identification.

(Said documen was marked Government's Exhibit 200-C for identification.)

By Mr. Lockley:

Q. Mr. Graflund, I show you Government's Exhibit 200-C for identification.

By the Court: 200-C?

By Mr. Lockley: "C", your Honor.

By Mr. Lockley:

Q. And I ask you if you have seen that before.

A. Yes, sir, I have.

Q. Was that a record that was kept in the ordinary course of business of The Shotwell Manufacturing Company?

A. Yes, sir.

Q. Was it kept under your supervision and direc-
2651 tion?

A. Yes, sir.

Q. Is it true and correct, to the best of your knowledge?

A. Yes, sir.

By Mr. Lockley: I offer Government's Exhibit 200-C in evidence.

By Mr. McConnell: I object to it. It is outside of the period of the indictment. It concerns 1947.

By the Court: What is it, Mr. Lockley?

By Mr. Lockley: I offer it, your Honor.

By the Court: What is it, Mr. Lockley?

By Mr. Lockley: Perhaps I better have Mr. Graflund tell us what it is.

By Mr. Lockley:

Q. What does this purport to be, Mr. Graflund?

A. It is a ledger card.

Q. The ledger card of The Shotwell Manufacturing Company?

A. That is correct.

Q. What is the nature of the information contained on it?

A. It is a card that is called "Miscellaneous Ac-
2652 counts Others" and on it were recorded sales to various companies.

By Mr. Lockley: I offer it, your Honor, only with respect to those sales which I will develop were recorded between The Shotwell Manufacturing Company and the General Confections in the year 1946.

By the Court: The exhibit may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 200-C.)

By Mr. Lockley:

Q. Now I call your attention to the entries dated October 11, 1946, with the heading "General Confections", and ask if you know what that entry purports to be.

A. No, sir, I do not.

2653 Q. For what purpose was that ledger sheet normally used?

A. Well, this general—this sheet, as I recall it, was used to record entries where a creditor had a balance due us rather than the creditor—us owing the creditor.

Q. Would that sheet reflect the sales of raw materials by Shotwell?

By the Court: I didn't understand. Do you mean that it reflects accounts payable from various companies to Shotwell Company?

By the Witness: Correct.

By Mr. Lockley:

Q. I show you Government's Exhibit in evidence No. 157 and No. 159 and ask if those two invoices have any relation to the entry of October 11th which shows a charge of $30,796.98 and the words "General Confections"?

A. Unfortunately this balance is destroyed, Mr. Lockley.

By the Court: I didn't hear you, Mr. Graflund.

By the Witness: The balance is torn out.

By Mr. Lockley:

2654 Q. Here it is written in ink too.

A. Yes, sir.

By the Court: Which exhibit is that, Mr. Lockley?

By Mr. Lockley: This is No. 157, your Honor.

By Mr. Lockley:

Q. Then your testimony is that Exhibit No. 157 is recorded on Exhibit No. 200-C?

A. Correct.

Q. And what does that debit charge of $30,796.98 indicate?

A. That General Confections owes us that sum of money for merchandise shipped to them.

Q. And are you able to state whether the merchandise shipped to them is the merchandise reflected on invoice No. 157?

A. Yes, sir.

Q. And that is corn syrup, is that correct?

A. That is correct.

Q. All right. Now, I call your attention to Government's Exhibit 157-A, 157-B and 157-C which are checks of $10,000.00, $10,000.00, and $10,796.98 and ask you if those checks are reflected in any way on Govern-

2655 ment's Exhibit 200-C?

By Mr. McConnell: Checks to who, Shotwell?

By Mr. Lockley: To Shotwell.

By the Witness:

A. There are two $10,000.00 ones and $10,796.98, yes, sir.

By Mr. Lockley:

Q. Well, how are they entered?

A. As a credit to the account.

2656 Q. In other words, these checks paid the account of $30,796.98?

A. That is correct.

Q. I call your attention to the fact that these are checks by the Reserve Trading Corporation. They were credited, were they, against the General Confections' account?

A. That is correct.

Q. Will you examine them and tell me the endorsement that appears on the reverse?

A. It was paid to the order of Merchants National Bank, Shotwell Manufacturing Company.

Q. Now will you also examine Government's Exhibit No. 159, and see if it has any relation to Government's Exhibit 200C?

A. Yes, it has.

Q. Government's Exhibit 159 is an invoice for $11,268.60. What is the entry, if any, on 200-B?

A. A charge to the General Confections.

Q. And what does that entry reflect or mean?

A. That General Confections owed The Shotwell Manufacturing Company $11,268.60.

Q. And was that for the purchase of syrup?

A. Yes, sir.

2657 Q. I show you Government's Exhibits 159-A and 159-B in the amount of six thousand and $5,268.60, and ask you if they are recorded anywhere on Exhibit 200-C, checks to Shotwell?

A. I see one entry that equals the total of the invoice.

Q. And what does that entry indicate?

A. It is an offset against the charge of $11,268.60.

Q. Does that mean that that invoice was paid?

A. Yes, sir.

Q. And is the charge in the name of General Confections on the Shotwell ledger sheet, 200-C?

A. Yes, sir.

Q. And by whom were those checks drawn?
A. Reserve Trading Corporation.
Q. Were they received by the Shotwell Manufacturing Company in payment of the General Confections account?
A. Yes; they were.
Q. By whom were they endorsed?
A. By the Shotwell Manufacturing Company.
By Mr. Lockley: Will you mark this Government's Exhibit 201 for identification.

2658 (Said document was marked Government's Exhibit 201 for identification.)

By Mr. Lockley:
Q. I show you Exhibit 201 for identification, purporting to be the minute book of the Shotwell Manufacturing Company, and ask you if you have seen that before?
A. Yes, sir; I have.
Q. Is that a record kept by you in the ordinary course of business?
A. Yes, sir.
Q. Was it part of your duties to keep such records?
A. Yes, sir.
Q. Is it true and correct, to the best of your knowledge?
A. Yes, sir.

2659 By Mr. Lockley: I offer Government's Exhibit 201.
By Mr. O'Brien: What is it?
By Mr. Lockley: It is a minute book of the corporation.
By Mr. O'Brien: Are you offering the whole book?
By Mr. Lockley: Yes, I offer the whole book.
Will you mark these Government's Exhibits 202 and 203 for identification?

(Said documents were marked Government's Exhibits 202 and 203 for identification.)

By Mr. O'Brien: Well, this book, your Honor, we have scarcely had time to examine it, so we can't pose all objections now. Indeed, I don't know that I have any special objection.

But, of course, right at the outset, these minutes extend back to before and beyond the indictment period and without the materiality of anything being pointed

out in this large book, I can't see any basis for the inclusion of those minutes.

2660 The minutes which are within the period of it, I think we should be entitled, in the case of a volume of this size, to know what it is that counsel is interested in, or else have time to read it.

By the Court: Have you in mind certain minutes, Mr. Lockley? Rather than the entire book?

By Mr. Lockley: Yes, your Honor.

By the Court: Can you indicate to counsel which minutes you want to offer?

By Mr. Lockley: I have laid a foundation for it at this time, your Honor.

I will withdraw my offer until a later time, when I expect to use it then.

2661 By Mr. Lockley:

Q. I show you Government's Exhibit No. 202 for identification, which appears to be a stockholders' ledger of Shotwell Manufacturing Company, and ask if you have seen that before.

A. I have.

Q. Was that a record kept in the ordinary course of business?

A. Yes, sir.

Q. Was it kept under your supervision and direction?

A. It was.

Q. Was it true and correct?

A. Yes, sir.

Q. I offer you Exhibit 203 for identification, which appears to be a stockholders' ledger of common stock, and ask if you have seen that before.

A. I have.

Q. Was that kept under yur supervision and direction?

A. It was.

Q. Was it part of the books and records of the company?

A. Yes, sir.

2662 Q. Was it true and correct, to the best of your knowledge?

A. Yes, sir.

By Mr. Lockley: I offer Government's Exhibits 202 and 203 for identification into evidence.

By Mr. McConnell: I have no objection to them for

those years, 1945 and 1946. I object to them before and after those years.

By Mr. Lockley: If your Honor please, with respect to Exhibit No. 201, the minute book, might I inquire as to whether it will be possible to offer this on rebuttal, since I have laid a foundation for it?

By the Court: Well, I assume so, if it is proper rebuttal material.

By Mr. Lockley: Do you object to these?

By Mr. McConnell: Yes, I objected to them, except as to 1945 and 1946, the indictment years. I think, as to those years I have no objection.

By the Court: Are you concerned with anything
2663 more than the stockholders' ledger covering 1945 and '46?

By Mr. Lockley: In only one respect, your Honor, just one account that is not in 1945 and 1946, in a matter which was brought out by defendants on cross examination.

By the Court: A matter that what?

By Mr. Lockley: That was brought out by the defendants on cross examination of another witness.

By the Court: Well, that doesn't tell me anything. I don't know what you are talking about. Tell us what you have in mind in the ledgers outside of '45 and '46 and perhaps I can then hear the objection.

And you didn't indicate through Mr. Graflund, or I didn't follow—203 is the common stock, and what is 202?

By Mr. Lockley: Five per cent preferred stock.

By the Court: Five per cent preferred.

By Mr. McConnell: I have no objection to that, that one entry.

2664 By the Court: Well, then, if you indicate for the record the entry you are offering, in addition to 1945 and '46—

By Mr. Lockley: It is an entry headed Loyola University.

By Mr. Lockley:

Q. Mr. Graflund, I show you Government's Exhibit 203 and ask if you can tell from that whether Loyola University owned any stock in The Shotwell Manufacturing Company?

A. Yes, sir.

Q. And when did they obtain it?

A. July 28, 1950.
Q. Did they own any stock in '45 and '46?
A. No, sir; not to my knowledge.
Q. Now, can you, from examination of Government's Exhibits—

By the Court: So that the ruling may be reflected in the record, I will receive Exhibits 202 and 203 for the years 1945 and 1946, and the entry as to when the Loyola University became a stockholder.

By Mr. Lockley: Yes, your Honor.

2665 (Said documents were received in evidence by the Court and marked Government's Exhibits 202 and 203.)

By Mr. Lockley:
Q. Can you from an examination of these records, Mr. Graflund, tell me who was the controlling stockholder in The Shotwell Manufacturing Company during 1945 and 1946?

By Mr. McConnell: The books and records will speak for themselves on that.

By the Court: No. He may answer.

By Mr. Lockley:
Q. Are there any other records that would be of assistance to you?

By the Court: From an inspection of the stockholder records, he may answer.

By the Witness: There was no one stockholder who had control.

By Mr. Lockley:
Q. Well, who were the principal stockholders?

2666 By Mr. McConnell: I don't know how he can lump stockholders to show control. He said no one stockholder had control. This isn't a conspiracy case.

By Mr. Lockley:
Q. Who had the great number of shares of stock?

By the Court: He may answer.

By the Witness:
A. Are you speaking as individuals, a single individual, Mr. Lockley?

By Mr. Lockley:
Q. Any single individual and members of their families, immediate members.

By Mr. McConnell: Wait a minute. Let's have one

question at a time. A single individual, and if he wants to add about somebody else specifically later, all right. I object to having two questions lumped that way.

By Mr. Lockley: Well, maybe we can get at it this way.

By Mr. Lockley:

Q. Do you know how many shares of stock were outstanding in common stock in 1945 and in 1946?

2667 A. In 1945 there were a hundred thousand shares of common stock outstanding. There were 5,000 shares of preferred stock outstanding.

Q. Were they voting shares, the preferred stock?

A. No, sir.

Q. Non-voting. All right.

A. In 1946, in July of 1946—may I refresh my memory on that for a minute?

Q. Yes.

A. In July of 1946 Mr. Shotwell's interest, and his wife's interest, were wiped out. That is, they were canceled out at the sale of the stock.

Q. Do you know who purchased it?

A. The corporation.

Q. The corporation purchased the stock?

A. That's correct.

Q. And how many shares of stock were then outstanding, for the balance of 1946?

A. 63,550, I believe.

By the Court: 53?

By the Witness: 63,550, I believe. I am not quite certain as to that. It is around that figure.

2668 By Mr. Lockley:

Q. From examination of the common stock certificate book for the year 1945, can you tell me how many shares of stock were owned by Byron Cain?

A. Byron Cain personally?

Q. Yes.

A. In 1945 Mr. Cain had a balance of 1,066,717 shares.

Q. And how many were owned by Byron T. and Sally Cain—

A. Byron A. and Sally Cain.

Q. —as joint tenants?

A. In 1945, sir, or '46?

2669 Q. Well, perhaps it would help if you give us the figure for '45 and then the figure for '46 on each account.

A. For '45, the balance was 12,845.288.

By Mr. O'Brien: What do you mean, the balance?

By the Witness:

A. For Byron A. Cain and Sally T. Cain.

By Mr. O'Brien: I didn't understand the balance.

By the Witness:

A. We arrive at a balance by showing the stock issued, stock surrendered and then the balance.

By Mr. McConnell: What date?

By the Witness:

A. As of December 31, 1945.

By Mr. Lockley:

Q. Will you go back to Mr. Byron Cain, individually, and say what he had in '46?

A. Sixty-six point seven one seven shares.

By the Court: Now you are going to '46.

By Mr. Lockley: No, your Honor, I am having him give Mr. Cain for '45 and then Mr. and Mrs. Cain
2670 for '46. Now he has gone back to Mr. Cain for '45.

By the Witness: Wait a minute. No, I gave Byron and Sally Cain for '45.

By Mr. Lockley:

Q. Now, will you give Byron and Sally Cain for '46?

By Mr. McConnell: We don't know what he is talking about now.

By the Witness:

A. Byron Cain and Sally Cain, for '46, 13,175.373.

By Mr. Lockley:

Q. Do you know who James R. Cain is?

A. James B. Cain, sir.

Q. James B.

A. James B. Cain is his son.

Q. How many shares did he have in 1945?

A. 3,337.74.

Q. And how many in 1946?

A. 3,587.44—point seven four.

Q. Do you know who John H. Cain is?

A. That's Mr. Cain's son.

Q. How many shares did he have in 1945?

A. 3,337.74.

Q. And how many in 1946?

2671 A. 3,587.74.

Q. And do you know who Mary Alice Cain is?

A. Mr. Cain's daughter.

Q. And how many shares did she have in 1945?
A. None.
Q. And in 1946?
A. 3,425 even, no fraction.
Q. Do you know who Patricia Ann Cain is?
A. Mr. Cain's daughter.
Q. And how many shares did she have in 1945?
A. 3,337.74.
2672 Q. And in 1946?
A. 3,587.74.
Q. And do you know who Sally T. Cain, Trustee for Mary Alice Cain, is?
A. Mr. Cain's wife.
Q. And how many shares did that account have in 1945?
A. 3,175 even.
Q. And in 1946?
A. By the end of 1946, sir?
Q. Did she have any at the end?
A. None.
By the Court: Who was that that had that?
By Mr. Lockley: The trustee, a trust account.
By the Court: For whom?
By Mr. Lockley: Mary Alice Cain.
By Mr. Lockley:
Q. When you said Mary Alice Cain, that was Mr. Cain's daughter?
A. Correct.
Q. Was that stock sold in 1946?
A. You mean by Mr. Cain, Mr. Lockley.
2673 Q. Was it transferred in any way?
A. It was transferred; yes, sir.
Q. And how?
A. To an account entitled Mary Cain.
2674 Q. Now will you turn to the account of Mr. Sullivan. How many shares did Harold E. Sullivan have in 1945?

By Mr. Kirby: If the Court please, I object to it. It is immaterial. Mr. Sullivan bought it and paid for it and he didn't do anything illegal or improper about it. Nor did his family. It is immaterial to this case and I will object to it.

By the Court: I will overrule the objection.

By Mr. Lockley:

Q. All right, Mr. Graflund.

A. The question was how much did they have at the end of 1945?

Q. Yes, sir.

A. 3,182.019 shares.

Q. And in 1946?

A. In 1946 there was still the same balance.

Q. And Harold E. Sullivan and Stella M. Sullivan as joint tenants, how many shares did that account have in 1945?

A. None.

Q. And in 1946?

2675 A. 311.655.

Q. And Harold E. Sullivan, Jr., do you know who he is?

A. He is Mr. Sullivan's son.

Q. How many shares did he have in 1945?

A. 5,910.776.

Q. And in 1946?

A. The same amount.

Q. Do you know who Joseph D. Sullivan is?

A. Joseph D. Sullivan is a brother of Mr. Sullivan.

Q. How many shares did he have?

A. Nothing in 1945.

Q. Or 1946?

A. Or 1946.

Q. And Joseph J. Sullivan?

By Mr. Kirby: If the Court please, Joseph Sullivan is a farmer and a cattle dealer who lives in Marengo, Illinois.

By the Witness:

A. None.

By Mr. Lockley: He says he didn't have any.

By Mr. Kirby: It stumps me to know why you want to know about his brother. He isn't on trial
2676 here. He is an adult who is able to take care of himself. I object to it. It is improper.

By the Court: I will sustain the objection.

By Mr. Lockley: May I proceed, your Honor?

By the Court: I will sustain the objection.

By Mr. Lockley: As to that particular account?

By the Court: Yes.

By Mr. Lockley:

Q. Do you know who Joseph J. Sullivan is?

A. Mr. Sullivan's son, Harold—

Q. That account is in care of Harold E. Sullivan, Sr.?

A. Correct.

Q. How many shares in that account in 1945?

A. 5,910.776.

Q. And in 1946?

A. The same amount.

Q. Do you know who Stella M. Sullivan in care of Harold E. Sullivan is?

2677 A. She is the wife of Mr. Sullivan.

Q. How many shares were in that account?

A. 1945 and 1946, 5,690.366.

Q. Is that true for both years?

A. Yes, sir.

Q. Do you know who Daisy Sullivan is?

By Mr. Kirby: If the Court please, Harold Sullivan came from a family of thirteen or fourteen children, and I don't think they should be allowed to go into the holdings of the adult members not of his own family. I object to it.

By the Court: If you will make an objection I will rule on it, rather than your making a long statement.

2678 By Mr. Kirby: Well, I guess when you get into a question of a family, you would like to state your position with some firmness. I object to any inquiry as to any member outside his family.

By the Court: He just asked him who he was, and that is all he asked him. He didn't ask him about the number of shares.

By Mr. Kirby: It doesn't make any difference who she is.

By the Court: If that is what counsel had in mind, he had a right to ask him who he is.

By Mr. Kirby: I would beg the Court's indulgence, and ask that the Court instruct Mr. Lockley to first ask, before he embarrasses other people, if this person is a member of Harold Sullivan's family.

By the Court: I will.

Mr. Lockley, I don't think we should go into any stock ownership outside of the immediate family of the defendant.

By Mr. Lockley: Your Honor, I don't know who these people are. I was only inquiring of Mr. Graflund as to
2679 what their identity was.

By the Court: You may do that.

By Mr. Kirby: I can assure Mr. Lockley he is not a member of Mr. Sullivan's immediate family.

By Mr. Lockley:

Q. Is Eunice K. Sullivan a member of Sullivan's immediate family, do you know, Mr. Graflund?

A. How would you define Eunice K.?

By Mr. Kirby: If the Court please, he has already enumerated the entire membership of Mr. Sullivan's immediate family, that is, Harold, his wife Stella, his son Harold, and his son Joseph. He has gotten to the end of his rope.

By Mr. Lockley: If he will assure me that those are the members of the immediate family, that is all the questions I will ask on the Sullivans.

By Mr. Lockley:

Q. Will you turn to the Huebners? Do you find an account for Mr. Frank J. Huebner?

A. I do.

Q. And it is also for Laurel A. Huebner, joint
2680 tenant?

A. Right.

Q. And how many shares of stock were in that account in the year 1945?

A. 243.162.

Q. And in 1946?

A. The same amount.

Q. And that was all no par common stock?

A. That is correct.

Q. That is the voting stock?

A. That is correct.

Q. Now are you able to say, from an examination of those stock certificates, or that stock ledger book, who had the controlling interest in The Shotwell Manufacturing Company during 1945 and 1946?

By Mr. McConnell: He said that nobody had control. He said no individual had control.

By Mr. Lockley:

Q. Did Mr. Cain, Mr. Sullivan, and Mr. Huebner have control, between the three of them?

By Mr. Kirby: I object to that as a conclusion.
2681 By Mr. Lockley:

Q. Between the three of them and their immediate families?

A. Frankly, I would like to total them to answer that question.

By Mr. Lockley: Your Honor, might we have Mr. Graflund do that at the recess rather than take up the time of the Court at this time?

By the Court: Very well.

By Mr. Lockley:

Q. Mr. Graflund, going back to your trip to Mr. Lubben's plant, when was the second trip that you said you made?

A. In January, sometime in January of 1948.

Q. And while you were there, did you receive any telephone call from any of the defendants?

A. I did.

Q. And from whom was it?

A. Mr. Cain.

Q. Did he call you or did you call him?

A. He called me.

Q. What was the nature of the conversation?

A. Well, Mr. Cain wanted to know just exactly how
2682 the situation stacked up, just how it looked.

Q. With respect to what?

A. To the financial condition and so on.

Q. The financial condition of—

A. Yes.

Q. Of General Confections?

A. Yes, sir.

Q. Is that what you were there for at the time?

A. Well, that was one reason.

Q. What was the other?

A. And the other was to take up any information or any papers or documents, anything that might be helpful.

Q. With respect to your conversation, what was said at that time on the telephone?

A. Well, Mr. Cain simply asked me how did the picture look.

Q. What did you tell him?

A. I told him it didn't look good at all.

Q. And that is pretty general?

A. Well, it didn't justify any more, any further loans.

Q. Was that in connection with an anticipated further loan?

2683 A. Yes, sir.

Q. Do you know how much that loan was?

A. No, sir.

Q. Had any figures been mentioned to you at all?

A. No, sir.

Q. Did you know that Mr. Lubben at that time had a loan which Mr. Cain had guaranteed?

A. Yes, sir.

Q. Do you know how much that was?

A. $75,000.00.

Q. Did you have any part in the handling of that loan?

A. By that you mean what, Mr. Lockley?

Q. Well, did you examine Mr. Lubben's books before the $75,000.00 loan?

A. No, sir.

Q. Did you examine his books subsequently?

A. Just to make that system, serving him, to set up a cost system.

Q. To set up a cost system?

A. Yes, sir.

Q. Did you have a conversation with Mr. Cain as to the adequacy of the $75,000.00 loan?

A. Not with Mr. Cain, no, sir.

2684 Q. Did you have a conversation with any of the defendants?

By Mr. O'Brien: I understand him to say he had nothing to do with a $75,000.00 loan.

By the Witness: I don't recall any conversation with the defendants, sir.

By Mr. Lockley:

Q. You did have a conversation with someone. Who was it?

A. Mr. Lubben.

By Mr. Lockley: Will you mark this Government's Exhibit No. 204 and No. 205 for identification.

(Said documents were marked Government's Exhibits 204 and 205 for identification.)

By Mr. Lockley:

Q. Mr. Graflund, I show you Government's Exhibits

204 and 205 for identification and ask you if you have seen those before?

A. Yes, sir, I have.

Q. And what do they purport to be?

A. They are entries recorded on what we call journal vouchers.

2685 Q. And were those books kept in the ordinary course of business?

A. They were.

Q. Were they kept under your supervision and direction?

A. These were not, sir. These are 1945.

Q. Those were 1945. What was your position in 1945 in the plant?

A. Vice president and secretary.

Q. Vice president and secretary. You had nothing to do with the books at that time?

A. Not at this particular moment, no, sir.

By Mr. Lockley: Will you please mark those Government's Exhibits 206 and 207, for identification. Will you please mark these 208 and 209 for identification.

(Said documents were marked Government's Exhibits 206, 207, 208 and 209 for identification.)

By Mr. Lockley:

Q. I show you Government's Exhibits 208 and 209 for identification and ask you if you have seen those before.

A. I have, sir.

2686 Q. Were those books kept in the ordinary course of business?

A. They were.

Q. Were those kept under your supervision and direction?

A. They were, with the exception of the early part of 1946.

Q. And what part is that? How long?

A. January, and possibly February, sir.

Q. Were they true and correct to the best of your knowledge?

A. So far as I know, yes, sir.

By Mr. Lockley: Will you please mark this Government's Exhibit 210 for identification?

(Said document was marked Government's Exhibit 210 for identification.)

By Mr. Lockley:

Q. I show you Government's Exhibit No. 210 for identification, and ask if you have seen that before.

A. Yes, sir.

Q. Was that a record kept in the ordinary course
2687 of business?

A. Yes, sir.

Q. Kept under your supervision and direction?

A. I know it is 1945, sir. I just want to check it to be sure.

By Mr. Lockley: Will you please mark this Government's Exhibit 211 for identification.

(Said document was marked Government's Exhibit 211 for identification.)

By the Witness:

A. Yes, sir. With the exception of the two months I I stated; yes, sir.

By Mr. Lockley:

Q. Is it true and correct to the best of your knowledge?

A. Yes, sir.

Q. I also show you Government's Exhibit No. 211 purporting to be a cash disbursement book and ask you if you have seen that before.

A. Yes, sir, I have.

Q. Was that kept under your supervision and direction?

2688 A. In 1946?

Q. 1946.

A. Yes, sir, it was.

Q. I show you Government's Exhibit 207 and ask if that is a book that was kept in the ordinary course of business.

A. Yes, sir.

Q. Was that a part of the books and records of The Shotwell Manufacturing Company?

A. Yes, sir.

Q. I show you Government's Exhibit 206 purporting to be a general ledger for the year 1945 and ask if you have seen that before.

A. Yes, sir, I have.

Q. Was that a record kept in the ordinary course of business?

A. Yes, sir.

Q. When you became the comptroller in 1946, did you find Exhibits 205, 206, 207 and 204, purporting to be the journal vouchers and the general ledger and the accounts payable for the year 1945 in existence at that time?

A. Pardon me. Were those exhibits I have already—

Q. Yes. Did you find these exhibits for the year
2689 1945 in existence at the time you became comptroller in 1946?

A. They were in existence, yes, sir.

Q. To the best of your knowledge they are part of the books and records of the company?

A. Yes, sir.

Q. Kept in the ordinary course of business?

A. Yes, sir.

By Mr. Lockley: I offer them in evidence, your Honor.

By the Court: You offer what?

By Mr. Lockley: Government's Exhibits 204, 205, 206—

By the Court: Well, if you will state what they are so we may have some record as to what you are offering—

By Mr. Lockley: All right. I offer in evidence Government's Exhibits 204 and 205 which are the 1945 journal vouchers for the period January to July and July to December, respectively.

Government's Exhibit 206, which is a general ledger for 1945 and Government's Exhibit 207, which is a cash
2690 disbursements or accounts payable book for 1945.

By the Court: Cash disbursements or accounts payable?

By Mr. Lockley: Cash disbursements or accounts payable. It bears both names on it.

Government's Exhibit 208, journal for January to June, 1946—Government's Exhibit 209, journal for July to December, 1946.

Government's Exhibit 210, general ledger for 1946 and Government's Exhibit 211, which is the cash disbursements or accounts payable book for 1946.

2691 By Mr. O'Brien: If the Court please, that is quite a stack of books, I am afraid, to get into the record, without some statement as to the materiality or necessity and I would object on that basis. I have nothing specific in mind. I just don't see the materiality.

By the Court: What is it you intend to establish by these books, Mr. Lockley?

By Mr. Lockley: If your Honor please, it is my understanding that in order to have my expert witness testify, that the additional cash receipts are not on the books and records of the Shotwell Manufacturing Company and those books and records must be here in the court room and either available for counsel to examine on cross examination or to be identified or introduced in evidence.

By Mr. O'Brien: Well, it was my thought and my understanding of the ordinary practice that the expert or accountant would take the stand and testify that he had examined the books and that his findings were
2692 thus and so and so long as the books are available in the court room and a reasonable time is permitted us to interrogate him by verification of the books, that is all that is necessary, but it does seem a terrific burden on the record in this case to have all of these books physically in evidence.

By Mr. Lockley: If counsel is satisfied for them just to be here and identified as the books and records, well, I will withdraw my offer.

By Mr. McConnell: We have no objection to that. That is the ordinary procedure. Just so they are available. Nobody could print a record of this size.

By the Court: If you are both agreeable to doing it that way, of handling it that way, I suppose there is no objection.

By Mr. Lockley: All right, your Honor.

By the Court: In other words, reference may be made by the accountants or other witnesses that Mr. Lockley may put on the stand to those books and as to their
2693 contents, the same as though the books had been formally received in evidence.

By Mr. Lockley: That is satisfactory with the government.

By the Court: I gathered that that may be stipulated to by counsel. If there should be any difficulty as to any structural relation, you have a right to bring in your offer.

By Mr. Lockley: If your Honor please, I have now finished with Mr. Graflund, with the exception that at the recess I would like to have him make the computation of the number.

By the Court: You may reserve your right to recall him. You may reserve your right to examine him on rebuttal or on redirect examination, I should say.

By Mr. Lockley: All right, your Honor.

You may examine.

Cross Examination by Mr. O'Brien.

Q. Mr. Graflund, do you have any more accurate
2694 recollection of the date of your visit to the plant in January of 1946?

By Mr. Lockley: I don't recall any testimony that there was a meeting in 1946.

By Mr. O'Brien:

Q. January of 1948.

A. I would say it was the last week of January, or thereabouts.

Q. Have you checked that in any way or is that just your recollection?

A. Just my recollection, sir.

Q. And you went down with Mr. Busby, did you not?

A. Correct.

Q. How long did you stay?

A. Three days, perhaps four.

Q. Might it not have been one or two days?

A. It might have been, yes, sir.

2695 Q. Did you return with Mr. Busby?

A. Yes, sir.

Q. To Chicago?

A. Yes, sir.

Q. As to the financial condition of General Confections at that time, had you been told that it was seeking a loan of $50,000?

A. I had been told that he wanted additional money. I don't recall whether it was fifty thousand dollars.

Q. Do you have any recollection as to what the amount was?

By the Court: Do you understand the question?

By the Witness: Yes, sir. I shook my head no. I should have said no. I am sorry.

By Mr. O'Brien:

Q. When you got there, did you meet Mr. Lubben?

A. We did.

Q. And anyone else?
A. Did we meet Mr. Lubben and anyone else?
Q. Yes, sir.
A. Mr. Lubben, as I recall, was alone.
2696 Q. Did you check with Mr. Lubben's bookkeeper?
A. Out at the plant?
Q. Yes.
A. Yes, sir.
Q. Was that Miss Feldman?
A. No, sir.
Q. Who was it?
A. A Mr. Tobias.
Q. Did he show you the books?
A. He showed us the ledgers.
Q. Were you able to get from the books he showed you the information that you wanted?
A. No, sir.
Q. Do you not remember that you were there a day and a half?
A. It could very well be, sir.
Q. Was that in 1946—withdraw that.
What is your business now, Mr. Graflund?
A. I am self employed.
Q. At Wheaton, Illinois?
A. That is correct.
Q. In the cleaning business, is it not?
A. Correct.
Q. And you have not been with Shotwell for a year or more?
2697 A. A year and two and a half months.
Q. Is it true that in February of 1946, you took over the cash box in the vault from Mr. Roeser?
A. I took over the cash box, sir?
Q. Yes sir, when Roeser went to sales?
A. I exercised the duties of the comptroller.
Q. Well, either you don't understand me, or I don't understand you.
Let us go back chronologically. In 1945, as I understand it, Mr. Huebner telephoned you and said that Mr. Lubben would be in to make a payment of cash?
A. That is my recollection, yes sir.
Q. And Mr. Lubben did come in and he did give you the cash and you caused it to be put in the box in the vault?

A. That is correct.

Q. Now at that time did you know that a cash box was being maintained in the vault?

A. Yes sir.

Q. By or under the supervision of Mr. Roeser and Mrs. Morrill?

A. Yes sir.

2698 Q. And that is where you put that money that Mr. Lubben brought in?

A. That is correct.

Q. I understand that that is the only payment you received or money that you received from Mr. Lubben?

A. That is correct.

Q. Now except for that isolated transaction you had no contact or dealings with Mr. Lubben about cash money in the year 1945?

A. That is correct.

Q. Now you have said that when Mr. Roeser went to sales, you became the acting comptroller of the company?

A. That is true.

Q. Was that about Februay of 1946?

A. I would place it there.

Q. From that time down to sometime late in July of 1946, did you not, together with Mrs. Morrill, continue to handle cash into and out of that box in the vault?

A. I did not handle any money going in, beyond that one isolated case.

2699 Q. Well, now, Mr. Graflund, I do not mean that Mr. Lubben paid you money, but were there not moneys which came in which you, or you and Mrs. Morrill deposited in that box?

A. Moneys which came in?

Q. Yes.

A. I don't understand that question. Moneys came in from other sources?

Q. Cash money. Well, what is it you kept in this box? What is it that was kept in the box in the vault?

A. Money.

Q. Now where did the money come from?

A. Apparently from Mr. Lubben.

Q. Did you ever see any money going into the box?

A I don't recall it sir.

Q. You do not recall seeing money going into the box?

A. The question is a little bit ambiguous to me.

Q. All right. I will try to make it clear, Mr. Graflund. You said that Mrs. Morrill was maintaining a record of the ins and outs to the box.

A. Correct.

Q. And you know that it was a record of ins and 2700 outs?

A. Did I know?

Q. Yes.

A. Well, I was told so.

Q. By whom?

A. Well, Mrs. Morrill.

Q. Well, didn't you see the record?

A. Yes, sir.

Q. Where was the box kept?

A. In the company vault.

Q. Who had the key?

A. Well, I believe Mrs. Morrill had the key.

Q. Was the key also available to you?

A. Yes, sir.

Q. Did you and Mrs. Morrill also have the combination of the vault?

A. Yes, sir.

Q. You say that Mrs. Morrill would handle the money physically taken into and out of the box?

A. Yes, sir.

Q. On whose direction would she do that, yours?

A. It depended upon who gave her the money going in. Money coming out, if I asked for the money, she would give it to me.

2701 Q. That is what I was afraid I wasn't clear on. I just wanted to get it from you.

Now, if you were asked for money you would ask Mrs. Morrill in turn and she would get the money and give you the requested amount?

A. That is correct.

Q. And would she, at the same time, to your knowledge, make an entry on her record of the amount of money then withdrawn and the date of the withdrawal?

A. I assume she did sir.

Q. Now during any of the occasions when you ob-

tained money in that fashion, did you pay any of it to Dr. Doe?

By Mr. Lockley: I object, your Honor, to this general line of questioning about the money going in and out, unless Mr. O'Brien can state the time and place and circumstances. He has laid no foundation.

By Mr. O'Brien: Well, I merely am talking about the procedure and pattern now.

By the Court: He may answer.

By Mr. O'Brien:

Q. You may answer the question.

Will you please read the question to the witness, 2702 Miss Reporter.

(Question read.)

By Mr. Lockley: I object unless he can lay a foundation as to the time and place on this, your Honor.

By the Court: I think the time and place—well, first he can answer it yes or no and then we can find out the time and place. The time and place then should be set. The question is whether or not he ever took any money to Dr. Doe.

By the Witness: The anwer is yes to that one.

By the Court: I am sorry, I didn't hear you.

By the Witness: The answer is yes to that one.

By Mr. O'Brien:

Q. Do you remember when it was, Mr. Graflupd, approximately?

A. It was around the turn of the year in 1945 or early 1946.

By Mr. O'Brien:

Q. There is one thing on which I am not quite clear. Outside of the receipt of this money from Lubben at 2703 Huebner's direction late in the year 1945, did you have anything at all to do with that box until Roeser went to sales?

A. No, sir.

Q. Well, then if Roeser went to sales in February of 1946, were you making any pay-outs of the money prior to that time?

A. Prior to the time that Roeser went to sales?

Q. Yes, sir.

A. The only instance I would know of would be Dr. Doe.

Q. You think that was while Roeser was still there?

A. That is my impression, yes, sir.
Q. I see. Do you recall how much money?
A. I don't, no, sir.
Q. Approximately?
A. I would have no way of judging, except by the size of the package, yes.
Q. Well, do you have any recollection, Mr. Graflund, as to what was withdrawn from the box at that time?
A. The box was not under my direction at the time.
2704 Q. Well, let us leave that. Did you have occasion to pay any money out of the box to Keeley?
A. I did.
By the Court: To whom?
By Mr. O'Brien: Keeley K-e-e-l-e-y.
By Mr. O'Brien:
Q. Was that during the time that the box was under your direction?
A. Yes, sir.
Q. What is your best recollection as to the number of times that you made such payments?
A. Five or six.
Q. Would Mrs. Morrill bring the money to you for that purpose?
A. I would ask her for the money and she would get it from the vault.
Q. Do you remember whether Mr. Cain went to California during the month of January, 1946?
A. I would say yes.
Q. What is your recollection as to the length of the visit or stay in California?
A. I would say about three weeks to possibly a month.
Q. Was he not there until April of 1946?
2705 A. Was he not there?
Q. Yes.
A. That is, in Chicago?
Q. In California.
A. April of 1946?
Q. I am sorry. I can't hear you.
A. Until—the question is, was he not there?
Q. Wasn't he there from late in January to April in 1946?
A. I know of one occasion when he came back.
Q. Do you mean he returned?

A. To Chicago—oh, 1946.

Q. Yes, I am talking about 1946.

A. Excuse me. I am confused. In 1946.

2706 Q. Sure.

A. It could be, Mr. O'Brien. I am not prepared to state that exactly.

Q. All right. The downtown safety deposit box at the City National Bank & Trust Company, was that opened in '45 or '46 or had it been maintained by the company for quite some years prior?

A. Quite some years prior.

Q. And was it there that the securities of the company were kept?

A. Yes, sir.

Q. And as comptroller of the company did you have occasion to visit that box from time to time?

A. Correction there. I was not comptroller during the period, early period.

Q. What was the purpose of depositing the cash money from the plant to the downtown box?

A. Well, sometimes the amounts were large and it was felt that they should be put in the downtown vault.

Q. Was it fear of burglary?

A. Yes, sir.

Q. And from time to time you would take moneys down and from time to time you would bring them

2707 back, as you described?

A. That's correct.

Q. Now, the moneys that were paid to Keeley by you, what were they for?

By Mr. Lockley: Well, now, I object, your Honor, until such time as a proper foundation has been laid as to each instance, the time and the place and the circumstances.

By the Court: Well, generally, he may answer, if that is what you have in mind.

By the Witness: Will you repeat that? I am sorry.

(Question read.)

By the Witness:

A. For the purchase of raw corn.

By the Court: We will take our afternoon recess now. We will suspend for ten minutes.

(Recess taken.)

By the Court: You may proceed.

By Mr. O'Brien: Thank you Judge. Will you excuse us just a minute.

Mr. McConnell has a couple of questions. I am through.

2708 By Mr. McConnell: I don't like the way my colleagues limited me to a couple of questions. I am going to have more than that.

Cross Examination by Mr. McConnell.

Q. Mr. Graflund, you are an accountant, are you not?

A. Yes, sir.

Q. How long have you been an accountant?

A. 19—oh—

By the Court: Raise your voice a little bit.

By the Witness:

A. About 1930.

By Mr. McConnell:

Q. What are you, a certified accountant, or a public accountant?

2709 A. No, sir; just an accountant.

Q. A public accountant?

A. Not public either.

Q. You are a bookkeeper then?

A. No, sir.

Q. Well, you keep books, and you keep accounts, and you were chief bookkeeper for the Shotwell Company, is that correct?

A. That would be about it. If you keep the books yourself—

Q. Well, you know how to keep books, and you knew the orderly procedure for keeping books, and the books were kept under your supervision, is that true?

A. That's correct.

Q. At Shotwell Manufacturing Company?

A. That is correct.

Q. And as an accountant and as a bookeeper you knew what amounts and what accounts should be placed on Shotwell's books, did you not?

A. Yes, sir.

Q. I want to clear up one thing which isn't clear to me, and I don't think it is to the jury, either.

2710 I think you said that this box at the plant was opened up some time in the latter part of 1945, is that correct?

A. I said that I had knowledge of the transactions in the latter part of '45.

Q. And you had no knowledge of any transactions prior to that time, is that correct?

A. That's correct.

Q. From any source?

A. That's correct.

Q. And at that time somehow it came to your knowledge there was a box in which cash was being received, or was received at the Shotwell Company, is that true?

A. It came to my knowledge that money was being received, sir.

Q. Yes. And the first time it came to your knowledge, wasn't it, was when Lubben made a payment to you?

A. Not to me, sir; no, sir; before that time.

Q. Well, when was that first payment that was made to you?

A. By Mr. Lubben?

Q. Yes.

A. I placed the date somewhere around December
2711 of '45, sir.

Q. And you are sure of that date, are you?

A. No, I am not.

Q. Are you sure it is in '45?

A. I am not even sure of that.

Q. Well, are you sure it was during the time when you first learned of the opening of the box and the closing of the box in July of 1946?

A. I learned about monies coming in, sir, in the fall.

Q. Of '45?

A. Correct.

2712 Q. And the box, you say, was closed in July of 1946?

By Mr. Lockley: I recall no such testimony.

By Mr. McConnell:

Q. Well, do you know when the box was closed?

By Mr. Lockley: If it was closed.

By the Witness:

A. The latter part of 1946.

By Mr. McConnell:

Q. Was it in July?

A. It would be around July or August, sir.

Q. And at that time you made some sort of a state-

ment of the account, did you not, with a balance of some $3.40 or $4.50?

A. I didn't render any statement, sir.

Q. But didn't you figure up that there was a balance of about four dollars and something at that time?

By Mr. Lockley: He said he didn't render any statement.

By Mr. McConnell: I am asking if he figured up the account and showed a balance of about that much.

2713 By the Witness:

A. I didn't figure up the account, sir, in the box.

By Mr. McConnell:

Q. Did it come to your knowledge that there was a balance about that time, when the account was closed out, of about four dollars and some cents?

By Mr. Lockley: I object, your Honor.

By the Court: I will sustain the objection.

By Mr. Lockley: There is no testimony that the account was closed out.

By Mr. McConnell: He just said it was closed out in the latter part of July or August.

By the Court: It may have come from the janitor. We don't know where it came from.

By Mr. McConnell:

Q. Now, what was the payment that you received from Mr. Lubben?

A. What was the payment?

Q. Yes.

A. Do you mean what size?

Q. Yes.

2714 A. I would say it was substantial.

Q. Did you count it?

A. No, sir; I did not.

Q. What did you do with it?

A. If my memory serves me right, I gave it to Mrs. Morrill to put it in the box.

Q. And at that time she was keeping the box, was she?

A. She was the one that handled the transactions; yes, sir.

Q. So that that payment would have to be received at the time she was keeping the box, is that correct?

A. That would be right; yes, sir.

Q. And you think that was in 1945?

A. That's correct.

Q. Now, if Mr. Lubben testified that on October 12, 1946, he made you a payment of $25,929.81, is that true?

A. In October?

Q. Yes, of '46.

A. I know Mr. Lubben made a payment to me. He made one payment. And the date I cannot fix.

2715 Q. Did he make two payments to you?

A. No, sir.

Q. Mr. Lubben testified that he made a payment of $13,146.70 to Mr. Huebner and Mr. Huebner—

By Mr. Lockley: What page of the testimony?

By Mr. McConnell: 781.

By Mr. McConnell:

Q. —said to take it down and give it to Stanley Graflund and tell him specifically, " 'This is the overage on the corn syrup.'

"Q. Did you do that?

"A. Yes, sir, and I was told not to ever mention anything about candy overages, just on the corn syrup, and I went down and gave it to Mr. Graflund, sir."

Did that happen?

A. No, sir; there was no discussion of any overage of corn syrup when Mr. Lubben gave me the money.

Q. And he didn't give you the 13,000 and the 25,000 in October and November of 1946, did he?

A. I fix the date prior to that time, sir.

Q. Well, you fixed it in 1945, didn't you?

A. That's correct.

2716 Q. And you have no recollection that any payments at all were made to you in 1946, do you?

A. Not to my knowledge; no, sir.

Q. Now, don't you have a recollection that that corn box was closed out in July or August of 1946?

A. It was very close to that date, sir, It might have been a little later. It might have been August.

Q. It was in the summer of 1946?

A. That's correct.

Q. That was about the date that the corn shortage disappeared, wasn't it?

A. That's about correct; yes, sir.

Q. And there was a corn shortage from the latter part of 1945 to the middle of the summer of 1948, was there not?

A. Yes, sir.

Q. Now, did you know that because of your connection with the candy business?

A. Well, I know that because it was just general—it was a general topic of conversation all around.

Q. In the trade, wasn't it?

A. That's correct.

Q. And how did that shortage of corn affect the corn syrup business, and the candy business? Just tell us, will you, please?

2717 A. Well, the supplier or the manufacturer could not obtain corn syrup because the corn refiners couldn't get the raw corn at the ceiling prices. So in order for a manufacturer of candy to get corn syrup he, in turn, went out and procured the raw corn for the corn refiner.

Q. And when the refiner got it he shipped it to the—I mean when the elevator man got the higher payment he shipped it to the refiner and you got your corn syrup?

A. I don't know if the elevator man got it. All I know is the ultimate user was the refiner. The steps in between I wouldn't know.

Q. And the refiner wouldn't ship the corn syrup without you shipping corn?

A. That's correct.

Q. And you knew that in your business and you knew that was generally true in the trade, did you not?

A. That's true.

Q. Among your competitors as well as yourself, isn't that right?

A. Yes, sir.

Q. And when you said, in response to Mr. O'Brien's 2718 question, I think, that the money that you paid out went for corn, that is what you were referring to, wasn't it?

A. Correct, raw corn.

Q. To be used to get corn syrup with which to supply your company with the means of producing candy, isn't that correct?

A. That is correct.

Q. Now, you did sign the tax return in 1946, didn't you?

A. '45, also, sir.

Q. '45, too?

A. Yes, sir.

Q. And at the time that you signed this tax return you knew that money had been received which had been spent to purchase corn, didn't you?

A. That is correct.

Q. Now, with that knowledge, and knowing those facts, and from what you knew as comptroller of that company, did you believe that you were signing a false income tax return?

By Mr. Lockley: Well, I object to the witness's conclusion on that, your Honor.

By the Court: He may answer.

2719 By the Witness:

A. No, sir; I did not

By Mr. McConnell:

Q. And why—tell the jury why you didn't think it was a false return.

A. Because my money was received—

By Mr. Lockley: I object to that too, your Honor.

By the Court: Yes, I will sustain the objection. I don't suppose it is for him to determine the legal—

By Mr. McConnell: I know, but it is a question of intent.

By the Court: —questions involved.

By Mr. Lockley: This man is not being prosecuted for income tax evasion.

By Mr. McConnell: But the corporation is.

By the Court: I will sustain the objection.

2720 By Mr. McConnell:

Q. In any event, you didn't believe from what you knew then that the corporation was filing a false return, did you, at that time?

A. No, sir.

Q. Nor that you as an agent of the company were, either?

A. No, sir.

Q. Now, you were asked some questions about percentages of stock. In 1945 Mr. Huebner and his family only had a quarter of one per cent of the stock of this company, didn't he?

A. It was a very small figure.

Q. And the whole Sullivan family, including the uncles, and cousins, and aunts, only had about 20 per cent, didn't they?

A. Out of the hundred thousand shares, I placed it at about 30, sir.

Q. About 30?
A. Yes.
Q. How about the Cain family in 19—
A. About 30.
Q. As a matter of fact, the Sullivan family was 20.69 and the Cain family 27.81, wasn't it?
2721 A. Oh, I see.
By Mr. Lockley: For what year?
By Mr. McConnell: '45.
By Mr. McConnell:
Q. Am I correct?
A. Well, I see what I am thinking of.
Q. Am I correct?
A. I can't substantiate those percentages.
Q. Between them they didn't have control of the company in '45, did they?
A. Between the Sullivan family and the Cain family?
Q. The Sullivan family and the Cain family and the Huebner family?
A. I would say no.
Q. Now, you were around that company how long?
A. 21 years.
Q. Did you ever see any sums around there like $400,000.00 or $300,000.00 on the premises?
A. No, sir.
Q. You were familiar with their bank accounts, were you not?
A. Yes, sir.
Q. And you checked and audited the bank accounts, did you not?
2722 A. Our auditors checked them, sir.
Q. Well, you had to check on them, too, sir?
A. Yes.
Q. The cash balances?
A. Yes. We reconciled them monthly.
Q. And you knew what your bank accounts were?
A. Yes, sir.
Q. You never saw anything in there that wasn't on your books?
A. No, sir.
Q. You never saw anything like that down there in that vault, that wasn't on your books, did you?
A. In the vault, sir?
Q. Yes, in the vault.

A. In the box?
Q. In the box.
A. That wasn't on the books, sir.
Q. I know, but you never saw any money like two or three or four hundred thousand dollars around there, did you?
A. No, sir.
By Mr. McConnell: I believe that is all.
By the Court: Mr. Kirby has no cross examination, Mr. Lockley.

2723 *Redirect Examination by Mr. Lockley.*

Q. Mr. Graflund, did you prepare the computation that you were requested to of the stock?
A. I have them here.
2724 Q. Can you give the results for both '45 and '46 now?
A. Well, in 1945, I show 47,794.162 shares out of a hundred thousand.
By the Court: Owned by whom?
By the Witness: Held by the Sullivans and the Cain immediate families.
By Mr. Lockley:
Q. That is, the husband, the wife, and the children?
A. That is correct.
Q. That doesn't include any holdings by brothers and sisters?
A. No, sir.
Q. How about '46?
A. '46, I have 47,417.472.
Q. Out of how many shares?
A. Out of sixty-three thousand odd shares.
Q. Did that give them controlling interest in 1946?
A. Yes, sir.
Q. When you testified that you weren't sure of this payment received by Mr. Lubben, do you have any present recollection as to which year it was,
2725 1945, or 1946?
A. I fix the date pretty well in '45, sir.
Q. Do you recall whether it was received by you while you were the comptroller, or while Mr. Roeser was the comptroller?
A. It was received by me, sir.

Q. It was received by you?
A. Yes, sir.
Q. Well, do you recall what your official position with the corporation was after that time?
A. I was not comptroller.
Q. You were not the comptroller?
A. No, sir.
Q. So that is how you fix it as 1945?
A. Yes, sir.
Q. Well, as I understand it, you weren't officially designated as the comptroller even in 1946?
A. That's correct.
Q. But you were occupying that office, and performing those functions?
A. That's right.
By Mr. O'Brien: In '46?
By Mr. Lockley: Yes, in '46.
By Mr. Lockley:
Q. Now, at the time you signed the corporate tax
2726 returns for the years 1945 and 1946, did you know of the amount of money which had been received from the Lubben organ zations?
A. Only to the extent that we had received it. By "we", I mean myself, and Mrs. Morrill, and perhaps Mr. Roeser.
Q. Did you know of any money which had been received by any of the defendants from Dave Lubben, outside of the money which went into the cash box?
By Mr. McConnell: What he assumed—
By the Court: He may answer.
By the Witness:
A. No, sir.
By Mr. Lockley:
Q. You didn't know about that?
A. No, sir.
Q. So at the time you filed those returns, the only money you knew about was the money that had actually been in the cash box in the office?
A. That's right, sir.
Q. What do you mean when you say the cash box was discontinued?
A. The balance was—it just petered out.
2727 Q. Do you know if there were any payments received after that date?

A. Not to my knowledge.

Q. Could payments have been received without your knowing about it?

By Mr. McConnell: I object to that. That is hpyothetical.

By the Court: I think he may answer.

By Mr. McConnell: Of course, they could have received without him knowing about it.

By the Court: He may answer.

By the Witness:

A. Well, they could have been received without my knowledge, true.

By Mr. Lockley:

Q. You continued to ship merchandise to Dave Lubben after that period of time?

A. Yes.

Q. The corporation did?

A. Yes, sir.

2728 Q. Just one other thing. When you went back to New York or New Jersey—in 1948, was it, in January?

A. That was the second visit.

Q. And you said that you looked at the books—were given the books by Mr. Tobias?

A. That's correct.

Q. What books were they that you looked at at that time, what corporation or entity was in existence?

A. General Confections.

Q. General Confections. There are two, as I understand it, General Confections of New York and General Confections of New Jersey. Do you know which one it was?

A. I didn't know there were two. All I knew is General Confections and we were in the New Jersey plant.

Q. You were in the New Jersey plant at that time?

A. Yes, sir.

Q. Did you see any of the Eatsum proprietorship books at that time?

A. No, sir.

Q. Did you see any of the Eatsum partnership books at that time?

2729 A. No, sir.

Q. Did you see any of the General Confections

books for the year 1946?

A. The ledgers is what we were looking at.

Q. The ledgers for the year '46?

A. Not '46. No, we were looking at the ledger for the current year.

Q. What you were doing was establishing the financial status of the company at that time?

A. That's right.

Q. And that was in 1948?

A. That's right.

By Mr. Lockley: That is all.

By Mr. McConnell: I have just one more question.

Recross Examination by Mr. McConnell.

Q. In 1946, the latter part of '46, you were having a hard time collecting money from Mr. Lubben, weren't you?

A. The account started to slow up. He became behind in his payments. That is, he became slow in his payments.

2730 Q. By the end of the year he was into you for $47,000.00, wasn't he?

A. I don't recall the amount, sir.

Q. Approximately that?

A. Could be.

By Mr. McConnell: That is all.

By the Court: Anything further?

By Mr. Lockley: Just one thing, your Honor.

Redirect Examination by Mr. Lockley.

Q. I show you Government's Exhibit No. 200 and I ask if you can tell me whether that balance of $47,000.00, or whatever it was, at the end of 1946, was paid by Mr. Lubben?

By Mr. McConnell: I object to that. That calls for a conclusion of other years.

By the Court: Overruled.

By Mr. Lockley:

Q. At the end of 1946.

A. '46 is the question?

Q. Was that balance due at the end of 1946
2731 ever paid?

By Mr. McConnell: It doesn't make any difference.

By Mr. O'Brien: I object to it unless the payment is confined to the year '46.

By the Court: Overruled.

By the Witness:

A. There is '45 and '46. That is the figure you are referring to. And there are cash payments—

By the Court: You will have to speak up if you are going to talk, Mr. Graflund.

2732 By the Witness:

A. The balance was reduced by a combination of both cash and credits to his account.

By Mr. Lockley:

Q. And what was the balance at the time the account was closed out?

A. Zero.

Q. What is the figure of $665.56?

A. That is a journal entry.

Q. Do you know what that journal entry means?

A. No, sir; I do not.

Q. It reflects that it was all paid, is that correct?

A. The account was wiped out. I believe the 656 was the portion we wrote off as uncollectable. But I wouldn't swear to that as certain.

Q. With your recollection as to the $656 being an uncollectible bad debt, do you know if the balance of it was paid?

A. The balance of it was paid through two mediums.

By Mr. Lockley: All right. Thank you.

2733 *Recross Examination by Mr. McConnell.*

Q. Do you recall the Haberkorn deal?

By Mr. Lockley: Well, just a minute.

By Mr. McConnell: You showed how this was paid. I am going to show how it was paid. He went into it. He wanted to show how it was paid, but I am going to show how it was paid.

By Mr. Lockley: If you see anything about Haberkorn on this, Mr. Graflund, you can testify.

By Mr. McConnell: You have got some figures here.

I have got a right to show how those figures are wrong.
By Mr. McConnell:

Q. Do you remember anything about the Haberkorn deal?

A. Yes, sir.

By Mr. Lockley: I object, your Honor, on the grounds that the ledger sheet has no relation whatsoever to the Haberkorn deal, and it is entirely beyond the scope of the direct examination and the redirect examination.

2734 By the Court: I think he has the right to show how an account was liquidated. You have gone into it.

By Mr. Lockley: Will you determine first whether that Haberkorn account has anything to do with the ledger sheet?

By Mr. McConnell: Let it go.

By Mr. Kirby: That was '48.

By the Court: He has abandoned it.

By the Witness: Am I dismissed?

By Mr. Lockley: That is all.

By the Court: That is all.

By Mr. Lockley: You are through, thank you.

(Witness excused.)

By Mr. Lockley: Mr. Ericson.

MARTIN A. ERICSON, a witness called herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Mr. Ericson, will you please state your full name?

2735 A. Mr. Martin A. Ericson.

Q. And where do you live, Mr. Ericson?

A. San Jose, California.

Q. Are you employed?

A. No.

Q. Were you at one time employed by The Shotwell Manufacturing Company?

A. Yes, sir.

Q. And when was your first employment there?

A. About 1921, or 1922, somewheres around there.

2736 Q. With respect to the years 1945 and 1946, what was your position?

A. Superintendent.
Q. You were plant superintendent?
A. That is correct.
Q. And as such what were your duties?
A. In charge of production, shipping, receiving.
By the Court: A little louder, Mr. Ericson, please.
By the Witness:
A. I was in charge of production, of the plant, in charge of shipping and receiving.
By Mr. Lockley:
Q. Now, with respect to the shipping, can you tell us what was the usual nature of the order going to the shipping room prior to a shipment being sent out; what was the procedure?
A. To send a shipping ticket and a bill of lading to the shipping room.
Q. Who did that?
A. It was done—usually done by the traffic department.
Q. The traffic department would send the shipping ticket and the bill of lading?
2737 A. That is correct.
Q. What was done then?
A. The shipment would be made then.
Q. And then what happened to the shipping ticket and the bill of lading?
A. That would go into the girl who matched up those with the original invoices.
Q. Was that in the accounting department?
A. I believe you would call it accounting, yes.
Q. In 1946 were you in charge of the traffic department, was that part of your duty?
A. Well, in sort of a supervisory capacity, yes.
Q. Now, were there any occasions when the method that you have just described was not employed, in 1946?
A. Yes, there were.
Q. And when was that, if you know?
A. I can't give you any exact dates.
By Mr. O'Brien: I can't hear you, Mr. Ericson. Will you talk a little louder?
By Mr. McConnell: I haven't heard a word.
By the Court: Mr. Ericson, you sort of drop your voice, I think, and that is the difficulty we have in

hearing you. If you will bear in mind that when
2738 you drop your voice we lose what you have to say, that will help.

By the Witness:

A. I can't give you any specific dates.

By Mr. Lockley:

Q. Well, I show you Government's Exhibits Nos. 148, 149, 146, 147, 151, 152 and 155, and ask you if you have seen those before.

A. Yes, sir; I have.

Q. Where was that?

A. At the plant.

Q. Do you know by whom they were prepared?

A. Offhand I'd say they were probably prepared by the billing department.

Q. By the billing department?

A. Yes, sir.

Q. Do you know at whose instructions?

A. It may have been mine. I don't know. I don't recall definitely.

Q. And at whose instructions did you instruct the billing department?

By Mr. Kirby: If the Court please, he has first said he is not sure whether it was done by the
2739 billing department. He then has said that he is not sure whether he instructed the billing department. And I submit that where the proof is that unclear it should be stricken. I move to strike it.

By the Court: I suppose that is the best testimony he can give. It will have to stand for what it is worth.

By Mr. Kirby: But if the man doesn't know, I think we ought to have a frank expression of his inability to answer.

By the Court: Go ahead.

By Mr. Lockley:

Q. Do you know if those were prepared in The Shotwell Manufacturing Company plant?

A. I believe they were, yes.

Q. Well, could they have been prepared any place else?

A. Could they?

2740 Q. Yes. Or do you know if they were prepared any place else?

A. I couldn't answer that.

By Mr. McConnell: You have got two questions now.

By the Witness:

A. I couldn't answer that.

By Mr. Lockley:

Q. Do those bills of lading differ in any way from the usual bills of lading used by the Shotwell Manufacturing Company?

A. Yes. They are made in original, where the ordinary shipments are made in carbon.

Q. And are they different in any other respect?

A. It is not one of our standard forms of bill of lading, if that is what you are referring to.

Q. Does your standard form of bill of lading have imprinted on it as part of the form the Shotwell Manufacturing Company?

A. That's correct.

Q. Do these forms have such an imprint?

A. No, sir.

Q. Do you know the purpose for issuing those bills of lading?

2741 A. The purpose?

Q. Yes.

A. No, sir.

Q. What is the usual purpose of issuing a bill of lading?

A. The usual purpose, to cover a shipment.

By Mr. McConnell: I object.

By Mr. Lockley: What is it? I didn't hear the objection.

By the Court: I didn't hear your question, Mr. Lockley.

By Mr. Lockley: I asked him what was the usual purpose for the issuance of a bill of lading.

By the Court: He may answer.

By the Witness:

A. That is to make a shipment.

By Mr. Lockley:

Q. To make a shipment?

A. A receipt from a carrier for shipment being made.

Q. So would it be true that the purpose of issuing those bills of lading was also to make a shipment?

2742 A. That's correct.

Q. And when such shipments were made were they made from the shipping department of the Shotwell Manufacturing Company?

A. That's correct.

By Mr. O'Brien: What was the question?

(Question read.)

By Mr. Lockley:

Q. With respect to these particular shipments, do you know whether the merchandise shipped on those was manufactured by the Shotwell Manufacturing Company?

A. Unless I know definitely—

2743 By Mr. McConnell: I haven't heard any proof that they were shipped. He assumes that they were shipped.

By the Court: Well, the exhibits are in evidence.

By Mr. McConnell: They are bills of lading, yes.

By the Court: He may answer.

By the Witness:

A. I can't tell you what these—only where it is written on the bill of lading.

By the Court: Answer again now, and keep your voice up.

By the Witness:

A. Where the items in question are written on the bill of lading, that is the only ones I could tell you about.

By Mr. Lockley:

Q. Were those items manufactured by the Shotwell Manufacturing Company?

A. Yes.

Q. Do you know in whose handwriting the penciled notations are?

A. Yes sir.

Q. In whose are they?

2744 A. Part of them are mine.

Q. Do you recall the purpose of making such notations on the bill of lading?

A. Well, to the best of my recollection, it would be to specify what items went into the car.

Q. What items?

A. That's correct.

Q. Was it your practice with respect to all shipments to write in pencil on the bill of lading the nature of the items that went into the car?

A. No, sir.

Q. And what sort of a document would usually show that information?

A. The shipping ticket.
Q. The shipping ticket?
A. Yes, sir.
Q. Now, was there any shipping ticket issued in connection with these particular bills of lading?
A. I don't think so, no.
Q. Well, now the shipping ticket, after the shipment was made—and I might ask: Were those shipments made?
A. They must have been made, they are receipted for by carriers.
2745 Q. You say the shipping ticket went to the accounting department?
Now, if there was no shipping ticket on these particular bills of lading, do you know if the information went to the accounting department respecting them?
A. Any information respecting the shipments?
Q. That's right.
A. Well, these bills of lading would go to the accounting department.
Q. They would go to the accounting department?
A. That's right
Q. Did they go to the accounting department?
A. If they are handled in the usual manner they would, yes.
Q. Well, were they handled in the usual manner?
A. In so far as the shipping ticket is concerned, no. But in so far as the receipt is concerned, I can't tell you definitely.
Q. In so far as what is concerned?
A. In so far as the shipping ticket is concerned, it was not handled in the regular manner, procedure, but in so far as the bill of lading is concerned, I can't answer you.
2746 Q. Well, how would the accounting department get the information that the shipment had been made on those particular shipments?
A From the information on the bill of lading, I assume.
Q. Does that bill of lading show the dollars and cents?
A. No, sir.
2747 Q. I am still at a loss. Did you send any memoranda to the accounting department to notify them that such shipment had been made?

A. I may have.

Q. Did you?

A. I presume I would. I may have told them, yes, what went into the cars.

Q. I want to know your best recollection. Did you?

A. In so far as this is concerned, I would say yes on those, on those that you have here.

By Mr. O'Brien: What is "this"?

By the Witness: The one I am looking at has three items listed on the bill of lading in my handwriting.

By Mr. O'Brien: What is the exhibit number?

By the Witness: Where is that? 149.

By Mr. Lockley:

Q. Now when a shipment was made by the shipping department, it was on the authority of this shipping ticket, is that correct?

A. That is correct.

Q. Which was issued by the accounting department
2748 and went back to them?

A. That is right.

Q. There was no shipping ticket attached to these particular bills of lading?

A. I don't believe so, no.

Q. Then on what authority were those particular shipments made?

A. They were given, probably given written instructions as to what to put in the cars.

Q. What do you mean "they were probably"? Who was given instructions?

A. The shipping clerk.

Q. By whom?

By Mr. McConnell: I object to his testifying as to what probably happened. He doesn't know.

By the Court: Well, if he knows, he may state.

By Mr. McConnell: He is not testifying now as to his knowledge.

By the Court: You may answer the question.

By the Witness: It may have come from me, or it may have come from the traffic department.

2749 By Mr. Lockley:

Q. Did you give such instructions to the shipping clerk?

A. I probably did at times, yes.

Q. And from whom did you in turn get your instructions, if you did?

A. In so far as to what to load in the cars was concerned?

Q. Yes.

A. That would come from one of the officers of the company.

Q. Which one of the officers?

A. It may have come from—

By Mr. Kirby: If the Court please, I don't mean to be rude about this, but this is speculation, I think. He says they might have issued instructions on some of them. That isn't proof as to any one of these shipments. And then they are backing up to—well, if he did, who told him? I must object to that last question. It is purely speculation.

By the Court: That is what he is trying to find out.

2750 By Mr. Lockley:

Q. Did anyone else have authority to issue such instructions besides yourself, Mr. Ericson?

By Mr. Kirby: I object on the ground it is not a question of authority. It is a question of what specifically happened, if he knows.

By the Court: He may answer.

By the Witness: Would you repeat the question, please?

(Question read by the reporter.)

By Mr. Lockley:

Q. Did anyone else have authority to instruct the shipping department about shipments?

A. Oh, yes.

Q. Who?

A. The traffic manager could have done it, or one of the officers of the company could have given that information.

Q. Now, I want your best recollection as to whether any of the officers of the company ever instructed you to make those particular shipments reflected by the bills of lading?

A. Instructed me?

Q. Yes.

2751 A. Yes, they did.

Q. And who were they? Who was it?

A. I can't tell you exactly. It may have been any one of the three.

Q. Who were any one of the three?

By Mr. Kirby: I object to that. He said he can't tell.

By the Court: Well, if he says it was one of the three but he can't tell which one, I think he can answer as far as he can go.

By Mr. Lockley:

Q. Who do you mean by the three?

By Mr. Kirby: I object to that.

By the Court: He may answer.

By the Witness:

A. Mr. Cain, Mr. Sullivan, and Mr. Huebner.

By Mr. Lockley:

Q. Did anyone else have some authority?

A. No, sir.

Q. Would you have shipped a carload of candy on the instruction or authority of anyone other than Mr. Cain, Mr. Sullivan, or Mr. Huebner?

By Mr. Kirby: I object to the question. He is leading the witness.

2752 By the Court: He may answer.

By Mr. Kirby: He is treating the witness of the Government on direct examination as though on cross. He is asking him purely speculative questions. I object on those grounds.

By the Court: He may answer.

By Mr. Lockley:

Q. You may answer.

By the Witness: Repeat the question.

(Question read by the reporter.)

By the Witness:

A. No, sir.

Q. Are you able to state from an examination of those bills of lading whether any of those shipments were full carloads, and would you tell us the exhibit number?

A. Exhibit 147.

Q. Is that a full carload?

A. On the carload—if I recall the correct carload weights at the time, yes.

Q. Any others?

A. Exhibit 151. That is all.

Q. Now to whom did you report then when these 2753 shipments had been made, if anyone?

A. To whom did I report?

By Mr. McConnell: That assumes he reported to somebody.

By Mr. Lockley: I said, if anyone.
By Mr. O'Brien: That is another cross question.
By the Court: He may answer.
By Mr. Lockley:
Q. Well, did you report to anyone?
A. I probably reported this information to Mr. Huebner.
Q. You say you probably did. Well, do you have any recollection?
A. Well, that is the best of my recollection of the deal.
Q. That you reported it to Mr. Huebner?
A. Yes, sir.
Q. Did you report it orally or in writing?
A. I may have done either one.
Q. At different occasions, do you mean?
A. That is right, because, as I say, some of these, the information is on the bill of lading.
Q. Did you keep a record of those shipments?
A. I think so.
2754 Q. And what was the nature of those records?
A. Simply a sheet of paper as to what went out in the cars, or—
Q. When did you start to keep the record?
A. I presume at the time of the first shipment.
Q. I am sorry. I didn't hear your answer, Mr. Ericson.
A. I said I presume at the time of the first shipment.
Q. At the time of the first shipment. Are you referring to the first shipment reflected on those bills of lading?
By Mr. McConnell: I don't think any presumption should be indulged in here, except the presumption of innocence.
By Mr. Lockley:
Q. Are you referring to the first shipment reflected on those bills of lading?
A. That is right.
Q. Did you keep any records of shipments other than the record you have referred to on the cars, reflected by the bills of lading?
A. What do you mean by any other record?
2755 Q. Well, did you keep any record of the shipments of Mr. Lubben, or the General Confections, or the Eatsum Food Products Company?
A. I don't believe so.
Q. You did not keep any special records?

A. I don't think so, no.

2756 Q. You say you did keep a record of those shipments shown by the bills of lading. I show you Exhibit 63-B and ask if you have seen that before.

A. Yes; sir.

Q. Do you recognize the handwriting?

A. Yes, sir.

Q. And whose is it?

By the Court: Whose handwriting is it?

By the Witness: It is my handwriting.

By Mr. Lockley:

Q. What does that record purport to be?

By the Court: Is that 63-B?

By Mr. Lockley: 63-B. A, B.

By the Court: Are you sure of that?

By the Witness: Yes, sir.

By the Court: Is that what they call a recap sheet?

By Mr. O'Brien: Yes, that is what it is, Judge, only it is not a recap sheet, 63-B.

By the Court: All right.

By Mr. Lockley:

Q. What is that record 63-B? What does that purport to be, Mr. Ericson?

2757 By the Court: Now he said that was in his handwriting?

By Mr. Lockley: Yes, sir.

By the Court: All right.

By the Witness: Well, it is where shipments were made on particular dates.

By Mr. Lockley:

Q. Shipments made—

A. I can't—the top ones I have written where they have gone to, but the lower ones I couldn't tell you where they went to.

Q. Are those records of a shipment of merchandise, or is that a record of shipment of merchandise sold to Mr. Lubben or the General Confections or Eatsum?

A. The top ones are shipments that were shipped to, well, in Chicago. I don't know what car. The others—William Barron, I believe he was out on the coast.

Q. Do you know—

A. The other ones I can't tell you where they went to.

Q. Do you know who purchased those shipments?

A. Do I know who purchased them?

Q. Yes.

A. No, sir.

2758 Q. Do you know whether or not that is a record of shipments made or sold—not sent to, but sold to Mr. Lubben or Eatsum or General Confections?

A. I cannot answer that question.

Q. Were you instructed to keep such a record, the record you have there, 63-B?

By Mr. O'Brien: Well, I will object to the form of the question. It does not appear anywhere that it was a record that was kept and the circumstances have not appeared either.

By the Court: He may answer.

By Mr. Lockley: He says it is in his handwriting.

By Mr. Lockley:

Q. You may answer.

(Question read.)

By the Witness:

A. Well, I believe this record was kept from the notes of shipments made and cars, yes.

Q. The record of the notes of shipments made?

A. Notes I kept. In other words, I kept a record of what went into the cars or what went on the bills of lading.

2759 Q. Was it your normal practice to keep such records?

A. No, sir.

Q. Did you ever keep any other record than the one you have in your hand, 63-B?

A. You mean, in addition to this on the same items?

Q. Yes.

A. I presume I must have to get this information from.

Q. Now the other record that you are referring to, did it have the same information that appears on Exhibit 63-B?

A. It may have been on one sheet or it may have been a combination of notes.

Q. Would it have had more information than appears on 63-B?

A. No, sir, except as to perhaps car number. It went in a car.

Q. Would it have had any additional cars or shipments than appear on 63-B?

A. No, sir.

Q. What was the purpose of the record that you have in your hand?

A. The purpose of this record?

2760 Q. Yes.

A. Well, this record was made up and actually, I don't remember what the purpose was.

2761 Q. You just kept it but you don't know why?

By Mr. McConnell: I object to cross examining the witness.

By Mr. Lockley: I am not cross examining him. I am asking him.

By the Court: He may answer.

By Mr. Lockley:

Q. Do you have any recollection as to why you kept it?

A. I presume I kept it due to the fact that there was no shipping ticket made on the shipment.

By the Court: Mr. Lockley, when you stand there I don't hear and I am sure the jury can't hear either. We will have to ask to have that answer read.

(Answer read.)

By Mr. Lockley:

Q. You said you kept another record besides that one?

A. I kept—I probably—I had to take this from something, and I probably took it from a record. Whether or not it was a complete record on one sheet or whether it was a combination of records which the shipping de-

2762 department used for shipping the stuff out—it would be one or the other.

Q. So I understand you had an original record of some sort, is that correct, from which this Exhibit 63-B is a transcript of some portion?

A. Yes, sir.

Q. Well, do you recall whether you were instructed by anyone to keep such an original record?

A. No, sir, I don't.

Q. Do you recall the occasion for drawing off this portion of it which is shown on Exhibit 63-B?

A. The occasion?

Q. Yes.

A. No, sir.

Q. Were you told by anyone to do that?

A. I presume—

By Mr. McConnell: He said he wasn't instructed. Now he is asking if he wasn't told. It is the same question. I object.

By the Court: He may answer.

By the Witness:

A. Someone asked me for this so I gave it to them.

By Mr. Lockley:

Q. Who was the someone?

2763 A. That I couldn't say definitely. I mean I couldn't say who it is without being sure of it.

Q. What is your best recollection?

A. It would be one of the officers of the company. I will answer it that way.

Q. Do you know which one?

A. No, sir.

Q. Did you ever discuss the shipments reflected by these bills of lading with Mr. Lubben?

A. Did I ever discuss them?

Q. Yes.

A. Only in so far as shipping instructions were concerned.

Q. That is to say—

A. Where the shipments were to be made.

Q. That is where they were to go, the shipments?

A. Yes, that is right.

Q. I call your attention to the fact that on Exhibits 148, 146, 149, 147, the shipper is shown as the ABC Candy Shippers. Do you know any such organization?

A. No, sir.

Q. Do you know how the ABC Candy Shippers came to be named as the shipper on those bills of lading?

2764 A. It was the same. Where it came from, I couldn't say.

Q. Was it put there at your direction?

A. It probably was.

Q. Well, the shipment was being made from the Shotwell Manufacturing Company, was it not?

A. That is correct.

Q. Do you recall any reason why the name ABC Manufacturer or ABC Company was put on there instead—

A. No. Only that they didn't want the name Shotwell Manufacturing Company to appear on it.

Q. Who do you mean by "they"?

A. Again I will say the officers of the company.

2765 Q. Did you have a conversation with any of them with respect to that particular matter?

A. Yes, sir.
Q. And who?
A. I couldn't name any specific time. I don't know the exact time or when it happened, whether there was one person or more than one in the room at the time.
Q. Well, what is your best recollection as to when it was and who was present?
A. Well, if I remember correctly, it was Mr. Cain and Mr. Huebner's office and Mr. Cain and Mr. Sullivan and Mr. Huebner and Mr. Lubben were there.
By Mr. Kirby: What is the time of this, now?
By Mr. Lockley:
Q. Can you give us the time?
A. The time?
Q. Yes, about the time of the year.
A. I can't tell you that.
Q. Can you give us the year?
A. It is probably 1946.
Q. And—
A. At the time of the shipments.
2766 Q. Do you know whether it was winter, spring, summer or fall?
A. No, sir, I don't.
Q. Would it be about the date of those shipments? Does that help you refresh your recollection?
A. It would be, yes.
By Mr. O'Brien: What date? What date is that?
By the Witness: The early part of March.
By Mr. O'Brien: You have got dates all the way from March to August, haven't you?
By the Witness: Yes, sir.
By Mr. Lockley:
Q. Was it some time between March and August?
A. No. It would probably be prior. It would be the early part of March.
Q. The early part of March, all right. Now, what happened at that meeting? What was said?
A. I couldn't tell you.
By Mr. Kirby: Does he have a definite knowledge of who was there?
By Mr. Lockley: He said it already.
By Mr. Kirby: I am not clear, if your Honor
2767 please. Does he have a definite knowledge of who was there?

By Mr. Lockley: He already testified it was Mr. Cain, Mr. Sullivan, Mr. Huebner, and Mr. Lubben.

By Mr. Kirby: I am not sure on it. I would like the witness queried, if he has a definite knowledge of who was there.

Do you have a definite knowledge of who was there?

By the Witness: No, sir.

By Mr. Lockley:

Q. Is that your best recollection?

A. That is my best recollection.

By the Court: He said it was his best recollection. He may answer.

By Mr. Lockley:

Q. Will you tell us what happened at that time?

By the Court: State again whom you stated was there.

By the Witness: Mr. Cain, Mr. Sullivan, Mr. Huebner, and Mr. Lubben.

By Mr. Lockley:

Q. And I presume yourself?

A. That is right.

2768 Q. Now what happened?

A. I can't remember that far back, just what transpired at this gathering or meeting.

Q. Do you remember the meeting? Do you recall, did the conversation have anything to do with the particular shipments?

By Mr. McConnell: I object to counsel leading the witness.

By the Court: He may answer.

By the Witness:

A. Well, I presume when—there I am using the word "presume" again. Yes, evidently the name of the shipper or the name of the shipper or not using the Shotwell Manufacturing Company name at that time came up, yes.

By Mr. Lockley:

Q. It is your recollection at that time you were instructed to use the name ABC Company?

A. That is right.

Q. Is that your best recollection as to what was said?

A. Yes, sir.

Q. Do you recall any other conversation at that time?

2769 A. No, sir.

Q. Do you recall any other conversations with

any one of the defendants regarding these shipments other than you have testified to?

A. No, sir.

By Mr. Lockley: All right. You may cross examine.

2770 *Cross Examination by Mr. Kirby.*

May I see that exhibit, 63-B, please?

By Mr. Kirby:

Q. This 63-B, that is the document that is in your handwriting?

A. That is right.

Q. Is that connected with the unbilled shipments or not, or don't you know?

A. The only ones I can match them with are those. I believe the top two on which there are bills of lading.

Q. But are these—are you saying that these are unbilled shipments, Mr. Ericson?

A. No, I don't say that. I don't know anything about unbilled shipments.

Q. So far as you know, these shipments were covered with regular invoices?

A. They could have been later, yes, sir. They weren't at the time shipment was made.

Q. Well, do you know what these particular shipments are? That is the question. Or don't you know?

A. Do I know what they are?

2771 Q. Yes, whether they are covered by one invoice or another?

A. I couldn't tell you.

Q. Well, it would take some time to check through the different invoices. I don't think we could do that at this hour. Perhaps we could do that during the recess.

Perhaps we should do that during the recess, your Honor.

By the Court: I suppose that you are suggesting that we adjourn?

By Mr. Kirby: That is right. We wasted a lot of time while—a while ago around here, looking for papers, so I think that would be the best thing to do.

By the Court: I don't think the jury would have any objection to that, and I don't suppose I would have any objection.

We will be at recess until ten o'clock tomorrow morning.

By the Marshal: Will the audience please remain standing while the jury, as well as the Judge, file out?

2772 This Honorable Court will now recess until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken in the above entitled cause until the following day, being Wednesday September 30, 1953; at the hour of 10:00 o'clock a.m.)

2773 (Caption—No. 52 CR 143)

Chicago, Illinois,
Wednesday, September 30, 1953,
10:00 o'clock A. M.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:—

By the Clerk: 52 CR 143, United States of America vs. Shotwell Manufacturing Company, et al. Case on trial.

By the Court: Mr. Ericson, I think you were on the 2774 stand.

MARTIN A. ERICSON, a witness heretofore called herein on behalf of the government, having been heretofore first duly sworn, resumed the stand and testified further as follows:

Cross Examination (Ctd.) by Mr. McConnell.

Q. Mr. Ericson, there was some talk here last night about lawyers talking to witnesses. Have you ever met me before in your life?

A. No, sir.

Q. We have never even been formally introduced, have we?

A. No.

Q. Now, you were testifying about conversations, or meetings, between people out at Shotwell back in 1946. Do you have a recollection of events back that far?

A. In a casual sort of way, yes. Meetings we had quite often.

Q. In a casual sort of way?

A. What I meant to say, we had meetings quite
2775 often so far as plant operation is concerned.

Q. Well, there was nothing unusual about having meetings as to your plant operation, was there?

A No, sir.

Q. And in meetings I suppose you met with the people who were running the business at that time?

A. That's correct.

Q. And how many meetings did you have?

A. The number of meetings?

Q. Yes.

A. I couldn't answer that question.

Q. How do you distinguish any particular meeting?

A. Only by reference to some particular thing, that is all.

Q. By reference to documents?

A. Yes, sir.

Q. Well, you were referred to one document here which appears to be in your handwriting, which is Government's Exhibit 63-B. Now, is that the document you used to refresh your recollection, or to fix a meeting in the executive offices in which you thought probably some of the officers were there?

A. I don't believe so, no.

2776 Q. Well, you were asked about that document, weren't you?

A. Yes, sir.

2777 Q. Have you been asked about that document by Government counsel since you left the court room?

A. No, sir.

Q. Have you had any talk with Mr. Lockley since you left the court room—

A. No, sir.

Q. —yesterday?

A. No, sir.

Q. When is the last time you talked to Mr. Lockley?
A. I believe it was a week ago Tuesday.
Q. He went over this matter with you?
A. Yes, sir.
Q. Did you tell him then that you couldn't identify people who were in conferences back that far?
A. I told him the same as I said in court yesterday, that I assume that—or that it would be the people that I mentioned, that is, the executives of the company.
Q. You told him that was just an assumption of yours?
A. That would be my recollection, yes.
Q. Then did he try to get you to fix it more—
By Mr. Lockley: Just a minute, counsel. There has been no—
By the Court: I don't think there is any occasion
2778 for that question.
By Mr. McConnell: I want to know how he got from an assumption down to a statement.
By the Court: I don't know that it appears that he got from an assumption to a statement.
By Mr. McConnell:
Q. Is your testimony still in this case that all you are relying on is an assumption that somebody must have been present?
By Mr. Lockley: I object, your Honor. His testimony is not that. It is that he is relying on his recollection.
By Mr. McConnell: This is cross examination. I am asking him now.
By the Court: He may answer.
By the Witness:
A. In so far as this paper is concerned, as I said before, no, but in so far as the bills of lading are concerned, yes.
By Mr. McConnell:
Q. So that the bills of lading which do have so-called unbilled shipments, your testimony as to whom you talked to is just whom you assume you must have talked to, is
2779 that correct?
A. That is correct.
Q. And you have no independent recollection now of meeting and seeing and talking to those men, have you?
A. Of any one individual thing?
Q. Yes.
A. No.

Q. Now, that document that you have in your hand has nothing to do with unbilled shipments, does it?

A. That I can't answer.

Q. Well, you were asked on cross examination here:

"Q. So far as you know these shipments were covered with regular invoices?

"A. They could have been later; yes, sir. They weren't at the time shipment was made."

Did you make that statement yesterday?

A. I believe so.

2780 By Mr. McConnell: What is our next number?

By Mr. Kirby: Mr. McConnell, all of those exhibits are already Government's exhibits.

By Mr. McConnell: They are already in evidence?

By Mr. Kirby: Yes, they are. They are in by stipulation.

By Mr. McConnell: Pardon me.

By Mr. McConnell:

Q. I show you Government's Exhibits 57, 58, 59, 60, and 62, and ask you if you will look at these documents and tell me whether or not they represent the invoices of Shotwell Manufacturing Company covering the items that are on that written memorandum which you have in your hand, Government's Exhibit 63-B?

A. Yes, sir; they do.

Q. Now, every single one of those shipments that is on your memorandum was billed on regular invoice and the check shows that Shotwell received the money for them, isn't that so?

A. Yes, sir.

Q. And received the money by check?

2781 A. According to that; yes, sir.

Q. Now, Harold Sullivan is a lawyer, isn't he; you know he is a lawyer?

A. Yes, sir.

Q. And he is a Master in Chancery; do you know that?

A. Yes, sir.

Q. And he wasn't anybody that was running that plant out there, was he, so far as shipping, and so forth is concerned?

A. No, sir.

By Mr. McConnell: That is all.

By Mr. Kirby: No questions.

By the Court: Mr. Lockley, any redirect?

By Mr. Lockley: Mr. O'Brien I think has a turn yet.

Redirect Examination by Mr. Lockley.

Q. Mr. Ericson, you were just shown Government's Exhibits 57-A, 58-A, 60-A, and B, and 62-A, and you said that those invoices agreed with the entries contained on this sheet in your handwriting, 63-B; is that correct?

A. That is correct, yes, sir.

2782 Q. Now, I show you Exhibit Nos. 146, 147, 148, 149, 151, 152, and 155, which are the bills of lading. Is there any relationship between those bills of lading and those invoices, or that exhibit—or Exhibit 63-B?

By Mr. Kirby: Those are the so-called unbilled bills of lading?

By Mr. Lockley: Those are the so-called unbilled shipments, the bills of lading.

By the Court: If you stand there, we will never hear him.

By the Witness: One of the shipments—one of the bills of lading covers a shipment and whether or not this particular invoice covers part of this shipment, I don't know. I can't say directly.

By Mr. Lockley:

Q. What is the date on the bill of lading?

A. May 22.

By the Court: Speak up, please.

By Mr. Lockley:

Q. And what is the date on the invoice?

A. October 20.

Q. Would a shipment be made on May 22nd, and

2783 an invoice on October 20th?

A. Shouldn't be; no, sir. These are the same figures, but your dating is different on this, too.

Q. All right. And are you able to state whether there is any relationship between those invoice copies you have, and those bills of lading?

A. No, sir.

Q. No, sir, what? There is no relationship?

A. There is no relationship, as far as I can see.

Q. Do you know what Mr. Sullivan's official position was at the Shotwell plant during 1945?

A. 1945, I believe he was vice president.

Q. And in 1946?
A. The same thing, I believe.
Q. He was vice president?
A. I believe so.
Q. Executive vice president?
A. That is correct.
Q. Do you know what his duties were?
A. No, sir.
Q. Did you see him at the plant?
A. Yes, sir.
Q. Did you ever have any conversations with him
2784 relative to the operation of the business?
A. I'd say no.
By Mr. Lockley: That is all, Mr. Ericson.

2785 *Recross Examination by Mr. McConnell.*

Q. You have examined these bills of lading and the invoices, haven't you?
A. Yes, sir.
Q. They are not even in the same years, are they?
A. No, sir.
By Mr. McConnell: That's all.
By Mr. Lockley: That's all, Mr. Ericson.
(Witness excused.)

LEON BUSBY, a witness called herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Will you give your name, Mr. Busby?
A. Leon Busby.
Q. Where do you live?
A. 349 Ridge Road, Kenilworth, Illinois.
Q. What is your occupation?
A. Certified public accountant.
Q. You are a certified public accountant and have
2786 you ever been employed by The Shotwell Manufacturing Company in your professional position?
A. Yes, sir.
Q. When did that employment originate?
A. Shortly after 1942.

Q. 1942, and are you still employed by them?
A. Yes.
Q. What were your duties in the years 1945 and 1946 in connection with your employment with The Shotwell Manufacturing Company?
A. My firm prepared audits for the company. They prepared from these audits corporate tax returns, installed accounting systems, prepared budgets and other sundry details that accountants are called upon to do as public contractors.
Q. Did you keep the books for the corporation?
A. No.
Q. From what information did you prepare the returns in 1945 and 1946?
A. They were prepared from the books of account of the company.
Q. Which were kept by the employees of the company?
A. Yes, sir.
Q. Did you audit those books of account?
2787 A. Yes, we audited them.
Q. What was the extent of your audit?
A. Semi detailed audit, what we called a spot check audit, selecting various details at random, verifying these details and checking them into control accounts.
A Juror: We can't hear him.
By Mr. Lockley:
Q. Will you speak up. You can't be heard at the other end of the jury box.
You say it was a semi check?
A. A semi detailed audit.
Q. And that consisted of spot checking?
A. That is right, selecting various detailed data, verifying this data by comparing it with the ledger accounts and other information that we thought was necessary.
2788 Q. As a part of your detail, did you circularize the accounts receivable customers?
A. Whenever we thought it was necessary. We didn't do it every year—from time to time, we did.
Q. Did you do it in 1945 and 1946?
A. I don't recall.
Q. I show you the 1945 and 1946 returns, being Government's Exhibits 1 and 1-A, 2 and 3, and ask you if your signature appears thereon?

A. The corporation income tax return as amended for 1946 was signed by one of the men from our firm but personally, I did not sign it.

Q. That was prepared by your firm, though?

A. That is correct. We are responsible for that.

Q. And was it prepared under your direction and supervision?

A. Yes. The original corporation income tax return for 1946 is signed by me.

Q. I believe that is Government's Exhibit 2. That is correct.

A. The corporation excess profits tax return for the year 1945 was signed by me.

The corporation income tax return for 1945 was
2789 signed by me.

Q. Do you know if the books and records of the Shotwell Manufacturing Company disclosed at that time any receipts in excess of the amounts recorded on the invoices themselves?

A. No, I do not know.

Q. Were you informed at the time you prepared the 1945 return that any such receipts had been received by the corporation?

A. In a general way we were informed that none had been received.

Q. In a general way you were informed that none had been received?

A. That is correct.

Q. And did you make inquiry?

A. That is what I mean when I say "in a general way." I made inquiry.

Q. And from whom?

A. I presume the inquiry was directed to Mr. Graflund. We obtained general letters and the signatures on the letters probably will indicate to whom the inquiry was directed.

By Mr. McConnell: I object. If there are letters, the letters would be the best evidence.

2790 By the Court: Yes. The objection is sustained.

By Mr. Lockley:

Q. And in 1946, do you know if the books and records disclose the receipt of any amounts in excess of those shown on the invoices themselves?

A. I do not know.

Q. Do the books and records disclose the receipt of any amounts for sales on which no invoices had been issued?

A. I didn't know at that time.

Q. You say that you inquired generally from the corporation.

By Mr. Lockley: Would you please mark these Government's Exhibits 213 for identification and 214 for identification.

(Said documents were marked Government's Exhibits 213 and 214 for identification.)

By Mr. Lockley:

Q. I show you Government's Exhibits Nos. 213 and 214 for identification, and ask you if you have seen those before?

A. Yes, I have.

2791 Q. Were those letters which were received by you in your course of business as a certified public accountant?

A. Yes.

Q. From whom were they received?

A. There are two signatures here, one dated February 8, 1946, which pertains to the 1945 audit, which was signed—

Q. Just tell us, were they received? I want to know, were they received from Shotwell Manufacturing corporation?

A. Yes, they were received from these people.

Q. And did they become a part of your regular files and work papers in connection with your employment with that firm?

A. Yes.

By Mr. Lockley: I offer Government's Exhibits 213 and 214 in evidence.

By Mr. Kirby: I object. They are not competent as to the defendant Sullivan.

By Mr. McConnell: I have no objection on behalf of the corporation.

By the Court: The exhibits may be received.

2792 (Said documents were received in evidence by the Court and marked Government's Exhibits 213 and 214.)

By Mr. Lockley:

Q. Mr. Busby, I show you Government's Exhibits 213 and 214, directing your attention first to the date Feb-

ruary 8, 1946, and I ask you from whom was that received? That is, Exhibit 213.

A. I would say it was received from the company.

Q. And who signed it?

A. Howard Roeser, Frank J. Huebner.

Q. And what is Mr. Huebner's title on that?

A. Vice president.

Q. Vice President. Does that refresh your recollection as to whether you circularized the accounts receivable outstanding for the corporation in preparation of that, the 1945 return?

A. From the statement here, we did not circularize them at the end of the year, December 31, 1945.

Q. And at whose request was that?

A. Well, this is a standard circular letter. In most instances it is prepared by our accountants.

Q. It was signed by the officers of the corporation?

A. That is correct. In part, it is designed to protect
2793 us in a limited investigation. The volume of work is too great to be covered in the time limit.

Q. I also call your attention to the last paragraph, and I ask if you will read that, please?

By Mr. McConnell: Is this in evidence? Is this the one you offered?

By Mr. Lockley: Yes, I offered both.

By Mr. Lockley:

Q. Will you please read it out loud?

A. "Insofar as we are able to determine, we certify that the company is not contingently liable under any purchase or sales contracts at the balance sheet date and that we have abided by all regulations of the Office of Price Administration, War Labor Board, Salary Stabilization Act of 1942, State Labor Laws, and other Governmental restrictions".

Q. I show you Government's Exhibit 214, and ask if that is a letter of the same nature as Government's Exhibit 213?

A. Yes.

Q. Does it relate to the preparation of the tax return for the year 1946?

A. It relates to the preparation of our audit.

2794 Q. Of your audit, all right.

And does that likewise contain a statement that The

Shotwell Manufacturing Company complied with all regulations of the Office of Price Administration during the year 1946?

A. Yes, it does.

Q. Now, Mr. Busby, who signed that letter, Government's Exhibit 214?

A. H. S. Graflund, Frank J. Huebner.

2795 Q. Mr. Huebner signed both, is that correct?

A. Yes.

Q. Now do the income tax returns prepared by you in 1945 or for 1945 and 1946 contain any information not taken off of the books of account of The Shotwell Manufacturing Company?

A. Not to my knowledge..

Q. Were you at any time during the preparation of those returns advised of the existence of a memoranda record of cash received and cash paid out?

A. No.

Q. Did you know of the existence at that time of a vault with currency in the premises of The Shotwell Manufacturing Company?

A. No.

Q. Did you know that there was currency in a vault at the bank rented by The Shotwell Manufacturing Company?

A. No.

Q. During 1946, were you advised by anyone that there were sales of merchandise by The Shotwell Manufacturing Company for which no invoices were rendered?

2796 A. No.

Q. In 1948, did you make a trip to New Jersey on behalf of The Shotwell Manufacturing Company?

A. Yes.

Q. About when was that?

A. January 7, 1948.

Q. January 7th?

A. We left here on the 7th.

Q. You left on the 7th. Who accompanied you?

A. Mr. Graflund.

Q. Mr. Graflund. And where did you go?

A. Hillsdale, New Jersey, to the plant of the General Confections Company.

Q. That is Mr. Lubben's plant?

A. Mr. Lubben's plant.

Q. What was the purpose of that visit?

A. To determine whether or not the General Confections Company was in any financial condition that would justify a loan by Shotwell Manufacturing Company.

Q. Do you know the amount of the loan?

A. $50,000.00.

Q. And did you examine the books and records of General Confections at that time?

2797 A. In a cursory way. We just looked them over for a couple of days.

Q. Did you return then to Chicago?

A. Yes.

Q. What day was it that you arrived back in Chicago?

A. January 10th of 1948.

Q. Did you at that time have a meeting with any of the defendants?

A. The following day.

Q. The following day, Sunday?

A. Sunday.

Q. Who was present?

A. Mr. Cain at first, and then I think Mr. Sullivan came in after the meeting started.

Q. Anyone other than yourself, Mr. Cain and Mr. Sullivan?

A. No.

Q. Where was it?

A. At Mr. Cain's home.

Q. Where is Mr. Cain's home?

A. Wilmette, Mohawk Road. I don't remember the number—1100 something.

Q. Will you keep your voice up, Mr. Busby. Can 2798 you fix the approximate date of the meeting?

A. At Mr. Cain's home?

Q. Yes.

A. It was the 11th of January, 1948.

Q. All right. Will you tell us what happened at that time? What was said?

A. I told Mr. Cain that I was there for the purpose of reporting what I found at the General Confections Company, in particular with respect to whether or not he should make the loan, and I advised him that the company wasn't financially sound and that he shouldn't make the loan. And later, I told him that one reason for the company being in a bad financial condition appeared to be

from some tax difficulty that they were in and that Mr. Graflund had told me about these difficulties.

2799 Q. What do you mean by "these difficulties"?

A. That the General Confections Company had been involved in receiving over-ceiling prices in the black market from the sale of candy.

Further, that a party to this transaction had been reported by Mr. Graflund to be of the Shotwell Manufacturing Company and that I thought that something should be done about it.

Mr. Cain told me that he didn't know why anything should be done about it. He knew about the situation, because if money had been paid out from Shotwell, so far as it had been concerned, it hadn't netted any gain from the transaction.

Q. Did he say that the Shotwell Manufacturing Company had received such funds?

A. Yes. He said that they had received it.

Q. At what point in the conversation was that statement made?

A. Well, I can't pinpoint any—

Q. Was it—

A. It was after talking about the financial situation. In other words, I disposed of the financial situation when I first went in and then this came up following that.

2800 Q. You spoke of the financial situation first, that is, the stability of the General Confections?

A. That is correct.

Q. And Mr. Sullivan, did he come in while you were talking about the financial situation?

A. Yes, I think he was there.

Q. He was there then, was he, at the time?

A. I think he came in. I don't know exactly what point he came in.

Q. Was he there at the time Mr. Cain stated that the Shotwell Manufacturing Company had received payments? What did he call them?

By Mr. McConnell: Let us have one question at a time. You have two of them.

By Mr. Lockley: I will ask him first—

By Mr. Lockley:

Q. How did Mr. Cain refer to the payments that had been received?

A. Over-ceiling prices.

By Mr. McConnell: If the Court please, can't we have—wait a minute. I object to this. He led these other witnesses all yesterday afternoon. We are entitled to have conversations and we are entitled to first find out
2801 what the witness can tell of the conversation without prompting and leading by counsel. I object to the leading question.

By the Court: The answer may stand.

By Mr. Lockley:

Q. Will you continue with the conversation, Mr. Busby?

A. Mr. Cain referred to them as over-ceiling prices.

Q. And then was there any further conversation after that?

A. Why, yes. I told him that I thought the company should file amended returns to disclose these over-ceiling prices and at least get on record.

Q. Are you speaking of amended income tax returns?

A. Yes, income tax returns.

Q. Was any statement made as to the amounts?

A. He said he wouldn't know what amounts were involved, that the company hadn't kept—or anybody hadn't kept any continuing records and that if it could be determined, why, he was quite willing that the amended tax returns be filed because he didn't want to get into any trouble with the government.

He didn't have any idea that he was violating taxes.

2802 Q. Was Mr. Sullivan present at that time?

A. Yes, I think he was there.

Q. He was there, was he, throughout the course of the conversation?

A. Most of it, yes.

Q. Was there any other portion of the conversation that you recall?

A. Why, Mr. Cain wanted to know how to go about filing amended returns and either at that meeting or later, I don't recall, he instructed me to talk to the Internal Revenue Department.

2803 Q. Was it at that meeting—stick to that meeting for a moment.

A. It came up at that meeting, yes.—and find out, get their instructions as to what would be done with respect to clearing up the matter.

Q. And was that the end of your meeting?

A. Well, there was some—he asked me whether we

thought we could file amended returns without any repercussion from the Department if it was found out that the company was in violation, and I told him I thought it could be, because the Department had—the Treasury Department and the Internal Revenue seemed to be carrying on in a drive to have taxpayers make disclosures of delinquent amounts, where they thought there might be taxes due.

By Mr. Lockley: Your witness, Mr. O'Brien.

Cross Examination by Mr. O'Brien.

Q. Up until the time that you went east with Mr. Busby—or rather, Mr. Graflund—you knew nothing about these matters, as I understand it, Mr. Busby?

A. That is correct.

2804 Q. And was it through Mr. Graflund on that trip that you first learned of them?

A. Yes.

Q. Was it on Saturday that you arrived at Chicago?

A. Yes.

Q. Or returned to Chicago?

A. Yes.

Q. Did you call Mr. Cain and make an appointment then, or had you made one before?

A. I called him and made an appointment at that time.

Q. For the next day, Sunday?

A. For the next day.

Q. Sunday, at his home?

A. I don't know whether I called him Saturday night or Sunday morning.

Q. Well—

A. But I called him to make the appointment for Sunday at his home.

Q. So that the precise time is not important, but in any event you went out there on Sunday?

A. That is correct.

2805 Q. And when you got through with your report as to the financial condition of General Confections, such as it was, I understand that you then inquired of Mr. Cain as to whether there had been receipts of overages?

A. I told him that Mr. Graflund had reported to me that there had been.

Q. And did you ask him if that was so?

A. And he said there had been some.

Q. Did you ask Mr. Cain why he had not informed you of it?

A. Yes.

Q. What did he say?

A. He said that he didn't think it was any part of the accounting matters for the Shotwell, that the reason they hadn't been recorded was to avoid violation of the OPA regulation, and that the receipts had been paid out and therefore resulted in little or no net gain.

Q. Did he say whether they paid out for materials for the company?

A. Yes, he said they had been paid out to get raw materials to keep the company in production.

Q. And was it his position that monies so paid
2806 out would be deducted from receipts?

A. That is correct, yes.

Q. And that it made no difference, tax-wise, whether the "ins" and the "outs" were reported in the return?

A. That is correct.

Q. What, if anything, did you say to him as to whether it would make a difference?

A. I told him that the deductions, according to the regulation, were not permissible, were not being allowed by the Commissioner.

Q. Did that mean that where the company had paid out cash premiums to acquire goods, under the Commissioner's ruling, as you understood it, such pay outs could not be deducted as part of the cost of the goods?

A. At that time, that is my understanding.

By Mr. Lockley: I object to what the witness' understanding of the law is, unless he is discussing the actual conversation at the time.

By the Court: I assume so.

By Mr. O'Brien: I took it that this was.

By Mr. O'Brien:

2807 Q. Is it, Mr. Busby,

A. Yes, sir, this is part of the conversation.

Q. That is what you told Mr. Cain?

A. Yes,

Q. What, if any, comment did Mr. Cain make about that, when you informed him of the Commissioner's position?

A. Well, he was surprised at first.

Q. What did he say?

A. He said that if that was the case, he would follow my recommendation, that we go into the Collector's office, and discuss the filing of amended returns.

Q. Did he make any statement or expression as to the fairness of such position?

A. Yes, he said he thought it was utterly unfair, that they had received income and they paid it out, and there was no gain to it. He didn't know why there was any taxable income.

Q. Now, have you exhausted, for the moment, your recollection of that conversation in so far as the returns were concerned?

A. I told him that I didn't know whether or not there would be any taxable income to the corporation. In
2808 the first place, I didn't know whether the receipts belonged to the corporation.

Second, the question of deductions was under contest, and the ultimate outcome of that, I didn't know, but under any circumstances, the information should be cleared up by filing amended returns.

Q. It was your position then that the thing to do was to get in and get it worked out?

A. That is correct.

Q. And did you have any conversation with Mr. Cain at the time as to whether there might, or could be, criminal prosecution?

A. Yes, I told him that in case any violations were developed, why, there could be criminal prosecutions, except for the policy of the Bureau on a disclosure matter.

2809 Q. And did you tell him about the policy at that time?

A. I explained to him that the Secretary of the Treasury, and the Commissioner—well, even the Bureau itself, had followed the policy for some time, but particularly in 1945 and '46 and through 1947, as a matter of fact they were making a drive to have people come in and make disclosures, primarily promising them that there would be no criminal prosecution, in case they did so in time.

Q. And Mr. Cain, did he ask you to go to some agent of the Bureau and inquire about it?

A. Yes.

By Mr. O'Brien: Excuse me a moment, your Honor. That is all.

By Mr. McConnell: I want to ask him a few questions.

Cross Examination by Mr. McConnell.

Q. I think Mr. Lockley asked you about whether Mr. Cain admitted receipts of money in this conversation. Now, prior to this conversation you talked to Mr. Graflund, 2810 as I understand it?

A. That's correct.

Q. And the receipts that he was referring to were the receipts that were between a period of, say, October and July, were they not?

By Mr. Lockley: I don't recall any such testimony, Counsel.

By Mr. McConnell:

Q. Well, what receipts was Graflund talking about?

A. Well, Graflund was talking about primarily the receipts of General Confections Company, price over ceiling—over-ceiling prices. And the extent of his statement was that Shotwell was involved in the matter.

By Mr. O'Brien: He is talking about General Confections receipts.

By the Witness:

A. In other words, Graflund was telling me about the receipts of General Confections Company from over-ceiling prices.

By Mr. McConnell:

Q. Well, in this conversation that you had at Mr. Cain's house, Mr. Cain didn't admit to you that he had received $500,000.00?

A. Why, no, he didn't have any idea what the amount was.

2811 Q. And he didn't tell you any amount either, did he?

A. No, he didn't tell me any amount.

Q. And he said he didn't know what the amount was, is that it?

A. That's right.

Q. Well, now, I think you told him in that conversation that according to the regulations at that time, as you understood them and knew them, there would be no deduction for payments out as against payments in, in black marketing transactions.

A. That's correct.

Q. And that regulation was changed later on, was it not?

A. That's right.

Q. So that they did become deductible?
A. They are deductible at this time, since 1948.
By Mr. McConnell: That is all.

Redirect Examination by Mr. Lockley.

Q. Well, I had exhausted your recollection, Mr. Busby, but I am glad to hear that you remembered some more of it on cross examination.
2812 By Mr. McConnell: I object to that comment, to his own witness. This is his witness and he is commenting now on—
By the Court: What do you want me to do about it?
By Mr. McConnell: I move to strike it.
By the Court: It may be stricken.
By Mr. Lockley:
Q. You referred to the voluntary disclosure policy that you discussed with Mr. Cain, so I understand that you told him that if the taxpayer came in and made a disclosure to the Bureau, why, then everything would be forgiven; is that the substance of it?
A. If they made the disclosure within the time the Secretary of the Treasury, and the Commissioner—
Q. Now, do you know what the policy of the Bureau of Internal Revenue was with respect to such disclosures if an agent had already begun an investigation before the taxpayer came in?
A. Yes, I know.
By Mr. O'Brien: I object to the form of the question.
By the Court: I think so. We are going into some
2813 legal questions which I don't believe is a part of the examination of this witness.
By Mr. Lockley:
Q. Did you have any such discussion with Mr. Cain as to whether such—on that matter?
A. Yes, that point was discussed.
Q. And what did you tell him?
A. I told him that the disclosure had to be timely.
Q. And what do you mean by timely?
A. Before—
By Mr. O'Brien: I object again, your Honor. It is immaterial as far as this examination is concerned.
By the Court: Well, he may state his conversation with Mr. Cain in that regard.

By Mr. Lockley:

Q. Did you explain to Mr. Cain what you meant by timely?

A. Yes, I meant—I told him that the disclosure had to be made before an agent was assigned to the case to make an investigation.

2814 By Mr. Lockley: Thank you.

By Mr. O'Brien: That is all.

By Mr. Lockley: Thank you, Mr. Busby. That is all.

By Mr. McConnell: Wait a minute. I want to ask this man one more question.

Recross Examination by Mr. McConnell.

Q. This Company's books were kept on an accrual basis, were they not?

A. Yes, sir.

Q. And you said you prepared—or your firm prepared the income tax return from the books?

A. Yes, sir.

Q. And do you recall that there was a balance due Shotwell from General Confections in 1946, at the end of the tax year '46, of some $47,000 odd dollars?

A. No, I wouldn't recall that.

Q. Well, let me call your attention to these Government exhibits, 200, 200-A, 200-B, and 200-C, which purport to be the account with General Confections, and Eatsum, and calling your attention to the end of the year 1946, can you tell us what those documents show was the balance
2815 due and owing; that is, at the end of the year 1946?

A. There appears to be a balance due of $45,015.72, on the General Confections, Inc.

Q. That is a balance due Shotwell?

A. Due to Shotwell.

Q. Now, those books were being kept on an accrual basis, and you showed that figure upon which to pay income tax, regardless of whether or not Shotwell actually received the money, did you not?

A. That's correct. I would expect that, yes.

Q. So that Shotwell did pay income tax, according to your return, on that $45,000, even though they hadn't received it, is that right?

A. That is correct.

Q. Now, it wouldn't make a bit of difference in your

return, would it, if Shotwell had received $45,000, or that amount of money from General Confections, which was not shown on the books?

A. It wouldn't make any difference from an income position.

Q. From the tax liability standpoint?

A. From the tax liability standpoint, no.

Q. And it wouldn't make a bit of difference from
2816 the tax liability standpoint whether or not that amount was paid in some later year, would it?

A. No, sir; it would not.

By Mr. McConnell: That is all.

By Mr. O'Brien: That is, for the year '46, it would make no difference.

By Mr. McConnell:

Q. For the year '46, it wouldn't make any difference in the tax liability—

A. That is correct.

Q. —whether or not it was paid in '47, or '48, would it?

A. It wouldn't make any difference, tax-wise.

Q. Tax-wise?

A. That is correct. No, it wouldn't make any difference.

2817 Q. Now, you were asked about what you didn't know, as well as what you did know. You haven't been in the court room during the trial of this case, you have been excluded under the rule?

A. Correct. I haven't been.

Q. Now, there has been some testimony here by Mr. Lubben that he made payments from time to time to Mr. Huebner, and that Mr. Heubner divided the money up into three piles, one of which he labeled his own, and one of which he labeled Mr. Sullivan's and one of which he labeled Mr. Cain's, which he claimed was overages on Shotwell candies.

You didn't know anything about that, did you?

A. No, I did not.

Q. Nobody told you anything about that?

A. Never heard of it.

Q. Well, if somebody had told you that, and that had been the fact, would it have made any difference in your tax return?

By Mr. Lockley: I will object to that as a conclusion.

By the Court: Yes, I will sustain the objection.
2818 By Mr. McConnell: That is all.

Redirect Examination by Mr. Lockley.

Q. Mr. Busby, will you look at these ledger sheets again, 200-A, B and C, and tell me if the balance at the end of 1946 was subsequently paid?

A. Yes, the account appears to be satisfied, either by cash entries or journal entries, or vouchers.

Q. And in what year was it subsequently paid?

By Mr. O'Brien: We again note an objection, your Honor, since I think it will show that it is outside the indictment period.

By the Court: You went into it.

By Mr. O'Brien: I went into '46.

By the Court: He may answer.

By Mr. O'Brien: You may answer, the Judge said.

By the Witness:

A. It appears to be paid—it was paid in 1947 and the first part of 1948.

By Mr. Lockley:

Q. And was that a part of the taxable income of
2819 the corporation in 1947 and 1948?

By Mr. OBrien: I make the same objection.

By the Witness:

A. I can't answer that from here. I would say yes, from the looks of this.

By the Court: I will overrule the objection.

By the Witness:

A. It looks like it.

By Mr. Lockley:

Q. You said, as I recall, on cross examination—you stated that this was taxable in the year of accrual?

A. That's right.

Q. Would it also be taxable in the year in which payment was received?

A. No.

By Mr. Lockley: That is all.

By Mr. O'Brien: Will you read the last question and answer?

(Record read.)

By Mr. McConnell: I have no more questions.
2820 By Mr. Lockley: Thank you, Mr. Busby.
(Witness excused.)
By Mr. Lockley: Mr. Mammel.

2821 CHARLES J. MAMMEL, a witness herein called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Mr. Mammel, what is your full name?
A. Charles J. Mammel.
Q. And where do you live?
A. 7639 Colfax.
Q. And what is your occupation?
A. United States Internal Revenue agent.
Q. And how long have you been so employed?
A. Thirty-three years and eight months.
Q. And are you a certified public accountant?
A. I am.
Q. And will you please tell us what is your education.
A. My education, after the grade schools, was mostly in night schools from 1905 to 1926. I received sixteen high school credits in attendance at Y.M.C.A. and the Chicago Preparatory School.

I studied bookkeeping, accounting, economics, busi-
2822 ness, commercial and real estate law at the Bryant Stratton Business College, the Y.M.C.A. College, the Walton School of Commerce.

I attended the Armour Institute of Technology where I studied chemistry and engineering—chemistry and electricity, which I think they designated as chemical engineering and electrical engineering, and higher mathematics through calculus.

I had courses in the Treasury Department, mainly on consolidated income tax and excess profits tax and on evidence.

Q. And as a part of your duties in the Bureau of Internal Revenue are you required to examine income tax returns and audit books?
A. Yes.
Q. Do you compute taxes?
A. Yes.

Q. Determine net income?

A. Yes.

Q. Now, as part of your official duties were you assigned to examine the returns of The Shotwell Manufacturing Company for the years 1945 and 1946?

A. Yes, sir.

2823 Q. Did you compare the records of The Shotwell Manufacturing Company with the income tax and excess profits tax returns for those years?

A. I did.

Q. Were the income tax returns and the records in agreement?

A. They were.

Q. Now, have you been present in the court room throughout the course of this trial?

A. I have.

Q. Have you heard all the testimony?

A. I have.

Q. And have you examined all of the exhibits in evidence?

A. I have.

Q. Now, have you computed from the exhibits in evidence and the testimony you have heard what was the amount of premium payments made during 1945 by the Eatsum Food Products Company, sole proprietorship and partnership, to The Shotwell Manufacturing Company?

A. I have.

Q. And what was that amount?

A. One hundred—

2824 By Mr. Kirby: I object to that on the grounds that it is based upon an assumption that the matters are facts. It is not a hypothetical question, and it is not in the form which I assume is required. It is a flat statement, supposedly, of the fact, which I don't understand an expert is permitted to give. He can make certain assumptions, certain hypothetical assumptions, but I don't believe he can go beyond that. This does go beyond it and I object to it.

By the Court: You mean that counsel should preface his statement by stating to the witness that assuming that the testimony is true, that upon that assumption whether or not he is able to state the amount of the so-called premium payments, is that what you have in mind?

By Mr. Kirby: That is one of the things. He certainly should do that.

And then, of course, since there is some contradictory testimony in evidence we should know which of the testimony he is assuming is true and which he is assuming is false.

2825 By the Court: Well, I think we should know just what testimony he is taking into consideration when he gives his summary as to the amount of so-called over ceiling payments.

By Mr. Lockley:

Q. Mr. Mammel, do you have work sheets that you have prepared from the exhibits and testimony?

A. I have.

By the Court: Of course, it is understood in making his statement that he is proceeding on the assumption that it is testimony which he relies on that it is true.

By Mr. McConnell: If the Court please, I have never heard of a witness, an expert, testifying from contradictory testimony.

Now, ordinarily there is no dispute in the evidence in one side of the case, but here we have Government witnesses who are contradicting each other on payments which were made.

By the Court: Well, let's find out what testimony he is taking into consideration.

By Mr. Lockley:

2826 Q. With respect to the year 1945, Mr. Mammel, will you tell us the exhibits that you examined, and the testimony that you took into consideration in determining the receipts by The Shotwell Manufacturing Company in excess of the amounts shown on the Shotwell records?

A. Well, I took in Exhibits 27, 28, 40, 40-B—

By the Court: 40 what?

By the Witness: 40-B and 40-D, for Dan.

By Mr. O'Brien: B for boy?

By the Witness: D for Dan.

By the Witness:

A. —43, 45, 48, 55.

And in the partnership an amount of $5,542.00 and $30,000.00—

By the Court: Wait a minute, now.

By Mr. Lockley:

Q. Let's see, that is Exhibit 55-A, B, and C, I believe, Mr. Mammel? Or—

A. I am not sure what that is, I didn't put that down. And 63 for the thirty-six thousand and something. That makes a total of—

By the Court: Wait a minute now. I am not fol-
2827 lowing you. You ended with Exhibit 55, and then you made some statement regarding figures. What other exhibits are you taking into consideration?

By the Witness: And 63.

By the Court: Yes.

By Mr. Lockley:

Q. 63-A is the $30,000.

A. Is that it, 63-A?

By Mr. O'Brien: After Exhibit 55, the only exhibits mentioned are 63 and 63-A, is that correct?

By the Witness: That is right.

By Mr. Lockley: And 55-A, B, and C.

By Mr. O'Brien: Also 55-A, B, and C. Mr. Mammel didn't mention them, but Mr. Lockley says they are in there.

By the Court: 55-A, B, and C.

By Mr. Lockley:

Q. A, B, and C with respect to $5,542.00?

A. That's right.

By Mr. Kirby: I object to that on the ground that there was contradictory testimony in the record specifically as to a number of those exhibits.

2828 By the Court: Let's get it straight, so that I know what exhibits you are talking about. You are mentioning one and then Mr. Mammel doesn't mention it, and I am not clear. Will you go over it again?

2829 By Mr. Lockley:

Q. There is Exhibit 55, you said, Mr. Mammel, for $20,000.00.

A. Yes, with the $20,000.00—

By the Court: Let's forget the amounts. Let's get the exhibits, then you can talk about amounts.

By Mr. Lockley:

Q. Then 55-A, B and C?

A. That's right.

Q. And the No. 63?

A. Yes.

Q. Then 63-A?

A. That is correct.

Q. Now, what was the amount you arrived at?

A. $177,146.23.

By Mr. Kirby: The Court will recall that I had a pending objection which was based upon the fact that there is contradiction in the Government's evidence as to the payments mentioned in those exhibits, and I object to the use of such a summary prepared from contradictory evidence.

By the Court: Well, I don't know what contra-
2830 dictory evidence you are now referring to.

By Mr. Kirby: Well, for example, there is a $30,000.00 payment there which supposedly came out of a corn box, and we produced the corn box sheets, and we asked him to find where he got the thirty thousand and he couldn't. That is one.

By Mr. McConnell: I can think of another.

By Mr. Lockley: I don't believe you will find that is in evidence.

By Mr. McConnell: The forty-nine thousand in '46 which the Government's own witness, Graflund, denied ever receiving, when Mr. Lubben said he paid it to him.

By the Court: We are talking about '45 now. Let's not get beyond the year the witness is talking about.

By Mr. O'Brien: Well, on '45 there was a payment of $10,000.00 mentioned by Mr. Heitmann. Have you got that included in there?

By the Witness: Well, all of these here were testified to by Lubben as having been paid.

2831 By Mr. Lockley:

Q. Does that include a $10,000.00 payment by Mr. Heitmann?

A. It does.

By Mr. O'Brien: I object to,—I point out, I shouldn't object to it, I mentioned it before—but I point out that that item, allegedly paid by Heitmann in 1945, is beyond the Government's bill of particulars in relation to their proof of '45 payments and also is contrary to the affidavit in the files here.

By the Witness: I beg your pardon. The Heitmann payment was in '46.

By Mr. O'Brien: Well, as to the amount, your Honor, and the time, Mr. Heitmann said he paid the money in 1945.

By Mr. Kirby: That's true.

By the Court: Now, Mr. McConnell, will you please let Mr. O'Brien talk.

By Mr. McConnell: I haven't said a word.

By Mr. Kirby: That's right. It is my fault, not Mr. McConnell's.

By the Court: I am sorry. Mr. Kirby.

2832 By Mr. Kirby: That's right.

By Mr. O'Brien: Unquestionably Mr. Heitmann's testimony is 1945. And these are merely illustrative to show your Honor that it is true that the items are in controversy.

By the Court: Well, the testimony may stand, subject to the objection, and subject to cross examination.

I think we will take our morning recess now. We will recess for ten minutes.

(Short recess.)

2833 By the Marshal: This Honorable Court will now resume its session.

By Mr. Lockley:

Q. Mr. Mammel, will you speak a little more slowly when you are giving numbers and will you also give the numbers in dollars and cents?

A. Do you want both?

Q. Clearing up the matter of the $10,000.00 payment in 1945 that Mr. O'Brien was talking about, have you included as an additional amount the $10,000.00 payment from Mr. Heitmann in your computation for 1945?

A. I have not.

Q. You have not?

A. No.

By Mr. McConnell: What do you mean additional? There is only one.

By the Witness: There was none in 1945.

By Mr. Lockley:

Q. Is the $10,000.00 payment from Mr. Heitmann included in your computation for 1948?

A. No.

By Mr. Kirby: If the Court please, if I may be indulged—I examined Mr. Heitmann particularly about

2834 that and I read to him from the transcript of his deposition in which he had said at one time the payment was made in December of 1946 and I asked him if that was so and he said it was not so. He insisted it was made in 1945 and I objected to the use of an expert who by himself put this in 1946.

By the Court: We don't know whether it was put in 1946 or not. Let us find out.

By Mr. Kirby: He just said it was put in 1946.

By the Court: We haven't come to 1946. When he makes reference to it, I will hear you. At least, we have determined now that the $10,000.00 payment made by Heitmann is not included in his 1945 computation.

By Mr. McConnell: I object to the whole statement. It is invading the province of the jury.

By the Court: Well, the jury will understand when Mr. Mammel is giving his testimony in summarizing the total amount of the alleged over-ceiling payments or pre-
2835 mium payments to Shotwell, he is assuming to summarize the total amount from certain exhibits and from the testimony given by Lubben and he is assuming that testimony to be true and assuming the verity of the exhibits to which he refers. He has stated that those exhibits and that testimony reflect that $177,046.23 was paid to Shotwell in 1945.

By Mr. Kirby: I would like to call to the Court's attention the case of Kirsch vs. United States, Court of Appeals Eighth Circuit in 1949, 174 F. 2d, 595, and I pass up to the Court a book which carries excerpts from it and I ask the Court to be good enough to read the language, particularly starting at the bottom of page 447 of this text, and particularly applicable to our objection here.

Your Honor may lean over and I will point the language that I am thinking of.

By the Court: Yes.

By Mr. Kirby: Here (indicating), where it refers to contradictory evidence.

2836 By the Court: Well, you can leave that with me, Mr. Kirby, and I will be glad to read it more thoroughly than I can now on the bench, but I will accept the testimony subject to your objection and if later on you want to make a motion to strike, you may do so.

By Mr. O'Brien: Your Honor, it isn't clear to me that you had finished your statement to the jury when Mr. Kirby stepped forward with that case. Had you finished your statement?

By the Court: Yes, and if counsel has anything to suggest that I should include in my statement to the jury, I will be glad to hear him.

By Mr. O'Brien: Well, I would think that in addition to that part of the statement which says that Mr. Mammel is assuming the verity of the exhibits and relying on Mr. Lubben's testimony and assuming it to be true, that it might be proper to point out to the jury that that is merely for the convenience of the Court and the jury
2837 and that the jury are the ultimate judges of the true facts.

By the Court: Yes.

By Mr. O'Brien: And in no way bound by what is stated.

By the Court: I will be glad to accept the suggestion of Mr. O'Brien, that Mr. Mammel's testimony is merely for the convenience of the Court and the jury and of course, it is for the jury to ultimately say where the truth may be in this case and whether Mr. Lubben has told the truth and whether or not these exhibits have verity. That is a question that the jury will have to determine. That is your function.

Mr. Mammel is merely offering his testimony, as I understand it, for the convenience of the Court and the jury so that we may be able to have an aid and assistance in obtaining the alleged net results as reflected by the exhibits and by this testimony as to the total amount of the alleged payments.

You may proceed.

2838 By Mr. Lockley:

Q. Now, with respect to the year 1945, Mr. Mammel, assuming that your computation was correct as to the amount of the overages as just testified by you, what was the amount of the net income received by The Shotwell Manufacturing Company in that year?

By Mr. Kirby: I object to that, if the Court please, on the ground that the hypothetical question which purports to touch on the net income must be complete in itself.

By the Court: Yes. I don't understand that question.

By Mr. Lockley: All right. I will pass on to 1946.

By the Court: I will sustain the objection.

By Mr. Lockley:

Q. Did your examination of the records of The Shotwell Manufacturing Company disclose the receipt of this additional amount of $177,146.23, that you have been testifying to?

A. No part of it is on the books of The Shotwell Manufacturing Company.

2839 Q. And did your examination of the 1945 income and excess profits returns reveal that that money was included in those returns?

A. No part of it is in the 1945 income and excess profits tax returns of The Shotwell Manufacturing Company.

Q. All right.

Now, with respect to the year 1946, assuming that the exhibits which are in evidence are true, and that the testimony of Mr. Lubben is also true, will you tell us what exhibits you took into consideration—or did you determine the additional amount received by the Shotwell Company in 1946?

A. I did.

Q. All right. And what exhibits did you take into consideration in making that computation?

A. Do you want the exhibits and amounts?

Q. Just give me the exhibit numbers, I think.

A. Exhibit 73, 92, 93, 13, 94, 95, 96, 97, Mrs. Krasne for $1,450.00.

By the Court: $1,450?

By the Witness: Yes. No exhibit on there. 99, 112, 120, 122, 124, 126, 133, 158, 158-A, 160, and the un-

2840 billed shipments, 146, 147, 148, 149, 151, 152, 155.

By Mr. Lockley:

Q. What was the amount determined by you?

By Mr. Kirby: I make precisely the same objection that I made earlier, and I could point out the discrepancies in proof, conflcits of the Government's own witnesses in 1946, as had in 1945.

The Court, I am sure, has the objection in mind.

By Mr. McConnell: I also make the same objection. It not only invades the province of the jury, but it invades the province of the Court in determining the matter of law.

The returns showing the receipts of the corporation—that is a matter of law which this witness presumes to determine in this testimony.

By the Court: I will overrule the objections. He may answer, subject to a motion to strike.

By the Witness:

A. In 1946, the overages without the unbilled 2841 shipments were $211,193.19. The unbilled shipments, $65,532.98, or a total of $276,726.17.

By Mr. Lockley:

Q. And from your examination of the books and records of The Shotwell Manufacturing Company for 1946, did you find any portion of that amount reported?

A. No part of that amount is in the Shotwell books and records.

Q. Was any part of that amount reported in the income tax return of The Shotwell Manufacturing Company for the year 1946?

A. No part of that amount is included in the income tax return of The Shotwell Manufacturing Company.

By Mr. Lockley: That is all.

By Mr. Kirby: I now move to strike the testimony of the witness with respect to his total for 1945 and for 1946, on the grounds which we have already assigned.

By Mr. McConnell: I join in that motion, but I would like to be heard at the end of the case, as I can argue on it before your Honor rules on it.

2842 By the Court: Very well. I will defer my ruling until after the examination, if you have any.

By Mr. O'Brien: I have none. I join in the motion, too.

2843 By Mr. Kirby:

Q. Mr. Mammel, am I correct in believing that in some instances you used—as to an exhibit you referred to a check to cash, some of the exhibits you referred to are checks to cash?

A. I used all the exhibits in evidence.

Q. And some of them are checks to cash?

A. Right.

Q. And in each case the checks to cash—did you assume the cash was handled by Lubben?

A. Well, I took into consideration all the testimony. Some of it was Lubben's and some other people as well. As a matter of fact, I think Lubben testified on most everything.

Q. I am sure he did, Mr. Mammel.

Now, did you find, Mr. Mammel, any receipt from anybody at Shotwell for this money that Lubben testified he gave?

A. I don't quite get that.
Q. Well, you referred to a number of exhibits.
A. Yes.
Q. Now, do those exhibits which you identified by number—did any of them include receipts from any-
2844 body at Shotwell for that money?
A. No.
Q. Now, what was the earliest exhibit you mentioned in 1945?
A. Well, let's see.
By the Court: The number or the date?
By Mr. Kirby:
Q. Well, I would like the number of the exhibit.
A. Well, the earliest exhibit is Exhibit 27 and it covered the first overages.
Q. Well, there was—
A. In the amount of $10,849.00.
Q. Did you include that in your total?
A. I did.
Q. Mr. Mammel, there was no such authorization slip for that, was there?
A. Well, I don't recall that. I didn't think it was necessary to look for those.
Q. Well, your have the reputation of being a very careful man for looking for things.
A. There are only a few in the record.
Q. That is what I was getting at. I don't mean to quarrel with you, but there were very few, is that right?
2845 A. I admit that.
Q. One of them that is missing—there isn't any for this check you mentioned in the amount of ten thousand dollars?
A. I don't recall.
Q. Is the next exhibit you talked about Exhibit No. 28?
A. That is right.
Q. That is just a check to cash, isn't it?
A. Yes, it is.
Q. There is no cash authorization slip to support that, is there?
A. I don't know.
Q. Well, could you refer to some of your memoranda to tell me?

A. Yes, I could, but I will have to get it from the tape.

Q. Oh, you are free to do that.

By Mr. Lockley: Well—

By the Court: Well, Mr. Lockley, if you remember, perhaps we can expedite matters and agree with Mr. Kirby.

By Mr. Lockley: I think we can agree that there is no cash authorization slip for that payment.

2846 By Mr. Kirby: All right.

By Mr. O'Brien: Also 27?

By Mr. Kirby: Also 27?

By Mr. Lockley: Yes. There is no cash authorization slip for 27.

By Mr. Kirby:

Q. And there is no recap sheet of any kind with respect to that Exhibit 28, that is that $6,183.00 check, is there?

A. No. You have got a complete set of books on it.

Q. The question with respect to the memoranda though, is that it doesn't exist?

A. No.

Q. I wondered, is there a memo or recap sheet, Mr. Mammel, with respect to the next item that you mentioned, Exhiibt 40?

A. You mean 40-B?

Q. Well, it is in that series.

A. Oh, 40, 40-B and 40-D are all together.

Q. Those have no memo or recap sheets in evidence with respect to them?

A. I don't recall that.

2847 By Mr. Lockley: They do have, Mr. Mammel.

By the Witness: They do have. I thought they did. I wasn't sure.

By Mr. Kirby: I am going to have to stop and argue with these boys.

By Mr. Kirby: I don't think there is a memo, is there?

By the Court: 40-A, I think they referred to.

By Mr. Lockley: Yes.

By the Court: Exhibit 40-A.

By Mr. Kirby: My wife has sharper ears than I have. I can hear Sam telling him there is a cash authorization

which is something else again. I asked him if there is a memo.

By Mr. Lockley: Yes, there is Exhibit 40-E.

By Mr. Kirby: Is that a memo?

By Mr. Lockley: Are you talking about the recap sheet?

By Mr. Kirby: Is that a recap sheet?

By Mr. Lockley: Yes.

2848 By Mr. Kirby: All right.

By Mr. Kirby:

Q. But, Exhibit 40-E, is that connected, in the way you handle it, Mr. Mammel, with the eighteen thousand and the fifteen thousand? You put them altogether?

A. I think those three go altogether on that one recap sheet.

Q. You heard Mr. Lubben testify here, of course?

A. Yes.

Q. Which one was the one that was the pump priming check to get chocolate started to him, do you remember?

A. I don't remember.

By Mr. Lockley: I object to that, if your Honor please. I don't believe there is any such characterization as pump priming check.

By Mr. Kirby:

Q. You remember the check, you remember his testimony in general, do you?

A. Well, I do, in general, yes.

Q. Do you remember that in 1945 he wanted to get some Cardinal chocolates which were a very desirable

2849 item and in order to start getting some he had to give some money.

Do you remember his telling that?

A. Just faintly.

Q. Now, which—and then, oh, do you remember on my cross examination my showing him he had had before that 60 tons of chocolates, do you remember that?

A. Well, I remember some figure.

Q. Which was the check which was the pump priming check to get the chocolates started?

By Mr. Lockley: I object again to the characterization.

By Mr. Kirby:

Q. Do you remember that?

By the Court: By "pump priming" I assume he means the check that was used to get the supply started from Shotwell?

By Mr. Kirby: To get it started, that is right.

By Mr. Kirby:

Q. Which one is this?

A. I don't know. It is in the record. I don't know.

2850 Q. Whichever one it is, you have assumed the validity of Lubben's testimony with respect to that?

A. What else could I do? I am not here to say that Lubben's testimony is correct or not. I am merely taking these figures from the record there and summarizing them. Isn't that right?

Q. You don't say to me that Lubben told the truth or that Lubben lied?

A. Well, I don't know.

By Mr. Kirby: Thank you.

Cross Examination by Mr. McConnell.

Q. You heard Mr. Lubben's testimony about dividing this money up into piles, didn't you?

A. I sure did.

By Mr. Lockley: Well, now, I object to that, your Honor. I believe they should restrict their cross examination to the matters which were gone into on direct examination.

By Mr. McConnell: Well, if you summarized it here as to other payments—

2851 By the Court: That was a preliminary question.

By Mr. McConnell: That is all it is.

By the Court: All right, Mr. McConnell.

By Mr. McConnell:

Q. Now, are you a lawyer?

A. I am not.

Q. You never studied law?

A. I just studied commercial business and real estate law.

Q. And you got that out of a night course, or what was the name of the place?

A. What was what?

Q. What was the school you went to, this commercial school?

A. Well, the Y.M.C.A.

Q. How long ago was that that you went to the Y.M.C.A.

A. I don't claim to be a lawyer.
Q. No?
A. No.
Q. You don't claim to have any knowledge of law, do you?
A. I have considerable knowledge of income tax
2852 law.
Q. Yes?
A. Yes.
Q. And you have never been—have you been authorized to practice law anywhere?
A. No, I am not a lawyer.
Q. Getting back to that original question, you said that you did hear this testimony about the three piles of money that Mr. Lubben testified to?
A. Correct, I did.
Q. Now are you assuming to tell us that that is a receipt to the corporation as a matter of law?
By Mr. Lockley: I object, your Honor. This witness is only testifying to computations.
By the Court: I will sustain the objection.
By Mr. McConnell: He is also assuming to say, what does the testimony mean so far as receipts to the corporation are concerned.
By the Court: He is assuming in his testimony that the mor y constituted receipts for Shotwell. Now, if there is a question of law about it, the Court will have to
2853 decide it, but not Mr. Mammel.
By Mr. McConnell: I just want to make it clear he is not determining that question.
By the Court: I don't think you need to worry about that.
By Mr. McConnell: All right.
By Mr. McConnell:
Q. You agree to that, too, you are not going to determine the question of law on that issue?
By Mr. Lockley: I object, your Honor.
By the Court: Oh, I think we may assume that.
By Mr. McConnell: All right. That's all.
By Mr. Lockley: Mr. O'Brien?
By Mr. O'Brien: No cross.
By Mr. Lockley: That's all, Mr. Mammel.
(Witness excused.)

WILLIAM M. RUGGABER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

2854 Q. Mr. Ruggaber, will you give us your name?
A. William M. Ruggaber, R-u-g-g-a-b-e-r.
Q. And where do you live?
A. I live in Deerfield, Illinois.
Q. Where are you employed?
A. I am in the chief counsel's office for the Bureau of Internal Revenue in Chicago.
Q. What is the nature of your employment there?
A. My job is technical adviser.
Q. What is a technical adviser?
A. He advises and assists in preparation, advises and assists attorneys in our office in the preparation of cases for trial.
Q. And in what respect?
A. I am responsible for the tax features.
2855 Q. You compute income taxes?
A. Correct, sir.
Q. How long have you been employed by the Bureau of Internal Revenue?
A. Thirty years this month.
Q. What has been the nature of your employment during that thirty years?
A. About 27 years I have been either at fraud investigation, or as a technical adviser.
Q. What was your education?
A. Grammar school, business college, the army, and then school again after the army, equivalent to the GI training, after World War II, at which time I took a special commercial course for veterans at the University of Wisconsin, majoring in accounting.
Q. Did you get a degree?
A. No, sir. A junior course did not give you a degree. I got a diploma.
Q. Are you an accountant?
A. So far as tax work is concerned, I am, sir. I am not a practicing accountant. I keep no books. I am prohibited from doing that by law.

Q. Have you computed income tax returns under
2856 income tax laws of the United States since your employment in the Bureau?

A. Yes.

Q. I show you Government's Exhibits 1, 1-A, and 2, which are the income and excess profits tax returns of The Shotwell Manufacturing Company for the year 1945, and the income tax return for the year 1946, respectively.

Will you examine those returns, please, and tell me whether The Shotwell Manufacturing Company was on a calendar year, or fiscal year basis?

A. They were on a calendar year basis.

Q. What was the basis on which their records were kept, cash or accrual?

A. Their statement here is accrual basis for the year 1945. The question is unanswered in the 1946 return.

Q. What was the amount of the income and declared value excess profits tax credit claimed for the year 1945?

A. Nine hundred thousand dollars.

Q. What was the gross receipts reported for 1945?

By the Court: Going back a bit, your answer of
2857 nine hundred thousand dollars, that was what, again?

By the Witness: Declared value excess profits credit which is ten percent of nine million.

By the Court: Say that again. Declared—

By the Witness: Declared value excess profits credit.

By the Court: 1945, and it was nine hundred thousand dollars?

By the Witness: Nine hundred thousand dollars, yes, sir.

By Mr. Lockley:

Q. What was the gross receipts reported from the manufacture and sale of candy for the year 1945?

A. Gross sales less return allowances, total $4,764,606.71.

Q. What is the cost of goods sold as claimed on the 1945 return?

$3,406,878.07.

Q. Did the Corporation have any other income other than the sale of candy?

A. Yes, sir.

2858 Q. How much?

A. Well, they had interest income of $799.92;

interest on Treasury notes, $2,975.50; net gain on sale of assets other than capital assets, $20,393.49, and then they had other income and it says, "Schedule attached"—$92,045.33.

Q. What is the other income on the schedule attached?

A. It consists of purchase discounts, salvage sales and miscellaneous in the small amount, that latter one.

Q. How much?

A. Miscellaneous is $213.09.

Q. What was the specific exemption claimed by the corporation for 1945?

A. Are you talking about income tax or excess profits tax?

Q. The excess profits.

A. The excess profits is—was—specific exemption is $10,000.

Q. What is the excess profits credit for 1945?

A. $57,153.23.

2859 Q. Now Mr. Ruggaber, assuming that a domestic corporation doing business in the city of Chicago and the state of Illinois during the calendar year 1945 whose regular annual accounting period was on the basis of the calendar year and whose records were kept on an accrual basis, which corporation claimed an amount of income and declared value excess profits tax credit for the year 1945 the sum of $900,000.00 and assuming that during the calendar year 1945 the corporation had gross receipts derived from the manufacture and sale of candies in the amount of $4,941,752.94 including over invoice cash receipts during the calendar year 1945 of $177,146.23 and assuming that the cost of goods sold amounted to $3,406,878.07 and assuming the corporation had other income totaling $116,114.24 including a net gain from the sale of assets subject to the provisions of Section 177-J of the Internal Revenue Code, amounting to $20,293.49 and assuming further that the corporation was entitled to deductions of $912,778.46 and further assuming that the corporation was entitled to a specific exemption of $10,000.00 and an excess profits credit of $57,153.23, can

2860 you determine the corporation's total declared value excess profits tax, normal tax, surtax and excess profits tax, for the year 1945?

A. I can.

Q. What would it be?

By Mr. Kirby: If the Court please, the integral part of the question is an increase in the gross receipts in the amount assumed by the witness Mammel, and we have a pending motion to strike to which I have called the Court's attention, to what I believe to be a well written expression of the law. That would, if resolved to sustain our motion to strike, defeat this question. This question has the same effect in it that we urged with respect to the Mammel computation and it really doubles the vice because he is now going to compute a tax on contradictory testimony.

Going to the next item of importance in the assumption, it is the question of cost of goods sold. The cost of
2861 goods sold item is assumed in the question to be precisely the same as shown on the return. That is to say, that the raw materials cost Shotwell not one penny more than shown by the return, but the proof is overwhelming that the raw materials did cost Shotwell, through cash payments of raw materials testified to by Government's witnesses, far beyond that. So, it is contradictory to the evidence in that respect and fatally so.

Then, your Honor, I make the further objection that at the time of 1945 there was a tax regulation, that you could make the taxpayer put on his books what he got above OPA prices, but if he paid out more than OPA prices to get materials to run his factory, he couldn't take a deduction for it. That later was defeated by the courts and abandoned after this indictment, incidentally by the Government as to policy.

But the test in that year is not the test under which the jury now hears the case and I make those specific ob-
2862 jections. I regret I wasn't able to follow it closer to make more, but that symbolizes the fact that this assumption, for a critical question of facts, is deeply controverted on their own proof and it invades the province of the jury and certainly is not binding upon the defendant Sullivan, in any event, because very much of the testimony has been specifically ruled to be not competent as to the defendant Sullivan and in no way could they frame a question to either Mr. Mammel or to this gentleman here which would obviate that effect.

By the Court: The objection is overruled.

By Mr. O'Brien: We make the same objection.

By Mr. McConnell: We make the same objection.

By the Court: The same ruling.

2863 By Mr. Lockley:

Q. What would the amount be?

By Mr. Kirby: I make the further objection that in all of the years that this matter has been pending, this company has never been told the amount of tax they owed.

By Mr. Lockley: I object to the argument.

By Mr. Kirby: And it is improper for such notification to be conveyed to these people and a bill rendered to them at the time of a criminal case. I object. They never had a bill.

By the Court: The objection is overruled.

By Mr. Lockley:

Q. Will you answer, Mr. Ruggaber?

A. The combined tax on that corrected sum of net income would be $520,069.88.

Q. And how much more is that than the total amount of tax reported on the original corporate tax return of the Shotwell Manufacturing Company and paid by that corporation for the year 1945?

2864 A. $149,430.93.

Q. Now, will you please examine the corporate income tax return for the year 1946, Government's Exhibit 2. Was that return prepared on the basis of the calendar year or fiscal year?

A. That it is.

Q. Is it the calendar year, Mr. Ruggaber?

A. Yes, sir.

Q. And I believe you previously stated that it does not indicate whether it was on the basis of cash or an accrual basis?

A. The question is unanswered on the blank.

By Mr. O'Brien: What was the answer?

(Answer read.)

By Mr. Lockley:

Q. What is the amount of gross receipts reported as derived from the manufacture and sale of candy?

A. I may have to correct something. I had the amended return in my hand. I am sorry. I had the wrong return. I think I will correct myself.

Q. All right. With reference to what question do you wish to correct yourself?

A. Accrual.

Q. It is on the accrual basis?

2865 A. On the original return, the question is answered correctly.

Q. What was the amount of the gross receipts from the sale and manufacture of candy reported for 1946?

A. After allowance for return and allowances, the gross receipts were $5,622,944.09.

Q. What is the cost of goods sold as shown on that return?

A. $3,449,910.40.

Q. Was there any other income reported?

A. Yes, sir.

Q. Other than from the sale of candy?

A. Interest on loans, notes or mortgages of $192.97. Interest on treasury bonds of $3,250.00. Net long term capital gains of $735.03. Other income of $67,062.89.

Q. What is the nature of the other income?

A. Purchase discounts, $54,544.15. Salvage sales $11,132.88. Miscellaneous, $1,385.86—$67,062.89.

Q. What are the deductions claimed on the return?

A. $1,041,357.40.

Q. Now, Mr. Ruggaber, assuming that a domestic corporation doing business in the city of Chicago and the state of Illinois during the calendar year 1946 whose

2866 regular accounting period was on the basis of a calendar year and whose records were kept on an accrual basis and had during the calendar year 1946 gross receipts derived from the manufacture and sale of candies in the amount of $5,899,670.26, including over invoice cash receipts and unbilled cash sales during the calendar year of 1946 of $276,726.17 and assuming that the cost of goods sold amounted to $3,449,910.40 and assuming the corporation had other income totaling $67,062.89, including a net gain on the sale of assets subject to provisions under Section 117J of the Internal Revenue Code in the amount of $735.03, assuming further that the corporation was entitled to deductions of $1,041,337.40, can you determine the corporation's total normal tax and surtax for the year 1946?

A. I can.

Q. What would it be?

2867 By Mr. Kirby: I object.

By Mr. McConnell: I make the same objection I made to the other.

By Mr. O'Brien: I object.

By Mr. Kirby: I make the same objection although the figures differ somewhat, but the principles are the same. I would like to inquire of Mr. Lockley, is the Government abandoning the corn syrup charge?

By Mr. Lockley: No, sir. That is included in the figure.

By Mr. Kirby: I object to the form of the question. I also object to the amounts that are being assumed are contrary to and do not accord with the bill of particulars furnished the defendants in this case. They widely vary and the form of the question is not proper.

By the Court: He may answer.

By Mr. O'Brien: I make the same objection.

By Mr. McConnell: Same objection on behalf of the corporation.

By the Court: The same ruling.

By Mr. Lockley:

2868 Q. What would it be?

A. The correct tax for the larger sum would be $562,168.92.

Q. And how much more is that than the total amount of tax reported on the original corporate income tax return of Shotwell Manufacturing Company and paid by that corporation for the year 1946?

A. $105,155.94.

By Mr. Lockley: That is all.

By Mr. Kirby: I move to strike the testimony of the witness on the grounds already stated.

By the Court: I will defer my ruling.

By Mr. O'Brien: I make the same motion.

By the Court: The same ruling.

Cross Examination by Mr. Kirby.

Q. Mr. Ruggaber, again like Mr. Mammel, you are not passing upon the truth of any of the testimony here?

A. I am not, sir.

Q. You don't purport to say whether Mr. Lubben told the truth or lied, do you?

2869 A. I am in no position to say that. I didn't hear Mr. Lubben.

Q. Now how much tax did the corporation pay on its 1945 return?

A. It paid combined taxes of $370,638.95.

Q. And it paid a tax of three hundred and seventy some odd thousand dollars in a year when its gross profits, according to the return, were how much?

A. The figure you asked me for was gross profits or gross income?

Q. Well, I would call it profit, but income may be the technical term.

A. Are you talking about receipts, sir, or are you—

Q. How much of what they made did the Government take? That is what I want to know.

A. Their gross sales were five million.

Q. Sure.

A. Cost of goods—

Q. Sure, sure.

A. They had a gross profit of two million.

Q. Gross, yes. How much did the company make in the year, according to the return? That is what I want.

2870 A. Their net profit was $1,202,000—I am sorry. I got it wrong.

Q. You are looking at the wrong one, the wrong year?

A. You are speaking of 1945, aren't you, sir?

By the Court: Yes.

By Mr. Kirby: Not all mistakes in connection with income tax handling is criminal.

By the Witness: He reported a net profit of $561,064.42.

By Mr. Kirby:

Q. So they made five hundred sixty thousand and they paid a tax of how much?

A. Three hundred seventy.

Q. Now in that year you have recomputed the tax and you say now the tax ought to be five twenty thousand?

A. The answer to the hypothetical question was if the income was increased by $177,146.23, resulting in a corrected net income of $738,210.65, the tax on that would be $520,069.88. That is all taxes, normal, surtax and excess profits, which expired that year.

2871 Q. You are not including a penalty or anything?

A. There is no penalty or interest in there.

2872 Q. So that would be five hundred and twenty thousand in tax for 1945?

A. Yes, sir.

Q. The year in which the company's return says it made five hundred and seventy thousand?

A. The company return says five hundred and sixty-one thousand dollars.

Q. All right. Now, Mr. Ruggaber, what would be the tax effect if the hypothetical question were changed so that the amount of increased receipts were balanced by an amount of increased payment out for materials? Would there be any difference in tax?

By Mr. Lockley: I object, your Honor, on the grounds that the question assumes facts not in evidence.

By the Court: Yes, I will sustain the objection.

By Mr. Kirby: If the Court please, we objected indeed to theirs as assuming facts not in evidence and they said it was hypothetical. I am trying to be just as hypothetical as they are and—

By the Court: I will sustain the objection.

2873 By Mr. Kirby:

Q. Would your answer, Mr. Ruggaber, be different if the cost of goods sold had been higher for 1945?

By Mr. Lockley: I object, your Honor, on the grounds that it assumes facts not in evidence.

By the Court: He may answer.

By the Witness:

A. Any change of any figure would change my tax, yes, sir.

By Mr. Kirby:

Q. Yes, and cost of goods sold that you mentioned, that includes what they had to pay for raw materials?

A. That is the amount the return shows as having been paid for merchandise which they sold.

Q. The expression "cost of goods sold", includes the cost of raw materials?

A. Yes, sir.

Q. So that if the cost of the raw materials were to be increased, the amount of the tax due in your hypothetical question would go down?

A. Yes, sir.

Q. And as the cost of the raw materials pur-

2874 chased went up, if it came to equal your increase in the gross receipts, there would be no tax due in your hypothetical question, isn't that right?

By Mr. Lockley: I object, your Honor, on the grounds that this is again assuming facts which are not in evidence.

By Mr. Kirby: I am only asking about his hypothetical question.

By the Court: He can answer.
By the Witness:
A. Correct, sir.
By Mr. Kirby:
Q. And the same thing would be true in 1946?
A. Yes, sir.
Q. Now, in 1945, and '46, were you in the Treasury Department?
A. Yes, sir.
Q. Were you familiar with the regulation with respect to one element of your hypothetical question, that is, what items may be put in under cost of goods sold; were you generally familiar with that?
A. Yes, sir.

By Mr. Lockley: I object, your Honor, it is beyond
2875 the scope of the direct examination.

By the Court: Yes, you are now outside of the scope of the direct. I will sustain the objection.
By Mr. Kirby:
Q. Did your regulations—I have to pose a specific question, your Honor—in 1945 and 1946 prohibit the taking of a deduction in the item, cost of goods sold, for any over the ceiling payments for raw materials; did your regulation so provide?
By Mr. Lockley: I object, your Honor.
By the Court: I will sustain the objection.
By Mr. Lockley: It is beyond the scope of the direct.
By Mr. Kirby:
Q. Do you know whether the regulation which you say you knew about in '45 and '46, with respect to what you could put on your tax return, as to cost of goods sold if over the ceiling payments were involved; do you know whether that has subsequently been abandoned?

By Mr. Lockley: I object, your Honor. It is be-
2876 yond the scope of the direct examination.

By the Court: Yes. The same ruling.
2877 By Mr. Kirby:
Q. As you are testifying on your hypothetical question, Mr. Ruggaber, are you assuming the state of the tax regulations as they existed then or the state of the tax regulations as they exist now, with respect to over-ceiling payments for raw materials?
By the Court: Obviously he must be basing his answer on the years in question. He is not assuming to determine tax in 1949 on the 1945 income.

By Mr. Kirby: Your Honor, I beg you to make him answer because he is not going to agree with you.

By the Court: I sustain the objection.

By Mr. Kirby: If the Court please,—

By the Court: There is no evidence before this witness that there were any payments made for goods sold in addition to that which appears on the income tax statement.

Obviously he is assuming to answer in accordance with the hypothetical question submitted to him by Mr. Lockley.

That is as far as he has gone.

2878 By Mr. Kirby: And I am inquiring whether in answering the hypothetical question he is assuming the state of the law and the regulations as they existed in the tax years or as they exist now. That is what I want to know.

By Mr. Lockley: If your Honor please, he is not assuming either one. He is merely answering my question as to the amounts.

By the Court: I don't know that regulations have anything to do with his answer.

By Mr. Kirby: He has to compute the tax some way, and he has to do it under the regulations, and I am merely trying to find out whether the regulations that he used for—

By the Court: Which regulations?

By Mr. Kirby: The Treasury regulations that he used with respect to answering his hypothetical question are the regulations as they exist today or the regulations as they existed in '45 and '46.

By the Court: All that this witness has done is as-

2879 suming that in 1945 there was an additional income of—

By Mr. Lockley: $177,146.00.

By the Court: —$177,000.00, as testified to by Mr. Mammel, and in 1946 there was an additional income of $276,726.17, and on that assumption he has recomputed the tax so as to determine what additional tax should have been paid by Shotwell in the event that Shotwell had received that additional income, isn't that right?

2880 By Mr. Kirby: That is correct, sir. And I am seeking to inquire whether in computing the taxes so computed, it is based on the regulations in '45 and '46, or the regulations as they exist today.

By the Court: Which regulations?

By Mr. Kirby: The Treasury regulations.

By the Court: Pertaining to what?

By Mr. Kirby: Well, specifically, the change has occurred with respect to this item, cost of goods sold.

By the Court: I don't think that that enters into this computation at all, and I will sustain the objection.

By Mr. Kirby: I am sure we are not in any disagreement on the items involved. You mean it is the regulation.

By Mr. Kirby:

Q. Mr. Ruggaber, in 1946, how much tax did the company pay?

A. $457,012.98.

By the Court: Will you say that figure again, please?

By the Witness: $457,012.98.

2881 By Mr. Kirby:

Q. So that in the two indictment years, the taxes that they paid were roughly $827,000.00, is that right?

A. That's right.

Cross Examination by Mr. O'Brien.

Q. Mr. Witness, did you take into consideration the testimony given in the Government's case that there were monies paid in the form of over ceiling payments for the acquisition of goods?

By the Court: Very obviously, Mr. O'Brien, he did not. It was not incorporated in the question.

By Mr. O'Brien: I understand that, your Honor.

By the Court: Then if you understand it, why ask it?

By Mr. O'Brien: Because I want him to state that on the record, and I want to call your Honor's attention to the fact that that undisputed evidence is in the record, and that therefore the question is properly involved

2882 with this witness, and it doesn't have to await our case.

By the Court: Well, I think it does.

By Mr. O'Brien: Well, I want to direct your Honor's attention expressly to that.

By the Court: I will sustain the objection.

By Mr. O'Brien: So that I assume even in the face of that express direction, if I were to address the same questions as Mr. Kirby did, as to whether the witness computed the tax according to present law, or according

to the 1945 or '46 law, those questions would be objected to and sustained?

By the Court: That is right.

By Mr. O'Brien: Right.

By Mr. McConnell: I would like to ask one question.

Cross Examination by Mr. McConnell.

Q. As I understand your testimony, all you are saying is that assuming the Government proves and sustains everything that Mr. Mammel assumes, and assuming that everything that counsel put in his question is established, and a verdict is reached by the jury which sustains that question, then you compute this much tax; isn't that all it is?

2883 A. What I am saying is, I am computing the taxes for the years which were in effect—which were law, not regulation, law, the rates.

The rates are different in '45 and '46. They are different today. We don't work on '45 and '46, on '53 law or rates. We have a rate for each and every year, a separate Act.

These are rates which were in effect under the Internal Revenue Code. I am not going into the merits of the income that has been added to here. I am just going into what the tax would be at the rates in effect for the year 1945, and what that tax would be at the rates which were in effect for the year 1946, and had a return been filed at that time showing such corrected income, this is what the tax would be.

2884 By Mr. McConnell: Now, I move to strike that, and ask that I have an answer to the question.

By the Court: I think the answer is fairly responsive. I will overrule the motion.

By Mr. McConnell:

Q. Were you assuming as true what counsel incorporated in his question in making your answer?

A. Am I assuming if that amount of money was given to me?

Q. Yes.

A. Correctly; yes, sir.

Q. That is just your assumption?

A. That is all.

Q. You are not purporting to say whether it is true or false?

A. I am not testifying to the accuracy of those figures. I am testifying to the computations I have made on those figures.

Q. You are not purporting to tell this jury that one witness testified truthfully, or another witness testified falsely, are you?

A. Gracious, no.

2885 Q. That is beyond your province?

A. That is right, sir.

By Mr. McConnell: That is all.

By Mr. Lockley: May we have our recess at this time?

By the Court: We will be in recess until two o'clock.

By the Marshal: The audience will remain standing while the Jury and the Judge leave the court room.

This Honorable Court will now recess until two o'clock this afternoon.

(Whereupon a recess was taken in the above-entitled cause until two o'clock p.m. of the same day, being Wednesday, September 30, 1953.)

2886

* * (Caption—No. 52 GR 143) * *

Chicago, Illinois,
Wednesday, September 30, 1953
2:00 o'clock P. M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley.

Mr. Vincent O'Brien
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in chambers, outside the hearing and presence of the jury:-

By Mr. Lockley: Your Honor will recall that Mr. O'Brien made a motion for the production of some
2887 affidavits the other day, I believe you signed an order, and I told you at that time that the government did not have an affidavit of any of the individuals named, one of whom was Ronald Stone.

That was my information from Agent Krane. Subsequently—this morning—I discussed it wtih Agent Twohig, and Mr. Twohig gave me a photostatic copy of an affidavit by Mr. Stone, which he took from Mr. Stone in connection with a case in which Mr. Stone himself is under indictment as a defendant in an income tax prosecution in New Jersey.

Now, that affidavit, to my knowledge, has no reference whatsoever to the Shotwell matter, but rather than take any risk on the matter I would prefer to submit it to the Court.

By the Court: Are you calling Stone as a witness?

By Mr. Lockley: No, sir.

By the Court: Well, then, I don't suppose that—

By Mr. O'Brien: He is subpoenaed, is he not, Mr. Lockley?

By Mr. Lockley: He is subpoenaed at the moment. I think he is.

I hope you realize that many of these subpoenas were put out before I got here and I am not even sure
2888 who all of our witnesses may be on rebuttal.

So I understand that he is under subpoena, isn't that correct?

By Mr. Calihan: I believe it is.

By the Court: Well, do you intend to call him in rebuttal?

By Mr. Lockley: Your Honor, I wish I could give you an answer. I frankly don't know. I have no present intention of doing so. It will depend entirely on what develops during the course of the defendants' case.

By the Court: I don't suppose that you are entitled to any statement unless Mr. Lockley will call—states that he will call the party as a witness, isn't that right?

By Mr. McConnell: He has him subpoenaed, your Honor. I don't know what he wants to subpoena him for.

By the Court: Even so, I don't know that it necessarily follows that he is going to call him as a witness. He is about to rest his case. You don't intend to call him in your case in chief?

By Mr. Lockley: No, sir.

By the Court: Well, we will cross that bridge when we come to it. You can let me know at a reasonable
2889 time before the defendants rest whether or not you intend to call Mr. Stone as a witness and, if so, then

I will look it over and determine whether or not it is a document that the defense should see. I think that arrangement should be satisfactory.

By Mr. Lockley: All right, sir. Thank you. I understand that the original of this is in the United States Attorney's office in New Jersay.

By Mr. McConnell: May I make a suggestion? A lot of these things that we are wasting the Court's time on, if you just take them up with us we would have a lot less trouble in this lawsuit. We would agree to half of this.

By Mr. Lockley: I think it is one of the things that the Court ought to know.

By Mr. McConnell: If you would just tell us about it. You don't have trouble getting along with us as lawyers.

By Mr. Lockley: I have no complaint, Mr. McConnell.

2890 (And thereupon the following further proceedings were had herein in the presence and hearing of the jury:)

Mr. Lockley: Mr. Fuller.

ROY E. FULLER, a witness called herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Mr. Fuller, will you please state your full name.

A. Roy E. Fuller.

Q. And where do you live?

A. Evanston, Illinois.

Q. And are you the official court reporter for this district?

A. I am one of the official court reporters for this district.

Q. And how long have you been a court reporter?

By Mr. O'Brien: Excuse me a moment, Mr. Lockley. I want to be heard on this matter, Judge.

By the Court: Yes, I assume that all counsel is 2891 going to do now is to identify a transcript. And Mr. O'Brien tells me he would like to be heard on some matters.

By Mr. Lockley: I will just ask the preliminary questions, your Honor.

By the Court: Yes, all right.
By Mr. Lockley:
Q. Do you understand the method of transcribing and taking down in shorthand?
A. I do, sir.
There was a pending question, I believe, Mr. Lockley, which I didn't have an opportunity to answer.
Q. Yes, sir.
A. As to how long I had been a court reporter.
Q. Yes.
A. Since 1910, actively in Chicago. And before that for a few years.
Q. And do you understand the method of transcribing and taking down in shorthand?
A. I do, sir.
Q. And I call your attention to proceedings taken before Judge Nordbye on November 12th and 13, 1952. Was this testimony taken down in shorthand under your supervision and direction?
2892 A. It was.
Q. And was the testimony recorded at the time it was given?
A. It was.
Q. And do you have a copy of that record with you?
A. I do.
Q. And is that an officially certified copy of the record?
A. It is.
Q. And is the record true and correct?
A. To the best of my knowledge and belief. I supervised the work and proof read the transcript as it was turned out and placed my certificate thereon.
Q. And did you compare it with the original shorthand notes?
A. It was compared by the individual reporters who worked under my immediate supervision and direction.
By Mr. Lockley: Thank you, sir.
My next question, your Honor, would be related directly to the material in that transcript.
2893 By the Court: Well, I gather that counsel don't raise any question as to the authenticity of the transcript to which Mr. Lockley has referred?
By Mr. O'Brien: That's right.
By Mr. Lockley: I believe we have a stipulation informally, between ourselves, on that, your Honor.

By the Court: Does that conclude your testimony, Mr. Lockley, when you have offered certain portions of the transcript?

By Mr. Lockley: Yes, your Honor.

By the Court: And then you are going to rest?

By Mr. Lockley: Yes, your Honor.

By the Court: And you, Mr. O'Brien, would like to be heard on the offer so that I may hear your position in the matter?

Mr. O'Brien: Yes, sir.

I make no point of the absence of the reporter who took it, or any of those things, I am sorry.

By the Court: Did I understand from you this noon hour, that the defense has certain motions that they would like to present to me in somewhat of an extended manner?

2894 By Mr. O'Brien: Yes, sir.

By the Court: And it would take some little time probably for me to hear both sides?

By Mr. O'Brien: Yes, your Honor.

By the Court: And your suggestion was—and I assume you had spoken to Mr. Lockley, I am sure you did—that it might be advisable to let the Jury go for the afternoon, so that we might utilize the remainder of the afternoon for the hearing of these motions?

By Mr. O'Brien: That's right.

By the Court: Well, then, Mr. Lockley, I will suggest that I hear Mr. O'Brien's motion with reference to the transcript this afternoon, and you will not rest then, of course, until I have heard the motion.

And that means that whatever additional testimony you have, if it is admissible, will only take a very few minutes, right?

By Mr. Lockley: Yes, sir. I don't think it will take long. It might take a half hour.

Ten minutes, perhaps.

By the Court: Are you referring to Mr. Cain's testimony, or are you referring to other testimony?

By Mr. Lockley: Mr. Cain's testimony only, your 2895 Honor.

By Mr. O'Brien: I suppose, subject to the Court's ruling, you would be through with Mr. Fuller after such part, if any, as the Court prescribed, would be put in evidence?

By the Court: Yes.

By Mr. O'Brien: And subject to that, counsel is resting?

By Mr. Lockley: That is correct. I would like to read it into evidence.

By the Court: I think we can excuse you now, Mr, Fuller.

By the Witness: Thank you, your Honor.

(Witness excused.)

2896 By the Court: Now, members of the jury, the government is about to rest, except for the reading into the record such portions of this transcript as I may admit. And I take it that will consume only a relatively short time.

And in view of the fact that there are certain motions that I should hear, I think that it would be advisable to let you go for the afternoon and report tomorrow morning at 10:00 o'clock.

I might say to you now that I realize this case is taking long, and I realize that it is somewhat irksome for a jury to sit in a case involving many books and records, and much of which may be not entirely clear to the jury at this time. You have been very patient and I appreciate it very much.

I do want you to understand that we have a job to do, all of us. Perhaps I am not any more happy sitting here than you are. I would like to be home myself. But we have a job to do and I do want to impress upon you the necessity of being patient and carrying on as you have done in the past, so that we may give this case the attention that it deserves.

I don't know how long the defense case will take. I am sure they will try to expedite it as much as they
2897 can. And while it may seem that during the trial we indulge in a certain amount of technicalities, in objections, and so forth, nevertheless, the lawsuit has to be tried according to certain rules and time has demonstrated that those rules are sound. And while it may seem somewhat irksome at times, being delayed by objections, in the long run it means that we are trying to arrive at the truth of the matter. And that is, of course, our total object here, to find out what the truth is.

I merely make that statement in the hope that when you

come back tomorrow morning, whatever testimony you are going to hear, that may be offered by the defense, that you will give to their testimony the same careful consideration that I am sure you have given to the government testimony.

So you won't need to wait around while we are arguing this motion. I am going to excuse you now till tomorrow morning at 10:00 o'clock.

The Court will take a recess now for five minutes.

(Recess taken.)

2898 (Thereupon the following proceedings were had and taken in open court, outside the presence and hearing of the jury:)

By the Court: Mr. Lockley, I think you might indicate the portions of the transcript that you have in mind so that Mr. O'Brien may be advised and may proceed accordingly.

By Mr. Lockley: On page 143 of the transcript where Mr. Cain was sworn and then on page 152, the last line, and all of page 153.

By Mr. O'Brien: Just a moment.

By Mr. Lockley: Are you getting it?

By Mr. O'Brien: 152, the last line?

By Mr. Lockley: Yes. All of 153 and 154 down to the question: "Did you tell him that there had been", not including that question.

Page 167, beginning with the question—or the question, rather, "What did you do about assembling the data?" 167. It is page 167, beginning with the question: "What did you do about assembling the data?"

By Mr. O'Brien: Beginning with that.

2899 By Mr. Lockley: Beginning with that. All of page 168 and the first paragraph of page 169.

Page 193 beginning at the top of the page, all of that page, all of page 194, all of page 195, and all of 196 and page 197 down to Mr. Ryan's remark "Mark this Government's Exhibit 1 for identification".

Page 212, the second question asked and the third question asked and the answers, and that is all.

Does your Honor desire any statement as to what that particular testimony relates to?

By the Court: Well, you may make the statements you think are pertinent.

2900 By Mr. Lockley: Well, the testimony at the outset, on page 152, is the questioning of Mr. Cain by Mr. O'Brien, his counsel, and it relates to a conversation with Mr. Busby and the $50,000 loan, and also —

By the Court: What page is that?

By Mr. Lockley: Page 152, and the following page 153, and page 154.

By the Court: Yes.

By Mr. Lockley: It relates to a conversation with Mr. Busby, at which time reference is made to the subject of over premium payments.

Page 167 relates to the assembling of information for the preparation of amended returns. That goes over to page 169.

Page 193 is cross examination by Mr. Ryan relating to the accuracy of the income tax returns for the corporation for the years 1945 and 1946, and the two questions on page 212 relate to whether Mr. Cain felt he owed a tax.

The Government's position, your Honor, is that these are judicial admissions made by the defendant voluntarily against interest. He was not compelled to testify. He was represented by counsel at the time.

2901 The cases of Cooper versus United States 5 Fed. 2nd 824,—

By the Court: Again, please?

By Mr. Lockley: Cooper versus United States 5 Fed. 2nd 824 holds that the voluntary admissions of a defendant at a preliminary hearing are properly admitted.

A similar case, U. S. versus Lindsly 7 Fed. 2nd 247 holds that the admissions of an affiant on motions to suppress evidence to show the defendant's ownership of wine and articles designated to manufacture it withheld not grounds for complaint.

A corrollary may be drawn likewise from the situation in Milton versus United States 110 Fed. 2d 556, and in that case a defendant voluntarily went on the witness stand in a former trial and made statements against interest, and the Court held that it is competent on a second trial to prove such statements as admissions voluntarily made and admissions made under such circumstances may be proven in the same manner for the same

reasons that admissions made out of court may be proven.

In the case of Wande versus United States, 158
2902 Fed. 2nd 651—

By the Court: 651?

By Mr. Lockley: 651, is another case which likewise holds that testimony at a previous trial was properly admitted where it had some tendency to establish the defendant's guilt.

And in United States versus Alderman, 107 Fed. 2d 497, it was even held that a plea of guilty before a Commissioner might be received in evidence.

2903 In United States vs. Johnson which I believe was a 7th Circuit case, 76 Fed. Sup. 554, affirmed 165 Fed. 2d, page 42. Certiorari denied, 330 United States 852 and a rehearing denied at 332 United States 834 held that grand jury testimony was admissible, to show the defendant's state of mind in the Government's case in chief and which would not be confined to impeachment as long as the testimony was voluntarily made.

The last case, United States vs. Yates—I guess it is Yates, 107 Fed. Sup. 408. It was held that on a new trial the defendant's testimony at the first trial might be read to the jury by the prosecution as either admissions by the defendant or under the reported testimony exception to the hearsay rule. It is the Government's position that the statements given in this particular case are admissions of a judicial nature which come within that exception, the reported testimony exception to the hearsay rule and that they might be used against him on the Government's case in chief without the necessity of using it as rebuttal evidence only.

By Mr. Kirby: Are you offering it against the defendant Sullivan or only against the defendant Cain?

2904 By Mr. Lockley: Well, those are only the defendant Cain's admissions. I would assume it is only admissible against the defendant Cain.

By Mr. Kirby: Thank you. I am sure it is correct. There may be more limitations but that one certainly exists.

By Mr. Lockley: I might state, though, that I believe it is admissible against the corporation since Mr. Cain was an officer of the corporation and president and the corporation can only act through its officers.

By Mr. McConnell: Then I would like to be heard.

By the Court: Well, let me hear Mr. O'Brien. I assume he wants to be heard.

By Mr. O'Brien: I have been trying to check the remaining pages, your Honor. If I could just take a minute to run through and note those, I could be more coherent about it.

By the Court: All right.

By Mr. Lockley: If your Honor please, I have the Klein case, if you desire to see it while you are waiting for counsel.

By the Court: You meant the Lindsly case and 2905 not the Klein case.

By Mr. Lockley: Yes. I am sorry, your Honor. That was U. S. vs. Lindsly, 7 Fed. 2d 247, yes.

Your Honor, while we are waiting for counsel may I make reference to one more case, which is Powers vs. the U. S., 223—U. S., at page 303. On page 313 the Court says,

> "The chief objection contended for in argument concerns the admission in the District Court of the testimony of the defendants before the Commissioner."

On page 14 it states:

> "In the present case it doesn't appear that the witness claimed his privilege or was ignorant of it, or that if he had known of it, would not have answered. Indeed, the record shows that his testimony was entirely voluntarily and understandingly given. Such testimony cannot be excluded when subsequently offered at his trial."

By the Court: I take it Mr. O'Brien is going to say, although I haven't heard from him yet, that in the event you are permitted to offer the purported transcript that you have referred to, he should be permitted to offer 2906 other portions which may be explanatory of that which you offer. Have your given consideration to that?

By Mr. Lockley: Yes, your Honor. I think they have a right to do that on their case.

By the Court: I don't know. That would not be the proper time to give it. That would be a self-serving offer. If it is admissible at all when offered by the defendant,

it is admissible only in your case, or the Government's case, in so far as it is explanatory of the portion which you offer. It couldn't be offered by the defendants as part of their case. I merely throw that out for your consideration. I assume that is what they have in mind.

By Mr. Lockley: Well, an explanation of our position then, your Honor, would be that the defendants would not be entitled to offer the testimony of any other witness other than Mr. Cain.

By the Court: My remarks referred only to—

By Mr. Lockley: Yes.

By the Court: —the subsequent portion of Mr. Cain's testimony which may be explanatory of the portion that you offer.

2907 By Mr. Lockley: Yes. As long as it relates to the material which we bring out on our direct case, I would think they would be entitled to bring out explanatory material, but not on any different subject-matter.

By Mr. O'Brien: If the Court please, as I see it, Judge, there are two things involved here. First is our objection or my objection to the use of the material at all, either in the part that is presented or in its entirety and only if that is ruled adversely to me, does the second question arise, and to whether the additional amount that I desire in on the same subject-matter—that is, Mr. Cain's testimony, and in that category, on the precise subject whether the additional amount that went in in that event, must be put in at this time by Mr. Lockley not either now or distinguished from my putting them in either now or later.

2908 Now, on the first point, the question as to their admissibility at all, in any part, I object, because notwithstanding the general rules to which your Honor's attention has been directed, it is my position that when a disclosure is claimed, and when there is a hearing on it, as was the situation here, all in an effort to suppress evidence furnished only in reliance on the sufficiency of that disclosure, and without any intimation from any Government Agent that the disclosure was not being accepted as sufficient, no such intimation at a time which would have been of any use to these people in enabling them to withhold information under claim of Constitutional rights, because on the record before you at the

time there was a little piece about Mr. Mammel's statement that after he was assigned to the case in February of 1949, he had a conversation with Mr. Cain in which he indicated that there was a possible criminal liability.

There is no testimony from Mr. Cain, no testimony from Mr. Lima, no testimony from any of the people who had been there from the summer of 1948, and down to the end of 1948, picking up these various papers.

2909 Now, the situation has not arisen in any case before the upper courts, nor do I find it in any of the district court reports.

But I say in that situation that we do not make such a motion for the suppression of evidence claimed to have been illegally taken, and claimed to have been taken, and sought to be used in violation of our Constitutional rights at this kind of peril.

There is no such decided case.

Now, on the second point, as to whether all of the material, or at least the established part that I have indicated must be put in by Mr. Lockley if he offers any at all, I refer your Honor to Section 2099 of Wigmore on Evidence. Third Edition. In the general part of that, which I will read first, as is always followed, then I will come to the specific part, it says:

2910 "It has already been moved that the idea of completeness involves not merely verbal precision, but entirety of parts. The second branch of the inquiry, therefore, is how far the principle of completeness requires the offering at the same time of all the parts of an oral utterance as a condition of offering any part of it. This inquiry conceives of an utterness as composed not simply of consecutive words, but of clauses and sentences forming connected parts of a single effort to express a general thought having various details. It is understood on all hands that the opponent may in any event afterwards put in the remainder, but the question here is whether the proponent must in the first instance put in all the parts or may select that part which serves his purpose. On this point there is a singular lack of judicial authority. While working out in fair detail the application of the principle of entirety to written utterances

2911 the courts have almost ignored its development in application to oral utterances. We are relegated for

information to the general spirit pervading their treatment of other aspects of the principle and are obliged to depend upon implied rather than an expressed rule."

2912 Now, after following these analogies which Mr. Wigmore mentions and having taken up, among other things, admissions, in the sense in which he defines them, and contracts, and notices, and dying declarations, he come to what to many is the separate category of testimony at former proceedings, as to which he says:

"The first consideration above noted is lacking since the cross examination often results in decided modifications of the direct examination. Nevertheless, many topics are often dealt with in a single testimony so that what is needed is only the part dealing with the particular topic on both the direct and the cross examination. The second and third considerations above also are often lacking. Accordingly, the fair rule and the one generally applied judicially is to require the witness to be able to state all the material parts of the testimony on that topic, both on direct and cross examination."

And he cites—he does not cite any case on that. But I do have, however, one case— 165 Fed., 48—the case
2913 really commences, Judge, on page 42, and it is United States vs. Johnson, from the Third Circuit. At page 48 the court says:

"Complaint is made concerning the admission of certain admissions made by appellants Greene and Memaloe. It is said that all of the grand jury minutes should have been given to the jury, if any were. No error was committed in this matter. What was given to the jury was consecutive testimony, not isolated excerpts of what someone said, pulled out of its context. There is no reason why the record should have been unduly cluttered with all the testimony before the grand jury. What was necessary and what the cases cited by the appellants require is that statements made are given sufficiently in their context so that the jury may have an accurate notion of what was said and under what circumstances."

By the Court: Well, how are you at all prejudiced

in the event the Court permits you to supplement any offer made by the Government?

2914 By Mr. O'Brien: I see your Honor's point, and conceiving of it—and I also noted what you observed to Mr. Lockley. And regarded in that way I can't see that that makes any difference, and would just as soon do it that way.

By the Court: Whether you read it or whether Mr. Lockley reads it, what difference is it; what difference is it, as far as the effect on the jury?

By Mr. O'Brien: But I object to the use of the material at all for the reasons which I first indicated, and I also want to say a little more on that.

I think that on the pages indicated by Mr. Lockley, pages 153—152 merely shows that Cain was sworn, so there would be no objection to that.

2915 By Mr. Lockley: Let me correct you, please, Mr. O'Brien. 143 is where Mr. Cain was sworn.

By Mr. O'Brien: I see.

By Mr. Lockley: 152 is just the beginning of a question.

By Mr. O'Brien: All right. Well, 143 is where he was sworn. But then 152 through 169—the pages mentioned by Mr. Lockley—he doesn't take them all in there, Judge, but everything from 152 down through 169, that he does take in, has no bearing on the question of intent as it is involved in this case.

The residue, 193 through part of 212, or such of the material comprehended between those numbers as Mr. Lockley referred to, does have something to do with the subject of intent.

Now, what I am trying to point out is that I think his offer, in so far as the intent—or intentional evasion issue in this case is concerned ought to be limited to the material that has to do with that subject, and it should be supplemented by the pages which have been omitted, and which I have marked, to fully take in that subject.

2916 If we are going beyond that, into the question that involves, let's say, admission of receipts, rather than the intent at the time of the tax return, then I think the only way we could balance it out would be to take the pages that I have marked, starting with 155, which he skipped, 156, 7, 8, 9, 60, 61, and part of—that is part of

61, part of 63, 3, 4, 5, 6, and 7. All of those Mr. Lockley skipped.

So what I have said in 155 through 160, in full, which Mr. Lockley skipped, and 161 to 167, as to part of each of those pages. That I would want in.

2917 And then I have got 174 to 177, which Mr. Lockley omitted, but which should be in. And I have got 191 and 192, which Mr. Lockley omitted and should be in.

Then I have the balance of page 197, which was omitted by Mr. Lockley. And I have really 198 to 203, inclusive, of which I want only part of 198 and part of 200, part of 201.

And then I have 206 through—no, 206, 208, 210, 211, and the balance of 212, which Mr. Lockley omitted.

Then I would have 213 and 215, each in part.

In other words, your Honor, if my general objection to the admissibility which I have made, and on which I continue to stand, if that be overruled and if Mr. Lockley reads the parts which he has suggested, then we would immediately want this remaining part in. And I do think that under these authorities that he ought to put it in. He ought to read the whole thing at that time and not break it up by reading this and having me stand up and read that. Although I can't say I care too much about it.

By the Court: Well, what have you to say about it, 2918 Mr. Lockley?

By Mr. Lockley: As to Mr. O'Brien's argument as to the admissibility of the testimony at all, as I understand it, he apparently claims that that testimony is privileged because it was given pursuant to a motion to suppress, on the theory that there had been a voluntary disclosure and that this evidence had been obtained from the defendants in violation of their constitutional rights, if I understood his argument correctly.

Well, when Mr. Cain took the stand, that was a calculated risk. He was not required to do so. He wasn't required to testify. He could have claimed his constitutional right to refuse to answer any questions, and when he failed to do so, why, it would seem unusual that anyone should ignore a record made in a court of law, under oath, and at the same time take into evidence, as we have been here for two weeks, the best recollection of the testimony

of witnsses as to what was said to them in the presence of the defendants.

2919 Certainly if an admission is any good at all, an admission made under oath in a court of law ought to be a good admission. And the fact that it was made in connection with a motion to suppress the evidence shouldn't alter its admissibility in any way.

Now, as to the second part of his argument, I have not had the opportunity to see exactly what the subject matter of the pages he refers to applies to. I assume that if they are material to the matters brought out by the Government on the direct or, I mean, at the time that I read such portions of the transcript as may be permitted, then he has a right to come back and read any other portion of the transcript that tends to explain it.

But I have to frankly admit it is a novel suggestion to me that the Government should have to put in part of the defense evidence, which would be in substance what it would be.

By the Court: Well, I don't think the Government is under an obligation to offer any portions of the Cain transcript which it contends is not an admission.

2920 Now, granted, if you had one sentence, or one statement, the Government couldn't take out a few words here and there and offer that. They would have to offer the entire sentence. They would have to offer the entire paragraph.

If a man, for instance, made a statement. It might take a whole page, one statement. It may well be that the continuity of it would be entirely broken, and a distorted effect would be given to certain words, if you plucked out a word here or there, or a sentence here or there.

And I think that is the situation to which Wigmore referred. But where you have testimony by questions and answers, I am quite clear that the one who offers that testimony has a right to offer such portions as the offeror thinks constitutes an admission and hence competent evidence.

And I am reasonably clear that there is no good reason why testimony given on a motion to suppress should not be considered an admission, in so far as it may be an admission. And I am also quite clear that the defend-

2921 dant would have the right to offer such additional portions of the transcript as may be germane, or ex-

planatory of—or material which should be read in connection with the so-called admission.

Now, obviously Mr. O'Brien has referred to a large part of this transcript. It may be that you haven't had sufficient time to analyze it and to determine whether or not you have any objection to the materiality of much that he has referred to.

By Mr. O'Brien: I think, Judge, it is substantially within the same—it is encompassed within the same area. It may be. I haven't any notion one way or the other.

It starts at 152 and runs to 212, omitting certain parts. I start with 155 and run to 215, omitting certain parts.

By the Court: It may well be that Mr. Lockley has no objection.

By Mr. O'Brien: It is all the same ball of wax.

By the Court: I have merely indicated that he may want to check over the pages that you have referred to in order to determine whether or not he does have any objection to the relevancy, so to speak, of that portion 2922 of the transcript.

By Mr. Lockley: Is it the Court's wish that Mr. O'Brien and I attempt to agree on the portions of the transcript?

By the Court: It is my wish that you go over the portions to which Mr. O'Brien has referred and if you have any objection to it, take it up with Mr. O'Brien and see if you can't agree. And if you cannot agree then you will have to submit it to me for my determination.

By Mr. O'Brien: Maybe we could do it this way, if the reporter—if you would write up the pages that I referred to in addressing the Court, give Mr. Lockley a copy and then he will be guided in checking it.

2923 By the Court: Now, of course, we have the other question. You have already indicated that it is not offered with reference to the defendant Sullivan. There may be a question as to whether or not an admission by a corporate officer constitutes a binding or competent admission as to the corporation.

In other words, is it in pursuance or in furtherance of the business of the corporation, or is it purely a personal matter?

Isn't that something for you to consider, Mr. Lockley?

By Mr. McConnell: That is something I would like to argue, your Honor.

By the Court: I am anticipating probably what you had in mind. Mr. Lockley indicated that he thought it was competent as to the corporation. I am suggesting—and I assume that is what Mr. McConnell has in mind—that this is an admission by an officer not in pursuance of the business of the corporation of which he is an officer, but in a matter purely personal to him.

By Mr. Lockley: Well, if your Honor please, the bulk of the testimony which Mr. Cain gives relates to the corporate matters, and particularly the preparation of
2924 amended income tax returns.

By the Court: Well, you contend that the motion was not only made on behalf of Cain, but it was made on behalf of the corporation as well?

By Mr. Lockley: Well, yes, your Honor. It was made on behalf of the corporation and on behalf of all the defendants, for that matter, although only Mr. Cain took the stand.

By the Court: Well, Mr. McConnell, have you something to offer on that matter?

2925 By Mr. McConnell: If the Court please, I think I should state at the outset that the corporation which I represent here is shown by these proofs as an independent entity and not an alter ego of Mr. Cain, Mr. Sullivan or anybody else. It stands here in this court as an individual defendant charged with a criminal act and it is receiving an independent defense in these proceedings and my position with reference to this evidence is this:

I did not propound the evidence that we have in the case down to date. I didn't sponsor it and I didn't bring it but the government has brought evidence into this case from which it appears at this stage of the proceedings that payments were made by Mr. Lubben to Mr. Huebner to be divided up between three individuals. True, they were corporate officers. True, they were dealing with corporate affairs in a sense but no authority has ever been shown by the corporation to put that business into black market operations. No authority has been shown, express or implied. The invoices which were made out were perfectly legal invoices and what happened, if it happened, happened over and above the legal obligations which were created by the corporation in the handling of its af-
2926 fairs in a perfectly legal, ordinary way in giving invoices for the price of its goods sold.

Now, we reach a state, where, as I say, I haven't sponsored this evidence. It is brought in and it is here, but it is claimed and it is charged that Mr. Cain and Mr. Huebner, and with Mr. Cain I think there was further evidence offered, I believe, of some jewelry purchase sent to him individually where he is, by this evidence mixed up in individual transactions which undoubtedly—

By the Court: You were attempting to have me receive evidence this morning with reference to the offset of all these premium payments being received by the corporation on account of payments made for raw materials.

By Mr. McConnell: Not at all. Just the ones that were received within a very, very limited period and that's all. That's all we were talking about. We were talking about nothing else.

By the Court: I haven't been clear as to the position of the defense. You didn't make a statement. I think that has caused some confusion.

By Mr. McConnell: We have never had a chance to make a proper statement yet.

By the Court: I had the impression that your posi-
2927 tion was that all of the Lubben over-ceiling payments were utilized by the corporation for raw materials.

By Mr. McConnell: Not at all. Not at all. Our position is that No. 1: That this corporation never received over-ceiing payments outside of the very particular period which I was very careful to eliminate—to accentuate, and to confine with these witnesses, namely, October, 1945, to July or August of 1946. That is the limit, we say, of any payments being received at all by this corporation.

2928 Now, there are hundreds of thousands of dollars here which Mr. Lubben assigns to the individual profits of the defendants, the individual defendants. That is the Government's evidence. That is not my evidence. That is the Government's evidence.

That is the setting up and the context in which this matter comes up. Here we have a defendant who is charged with that, charged with that on Lubben's books apparently, and he, Lockley, takes the position that the corporation should be charged with the admissions that an officer makes, where he himself is under a tax, where his interest is adverse to that of his corporation.

Now, it is perfectly true that an officer with no adverse relation to his corporation can make admissions which

bind its principals, but he is in a fiduciary relationship to that corporation, he is sitting there as a man duty bound to represent its interests, and nobody else's interests, and for that reason, and for that reason alone, his admissions are binding upon a corporation because of his duty to a corporation.

But, where it appears, and where it happens as in
2929 this case, by the Government's own evidence, that the man has an adverse interest different and distinct from that of the corporation which he represents, then that law does not apply and the law is clear on that. There isn't any authority to the contrary. I have got the cases on it.

By the Court: Has the Government offered any evidence that any money received by The Shotwell Manufacturing Company was used for the purchase of raw materials?

By Mr. McConnell: The Government offered witnesses on cross examination who admitted that in that particular period, in that limited period,—and Graflund was one. He said he got money and he went out for corn. He testified about going over to Dr. Doe to make corn payments. Roeser was doing that, too. He admitted it was being paid for corn during that limited period of time.

That is what the case breaks down into now, up to this date. Of course, we haven't had an opening statement. I never had a chance to advise the Court or the Jury on my position in this case.

By the Court: Mr. O'Brien told me he waived it.
2930 I assume he spoke for all of the counsel. He is the only one that made that statement with reference to the opening statement.

By Mr. McConnell: I understood him to say it was reserved until the close of the Government's case.

By the Court: Well, put it that way if you want to.

By Mr. McConnell: I didn't understand we were waiving it.

By the Court: You have a right to make an opening statement at that time.

By Mr. O'Brien: Yes.

By the Court. You have a right to make it.

By Mr. McConnell: I am not complaining about it. I am just saying I have never had a chance up to this time. I am not blaming anybody for it. I am just ex-

plaining why your Honor does not have my position, because I have never stated it.

By the Court: All right.

2931 By Mr. McConnell: Now, it is well established as a principle of corporate, or agency, law that the statement of an officer or agent is not binding on the corporation where the officer or agent has an interest adverse to that of the corporation. 2 Fletcher, Cyclopedia of Corporations, Section 734.

Kenner versus City National Bank 46 S.W. 2d 46, 51-52 (Tenn. 1932).

In this case, one Haun, the cashier of a bank padded a list of receipts to cover some defalcations. Somebody outside attempted to use that as admission against the bank. The Court said:

> "In the case before us, it is obvious that Haun padded this list of notes to conceal his defalcations. Such list of notes, therefore, was a self-serving declaration on the part of Haun to hide his fraud, and there would be no justification for holding defendant bank bound by an admission of this nature."

The case of Wheeler versus Home Savings and State Bank, 188 Ill. 34, 39 (1900).

In this case, one Singer was general manager of a 2932 corporation which owned warehouse receipts for a substantial amount of whiskey. Singer was in debt to the defendant bank. When the bank pressed for payment, Singer stated that he had loaned money to the corporation and that he would take the warehouse receipts in payment and in turn pledge them to secure his loan.

In due course, Singer appeared with the receipts and told the defendant bank that he had received them in satisfaction of a debt owed him by the corporation. Later the plaintiff, as assignee of the corporation, sued to recover the receipt. Held, that the corporation and its assignee were not bound by Singer's representations that the corporation had conveyed the receipts to him. Said the Court:

> "Singer was dealing with the bank in his own interest, and not as the officer or agent of the company. The bank could not, therefore, treat his representations so made in his own interest and against the interest of the company as the representations of the company."

There are a lot of other cases—Moores versus Citi-
2933 zens' National Bank of Piqua, 111 U.S. 156 (1884); Germania Safety-Vault and Trust Co. versus Boynton, 71 Fed. 797 6th Cir. 1896); Manhattan Life Insurance Co. versus Forty-Second and G. St. Ferry R. Co., 34 N.E. 776, 777 (1893); State Savings Bank of Ionia versus Montgomery, 85 N.W. 879 (Mich. 1901); Dixie Industrial Co. versus Bank of Wetumka, 92 So. 786, 788 Ala. 1922.
2934 I have some other cases in my other brief. The point I make is perfectly clear. Here is a man who has his own interest to protect. His interests are absolutely different and distinct from those of the corporation. He is making admissions on all moneys which the proof showed or will show were not received. He makes them for some reason of his own in those proceedings and to bind the corporation, it seems to me, is a violation of the rules of evidence. Where you are binding a principal by an agents' interest who is trying to protect himself, the corporation had no independent representation there.

By the Court: The admissions he allegedly makes in the testimony are to the fact that all of the moneys he received were turned over to the corporation and the corporation used the moneys to furnish raw materials.

By Mr. McConnell: I know, but that is the admission he makes. That is what I say.

By the Court: There is nothing adverse in the so-called admissions.

My Mr. McConnell: There isn't if he has an interest in putting that money in the corporation as against
2935 himself. He hasn't there. He certainly has a most adverse interest in the world in that situation and that is what the proof tends to show here up to this time—that he got the money and put it in his pocket. That is what the Government has been trying to prove here.

I say, I did not sponsor that proof. It came in by the Government and there it is. I am representing the corporation. They are seeking to bind me with an agent or an officer who is making the statement adverse to the corporation, in the sense that it puts receipts in the corporation's hands, but their proof shows it went into his pocket. If that isn't adverse, I don't know how it could be adverse. That is the present state of the record.

I submit, on that showing that we are not bound by Mr. Cain's admissions. We are an independent entity. We are entitled to have the protection of our own situation against admissions made by fiduciaries which helped him and not us. I submit that this admission, that this evi-
dence, is not admissible against this corporation.
2936 By Mr. Lockley: Well, your Honor, it seems al-
most too obvious to require mention that a corporation cannot act by itself but only through its officers. The officers here were the officers in control, both from a practical point of view and from the stockholding point of view. They handled all of the details of the business. It was testified to by various witnesses on the stand.

Now, I see no adverse interest between the individual defendants and the corporation. The indictment charges all of them collectively with attempting to defeat and evade the corporate tax. Now, if the corporation received money which it didn't report on its income tax return and they were partly responsible for that failure to report, why, then both they and the corporation—they acting for the corporation—are guilty of attempting to evade the tax by filing that false return.

Now, the Government offered no evidence whatsoever of any payments having been made out by the corporation for any raw materials. Some such testimony was brought
out on cross examination. You will recall that Mr.
2937 Graflund stated that he took some money down.
He didn't know how much. Mr. Roeser stated that he took some money—he thought it was money, to Dr. Doe. He didn't know for sure it was money. He took a package down there and he assumed it was money.

Now, that is the extent of the so-called payments which have been brought out to date.

By Mr. O'Brien: Don't forget Mrs. Morrill's testimony.

By Mr. Lockley: I do forget what Mrs. Morrill's testimony was.

By Mr. McConnell: She said she paid it all out on corn for raw materials.

By Mr. Lockley: There is some statement by Mrs. Morrill but we have yet, in any event, to get any times, places, dates, names or amounts and what record there was kept was destroyed at the instruction of Mr. Cain himself after the investigation had begun, as Mr. Graflund here testified the other day.

Now on cross examination it was brought out that there was a shortage of raw materials and that that
2938 shortage of raw materials was affecting the corporate business so that the defendants went into the black market in order to buy raw materials.

Well, if this was money which went into the defendants' pockets, why were they spending it out as a part of the corporate business so that they could continue the corporate operations? Why did they go out and buy raw materials for the corporation if this wasn't part of the corporate business? It is an inconsistent position, your Honor.

2939 I think Mr. McConnell takes the position that the corporation admits it received certain moneys between October, we will say, of 1945 and January, 1946, and that was the only money the corporation received and that money was all utilized for the purpose of buying raw materials. He contended any other amount they received went into the corporate funds.

By Mr. Lockley: Well, that is the first time Mr. McConnell has made such a statement and I am glad to hear that that much, at least, is now being conceded, but I would like to point out further with respect to the activities of the individual defendants and their relationship to the corporation, that they caused this additional money to be kept off the corporate books, the regular books and records. They are the ones who caused a record to be kept of it. It was kept by the corporate employees. They caused the money to be kept in the corporate safe and in the corporate safe deposit box down town.

Now, it seems a fair interpretation that the officers of the company would not be so utilizing the premises and the employees of the corporation unless they were
2940 engaged, at least in part, in corporate business. It may be that a fair interpretation with respect to all of this money is that the corporation received a part and that the defendants received the balance.

I don't think that is something impossible to ascertain, but what the defendants received individually is of no significance here. The question was, was it corporate income and was it reported on the books and records of the company and in its income tax returns, and it is the Government's position it was corporate income. I think the admissions that they have now given tend to support that position.

By the Court: Well, I take it, from what you said, Mr. Lockley, it is the Government's position that any admissions made by Mr. Cain and this other witness to which you refer are admissible and competent not only as to Cain but also as to the corporation, is that right?

By Mr. Lockley: Yes, your Honor.

By the Court: I will reserve my ruling on that until I have determined just what portions of the transcript will be received after I am informed as to the results
2941 of the conference you have with Mr. O'Brien.

Now, then, what other motions are there? I think it might be understood that while you are proceeding somewhat informally, that with these motions, they may be heard by the Court with the same force and effect as though made after the Government had formally rested. We are utilizing the afternoon for this purpose, even though you may have some additional testimony.

By Mr. Lockley: That is satisfactory with the Government.

By Mr. O'Brien: It is agreeable with us, Judge. It is our understanding that the only residue of evidence is what may go in from this book.

By the Court: That is right.

By Mr. Lockley: That is correct.

By Mr. Kirby: The first matter that I want to take up is to make a motion to strike certain of the testimony of Mr. Lubben.

I am referring to testimony at pages 601 to 605. That testimony was the testimony which was given one day and he came back on the next day and said that he wanted to change it. He said that he had invoked divine guidance and that he had been mistaken the day before. He
2942 expressed, as a general conclusion, as to the nature of his conversation when he came back this next day, but I call the Court's attention to the fact that the testimony as originally given was that he had in February of 1946 three checks and that he went to Harold Sullivan's office to talk abou. those three checks with the names cut out.

2943 When he came back the next day he changed his testimony and said that it didn't have anything to do with those cashed in February, that it was later, in September and October in connection with his delay in paying his bills about which he talked to Mr. Sullivan.

The Court will recall that we have several times asked one or another here, "Wasn't there a default in Mr. Lubben's paying his bills toward the end of 1946?" And we said, "Were they finally paid?" And we had gone over to the ledger. That is an entirely different subject the question of his defaulting payment in September and October, a wholly different subject than the subject of those checks.

Therefore, when Mr. Lubben did make it plain it was a completely different subject and all of that, when he came back again, just so the record is plain, I now move to strike in its entirety the conversation which he himself abandoned with respect to those three checks, and which is contained at pages 601 to 605 of the transcript.

By Mr. Lockley: Well, if your Honor please, the testimony at page 601 and 605 of the transcript, I be-
2944 lieve that that relates to the change of his testimony, or was that his original testimony?

By Mr. Kirby: It is the testimony that he abandoned that I now want to be abandoned from the record. This is the original testimony that I am moving to strike.

By Mr. Lockley: I see.

By Mr. Kirby: I am not moving to strike what he said the next day.

By Mr. Lockley: Well, I believe that the only portion of that which should be stricken is the part he subsequently corrected, and that was with relation to the date of the conversation.

By Mr. Kirby: The entire subject matter was different, your Honor.

The first conversation was the three checks with the holes in them. That was in February. And when he came back, he said that wasn't what he was talking about at all.

For instance, at page 603 he said:

"Answer: And, sir,—well, he didn't want to accept the check."

He is talking about the checks and so on.

Then you will recall he said he had gone to Mr. Huebner with the check, and Huebner said to go and talk to
2945 Cain about the checks, and Cain said to go down and see Sullivan, and so he went down and saw Sullivan about the checks.

When he came back the next day and he changed his story, and he volunteered—"I am trying to clean the record up"--

By the Court: What did he say?

By Mr. Lockley: Page 755.

By Mr. Kirby: 753.

"Your Honor, I would like to correct a little testimony that I gave yesterday, and I feel that I am in error in the—"

and so on.

And then he goes down and says:

"Yesterday when Mr.—when the prosecution here gave me three checks on which the names were cut out, I remember the transaction as giving the checks to Mr. Huebner, and I thought that was the time I had gone to see Mr. Cain and Mr. Sullivan, but that wasn't the time, sir. I went to see him on another time, but it wasn't in regard to those checks, around February 19th, it wasn't at that time, sir.

"I did go, however, to see Mr. Cain and Mr. Sullivan
2946 on another date. The exact date I don't remember, but I went there, to their offices."

And then Mr. McConnell interposed:

"Did I understand you to say that these conversations with Mr. Cain and Mr. Sullivan did not take place as you testified to?"

And then:

"By the Witness: Sir, the conversation—the conversation I had with Sullivan did take place, but it did not take place on that day. The conversation with Byron Cain was a conversation where I went, and I believe it was respecting sole payments, where I was bringing the cash money home, and it was not with reference to the checks."

And then Mr. Lockley asked:

"Question: Did I understand then that you actually had the conversations?

"Answer: Oh, yes, I had the conversation and I had the conversation with Mr. Sullivan, and I had a conversation with Mr. Cain.

"Question: But you were in error as to the time?

"Answer: Yes, sir."

2947 Then he says later on:

"Sir, I spoke to him, but it wasn't at the time"—he is talking about Sullivan now—"but it wasn't at the time of the three checks, at the time we had these checks come back, or the money wouldn't be taken in checks."

He is eliminating that subject that the money wouldn't be taken in by checks.

"The checks were returned to me by Mr. Huebner."

2948 And then Mr. Lockley asked:

"Q. Has anything transpired since you were on the stand yesterday that more nearly refreshes your recollection as to what the time of those meetings was?

"A. Yes, sir. To the best of my recollection it was some time around September or October of 1946, and I believe, sir—I remember, sir, that it was—there was a time when we were having a little difficulty getting up the payments, the cash payments in time, and that is the time, to the best of my recollection that I talked to Mr. Huebner and Mr. Sullivan.

"Q. Is your testimony changed in any respect other than the conversation instead of taking place I believe you earlier said, around February, that it took place later in the year?

"A. Later in the year, sir, but it wasn't in regard to the checks. The checks, I remember Mr. Huebner came and gave me the checks back and said that they decided they didn't want to take them.

"Q. Well, have you arrived at this more refreshed
2949 recollection just through your own mental processes, or have you had something that you have seen that helps to refresh your recollection?

"A. Sir, I have seen nothing, but each day and each night I ask for divine guidance to remember as correctly as I possibly can.

"This happened back in 1946 and I am trying very hard and I don't want to say anything that is not true. I am doing the very best I possibly can.

"Q. Now, is there anything else that you have testified to that you wish to change in any respect?"

And so on.

In other words, my position to the Court is that the subject matter is so completely changed that what is left in the whole record should be stricken.

By Mr. Lockley: Are you through, Mr. Kirby?

By Mr. Kirby: On that point, yes.

By Mr. Lockley: With respect to that, your Honor, I agree with Mr. Kirby, that that portion of the testimony which relates to the date of the meeting and
2950 the reference to the checks should be stricken. I don't know that we entirely agree as to the pages of the transcript that he desires stricken.

By Mr Kirby: Well, the portion that relates to the checks is between 601 and 605.

By Mr. Lockley: Well, I object to striking the portion on page 604. Well, at the bottom of page 603 I asked:

"Q. Was there any conversation?"

And on page 604 the answer was given:

"A. Mr. Sullivan asked me, when I talked to him, how I was keeping any record of my cash payments and was I marking this on my book—I mean, what was I doing."

"Q. And what did you tell him?

"A. I said, 'No, sir; we were selling merchandise for cash,' and we were getting the cash payments and giving it to him.

"He said, 'Are you sure this is not appearing on your books any place?'

"I said, 'No, Mr. Sullivan, it is not.'"

And then I said:

"Was that a true answer?"

He said, "No, sir, it was not because had I told"—
2951 And then Mr. Kirby objected and then he was asked:

"Q. Will you proceed with the conversation?"

And he said:

"Sir, so—he said, 'Well, Dave, you know how it is. You have a place in New Jersey, a farm in New Jersey. This money I have been using in my farm.'

"And if I recall correctly that day he told me—he said, 'I am getting a new driveway,' or something, 'put in.'

"And he said, 'That is the only way I can do it today, with the tax situations the way they are.'"

Now, that portion of the testimony beginning at page 603 and proceeding to page 605 does not relate to the three checks. It related to the conversation which Mr. Lubben subsequently testified he had but that he had in the later part of the year rather than in February as he had first believed.

2952 By Mr. Kirby: Well, it is a completely different conversation he said took place. He has the general expression that the same things were said but you can't, by a general expression that they were alike, say that they were alike. That is why I move to strike it.

By the Court: The motion is denied.

By Mr. Kirby: And now, your Honor, at the conclusion of the government's case I hand up a motion of Harold Sullivan for acquittal. Would your Honor like me to proceed with my argument about that now or shall we take a short recess?

By the Court: Well, I can stay a bit longer.

By Mr. Kirby: All right. You will recall that in April of 1953 when we were up in Minneapolis with Mr. Cunningham, Mr. Cunningham made this estimate of the case with respect to Harold Sullivan: He said, "And I might say this, your Honor, and I don't suppose I am telling the defendants a thing, facts that they don't know, but without Lubben's testimony, the evidence in so far as one of these defendants is concerned is practically nonexistent."

Now, save for that one matter, confused as it is and which I felt should be a subject for a motion to strike to eliminate as much confusion as possible—save for

2953 that one matter, there is no competent evidence in this record with respect to this defendant Sullivan or his guilt of this charge at all.

First, I am going to address myself to what I conceived to be and what I am sure the Court knows to be the proper rules on a motion for acquittal under Rule 29(a).

The rule specifically says:

> "The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

In the Encyclopedia of Federal Procedure they speak of that rule and they say:

"A jury cannot find the defendant guilty unless it can and does reasonably determine that the facts exclude every other hypothesis than that of guilt, and unless there is substantial evidence of such facts, the jury cannot reasonably so determine, and the Court
2954 should order a judgment of acquittal. Nor can a jury render a verdict of guilty where the only reasonable conclusion it can make is that the evidence is as consistent with innocence as guilt, and in such a case, a motion for acquittal properly lies."

2955 Even before that rule, Judge Sanborn in the Isbell case, 227 Federal, 288, spoke on the practice of granting defendant's motion and he said:

"At the close of the evidence in every trial by jury the question of law, not whether the weight of the evidence sustains the claims of the plaintiff or the defendant, but whether or not there is any substantial evidence to sustain the claim of the plaintiff unnecessarily and unavoidably arises and the duty rests upon the trial court to direct a verdict for the defendant if there is no such evidence."

Then with respect to the criminal case in front of the Court he said:

"It was essential to his lawful conviction that there should be proof beyond a reasonable doubt that he was knowingly taking"—

and this was liquor—

"into the Indian Territory. There is a legal presumption that he was innocent until he was proven to
2956 be guilty beyond a reasonable doubt. Evidence of facts that are as consistent of innocence as guilt is insufficient to sustain a conviction unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt. It is the duty of the trial judge to instruct the jury to return a verdict for the accused and where all the substantial evidence is inconsistent with innocence as of guilt, it is the duty of the Appellate Court to reverse a judgment against him."

In this Circuit they said, in Ex Parte U. S. where Judge Stone up in Madison had, at the close of the gov-

ernment's case, directed out certain of the defendants and the matter was appealed—as a matter of fact, they took Judge Stone all the way to the Supreme Court to undo what he did and it was sustained in every court, but in the Seventh Circuit, they said in 101 F. 2d, 870:

"There has been no encroachment on the proper province of the jury. The essence of legal power is to take the case away from the jury where there
2957 is an insufficiency of evidence to sustain the conviction. The court has inherent power to invoke these procedural aids in its effort to administer criminal justice."

In Wright vs. U.S. in the Eighth Circuit, 227 Federal 855, the Court said:

"The burden was upon the government to make this proof and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused."

Now, in Nocola vs. United States, an income tax, at 72 F. 2d, 780, the Court said, speaking of one of the defendants:

"Unless there is substantial evidence of fact which exclude every other hypothesis than that of guilt, it is the duty of the trial court to instruct the jury
2958 to return a verdict for the accused."

The same ruling is passed in Circuit—in the 1952 case, a tax case, United States vs. Yeoman-Henderson, 193 F. 2d, 867.

2959 Now, another tax case is Yoffe versus United States 153 Fed. 2nd 570:

"Unless there is substantial evidence of facts which exclude every other hypothesis than that of guilt, it is the duty of the trial court to instruct the jury to render a verdict for the accused, and where all the substantial evidence is as consistent with innocence as it is with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction."

Now, the Courts have said repeatedly in prosecutions under this 145 B of the Income Tax Law that one of the

things which must be proven is a willful, personal, individual intent to defraud the Government of its tax, and the leading case is the Supreme Court case in U. S. versus Murdock 290 U.S. 389. They say, speaking of the word "willfully" that is used in this sense of the statute under which Mr. Sullivan is being prosecuted:

> "But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely."

2960 In Lurdling versus the United States, 179 F. 2nd 419, another income tax case, they speak of the facts under which the prosecution is here being brought, and they say:

> "Such filing"—that is, of a tax return—"is unlawful, however, only if made willfully, with knowledge of the falseness and with intent to evade taxes. There is no presumption that may be drawn from the act itself—both knowledge and willfulness must be established by independent proof."

So far, does it go in the case of a corporation where an attempt is made to fasten liability upon an officer, and I will say here to the Court that Harold Sullivan became a vice president of this company on the first of July of 1946. He was not a vice president of this company in the year 1945 at all. The Government introduced the corporate minutes. They show the election of officers both for 1945 and 1946. They are in evidence. There isn't the slightest question about it. He was not vice president of the corporation at the time, in 1945, at the time the 1945 return was signed and filed at all.

2961 But, sir, to go along to this case now in Florida, United States versus A. L. Anderson. It is in Volumn 15, American Federal Tax Reports, page 822.

2962 There an attorney connected with this corporation signed the return himself, but he made a defense on a motion in front of the trial Judge that there was no competent proof in front of the Grand Jury directly showing that he had signed and filed such a return, and knowing personally of its falsity, and they did that extraordinary thing they opened the Grand Jury minutes and quashed the indictment against the man because there had not been proof of his personal knowledge of the wrong.

It said that the defendant was secretary. He was a lawyer, this man of the corporation, and had signed a tentative tax return for the corporation showing a probable final tax and so on. And the bookkeeper testified that he talked to the man. The bookeeper said he took the return over to him, and he had him sign it, and he knew it was going to be final. And then it said:

"There is no other evidence that the Court can discover in the record which remotely tends to charge Mr. Anderson with the falsity of this tax return, and the Court was of the opinion that the indictment
2963 was returned without sufficient evidence before the Grand Jury to justify the return of such indictment, and solely upon this ground granted the motion to quash the indictment."

Speaking of corporate officers, let me say briefly—let me briefly make a reference to the case, or the decisions with reference to them.

In Fletcher Cyclopedia, it says:

"The general rule is that where the grand charge involves guilty knowledge, or criminal intent—"and we have just seen that that is the essence on the decision on 145-B of the Internal Revenue Code—it is essential to the criminal liability of an officer of the corporation that he actually and personally do the act which constitutes the offense, or that the acts be done by his direction or permission.

"A corporate officer without regard to his position is ordinarily not criminally liable for corporate acts performed by other officers or agents of the corporation."

On the Phelps and Dodge case, in 139 Fed. 2d 393, it says:

2964 "The ordinary doctrine is that the Director merely by reason of his office is not personally liable for the acts of his corporation. He must be shown to have personally voted for or otherwise participated in them."

In U. S. versus Korland, in 44 Fed. the Court says:

"The principle that I have in mind is there is no criminal responsibility of a principal for the act of his agent unless the principal knowingly and inten-

tionally had been advised or encouraged the criminal acts committed by the agent."

2965 The rule is generally stated in Corpus Juris Secundum, Volume 19 at 363, as to corporate officers, and they say:

"They are ordinarily not criminally liable for a corporate act performed by others or agents and at least where the crime charged involves guilty knowledge or criminal intent it is essential to criminal liability on his part that he actually and personally do the acts which constitute the offense or that they be done by his direction or participation."

In American Jurisprudence, under Corporations—13 American Jurisprudence at Section 1100, they say:

"An officer of a corporation no matter how great his responsibility is not, as a general rule, criminally liable for the acts of the corporation performed through other officers and agents who are not acting under his direction."

Now, the Supreme Court in discussing what is meant by substantial evidence, has laid down the rule, that 2966 appears the first time in Consolidated Edison case, in 305, U.S. 197, where the Court says:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Having in mind what some of those cases have said, it will only take me a second to cover the entire record with respect to the proof as to the defendant, Sullivan.

At page 317 Mrs. Morrill identified Sullivan physically.

At page 319 she said he didn't spend much time at the plant.

Mr. Lubben took the stand and at page 417 he identified Harold Sullivan physically.

At page 493 and 500 and 502 he said he sent flowers to Mrs. Sullivan, and that he had gone to dinner with the Sullivans, with the Cains, with the Berrys, with the Hankermyers and a number of other people.

The next mention—and the only mention of a conversation of Harold Sullivan by Lubben is this one at 2967 page 601, which has been called to your attention a short time ago, in which he said that he had these three

checks, and he went to see Harold Sullivan, he talked to Harold Sullivan about it, and then he came back and said that that had not happened, that it was many months later and about a different subject that he was there.

The next reference to Harold Sullivan in the record by anyone appears in the testimony of Roeser, the comptroller of the company, and one of the signers of the tax return, who said he had never talked about the matter of either the over-payments, the unbilled payments, the income tax or anything with Sullivan.

The next witness was Graflund, the secretary, and later the acting comptroller, who signed the returns. And Graflund said he had not talked to Sullivan about any of these payments, about this cash, about the returns or any such thing.

2968 The next thing that happened was Ericson. Led by Mr. Lockley he said that he assumed the persons who told him about unbilled shipments must have been the executives, and when asked who the executives were he said that the executives were Cain, Sullivan and Huebner, and that they met with him and with Lubben. Today on the stand he said he was simply making an assumption and that he had no knowledge that there was such a meeting. He assumed that there must have been. And when asked if he could testify that it did happen, he said, no.

The next reference, and the concluding reference in the entire record, because the Court certainly has ruled that these conversations that took place out of Sullivan's presence are not binding upon him, the next reference, and the only reference that remains is the testimony of Busby this morning, where Busby said that in 1948 when he came back after first learning of these over-ceiling problems and asked for a meeting with Cain that Sullivan came there. There is absolutely nothing in that meeting as to what Sullivan said or did not say. There is no participation at all.

2969 And let me call your attention to the case of United States vs. Cole, a District Court case which appears in 90 Fed. Sup. 147, and it says there—that is an income tax case.

By Mr. Lockley: That is an estate tax case.

By Mr. Kirby: Well, the property had been held in

an estate at one time, and there was a question whether it came out of the estate and went to this person or to that person. But the real question in issue was who was liable for the income tax on the stuff that came out of the estate. There was an estate involved, but it was an income tax case .

But what is said would be good law, I submit, and perfectly applicable to the Busby testimony. The Court said:

> "But we cannot base criminality solely upon something that was done after the return had been made, unless it is of a character to show conclusively the existence of the criminal purpose at the earlier date,"

citing United States vs. Renny Ice Cream Company, 16 Fed. 2d, 353-357.

2970 So that as to the Busby testimony, where he said that as he came to talk about the matter with Cain, Sullivan came there, too, in 1948.

2971 To that this rule applies.

That is not anything to base criminality on, because his hearing the story in '48 is not proof that he knew the story when the tax return was filed in early '46 and early '47. And as they said in this income tax case—I will read it again:

> "But we cannot base criminality solely upon something that was done after the return had been made, unless it is of a character to show conclusively the existence of the criminal purpose at the earlier date."

And certainly the Busby proof does not.

Now, I have recounted for the Court absolutely ever single mention in this transcript of Harold Sullivan, even including the identifications of him that were made by witnesses that said yes, he is sitting over there.

Heitmann, I guess I didn't mention. He identified him and said he was sitting over there. And after doing that, I want to refer again to the rule that is adopted in a tax case, Lawton vs. Commissioner of Internal Reve-

2972 nue, 164 F. 2d, 380, where they say, again from that Consolidated Edison case from the Supreme Court, with an approval:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reason-

able mind might accept as adequate to support a conclusion."

In the Appalachian Electric Power case, in 93 F. 2d, 985, they say:

"* * * substantial evidence is evidence furnishing a substantial basis of facts from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences."

2973 And there are many cases that say the same thing. The summary of them is given by a District Court case in 67 Fed. Sup. 397, which says:

"In the Federal Court substantial evidence rather than a mere scintilla is necessary.

Now, if the Court please, the record I have reviewed for you, and it comes down to this, that except for the changed testimony of Lubben on that one point, there isn't even a scintilla which says that Harold Sullivan knew, and that Harold Sullivan willfully and admittedly and with a malignant heart was trying to defeat the Government of its taxes, and that is the test applied by Section 145 B.

The words of Mr. Cunningham I repeat to you again. He said:

"Your Honor, and I don't suppose I am telling the defendants a thing, facts that they don't know, but without Lubben's testimony the evidence in so far as one of these defendants is concerned, is practically non-existent."

2974 Now then, we do have Lubben's testimony. Not five cents does he say he ever gave Harold Sullivan. The only time he ever mentioned there was anything to do with him, he got up on the stand, and the next day voluntarily asked to take it—and to take it out of there, and he admitted no such conversation about that subject, the cash payments ever took place.

Now, if the Court please, I know that counsel urge matters upon the Court each day of the Court's life, and I don't want the Court to—and I know the Court won't—think I have omitted a shred of evidence which exists

with respect to the defendant Harold Sullivan. You have everything, and I humbly beg your Honor to grant the motion of acquittal, because the Government must make its proof.

The Government came in knowing it practically had no case against Harold Sullivan. They were on notice before that if the proof existed, they should bring it in. They knew all along it didn't exist. And at this stage of the game, with no rancor toward Mr. Lockley at all—

By Mr. Lockley: Thank you, Mr. Kirby.

2975 By Mr. Kirby: —none at all. But I think it is the plain fact that they have not produced substantial evidence of the crime charged here, willful intent, and knowledge of intent on the part of the defendant Sullivan.

By Mr. Lockley: If the Court please, I am pleased that Mr. Kirby doesn't hold me personally responsible for all this.

2976 I may be presumptious, your Honor, to attempt to tell you what your duties are with respect to granting a judgment of acquittal at the close of the government's case, but I would like to quote very briefly from the Yeoman and Henderson case, which Mr. Kirby has already referred to, at 193 F. 2d, 867. And the rule is laid down there that:

> "When a motion for a judgment of acquittal is made the sole duty of the trial judge is to determine whether substantial evidence, taken in the light most favorable to the government, tends to show the defendant is guilty beyond a reasonable doubt."

Citing Bell vs. The United States, Fourth Circuit, 185 F. 2d, 302, at page 310.

> "The rule is well stated in Curley vs. U. S., Court of Appeals, D.C., 160 F. 2d, 229 at page 232, as follows:
>
> " 'The true rule, therefore, is that a trial judge, in passing upon a motion for a directed verdict of acquittal must determine whether upon the evidence,

2977 giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' "

forth relating Mr. Sullivan. There is the testimony of Mr. Lubben which I read just a moment ago and which relates to Mr. Sullivan's concern over whether Mr. Lubben was keeping any records of these cash transactions and which, I believe, Mr. Lubben stated that the meeting was occasioned by the fact that he was somewhat late in making his payments of the over-ceiling amounts.

There was the testimony of Mr. Ericson that Mr. Sullivan was one of the members present at the time that a decision was made that the words ABC would be used on the unbilled shipments rather than the name of the Shotwell Manufacturing Company.

And, of course, there was also the testimony of Mr. Busby this morning that Mr. Sullivan was present at the conference he had in Mr. Cain's home at the time he returned from New Jersey.

2978 There is also evidence, of course, that he was a vice president—and Mr. Kirby says in 1946. He was, however, a director during all of these years. And he was a substantial stockholder. And he was one of the officers in control of the company.

2979 Mr. Ericson and Mr. Graflund both stated that they would only move with the instructions of one of those three individuals.

Now, to be sure, there has been no actual delivery of money made into Mr. Sullivan's hands. But I don't conceive that as a necessary element of the Government's case. The question is whether that income should have been reported on the return of the corporation and whether Mr. Sullivan knew that it was not being reported. In other words, whether he knew that the corporation was receiving income which was not going on its income tax returns. If he did that and if he had any part in keeping that additional receipts off the books of the company from which the returns were prepared, then he was as responsible for filing or causing to be filed the corporate returns as if he had made them and signed them himself, in so far as the law is concerned. The fact that Mr. Busby did the preparation of the return is an immaterial matter. They—and I mean Mr. Sullivan and the other two defendants—caused the return to be filed incor-

2980 rectly by keeping these additional receipts off the books from which they knew that the returns would be prepared.

As to the wilfulness, I think it is axiomatic that it need not be proven by specific acts of evidence but that it may be inferred from all of the facts and circumstances in the case. There are so many cases on it, your Honor, that I had even failed to find any—to take the trouble to look any of them up.

In any event, it appears that the evidence considered in the light most favorable to the Government here, together with all the inferences that may be drawn, such as the inferences that there were three piles of money, and that there are three defendants who were in charge of the corporation, all of those inferences, together with the actual facts testified to are sufficient to warrant sending the case, as to Mr. Sullivan, to the jury for their verdict.

By Mr. Kirby: The Court specifically held that that testimony about the three piles of money was not binding and therefore not even competent. And I don't think Mr. Lockley can argue that.

Talking about the returns, the only two people that
2981 signed the returns that testified were Roeser and Graflund. And I don't think that an inference that he caused a false return can stand in the light of Mr. Graflund's and Mr. Roeser's flat testimony that they didn't discuss these matters or these cash payments, or return, or any part of it, with Sullivan.

There is an express negativing of that and the argument does not overcome that negativing, as it exists in the record here.

2982 He talks again about Ericson. Ericson I think completely said—he asked him a question on redirect, he got up and said, "Well, what was Mr. Sullivan there?"

He said, "Well, he was the vice president."

And he said, "Did he handle some of the affairs of the company?"

And he said, "Yes."

He said, "Well, Mr. Ericson, did you ever talk any of the affairs of the company over with him?"

And he said, "No."

I don't mean to deprecate Mr. Ericson, but he was down in the stock room, Judge, and that was an absolutely true answer when he said that he personally didn't handle anything with Harold Sullivan.

Now, I think it would be—having in mind that I have read conscientiously the cases that say the quantum of proof that must exist and that it must be substantial, and it must be inconsistent with anything except the theory that the government has proven its case against this man, namely, that he personally—not that he was one of the three, but that he personally, wilfully and
2983 maliciously and with a malignant purpose, intending to defeat the government of its revenue, did something. There is no proof of that at all. And to then say they will bottom their whole case on that abandoned testimony of Lubben proves, I think better than I can argue, that there is nothing but a scintilla and that they should not be permitted to go further when only a scintilla exists.

By the Court: Well, I will announce my ruling in the morning on the motion.

Are there any other motions to be made?

By Mr. O'Brien: Yes.

I had pending, if the Court please, a motion to strike Mr. Heitmann's testimony as to the $10.000.00 payment in 1945. That motion arose at page 1812 of the record—

By the Court: Well, I haven't been favored with a record. I have had to plod along with my own record.

I remember the testimony.

By Mr. O'Brien: Well, I have a copy of the record which, your Honor, may be available to the Court.

By the Court: You lawyers probably need it more than I do, I think. Later on, when I have to refresh some of my notes—I may have to have access to the transcript.

2984 By Mr. O'Brien: When I say that, Judge, I don't mean just this one. I mean the record in general. We will be perfectly happy to supply it.

What I mean now, if the Court please, at that time it wasn't wholly established that the Government had otherwise proved the full limit of its bill of particulars in respect of the year 1945.

By the Court: Well, it occurred to me, when you made your motion—supposing, however, that the jury find that some of these payments are not sustained, what about their right to utilize the so-called Heitmann payment? Your position is that if you accept the Heitmann pay-

ment, you exceed the amount disclosed in the bill of particulars; is that it?

By Mr. O'Brien: That is one point, yes, sir.

By the Court: Well, you are assuming that the jury will find that all of the so-called overage payments outside of the Heitmann payment will be sustained.

By Mr. Lockley: May I interrupt, your Honor?

By the Court: Yes.

By Mr. Lockley: The $10,000 Heitmann payment
2985 does not exceed the bill of particulars, according to the question that I asked of Mr. Mammel this morning. The amounts which I asked Mr. Mammel—the amounts which he testified to as income for the year 1945, are in exact agreement with the bill of particulars, and the $10,000 which Mr. Heitmann testified to is either included in the $30,000 lump sum payment, which was not evidenced by any check, or if it is not in there, why, the Government has simply not included it as an additional $10,000.

By Mr. O'Brien: Well, it is carried in the year 1946. I think Mr. Mammel said—

By Mr. Lockley: No, sir; it is not carried in either years, Mr. O'Brien.

By Mr. O'Brien: The point is that Mr. Heitmann testified to a ten thousand dollar payment, not a partial payment, ten thousand dollars, and already without that, they have the precise amount of the bill of particulars in their proof.

Now, I think that the reason behind the provision in the rules, for a bill of particulars, is to prevent just that. It may be that a District Judge, or Court, enforcing those rules, could compel them to state every item of their proof that would make up the total amount.

2986 By the Court: Let me ask you—I haven't seen the bill of particulars—

By Mr. O'Brien: Yes, sir.

By the Court: Do the amounts which Mr. Mammel testified to, as to the so-called over ceiling payments of 1945 and '46, exceed the totals disclosed by the bill of particulars?

By Mr. O'Brien: No, not what Mr. Mammel testified to, according to their present claim, but what Mr. Mammel testified to in respect of the year 1945 excludes any possibility of this additional $10,000.

By the Court: He said he hadn't included the so-called Heitmann ten thousand dollar payment.

By Mr. O'Brien: That's right. That's the first part. Now, the second point is, Judge—and I think that this is an overlapping point—as I said, Mr. Cunningham filed with the Court—and it is already of record here—an affidavit on which he granted the Government's last continuance, representing that during the year 1945 Mr. Lubben made 100 percent of the payments, and that in the year 1946, Mr. Lubben paid eighty-three point some percent of the amounts, and others paid the difference as against a total of $300,000.

2987 By the Court: May I interrupt?

By Mr. O'Brien: Yes, sir.

By the Court: I don't see that there is much purpose in spending a great deal of time on this Heitmann payment. I will deny your motion now with the right to renew it again at the close of the defendants' case. If your position then seems sound I will be willing to reconsider any temporary ruling that I now have made.

By Mr. Kirby: While you were talking about that memo question I did want to ask the Court whether we might see and have our accountants check the sheets which Mr. Mammel said he was referring to, showing the different payments in the exhibits.

It is really the only way we can check it. If we could look at the memorandum he referred to. And I think that is not an unusual request.

By Mr. Lockley: If you Honor please, though, the material that he referred to is in evidence. Certainly they were entitled to get it while he was on the stand. But it seems to me that their request comes somewhat late.

By the Court: It should have been requested at the time that Mr. Mammel was on the stand.

By Mr. Kirby: Well, it wouldn't be the first time
2988 I have been late asking for something, Judge. Do you think that is enough ground to turn me down?

By the Court: Well, I am listening to Mr. O'Brien now.

By Mr. Kirby: All right.

By Mr. O'Brien: At page 577 of the record—well, I am sorry, I can't direct you to the record page now, Judge. I have been misinformed about it. But there is

a check in evidence, offered by the government, in the sum of $36,148.00—rather there is a payment alleged of $36,148.00 which is related to an item on a bank statement under date of November 27, 1945, statement of the Manufacturers Trust Company.

Now, the record—when I find it—contains a general statement that that amount was paid. There is no testimony to connect that payment up with Shotwell or any one identified with Shotwell. And, consequently, I wanted to move to strike that statement that the amount was paid.

I say I don't want to dwell on it here, but I want to have all these things in the record at the one time.

Now, I have a broader motion to strike, which, in
2989 the interest of time, I would like to cover by the memorandum, which I now hand to the Court, because in the memorandum I state the precise testimony that we would like stricken, I state the testimony which we do not ask to be stricken, and then proceed with the discussion of the reasons.

I will give Mr. Lockley a copy.

I don't see that it adds anything, any assistance for me simply to read this, and present it at this time, your Honor. You are taking the one motion under advisement. It is late. I don't think we would want to interrupt the jury tomorrow, and if it is agreeable to the Court I would like to leave it with you in this form. Would that be agreeable, Judge?

By the Court: Yes.

2990 I was just reflecting on the suggestion that we might resume a little earlier tomorrow morning and dispose of some of these matters before the jury is called, and that would give Mr. Lockley a little time to look over your memorandum and see what statements he had to make in that regard.

By Mr. O'Brien: What time would your Honor direct?

By the Court: Well, how about nine o'clock?

By Mr. O'Brien: All right.

By Mr. McConnell: I have a motion that I want to make, too.

By Mr. O'Brien: Now, I have one more motion which I think I shall present in the same way. It is a motion for acquittal—this does not include Harold Sullivan who made a separate motion, but it is a motion for acquittal of the

remaining defendants as to Count 1. And I have a short memorandum in suport of that, giving a copy both of the motion and of the memorandum to Mr. Lockley.

I don't think I handed your Honor or Mr. Lockley the formal motion to strike.

(Document handed to the Court and counsel.)

2991 By Mr. O'Brien: And with that, if the Court please, I will yield to Mr. McConnell.

By Mr. McConnell: If the Court please, I have a written motion for acquittal for the corporation, which is presented under the rule that Mr. Kirby referred to.

I want to make this quite short, if I can. Generally speaking, it follows along the line of the previous motion that I made, or objection that I made with reference to the Cain testimony.

Apparently I have a genius for not stating my position clearly, and apparently Mr. Lockley thought I was making some admissions about what my admissions admit or don't admit on that case.

I have argued this case at this stage on the Government's proof, on what they have presented here, and what their proof has shown down to date. We haven't offered any evidence yet in this case and I haven't made any admissions that I know of with reference to anything in the case except that for the purposes of this motion I am taking the Government's proof as submitted as true, which I am bound to do, as a matter of law, anyway.

I not only take it as true, but as Mr. Lockley pointed 2992 out, with the inferences which go with it.

Now, briefly, my position on this is this: That when the Government produces a witness who testifies in a manner to show that the moneys which are the subject matter of the litigation are not received by a corporation, which is an individual defendant, but are received by the officers of that corporation as individuals and leaves no doubt about it, so far as his conversation with Huebner is concerned, conversation from which the inference of implications are plain and clear and anybody can understand, that it was intended by Lubben and understood by Lubben, and, according to Lubben, understood by Huebner that these premium payments which were made on behalf of Shotwell's goods were going to Mr. Huebner and someone else.

That conversation was not binding on individual defendants, but certainly was sufficient to show that Mr. Huebner was not dealing on behalf of the corporation, with reference to those moneys, according to the Government's own witness.

Now, your Honor will recall that I took Mr. Lubben, on his cross examination, over every single one of his
2993 payments and he said that every payment that he made —and an affidavit was referred to here by Government counsel—that one hundred per cent of the payments that were made were made by Mr. Lubben in 1945 and eighty-three per cent of the payments that were made in '46 were made by Lubben.

2994 I took him very carefully over his cross examination and he identified every single payment that he made as being made by him to Huebner and that Huebner piled up the money in three piles, skimmed off something for the horse races, and said, "This is for Byron, this is for Harold, and this is for myself."

Now, that testimony is not binding on the individual defendants, but, if true, this corporation had no representation at all, which wasn't adverse to it, in this transaction, from the beginning to the end. The independent stockholders, who are not charged with any crime, who are not charged with any fraud, who owned this company and its assets, to whom Huebner had a fiduciary relationship, to whom Lubben knew of a fiduciary relationship.

On that testimony, standing there on the Government's own statement, we have a conspiring together by Lubben and Huebner to deal with the merchandise, to deal with the assets of this corporation for their own benefit.

That isn't my contention. That isn't my evidence. That is the Government's evidence.

2995 And this man Lubben came in here and did everything he could to put this money in the hands of individuals as distinguished from this corporate entity. Now, if this were an alterego of these defendants the Court might very well say, and counsel here might very well say, "Oh, well, it is all the same thing. You look right through the corporation and you look right back to the same people that were getting the money."

If this division of money was three ways among three individual stockholders who owned equal and proportionate

amounts of the corporate stock, you could very well say that it is a dividend, a distribution.

Huebner had less than one per cent of the stock of this corporation. Such a contention is not even possible under the situation that presents itself here now on this record.

So far as 1945 is concerned we have every single payment made under those conditions by Mr. Lubben, according to the Government's own testimony, which it sponsors, which it brings forward here and says this Court should rely on.

2996 Now, what is the legal situation? We have two cases in this circuit dealing with this specific matter. United States against Chapman, 168 Fed. 2d 997.

By the Court: Again, please.

By Mr. McConnell: 168 Fed. 2d 997, certiorari denied. 335 U. S., 853, United States against Empire Packing Company, 7th Circuit, decided in 1949, 174 Fed. 2d, 16, certiorari denied; 337 U. S. 959—

By the Court: 174 Fed. 2d 763?

By Mr. McConnell: No. Pardon me. 174 Fed. 2d 16, certiorari denied by the Supreme Court.

2997 In that case the Empire Packing Company was a meat packer. Chapman was its president and owner of all its preferred and 50 per cent of its common stock. He was in complete charge of operations including selling and had final authority on all corporate matters. And during the periods involved he instructed certain employees to collect over-ceiling prices from customers. These payments were turned over to Chapman, and in one or more instances they were charged and collected by Chapman himself. None of them were reflected on Empire's books. Certain fraudulent substitutions of lower grades of meat for those having higher ceilings and subsidies did appear in the books, but without showing the falsity of grading, weights and quantities.

Sans, vice president and treasurer and office manager, who was kept in ignorance of these matters and who prepared subsidy claims against the government, certified for Empire to the observance of price ceilings and to the truth of false entries.

The first case was the indictment and conviction of Chapman for attempting to evade a large part of his indi-

vidual income tax by returning $90,124.00 gross income instead of $282,115.00 actual gross income.

2998 Among other defenses Chapman asserted that the excess income must be attributed to the corporation which sold the meat and not to himself, relying on CIR vs. Wilcox, 327 United States 404, and arguing that since the embezzled money belonged to the corporation and was not taxable to the embezzler, therefore it was taxable to its owner and not to him. But in affirming the conviction the court said at 1002:

"'Here there was no question but that the corporation received full payment for all meats sold by it and the additional income to appellant resulted from what was in effect a premium for such sales by the corporation."

Next, Empire and Chapman were indicted and convicted for filing the false subsidy claims and the treatment of this case had to do with the filing of false—it hasn't anything to do with the income tax return.

The other case is the Sherin case. That was a Tax Court case, 13 TC 221, decided in 1949. Berger, president, and Sherin were owners of Berger & Sherin, Inc. Berger was in charge of sales and unknown to Sherin arranged

2999 with their salesman Biehl to charge new customers over-ceiling prices in the form of brokerage commissions, to be divided between them ninety per cent and ten per cent. Berger and Biehl were never authoried by the corporation or Sherin to receive any amounts over contract sales price and the corporation's books did not reflect any excess prices. The matter first came to light through OPA inspectors, and Sherin remonstrated but dropped the matter for the good of the corporation. The issues were:

(1) Was Berger & Sherin, Inc., taxable on the excess prices, and was its failure to report them fraudulent? That is our question here.

(2) Was Berger's individual return fraudulent in failing to report the excess prices?

Answering the second question yes,—namely that Berger's individual return was fraudulent—and the first question no, the Tax Court said, page 228 and 9:

"The respondent argues that Berger's activities in respect to the Biehl agreements and the performance

3000 by the corporation were in his capacity as president of the corporation and that, therefore, the corporation

is responsible for such actions on his part for the tax consequences thereof. We do not agree with the respondent. The corporation, as such, never authorized the illegal arrangements. It never received, directly or indirectly, any of the fruits of such transactions. Albeit Berger owned fifty percent of the corporate stock, Sherin owned an equal amount, and, on learning of Berger's action, he repudiated the illegal agreements. The corporate entity may not, in these premises, be disregarded. It has often been said that command over the income is a primary test of taxability. Here the corporation never had command over the illegal commissions. In accepting from Biehl ninety per cent of the excess payments, Berger acted for himself as an individual and not on behalf of Sherin, the other stockholder. Certainly it cannot be said on the record here that he intended to act for the corporation,
3001 nor may any doctrine of estoppel be invoked to close the corporate mouth."

3002 "The action of the respondent in including the sums of $26,905.50 and $74,502.50 in the corporation's income for the years 1941 and 1942, respectively, is disapproved."

That case also is applicable on the matter I was arguing about, the action of Cain in making the disclosure with reference to a matter in which his own income tax was involved, whereby he admits payment on behalf of the corporation, where he had an adverse interest and where you can't disregard the corporate entity.

Now, if the government's case is true, if the facts which they have presented to you here are true, this corporation has never had any independent representation at all. It has been a captive corporation from its inception in these matters.

And in 1945 over 60 per cent of the stockholders had no connection whatever with any of these individual defendants. And in 1946 over 33-1/3 per cent of them had no connection with them whatever and certainly were entitled to have independent representation and not have the corporation charged with criminal liability for the acts
3003 of officers acting under situations of that kind.

Now, some cases have arisen where a defendant has come in and tried to take positions of that kind where he is

directly attacked. This position is raised by the government. We didn't raise it. We sat here and their proof came in here, on occasion after occasion, where Lubben was trying to establish that this was not a corporate transaction and never was a corporate transaction.

3004 And you Honor will recall in the cross examination of the meeting down there at the Riviera I brought out from Davidson that he had said at that time that there was no occasion for the corporation to make a disclosure at all because it wasn't a corporate transaction, it was a transaction that he had with Huebner and the individuals.

Now, that is the state of the record down to date, except for this. Lubben said that in 1946 he came in and made two payments on corn syrup. And he said that he talked to Huebner and Huebner told him that Graflund was getting suspicious but to go down and tell Graflund and make these payments and say nothing about candy payments.

Now, there again, if you can believe that, Shotwell Company had an officer who wasn't disclosing anything to the comptroller of the company. And Lubben knew it.

And they tell Lubben—or Huebner tells Lubben, according to Lubben, to go down and pay it to Graflund. And Graflund is produced here as a government witness and Graflund says on cross examination it never happened. He never took those corn syrup payments in 1946.

3005 So we have, on the state of this record, one government witness produced by the government, contradicted by another one, both under oath.

And on that kind of evidence I say that no conviction could stand as against this corporation where the government's own witnesses deny these transactions which have been brought forward in this court.

Now, I say the government is bound by its own proof. They can't impeach Mr. Lubben. They have produced him and sponsored him. He told these things.

I am not admitting that they are true. I am saying that that is their proof and that is the state of the record as it stands today.

And on that record they have not proved that this corporation got any income, they have only proved that payments were made to individuals under circumstances which lead only to the implication and the inference—the only possible inference and implication a jury could draw from that testimony at this stage of the case is that these men

divided that money up, some of it went to the horse races, and the rest of it went in their pockets. And what did the corporation get out of that with which to pay income tax?

3006 Now, where is the corporation on that position? It couldn't recover the money. On the black market payments, the law in Illinois is clear. The law in Illinois is clear that the corporation had no rights. The corporation could never recover that money from those officers. A black market payment, an illegal transaction cannot be recovered by a corporation, or by a party who is seeking to recover.

So it was nothing which we could accrue on our books. Even if we had known about it we couldn't have accrued it.

The case is Samuels against Oliver, 130 Illinois 73, pages 85 and 86. The court said:

> "It would seem self-evident that the agent who merely aids the principal in the prosecution of an illegal business cannot recover for services or money advanced by him in the conduct of the business. The master or principal should not be permitted to recover against the agent for moneys received by him in the course of such illegal business."

So here we have a situation where this corporatioon couldn't accrue anything against their officers. It
3007 couldn't recover it. And you can't accrue, unless you have got a legal liability which you can enforce, which is enforcible. And that is the state of the record so far as this corporation goes, and against these individuals, so far as these payments are concerned.

3008 Now, over and above that, looking at the overall situation, I can't see how—I say this with all due deference—this Court can allow a verdict to stand against a corporation which is held captive by officers, if they are guilty of the things the government charges they are in this case. Unless we are going to forget all about corporate entity, unless we are going to say that if you have the misfortune to have fiduciaries representing your business who want to feather their own nests, that they can thereby get you into a situation where you are guilty of a crime, if the law is going to make that advance step, we have gone way beyond anything there is in the books to date on the liability of corporations for acts of its officers.

Why, 60 per cent of these stockholders had nothing to do

with this transaction, or any of these transactions. They never authorized any black market operations. They never authorized these men to do any of these things that they are charged with doing. They had money invested in this company. And, in effect, the government is going to say, "We will have a tax liability against this corporate entity,"

and they will have if they get through here with the
3009 criminal indictment and get through here and convict this corporation of crime, for money which they never received and which the government, if it believes its own proof, knows they never received.

And that is the state of the record that we have with us today.

Now, there were some transactions testified to by some of the government witnesses—Gladys Morrill and Mr. Graflund, and they were limited and boxed in a limited period of time. And if that is all there was in the case the government wouldn't be prosecuting the case, I am sure of that. They have gone far enough into it to know what those transactions were.

Mrs. Morrill said everything that came in in that period of time went out for the payment of corn or necessary materials. If it did, it was cost of goods sold and deductible.

That is the government's own witness, conclusion or not. They produced the witness and the witness so testified. They don't have to detail it. They didn't cross examine her. They let her leave the stand with that statement. And that is what she said.

3010 Now, that takes care of everything that has come into this corporation. Whatever came their own witness took out, as a cost of goods deduction. And there can't be any questions at all, black market or no black market, that is, the cost of obtaining materials, raw materials, to operate the business was deductible against income.

Now, there is one further point. If there is any money left over, by inference, or otherwise, shown to have been received by this corporation—I don't think anybody saw my point, I tried to make it with the accountant, he understands it—on an accrual basis, there was $47,000.00 of income which should—if it came in, should have been applied to that General Confections account. And if the officers were honest, were fulfilling their duty to the cor-

poration as fiduciaries, they would have so been applied. And it made no difference in the tax liability one way or another, because the item had been accrued. And what they did with it in later years might cause some tax liability to whoever did it, but it had nothing to do with
3011 the year '46.

By the Court: What have you to say about Mrs. Morrill stating that as office manager she was well aware that the books only recorded the amounts received on the invoice and that no record was made on the books of the company of any overage payments?

By Mr. McConnell: She knew that, but she limited her testimony to transactions within that time she was keeping the books and she said as to those transactions they all went out.

But she was captive there, too, on the basis of what has been shown here, if these men really were doing the things that the Government says they were doing.

3012 And the proof shows that the corporation received no monies at all, as it stands today, except the period of time that Gladys Morrill refers to, and as to that money, it went out in the cost of goods sold. And as to the other period, even on the Government's proof, the corporation received no income.

Insofar as criminal intent is concerned, at this stage of the case I can't see how this corporation—

By the Court: She says she was aware of some fifty or sixty thousand dollars cash, doesn't she?

By Mr. McConnell: She was aware of some fifty, sixty thousand dollars in cash, which she says was paid out, and if it was, there would be no tax liability.

By the Court: What makes you say that?

By Mr. McConnell: That is because there could be no tax liability if the money was paid out on the cost of goods, because it was deductible from income under the regulations, and so acceded to by the Treasury Department.

By the Court: Paid out on the black market?

By Mr. McConnell: Yes, if it was paid out on the black market, there could be no tax liability.

3013 I have got the cases on it.

By Mr. Lockley: I would like to inject, to comment that there is no evidence that that was the case.

By the Court: I was just inquiring.

By Mr. McConnell: Sellinger is the case, 11 Tax Court

776, case decided in '48, acquiesced in by the Commission:

"Over ceiling payments for raw materials are properly a part of the cost of goods sold for tax purposes."

So she had no intent to defraud anybody if she knew they went out on the cost of goods purchased, for the purpose of the corporation. There was no income tax due, if that was the fact, and she says it was.

And the accountants that were put on the stand say the same thing, that the income and outgo washed itself out, so far as they were concerned.

Now, I say I have argued this case on the record to date, and on the proofs that the Government has adduced, not proofs which I have shown. And that is the way the record stands.

And I submit on that record that there should be an
3014 acquittal for this corporation.

By Mr. Lockley: I will take just a moment, your Honor. I am somewhat intrigued by Mr. McConnell's statement that the Government placed money in the hands of Mr. Huebner, but we didn't place any in the hands of the corporation. I don't exactly know how that can be accomplished, unless you do it through the officers of the corporation, as was done here.

Now, the evidence is clear that that money came in to the corporation's cash box, or at least a portion of it did.

Mrs. Morrill's testimony was that it came in, but she says the money that came in went out; "We spent it to get raw materials that were hard to get, and that made more candy. It increased the candy sales, and we paid the taxes on candy sales."

And she was asked on cross examination:

"So that your transactions actually produced a higher income tax?"

And she answered: "Yes."

3015 Now, if then the evidence that was brought out by the defendants themselves on cross examination is to be deleted, this was most clearly a corporate transaction. It was done for the purpose of increasing the business of the corporation, and they not only paid more tax, but if they paid more tax, they had to earn more income, and if they earned more income, these defendants and the other stockholders got it. Which could be more a part of the corporate operations than that, it is impossible to describe.

Furthermore, it is clear that the products involved were corporate products here. It was candy that was manufactured by the corporation, or it was corn syrup that was stored by the corporation, and it was all sold by the corporation.

They argue that these defendants, the individual defendants didn't get permission of the corporation. Well, that is a ridiculous thing. It is silly to suggest that they should hold a stockholders' meeting for the purpose of legalizing their activities in the back market, and spread such a record, such a meeting on the minutes. They were, in effect, the corporation. These three stockholders were in a position whereby they could order the corporation to 3016 do anything at any time. In effect, all they did—their actions were the actions of the corporation, and their actions in receiving the money from Lubben were the acts of the corporation, and the fact that some of that money got into the corporate cash box, and that records were kept by the corporation employees, and that there was testimony about those employees—everybody knew that there was such money floating around in those years—is further evidence it was part of the corporation's activities.

I don't see how you can segregate the two sets of defendants, the individuals on the one side, and the corporation on the other. All of them operated together. What one did, in effect the other one did, and the corporation is inextricably bound up with the activities of its principal officers and directors.

By the Court: Well, gentlemen, I think we have to conclude, at least until tomorrow morning at nine o'clock and I will then hear Mr. Lockley as to any further observations he wants to make on Mr. O'Brien's motion, which has been delivered by him, and further on any differ- 3017 ences which you may have with Mr. O'Brien as to the portions of Mr. Cain's testimony that should be received in evidence, at which time I will make a ruling on the various motions that I have taken under advisement.

By Mr. Lockley: All right, your Honor.

By the Court: Mr. Kirby, may I retain the check book which you let me take over the evening?

By Mr. Kirby: Yes. If it would be any convenience, why don't you keep it in Chambers.

(Whereupon an adjournment was taken in the above entitled cause until the following day, being Thursday, October 1, 1953, at the hour of 9:00 o'clock a.m.)

• • (Caption—No. 52 CR 143) • •

3018 Chicago, Illinois, Thursday, October 1, 1953, 9:00 o'clock a.m.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley,
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following proceedings were had herein in open court, outside the presence and hearing of the Jury:

By the Marshal: This Honorable Court is now in session, pursuant to adjournment.

By the Court: I suppose the first matter which we should take up this morning is the question of the 3019 proffered evidence, Mr. Cain's testimony on the motion to strike.

By Mr. Lockley: May I designate a further portion of the transcript, your Honor. It is page 226, the third question and answer from the bottom, and also all of page 227, except the last question. I have gone over the portions of the transcript which Mr. O'Brien designated last night.

By Mr. O'Brien: Would you kindly read me the first statement, Miss Reporter?

(Whereupon the statement was read.)

By Mr. Lockley: With respect to that portion of the transcript on page 155, I have no objection to that, but from 155 on, that is to say, pages 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, they all relate to entirely different matters. They do not explain any portions of the original admissions. They refer to new subject matter, namely, such matters as to whether an investigation had commenced and what they should do about it. They are exculpatory and self-serving in nature. They are not explanatory, nor are they retractions. They relate in part to a meeting at Mr. Sauber's office, and in part to a meeting with Special Agent Krane—that is later.

3020 By the Court: Well, of course, I am unable to follow you, Mr. Lockley. I don't have before me the pages you refer to.

Now you have to start all over again.

By Mr. Lockley: All right, sir.

The Government has designated the last question on page 152, and all of page 153.

By Mr. O'Brien: May I make a suggestion, that in turning the pages, Judge, it may help as Mr. Lockley goes on, to have it designated in some way. I have marked my own on the left hand side of the page, according to what Mr. Lockley wants, and on the right hand side of the same page, as to what I would ask for. Mr. Lockley has indicated the last question on page 152. I have the middle portion of that page, starting with the words, "By the Witness", and then down through the words "16,000".

By the Court: Have you any objection to that?

By Mr. Lockley: No, your Honor.

The Government continues on page 153 for the full page, which relates to a conference that Mr. Sullivan and Mr. Cain had with Mr. Busby, and 154, at which time they admit that they were thoroughly familiar with the matter of premium payments.

3021 Mr. O'Brien desires, I presume, the balance of page 154.

By Mr. O'Brien: I hadn't asked for it. Let me see. No, I haven't asked for that.

By Mr. Lockley: Mr. O'Brien then desires page 155.

By Mr. O'Brien: Well, I desire the portions starting with, "Mr. Sullivan," the paragraph starting with "Mr. Sullivan", and running down through the next to the last answer on that page.

By Mr. Lockley: Well, that is only one paragraph of an answer to a question. I would suggest that the whole question and the whole answer be put in, if part of it is to be put in.

By the Court: Well, all right.

By Mr. O'Brien: I have no objection to that, if it is what you want.

By Mr. Lockley: Then at the bottom of page 155, we start talking about another matter. Now they are talking about the discussion that may be had lasted a week, and then subsequently on page 156, a discussion with Mr. Busby at great length that the matter be discussed with

other people, and with somebody in the Bureau of Internal Revenue.

3022 By Mr. O'Brien: Well, the part that I asked for on page 156 starts at the top of the page and runs through the answer "None", about the middle of the page and also the question at the bottom of that page.

By Mr. Lockley: That has to do with whether or not an investigation of Shotwell had been commenced. I see no admission of any sort there.

By Mr. O'Brien: Well, if I might suggest that the subject is commingled here somewhat inextricably and also counsel had Mr. Busby on the stand for that part of the conversation and he went into the question of what was a timely investigation and I feel we are entitled to it. I don't need much of it but I think we should have that much.

By the Court: The mere fact that Mr. Lockley may have had him testify on the stand doesn't enter into it.

By Mr. O'Brien: I appreciate that is true, but nevertheless that portion—

By the Court: I will sustain Mr. Lockley's objection to that portion.

By Mr. Lockley: The next portion, the beginning at the bottom of page 156 and going over to page 157 has to do with the question of voluntary disclosure.

By Mr. O'Brien: Well, it has to do with the tax too.

3023 By the Court: Yes, I will sustain the objection.

By Mr. Lockley: 158, likewise, is the question—

By Mr. O'Brien: If the Court please, I don't think we can cut this conversation up into subjects in any such way. The fundamental question that is here is the man's intent, and everything that he had in mind at the time that was connected with it. Now, what they told him and all of the circumstances under which he made these statements are essential to determine what he really thought and what his intent was. I don't think we can say that just because it can also be said that it laps over into this matter that it is to be excluded.

By the Court: You are seeking now, however, to bring in the question of whether or not there was a timely disclosure and that is not an issue before this jury.

By Mr. O'Brien: I wouldn't say that, on the parts that I have indicated, Judge, on page 157.

By the Court: Which portion have you in mind?

By Mr. O'Brien: The witness says:

"They would probably assess a tax and we would pay the tax and that would be that."

3024 And down in the middle it says:

"Did he tell you before going into the policy what the effect of the failure to put those items in the return might be?"

By the Court: No. I will sustain the objection.

By Mr. Lockley: And page 158 relates to the further matter of the disclosure.

By Mr. O'Brien: 158 I am not interested in.

By Mr. Lockley: You are not. All right, 159 then has to do with—

By Mr. O'Brien: I am not interested in 159, either.

By Mr. Lockley: You are not interested in 159. 160—

By Mr. O'Brien: And 160, on the matter of intent, the next to the last question and the answer to it, I should like to have.

By the Court: Which question, please?

By Mr. O'Brien: The next to the last question on page 160, starting "Following that did you tell Mr. Busby"—

By the Court: What do you say about that, Mr. Lockley?

3025 By Mr. Lockley: Your Honor, it is not explanatory in any way. It is exculpatory. It isn't an admission, nor is it a retraction of an admission. It is purely a defensive matter which the defendants can bring out themselves, if they desire to put Mr. Cain on the stand.

By Mr. O'Brien: What do you mean by admission, Mr. Lockley? Maybe I am under a misapprehension. What is it that you are offering—what is it that you claim is admitted by the testimony that you want to put in?

By Mr. Lockley: Well, as to the first part—

By Mr. O'Brien: Just in sum total, what are the admissions that you have in mind?

By Mr. Lockley: That Mr. Cain knew that there were over ceiling premiums being received by the corporation during this period of time, that they amounted to around four hundred thousand dollars, that he never handled any of the pay outs, so-called, himself, and that they were all done by the officers and employees of the corporation.

And, furthermore, what record there was of those pay outs had been destroyed, and that he knew the returns were false and fraudulent at the time they were filed.

3026 By Mr. O'Brien: That is just the point, that finally comes out reluctantly.

I am telling your Honor that they have two purposes

in the admissions. The first is ostensibly the only one, but the second one goes to the question of intent, the intent of willful evasion.

So that matters that are pertinent to either of those things, we are entitled to have in.

The part that I want, at the bottom of 160, has to do with just that.

By the Court: I will sustain the objection as to the portion of 160 to which you have referred.

3027 By Mr. O'Brien: May I ask your Honor at this time whether that is on the basis that it is not in itself related to the issue of intent or whether it is on the basis that your Honor has—

By the Court: I don't think it bears a reasonable relation to the portion of the transcript offered by the government.

By Mr. O'Brien: Well, not to delay on it, but is it your Honor's thought that the matter of disclosure as it bears upon the issue of intent in the case is terminated through the hearings which you had or that it is open before the jury here on the issue of wilful intent?

By the Court: Well, I will cross that bridge when we come to it. Whether you may offer evidence, affirmative evidence, on that point is a matter that I will consider when it is offered. I am merely considering now whether the portion to which you have referred bears a reasonable relation by way of explanation or modification to the portion offered by the government. I don't feel that it does. Therefore I have to sustain the objection.

By Mr. O'Brien: I note again, your Honor, that the government's portion goes also to the matter of intent, and the question of intent is affected by what the tax-
3028 payer afterwards did. And this is part of what was afterwards done.

By Mr. Lockley: As I understand it, your Honor, the basic problem here is to put into evidence the matters which the government considers to be admission against interest, and it is a question, in so far as the defense is concerned, to put in any additional matters which would tend to explain or modify those admissions.

By Mr. O'Brien: Of course, that is what we are talking about.

By Mr. Lockley: But to go beyond that—Well, with respect to page 161 that is a—

By Mr. O'Brien: You want to put in admissions as you conceive them on the subject of intent, but you don't want the other testimony which bears on the same subject, and which is part of the same testimony at this trial, on a hearing. I mean the hearing of November.

By the Court: Well, you may proceed.

By Mr. Lockley: Page 161 is a continuance of the Sauber conference, the arrangements for a voluntary disclosure.

By Mr. O'Brien: Well, page 161, again, is the last question and the last answer on that page.

3029 By the Court: I will sustain the objection.

By Mr. Lockley: Page 162 relates to an attempt to fix the time.

By the Court: Yes. I will sustain the objection.

By Mr. O'Brien: The only thing I am suggesting on 162 is the top question and the top answer.

By the Court: Say that again, please.

By Mr. O'Brien: The first question and the first answer on 162 I should like to have.

By the Court: I will sustain the objection.

By Mr. Lockley: 163 relates to a meeting at Mr. Sauber's office, which is again beyond the scope of any of the material that the government has offered previously.

By the Court: Yes, I will sustain the objection.

3030 By Mr. O'Brien: I would like to say, for the record, if the Court please, that it is my position that the whole subject matter of disclosure, as revealed by the parts of the transcript that we are discussing, has to do with the issue of intent, or wilful evasion, and that since Mr. Lockley is including in the portions which he tenders claimed admissions on the matter of intent, I am entitled to have everything which is related to that, whether by way of disclosure or otherwise, incorporated.

By the Court: I will overrule the objection to it.

By Mr. Lockley: Page 164 is a continuance—

By Mr. O'Brien: 163, I was interested in the last question only and in the answer at the top of page 164.

By the Court: Yes, I will sustain the objection.

By Mr. Lockley: Were you interested in anything more on 164?

By Mr. O'Brien: And after that colloquy in the middle of the page, Judge, the question—we are speaking of 164—
the question, "What if anything," etc., and the answer.
3031 By the Court: I will sustain the objection.
By Mr. O'Brien: And the last question and answer, part of which answer is on that page, and finished off at the top of the next page.
By the Court: I will sustain the objection.
By Mr. O'Brien: On page 165, the middle paragraph, "I said the only thing we could do"—down through the word "price", on page 165.
By Mr. Lockley: Well, this again relates to a conversation with Mr. Sauber, which has not been brought out at all on the portion of the transcript which the Government has sought to introduce up to this point.
In any event, that is only one paragraph out of an answer three paragraphs long.
By Mr. O'Brien: Well, if you want the others, you are free to offer them.
3032 By Mr. Lockley: Well, the government objects to that one paragraph, your Honor.
By the Court: I will sustain the objection.
By Mr. Lockley: 166 is a continuation of the conference with Sauber.
By the Court: It merely relates the conversations that he had with Sullivan.
By Mr. Lockley: That is right.
By the Court: I will sustain the objection.
By Mr. Lockley: And then comes another portion that the government desires to offer at the middle of page 167 beginning with "Assembling the data". He says they started out to make a compilation and they came up on page 168—the substance of it, they came up with a figure of something like $400,000.00, and then how they arranged the payoff or payouts and on page 169 it took less than a minute and he knew they weren't any good and couldn't substantiate them. It is just the first paragraph on page 169.
Did you have anything further you wanted on that page, Mr. O'Brien?
By Mr. O'Brien: I have nothing on 169, but on 167 I wanted the top paragraph, that is the one that concludes—the one that starts on the preceding page and concludes

at the top of 167 and I wanted the next paragraph.
3033 By Mr. Lockley: That all relates to the conference with Mr. Sauber.

By Mr. O'Brien: Why, certainly, but the conference with Mr. Sauber is essential to understand what was done in the background of the supposed admission.

By the Court: I will sustain the objection.

By Mr. Lockley: I believe, Mr. O'Brien, you skipped page 174.

By Mr. O'Brien: Well, on 174 I wanted the question and answer, that is, the second question on that page and the answer to it.

By Mr. Lockley: That has no relationship to the compilation of the data. It relates entirely to whether or not the defendants had knowledge or notice that an investigation was being conducted. It is entirely new subject.

By the Court: What portion of 174 does Mr. O'Brien refer to?

By Mr. Lockley: That is the question, as I understand it "At any of those times".

By Mr. O'Brien: Yes.

By Mr. Lockley: —"from begenning to end did you have any intimation or notice from any agent, or from anyone else, for that matter, that a conduct of that
3034 investigation was for any purpose other than to ascertain the amount due as Mr. Sauber had told you?

"A. No."

That relates to their notice of an investigation being conducted.

By the Court: I will sustain the objection.

By Mr. Lockley: On page 175.

By Mr. O'Brien: It has to do again with the circumstances under which the supposed admission was made.
3035 By the Court: What portion of page 175?

By Mr. O'Brien: Nothing on 175.

By the Court: All right.

By Mr. O'Brien: On 176, the bottom of the page, starting with the question:

"Question: Did they ever tell you what amount they had determined to be due?"

And running from there to the bottom, and the answer at the top of page 177, and the next two questions and answers on 177.

By Mr. Lockley: Well, there again, your Honor, it is

entirely a new subject. It has to do with whether they knew the amount of income tax due, and whether the Government had ever notified them of that. So far as I can see, it has no relation to any admission. It is neither an explanation or a retraction of it.

By the Court: I will sustain the objection.

By Mr. O'Brien: 191 is the next page.

By Mr. Lockley: The whole page, Mr. O'Brien?

By Mr. O'Brien: The whole page.

By Mr. Lockley: Well, the first portion has to do with the conversation with Mr. Sauber. The other portion of that has already been ruled out.

3036 The question, "Did Mr. Busby tell you in your conversation on January 11 that there was any requirement for a disclosure other than those mentioned in the published policy"—

By Mr. O'Brien: That has to do—

By Mr. Lockley: I don't have any objection to those two questions.

By Mr. O'Brien: It has to do with the premium payments.

By the Court: Well, I don't think any portion of it is admissible. I will sustain the objection.

By Mr. O'Brien: And I wanted all of 192.

By Mr. Lockley: Now, that has to do with Mr. Krane's first visit to the premises of Shotwell.

By the Court: Same ruling.

By Mr. Lockley: Page 193 begins the cross examination by Mr. Ryan, and that includes the admissions that Mr. Cain knew at the time the returns were filed that they were false, and it goes over to pages 194 and 195, 196, and to the center of 197.

Now, I understand that Mr. O'Brien wants the balance of page 197.

3037 By Mr. O'Brien: You have all of 194?

By Mr. Lockley: Yes, all of 194, all of 195, all of 196, and to the center of page 197.

By the Court: Is that what you are offering?

By Mr. Lockley: Yes, sir.

3038 By the Court: Mr. O'Brien suggested that the remainder of 197 be offered, is that it? Do you want to offer an affidavit that he made?

By Mr. O'Brien: No, it doesn't go to that. Mr. Ryan is interrogating him about the affidavit and what I am

asking is Mr. Ryan's question, the first paragraph of Mr. Ryan's question.

By the Court: Do you want to offer just a question?

By Mr. O'Brien: Well, it goes on the next page, Judge, 198, where Mr. Ryan says, "Directing your attention then to the last page thereof and to the language"—which he quotes, I wanted the question at the bottom of 197 and then continuation of that question on page 198 and the answer to it on 198. That is, the answer "That is my statement under oath and it still stands."

That has to do intimately with the subject matter with which Mr. Ryan is interrogating.

Mr. Lockley. Well, I have no substantial objection to it, your Honor.

By the Court: All right.

By Mr. O'Brien: At the bottom of that page is a further question by Mr. Ryan starting "Now, then,
3039 directing your attention", and so on. I wanted that question and the material on page 199 starting at the top and running down through the answer "That is correct," along in the last third of the page.

By Mr. Lockley: Well, I have no objection.

By the Court: All right.

By Mr. O'Brien: On page 200 I want the first question and the first answer which again is intimately connected with the subject matter at hand. The first question starts, Judge, "Did you tell him to tell the official", and the answer, "He reported back that the Government told us that we did owe taxes."

By Mr. Lockley: Your Honor, I think we have the same objection to that, that we are going back to the voluntary disclosure meeting with Mr. Sauber which the Government has not attempted to introduce through this transcript.

By Mr. O'Brien: That is a mere accidental thing. The real essence of it, Cain's condition of mind as to whether Cain thought that there were taxes owing or whether it was merely that the Government said that there were.

By the Court: What are you offering, the first
3040 question and answer?

By Mr. O'Brien: Yes, sir.

By the Court: Nothing more?

By Mr. O'Brien: Nothing more.

By the Court: I will sustain the objection.

By Mr. O'Brien: That is not sustained, is it, your Honor, on the basis that there is more than that which should be included?

By the Court: Well, at least I am contending that the offer is not germane to the portion offered by the Government.

3041 By Mr. O'Brien: On page 201. Of course, my mind goes back, your Honor, to the time when this testimony was admitted over my objection and your Honor took the position that it was a question of Cain's state of mind and let in this cross on that basis.

Now, this is right part of that cross.

By Mr. Lockley: It is not—

By the Court: I am merely ruling on what is offered.

By Mr. O'Brien: Now, on paoge 201, the next to the last question—well, put it this way: Both questions, the two questions at the bottom of 201 and the intermediate answer there or intervening answer, plus the answer at the top of 202.

By Mr. Lockley: We appear to be back on the same subject again of advising Mr. Sauber.

By the Court: Yes, I will sustain the objection.

By Mr. O'Brien: On 202, the second question and the answer—well, really on 202, all of the balance starting with the second question going on to the bottom of the page.

By Mr. Lockley: All of that relates to the conversation.

By the Court: With Mr. Busby.

By Mr. Lockley: I can't tell whether it is with
3042 Mr. Busby or whether it is with Mr. Sauber.

By Mr. O'Brien: Regardless of who it was, Mr. Ryan was exploring Cain's condition of mind. That is the pertinency of the offer.

By Mr. Lockley: Well, he is relating to a conversation here: "Did you tell him to tell Mr. Sauber?"

By the Court: I will sustain the objection.

By Mr. O'Brien: On 203—what I have offered on 202 carries over to the top of page 203 and then the answer and then the next question and answer which is the first new question on 203. It is all a part of the same material.

By Mr. Lockley: Well, the same objection applies then to the—

By the Court: The same ruling.

By Mr. O'Brien: And the question and answer in the middle of the page, at 203, starting with "Well, in sending him over to Mr. Sauber—" et cetera, page 203.

By Mr. Lockley: Well. we are back on that question of Mr. Sauber again, in making a disclosure. Frankly, I hardly see how an act which took place sometime in 1948 can have any relevance to a man's state of mind in 1946 and 1947. If Mr. Cain had a false intent at
3043 the time those returns were filed, in 1946 and 1947, the crime was complete at that time and what he did in 1948 doesn't intend in any way to forgive or excuse the crime. I hardly see how this has any relation to his wilful intent.

By the Court: I will sustain the objection.

By Mr. O'Brien: Well, that is one of the things I am curious about, as to whether it is either the Court's position or counsel's position that what happened in the way of disclosure in 1948 has no bearing on the issue of intent at the time the returns were filed. If there is any such thought, I would like to have a ruling on it.

3044 By Mr. Lockly: Well, your Honor, this isn't a prolonged inquiry into—

By the Court: Well, I have ruled on it.

By Mr. Lockley: All right, sir. Where do we go on 206, Mr. O'Brien.

By Mr. O'Brien: On 206—on 206 the first question and then the answer from the middle of the page reading, "It had to be because I left here on the 23rd or the 24th of January." And then the question and the answer at the bottom of the page.

By Mr. Lockley: Well, as to the—

By Mr. O'Brien: And the answer ending at the top of page 207.

By Mr. Lockley: As to the first portion offered, why, it has to do with the time.

By Mr. O'Brien: That is right.

By Mr. Lockley: Fixing the time only, which is—

By Mr. O'Brien: Well, it is necessary to understand the last question and the first part.

By the Court: Well, it relates to conversations with Mr. Sullivan and Mr. Busby.

By Mr. Lockley: Yes, sir.

By the Court: I will sustain the objection.

3045 By Mr. O'Brien: And on page 207, the middle paragraph reading, "I said 'We stand willing and able' ", etc.

By Mr. Lockley: Well, sir, I have no objection to that.

By the Court: Very well.

By Mr. Lockley: It is lifted out of context. I would like to have an exact description again by Mr. O'Brien as to what portion that is.

By Mr. O'Brien: I think I described it as the middle paragraph of the page starting with the words "I said 'We stand willing and able' ", etc.

By Mr. Lockley: Well. that being the case I would offer the first paragraph, which begins, "After all, I was a business man".

By the Court: That may be received.

By Mr. O'Brien: All right.

On page 208 about the—well, it is the first question "Whether you owed the tax or not, is that right?" And the answer and the next question and the answer and the next question and answer. In other words, the first, second, third questions on page 208 and the answers to them.

By the Court: Well, what do you say about that,

3046 Mr. Lockley?

Mr. Lockley: Well, I am trying to understand exactly what it means. It doesn't have any significance to me. It is lifted out of context and I don't see that it relates to any particular matter.

By Mr. O'Brien: It relates to the man's thought and intention. Mr. Ryan asked, "Whether you owed the tax or not," and he said, "Whether I owed—I expected to be assessed for them."

"Q. But to the extent that they would be deductible you would consider that you didn't really owe the taxes, even though"—

And then,

"Q. —even though you might be in a position where you would have to pay?

"A. That is correct."

By Mr. Lockley: Well, I don't have any objection then.

By the Court: All right.

By Mr. Lockley: I don't have any objection to that portion of it, but I will offer the balance. Let me see.

I will offer the next question and answer which concludes "under the terms of the Revenue Act I was guilty of fraud."

By the Court: On what page?

3047 By Mr. Lockley: That is on page 208.

By the Court: Very well.

By Mr. O'Brien: Have you finished?

By Mr. Lockley: Yes.

By Mr. O'Brien: Then I take the next question at the bottom of 208, Judge, and ending just before the colloquy on page 209.

By Mr. Lockley: Leave out the colloquy?

By Mr. O'Brien: Yes.

By Mr. Lockley: All right.

By Mr. O'Brien: And then the answer and the question and answer following it on page 210.

By Mr. Lockley: All right, your Honor.

By the Court: All right.

By Mr. O'Brien: Okay?

By Mr. Lockley: Yes.

By Mr. O'Brien: Then on page 211, the answer, the question and answer, really, yes. At the top of 211, starting with "We told Mr. Sauber that unquestionably we owed taxes, that is right, under their rules."

3048 By Mr. Lockley: Well, this relates to another conversation, or I presume it is the same conversation with Mr. Sauber.

By Mr. O'Brien: The same one, but it is on the same subject.

By Mr. Lockley: But it relates to—I see no reference to the state of mind. They speak of their moral position, not their legal position here or their intent. I don't know what they mean by "We morally owe no taxes."

By the Court: It may be received.

By Mr. Lockley: It may be received? All right.

By Mr. O'Brien: On page 213.

By the Court: What page, please?

By Mr. O'Brien: 213.

By Mr. Lockley: First, if you please, Mr. O'Brien. I have two questions in the middle of page 212.

By Mr. O'Brien: Oh, yes.

By Mr. Lockley: They begin:

"Did you feel you owed a tax?"

And the answer:

"Yes, I felt we owed a tax."

And the next question and answer.

3049 By the Court: 218?

By Mr. Lockley: 212, your Honor.

By the Court: I know, but are we now on 218?

By Mr. Lockley: Is that where you go next?

By Mr. O'Brien: Well, in that case, I would want the following questions and answers, a question on 212, Judge, right after what Mr. Lockley said—the question?

"Morally and legally?"

And the answer, and then the question and answer following.

By Mr. Lockley: Well, I have no objection, your Honor.

By the Court: All right.

By Mr. Lockley: That goes to the top of page 213, Mr. O'Brien; right?

By Mr. O'Brien: Well, I didn't carry it that far. I had—it seemed to me repetitious. I had just this part. (Indicating).

By Mr. Lockley: Oh, all right.

By Mr. O'Brien: And then on page 213, the first—the matter starting with, and including the first question.

By the Court: On page two hundred thirteen?

By Mr. O'Brien: 213. The first question, down 3050 through the last answer on the page. It is on the same subject matter.

By Mr. Lockley: Well, this seems to be going to the question of whether they paid their taxes, and whether they owed their taxes, and whether there was a moral obligation, and a legal obligation—it seems to me to be getting—

By Mr. O'Brien: Well, it is a direct part of the same thing.

By the Court: It goes to how far on page 214?

By Mr. O'Brien: No, I didn't reach 214, Judge: It starts on page 213 with the first question, and goes down through the last answer on the page.

By the Court: It may be received.

By Mr. O'Brien: 214, I wasn't interested in. 215 I am not interested in. The first two questions and the first two answers—

By Mr. Lockley: Just a moment. If we are going to

include all of that on page 213, I would like to include down to the answer, "That is right, I meant—that is what I meant."

By the Court: Very well.

By Mr. Lockley: Yes, on page 214.

By Mr. O'Brien: All right.

3051 By Mr. O'Brien: Well, now, where does it conclude?

By Mr. Lockley: It concludes, "That's right." With the answer.

By Mr. O'Brien: With the third answer on the page. All right.

By Mr. Lockley: That's correct.

By Mr. O'Brien: Then on 215, first two questions and answers.

By Mr. Lockley: No, I don't have any objection to those.

By the Court: All right.

By Mr. O'Brien: On page 218, the bottom question, ending on the top of 217, and right down through the answer at the middle of the page, "That's right, he said it was the government policy that over-ceiling payments could not be deducted."

By Mr. Lockley: I am sorry, Mr. O'Brien. Would you show me where that is?

By Mr. O'Brien: Starting at the bottom of 216, down through this (Indicating).

By Mr. Lockley: Well, we are going back to the conversation now with Mr. Sauber. I think that that is in—

By the Court: I didn't follow, Mr. O'Brien. Where did you start from on 216?

3052 By Mr. O'Brien: At the very bottom, the question starting—

By the Court: "Which meeting—"

By Mr. O'Brien: Yes, sir. And running down through the middle of the next page.

By the Court: Yes, I will sustain the objection.

By Mr. O'Brien: I have just one more. That's 217—and I think that is the last.

By Mr. Lockley: Well, now, your Honor, if I may be permitted I would like to offer an additional portion on page 226, beginning with the third question from the bottom of the page, extending to all but the last question and answer on page 227.

By the Court: Very well.

By Mr. O'Brien: Well, I don't see that—how far do you go, to the bottom of the page?

By Mr. Lockley: Yes, right here (Indicating).

By Mr. O'Brien: Through the next to the last answer?

By Mr. Lockley: Yes.

By Mr. O'Brien: Yes. Is that in?

By Mr. Lockley: Yes.

By Mr. O'Brien: All right.

By the Court: Now, Mr. O'Brien, which is your last page?

3053 By Mr. O'Brien: My last one was 217.

By the Court: And what portion of that?

By Mr. O'Brien: I will have to go back. It is right from the top down to the middle of the page, down to the question, "Now, in your conversation with Mr. Sauber—"

By Mr. Lockley: I believe, your Honor already ruled that was out.

By Mr. O'Brien: Yes, your Honor had ruled.

By the Court: Yes, I will sustain the objection.

3054 By Mr. O'Brien: I don't think so. I thought the Court had admitted that, because I hadn't marked it off. We passed it.

By Mr. Lockley: Yes, I objected on the ground that it related to the meeting with Mr. Sauber, that it has to do entirely with conversation, it has no relation to the state of mind, it is not an admission.

By the Court: I will sustain the objection.

By Mr. Lockley: Did you have anything further?

By Mr. O'Brien: I am just looking. You added something since last night.

By Mr. Lockley: All right.

By the Court: I suppose it would be perfectly proper for either counsel, when this testimony is read, to state, for instance, that Mr. Sauber is a representative of the Internal Revenue Department, or such explanatory side statements that may aid the jury in knowing about the identity of the parties referred to. Otherwise much of this will be entirely unintelligible. And that refers both to the portion read by Mr. Lockley and the portion read by defense counsel.

I merely make that by way of comment.

By Mr. Lockley: All right.

3055 By the Court: Now, gentlemen, before the jury comes in there are some observations that the Court wanted to make for the record now on these motions that the Court took under advisement.

On the motion made on behalf of the Shotwell Company that none of the statements made by Mr. Cain in this proffered testimony on the hearing—on the motion to suppress is admissible as to the corporation because it is contended that the testimony indicates that Mr. Cain's interests were adverse, and therefore anything stated by Mr. Cain was in his individual capacity and not as an officer of the company, I call attention to counsel, however, that the motion to suppress was made on behalf of all the defendants. Mr. Cain took the stand and was offered as a witness by all of the defendants in support of the motion to suppress. The corporation was represented by counsel at the hearing when Mr. Cain took the stand as a witness and counsel for the corporation actively participated in the proceedings.

3056 There is nothing in the proffered testimony of Mr. Cain which has any indication of any adverse interest by him as to the Shotwell Company.

In fact, the contrary appears.

Under these circumstances, it would appear that the Court could not limit the offer as to Mr Cain, but insofar as his statements constitute competent evidence, they are admissible not only as to him, but as to the corporation as well.

And in this connection, it may not be amiss to point out the Court cannot at this time determine the factual issues as to what may have ultimately happened to any of the overage payments which the Government contends were delivered by Lubben to Huebner. There is testimony that Huebner stated, or intimated at least, that the money was divided among the three individual defendants. There is other testimony which may support that statement.

On the other hand, there is testimony, especially in the proffered transcript of Mr. Cain, as well as elsewhere,

3057 that some, if not all, of the overage payments were used by the corporation to purchase materials for the manufacture of its product.

The records of Eatsum and General Confections, so far as they are available, indicate that these overages were due Shotwell by reason of merchandise sold by Shotwell to Lubben's companies. The monies due Shotwell were delivered to an officer of Shotwell as an obligation of Shotwell, not by way of a personal debt to the officers.

Therefore, this Court cannot at this time usurp the functions of the jury in determining on this record the ultimate disposition of any of the overage payments. If Lubben made the payments, as he states, in discharge of an obligation to Shotwell, the mere fact that an officer of the company who received the payments stated that the three individual defendants were going to divert the payments for their own use, does not necessarily negate the fact that the debt to the corporation was discharged.

Lubben's records did not indicate any personal debt to Cain, Huebner, or Sullivan. The checks drawn to cash were for the purpose, according to his statements of
3058 obtaining currency to discharge the debt to Shotwell.

Insofar as the defendant Sullivan is concerned, and his motion for acquittal, the Court must consider the testimony in the record as to him in the most favorable light in support of the charges made in the indictment. Whether on this record the Government has established his guilt of the offense charged beyond a reasonable doubt, is for the jury to determine.

Lubben's testimony as to his conversation with Mr. Sullivan is not denied or controverted in the record. The Court cannot say on this record that such testimony should be disregarded. The mere fact that Lubben changed his testimony as to the time when the alleged conversation took place does not justify a motion to strike the entire testimony.

3059 Lubben contends that everything he related in his first testimony regarding the conversation is true, except as to the time when it took place. None of this testimony, or any of the reasonable inferences to be drawn from other facts and circumstances disclosed by the evidence are controverted.

The Court is well aware that there must be more than a scintilla of evidence involving defendant Sullivan in order to justify a finding of guilty. Whether he inten-

tionally and wilfully with guilty knowledge intended to defraud the Government of any income tax due from Shotwell for the years 1945 and 1946, as charged, is, at this time, at least, a question for the jury to determine and not for the Court to decide as a matter of law.

The Court has given due consideration to the motions of the defendants to strike certain testimony given by the witnesses Lubben, Krasne and Feldman, and also the respective motions for acquittal which have been filed by the various defendants. Some of the observations which the Court has heretofore made are pertinent to these
3060 motions. After due consideration the Court is of the opinion that the motions should be and they are denied and exceptions reserved to the particular defendants whose motions are hereby denied.

By Mr. O'Brien: Judge, we have one more motion which we said we would take up at this time, and that is the motion for the mistrial, and in which I expressly request that the jury be polled in the manner that the Circuit has prescribed.

By the Court: All right.

You may call in the jury.

By Mr. Kirby: Your Honor, I wonder if we might have a short recess before that is done. Five minutes would be enough.

By the Court: We will take a recess for five minutes.

(Short recess.)

(And thereupon the following proceedings were had in the hearing and presence of the Jury:)

By Mr. Kirby: Your Honor, I have some added motions that need to take place out of the presence of the jury.

3061 By the Court: Well, I have had no notice of those motions. I think you had better defer with the presentation of them until an appropriate time.

By Mr. Kirby: It would not be possible to present them at any other time.

3062 By the Court: May I see them?

By Mr. Kirby: Of course, the only thing that is going to happen now, they are going to read that transcript, is that all?

By the Court: I think so.

By Mr. Kirby: That is the next thing to happen. All right.

By Mr. Lockley: Mr. Fuller.

Shall we have the formality of having Mr. Fuller on the stand?

By the Court: I don't think so.

By Mr. Lockley: All right.

At this time, ladies and gentlemen of the jury, I desire to read from the transcript of a proceedings held before his Honor Judge Nordbye on a motion by the defendants to suppress evidence on November 12 and 13, 1952.

Certain portions of the transcript have been designated by the government and certain portions by the defendants. Mr. O'Brien and I have agreed that in order to make it as understandable as possible I will read all of those portions. Mr. O'Brien will please check me to make sure I have them correctly, as far as he is concerned.

3063 The defendant Byron A. Cain was called as a witness—

By the Court: You will have to raise your voice, too, Mr. Lockley, if you want the jury to follow what you read.

By Mr. Lockley: All right, sir.

By the Court: And read slowly so that they may follow your statements.

By Mr. Lockley: All right, sir.

"BYRON A. CAIN, one of the defendants herein, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:"

The questioning by Mr. O'Brien, the answers by the defendant Byron Cain.

"Q. Do you recall, Mr. Cain, any occasion or occasions or an occasion late in the year 1947 or early in 1948 when Lubben asked your company to lend General Confections $50,000.00?

"A. I do.

"Q. Is it true that you sent Mr. Busby east to investigate the financial position of General Confections, Inc.?

3064 "A. I did.

"Q. Is it true as he said that on his return, and on January 11, 1948, he reported to you at your home?

"A. That is correct. Mr. Sullivan came over to my house.

"Q. Harold Sullivan was present, too?

"A. That's right.

"Q. And will you state briefly what his report was?

"A. He told us—

"Q. His advice.

"A. He told us that his financial condition was very bad, that $50,000 wouldn't do him a bit of good in his judgment from a cursory examination of his books, therefore, we would be very silly to enter into such a loan.

"Mr. Sullivan and I were businessmen. We didn't make the loan.

"Q. At that time, did Mr. Busby speak to you and Harold Sullivan on the subject of premium receipts and premium payments?

"A. He did.

"Q. You were thoroughly familiar with those 3065 at that time, were you not?

"A. We were.

"Q. Prior to that time, prior to January of 1948, did Busby know anything about them?

"A. Not a thing.

"Q. Did he inquire of you if it was true that there was such a payment?

"A. Yes, he did.

"Q. And of Harold, too?

"A. Yes, he did.

"Q. What did you tell him?

"A. I told him what had gone on in the company, that we had been taking over ceiling prices, and we had been making trade bids."

By Mr. O'Brien: Deals, that should be. It is corrected in my copy.

By Mr. Lockley: Is it corrected?

"—trade deals. We had taken over ceiling payments from Lubben, and his various companies over a period of a couple years, and he promptly became

exercised about it, and said, 'We must make an amended return.'

3066 "Mr. Sullivan and I told him to go down and make whatever arrangement was necessary with the proper authority to make such amended return.'

"Q. What, if anything, was said as to the reason for your failure to incorporate those items in the 1945 and 1946 returns?

3067 "A. Well, our reasons, of course, were very apparent. We were in violation—

"Q. No, what was said.

"A. We told him that we were in violation of the OPA and subject to triple penalty, if we were, and we certainly didn't want to put that on our tax return. That was No. 1."

On page 167 of the transcript Mr. Cain is still under questioning by Mr. O'Brien.

By Mr. O'Brien: It really starts on 166.

By Mr. Lockley: It is my understanding of the Court's ruling.

By Mr. O'Brien: All right.

By Mr. Lockley: For your understanding, there is a gentleman named Mr. Sauber, who is an employee and an official of the Bureau of Internal Revenue who will be referred to.

"Q. What did you do about assembling the data that you told Sauber you would assemble pending the arrival of the agent?

"A. We started out to take a compilation. We were primarily interested in over-ceiling payments

3068 to us, anything that could be charged to us. That is the only thing we were interested in.

"So we started out to assemble that data and, as things usually do, the agent didn't appear, and he didn't appear, so it dragged.

"The minute he appeared everybody went to work on it again.

"Mr. Busby, I think, had a man working on it continuously from about, oh, January, February, right on through, but then we put the whole staff on it, Mr. Huebner, and the whole gang of us got to work, Mr. Sullivan, and we assembled what would give him something to go by and we told him that.

"Q. What did you assemble?

"A. We got the invoices that had been shipped to Lubben and through Mr. Huebner's memory we tacked the highest price that we in our judgment had ever been charged on over-ceiling and we considered no trade deals, no straight deals with the fellow at all. Every single invoice we considered that we got some kind of a cash rebate on.

3069 "Q. Whether you did or not?

"A. Whether we did or not, whether it was a trade or not, and then we finally came up with a figure of something like $400,000.00. We said, 'Here it is.'

"And then they were in a dilemma about what to do about the payouts, and I said, 'I will tell you what we will do about it. Give me a piece of paper.'

"I said, "Busby, work it backwards.'

"I wrote it down this way—'There is your payouts.'

"It took me one minute, less than a minute, and I knew they weren't any good, and we couldn't substantiate them, but I threw them in for what they were worth. I hoped they believed that we paid out something."

And now Mr. Cain is under cross examination by Mr Ryan, who was an assistant United States Attorney.

"Q. Now, Mr. Cain, before you sent Mr. Busby to New York and before he returned and told you

3070 that he learned you received over-ceiling payments you knew, of course, that you had received over-ceiling payments?

"A. Certainly.

"Q. Did you consider prior to that time that Mr. Busby talked to you the effect of these over-ceiling transactions and the corporate tax liability?

"A. Yes, we had.

"Q. You had considered it. Was it your thought it would affect your tax liability to increase it or that it would remain constant in spite of these transactions?

"A. Well, at that time we didn't know.

"Q. Well, at the time that you filed corporation

tax returns for the year 1945 did you consider that they were honest tax returns or an honest tax?

"A. They couldn't have been.

"Q. You mean that you considered at the time that the corporate return for 1945 was filed that it could not have been an honest tax return?

3071 "A. That's correct, inasmuch as it didn't reflect our total income or total expenses.

"Q. Did you consider at the time the corporation tax return for 1945 was filed that it did not show the total of net taxable income?

"A. Restate that."

And the question was re-read.

"A. I would say yes to that statement.

"Q. That you considered it did not show the total of net taxable income."

The Court said: "I don't think the witness answers the question. He nods his head."

And the witness replies:

"I said yes, your Honor.

"Q. So when the 1945 tax return for the Shotwell Corporation was filed you considered it to be a fraudulent return?

"A. Inasmuch as it did not reflect the total income and total expense it was fraudulent, yes.

3072 "Q. And in that it did not reflect the total, in your opinion, the total tax due the Government, is that right?

"A. In the opinion of the Government, yes.

"Q. I mean, in your opinion. I am not questioning about the opinion of the Government. In your opinion?

"A. In my opinion, I would never give the Government any money unless they told me I owed it to them, so I would have to take the Government's opinion on taxes.

"Q. My question is, when the Shotwell corporation tax return for the year 1945 was filed, did you consider that you had omitted from it some of the net taxable income, the net taxable income that was in fact received by the Shotwell corporation?

"By the Witness: Yes.

"Q. Well, then, you considered the 1945 to be a fraudulent return, is that correct?

"A. That is correct, inasmuch as my modification of the answer previously.

"Q. What modification is that?

"By the Witness: Read it back to him, Mr.
3073 Reporter.

"Q. Well, did you or didn't you consider it a fraudulent return?

"A. Yes, it was a fraudulent return inasmuch as it did not reflect the total income and expense of the company.

"Q. Well, would you consider a return fraudulent if it showed all of the tax that was due from the taxpayer, even though there were inaccuracies in it?

"A. Yes.

"Q. You would consider it fraudulent?

"A. Yes.

"Q. Did you consider the 1945 tax return of the Shotwell corporation was fraudulent because it did not reflect all of the net taxable income of the corporation and all of the tax due the United States?

"A. I would say yes to that question.

"Q. Did you consider the 1946 tax return of the Shotwell corporation fraudulent, as not reflecting correctly the total net taxable income of the corporation for that year, and the total tax due?

3074 "A. Yes.

"Q. Now, then, when you called on Mr. Sauber in company with Mr. Busby, did you tell him that the Shotwell corporation had filed false income tax returns for the years 1945 and 1946?

"A. Yes, I guess I did.

"Q. I show you, Mr. Cain, a copy of an affidavit, which has just been marked Government Exhibit 1 for identification, which purports to be a copy of an affidavit that you made in connection with, or in support of the motion to dismiss. I ask you to look at it and see if that is the affidavit that you made, if it is a copy of the affidavit?

"A. Are you trying to say that because I say 'Omissions and misstatements'?

"Q. No, I am asking you, Mr. Cain, if that is a copy of your affidavit?

"A. Yes, this is a copy.

3075 "Q. Directing your attention then to the last page thereof and to the language:

"'Affiant further avers that although he and his associates have steadfastly maintained' that the defendant corporation owes no tax over and above the sum of $370,638.95 which it paid for the year 1945, or over and above the sum of $457,012.98 which it paid for the year 1946, the activities of said agents aforeand were of such embarrassment * * *.'

"Is that your statement made under oath?

"A. That is my statement under oath, and it still stands.

"Q. Now, then, directing your attention to a conference that has been testified to which you had with Mr. Busby when you returned from New York in January of 1948"—

By Mr. O'Brien: When he returned.

By Mr. Lockley: Pardon me.

"—when he returned from New York in January of 1948, at that time he asked you about these overceiling transactions that the Shotwell Company had had, is that correct?

"A. That's correct."

3076 "Q. At that time did you tell him that the Shotwell corporation had made false tax returns for the years 1945 and 1946?

"A. At that time I told Mr. Busby that we had omitted this over ceiling receipts and over ceiling payments.

"Q. Did you tell him?

"A. No, I did not.

"Q. You did not tell him, that, you did tell him, did you, that you had over ceiling receipts, that you had received over ceiling payments, and that you had paid out over ceiling payments, and that roughly they balanced or washed each other out?

"A. That's correct."

This is a portion of an answer by Mr. Cain:

"After all, I was a businessman. I got involved—"

By Mr. O'Brien: Where are you now?

By Mr. Lockley: Page 207, Mr. O'Brien.

By Mr. O'Brien: How about 201?

(Discussion between counsel.)

By Mr. O'Brien: 206?

By Mr. Lockley: 207.

3077 This is on page 207 of the transcript.

"After all, I was a businessman. I got involved in this thing through no particular desire on my part. I wanted to build up a business, and so I wasn't surprised nor was I disappointed.

"I said, 'We stand willing and able to pay any amount of tax that is assessed against us, and we are anxious to get the job done. If we find that we have money coming back, or we feel that we have money coming back, we will use every means to get it back, but we are ready to pay it right now.'"

Further questions by Mr. Ryan and answers by Mr. Cain.

"Q. Whether you owed the taxes or not, is that right?

"A. Whether I owed—I expected to be assessed for them.

"Q. But to the extent that they would be deductible, you would consider that you really didn't owe the taxes, even though—

"A. You mean my own mental reservation on it?

3078 "Q. —even you might be in a position where you would have to pay?

"A. That is correct.

"Q. Well, then, you wouldn't have considered yourself guilty of any fraud at that time, is that right?

"A. I don't understand this fraud thing all the time, Mr. Ryan. Under the terms of the Revenue Act I was guilty of fraud.

"Q. Well, the statute involved provides that anyone who attempts to defeat and evade the payment of any tax imposed under the particular chapter wilfully attempts to defeat and evade, is guilty of what we call tax evasion, and that is the fraud to which we have reference, I have reference, in asking these questions—the wilful attempt to defeat and evade the payment of taxes, and on the basis of what you say your attitude was when you talked to Mr. Sauber you didn't consider that you were a wilful evader, is that right?

"A. That is a long question, isn't it?

3079 "Well, I was certainly an unwilling evader.

"Q. Well, you mean in the sense that your evasion was incident to something else, or in the sense that it wasn't wilful if there was evasion?

"A. Mr. Ryan, if it hadn't been for the fact that the OPA was in effect and we had to do things in violation of that law, this tax case never would be. We would have reported every penny of income that ever came in to the company."

"Q. Well, then, you say that you did tell Mr. Sauber that the corporation owed taxes unquestionably?

"A. We told Mr. Sauber that unquestionably we owed taxes, that is right, under their rules.

"Q. How do you reconcile that with your affidavit in which you say that at all times you have maintained throughout these proceedings that the corporation owed no taxes?

"A. Well, we morally owe no taxes. If we took
3080 in money and spent the money we owe no taxes, but under your rules we do owe taxes.

"In other words—"

By Mr. O'Brien: That is as far as he goes.

By Mr. Lockley: And then to page 212:

"Q. Did you feel that you owed a tax?

"A. Yes, I felt that we owed a tax.

"Q. Morally and legally?

"A. My answer still stands. I felt that I owed a tax."

The next question—

By Mr. O'Brien: The next question.

By Mr. Lockley: (Reading):

"Q. Did you make any distinction between the feeling that you owed it legally and the feeling you owed it morally? You made the distinction a little while ago, that is the reason I ask.

"A. Yes, I would make a very definite distinction between a moral obligation and a legal obligation."

Excuse me.

3081 "Q. Did you mean what you said to him?"—which refers to Mr. Sauber—

"A. Yes, I meant that we wanted to pay the taxes.

"Q. That you owed the taxes?

"A. I really meant that. I meant we wanted to settle this thing.

"Q. What did you mean in your affidavit when you say:

"'That at all times in your proceedings you and your associates have maintained that the corporation owed no taxes'?

"A. Well, I am going over to the moral side of it now.

"Q. Well, do you mean when you spoke to Mr. Sauber you were speaking legally, and when you spoke in the affidavit you were speaking morally, is that what you mean?

"A. And when I spoke to Mr. Sauber and explained the case to him from the moral angle he understood just that.

3082 "Q. Well, of course, Mr. Cain, a taxpayer either owes taxes or he doesn't. There is a distinction between owing taxes and considering yourself in a position where though you don't think you owe them, you can't prove that you don't.

"Do you understand that distinction?

"A. That is right.

"Q. Now, if I understand you correctly, you meant that you owed the taxes in fact, and you said so to Mr. Sauber.

"Is that right?

"A. I meant that I owed the taxes, and couldn't prove that I didn't.

"Q. You owed them, and you couldn't prove that you didn't?

"A. That is right. I meant—that is just what I meant."

And now on page 226:

By Mr. O'Brien: Page 215?

By Mr. Lockley: Did we leave something out, Mr. O'Brien?

By Mr. O'Brien: At the top of page 215.

By Mr. Lockley: 215 of the transcript.

3083 "Q. Did you feel, did you believe that the gross receipts unreported you had received exceeded the gross disbursements unrecorded?

"A. At the time I made the disclosure?

"Q. Yes.

"A. I don't believe I knew the status of the situation at that time."

And now to page 226.

"Q. To whom did you pay any of the money that you say was spent for the purpose of procuring materials over ceiling?

"A. I didn't pay any of it to anybody.

"Q. What did you do with it?

"A. I never handled a penny of it.

"Q. Did you ever receive any of it from Mr. Lubben?

"A. No.

"Q. Personally?

"A. No.

"Q. Who did?

"A. Oh, various people in the company.

"Q. Well, who would they be?

"A. Mr. Huebner, I think Mrs. Morrill received
3084 some, Mr. Graflund, Mr. Roeser, and possibly one or two others.

"Q. Well, who might the others be?

"A. I would have to refresh my memory on it.

"Q. But you did not?

"A. I never did, no.

"Q. Did you ever see any of the money?

"A. I think on one occasion I might have seen the money.

"Q. That is, between the time it was received and paid out?

"A. You mean did I see it between the time it was received and paid out? Oh, I would think so. I was President of the company."

At this time, your Honor, the Government rests.

And Thereupon The Government Rested Its Case In Chief.

3085 By the Court: Mr. O'Brien, the matter to which you refer, I haven't forgotten it, but I wanted to write up the matter more carefully. I want to refer to it more carefully than I can orally that way. Some time during the day I will ask the jury the question that you have in mind. You may proceed.

By Mr. Kirby: I have certain motions. Has the Government's case rested?

By Mr. Lockley: Yes, sir.

By the Court: May I see the motions, please.

By Mr. Kirby: I would like to discuss them out of the presence of the jury.

By the Court: Haven't I just passed on this motion?

By Mr. Kirby: No.

By the Court: I thought I had.

By Mr. Kirby: No. It involves a little something else, your Honor. If your Honor please, the times stated on which it is made—I don't mean the hour, but—

By the Court: Well, we could take our morning recess now and I will hear you in chambers on it. We will take a recess for ten minutes.

3086 By the Marshal: The court will recess for ten minutes. Will the audience please remain standing while the jury files out.

(Whereupon a recess was taken.)

(Thereupon the following proceedings were had and taken in chambers, outside the presence and hearing of the jury:)

By the Court: I merely suggested we take it in chambers, thinking we might expedite the matter. I notice you have two motions, one for acquittal of defendant Sullivan and the other for severance.

By Mr. Kirby: I mean the two motions jointly, that is to say, the defendant Harold Sullivan and—

By Mr. McConnell: This motion doesn't concern me, I don't think.

By the Court: I am sorry. I didn't hear that.

By Mr. McConnell: This motion doesn't concern me.

By the Court: I don't think it does.

By Mr. Kirby: The defendant, Harold Sullivan, wishes to put the case to the Court now on a motion for acquittal at the conclusion of all the evidence as to the defendant Sullivan. That is, the defendant Sullivan is not 3087 obliged, as I conceive it, to introduce any evidence in his defense at all. He may rest, and it is up to the Government to prove beyond all reasonable doubt his guilt. He needn't adduce evidence at all.

By the Court: Does he rest?

By Mr. Kirby: He asks leave to make these motions to rest, for an acquittal upon resting, that is, the conclusion of all the case, and that if that motion for acquittal be not granted by the Judge, then we must tender that issue to a jury.

Then we want a severance so we can go to the jury with the case, if it exists as to Harold Sullivan. We don't want to be put in the position, your Honor, of having an enor-

mous amount of further evidence come in, which, as we understand it, wouldn't add or detract to the quantum of proof against Harold Sullivan now. That quantum of proof, we have indicated, is extremely limited. It turns, as your Honor's memorandum this morning indicated, solely or principally upon that Lubben statement about that one conversation and of course the proof which would go on in the balance of a long trial would cover many
3088 fields, much misunderstanding, and it couldn't be cured by an instruction to the jury to disregard that evidence with respect to the defendant Sullivan. It is not possible, as we see it, for the defendant Sullivan to be granted the rights he asks for, that is, to rest his case, to have the motion for acquittal at the conclusion of all the case passed upon by the Judge and also to have a fair passing upon his guilt by this jury if we have to sit here and listen to all the rest of the case because you can't clear that out of the minds of the jury by an instruction.
3089 By the Court: As a practical matter, I don't have in mind as to what you have in mind as to how it would be handled.

By Mr. Kirby: Harold Sullivan would rest.

By the Court: Yes.

By Mr. Kirby: And then I would ask for the Court's review again in the Court's mind of the rules as they apply at the conclusion of all of the evidence. That is to say, there is now no evidence to go to the jury whatever.

By the Court: Assuming I denied your motion, what then?

By Mr. Kirby: Then we want to go to the jury and argue Harold Sullivan's guilt or innocence to the jury right now.

By the Court: I know of no such procedure.

By Mr. Kirby: How can we possibly get a fair—

By the Court: Your motion for a severance isn't timely. If there was any merit to your motion for a severance, it should have been made before we started the trial.

By Mr. Kirby: Well, although we had that hint from Mr. Cunningham in Minneapolis, that the proof would be extremely sketchy, nevertheless, until we see what it is, we don't see that we have to arrive at a point
3090 that we can decide whether to rest or not and now we have come to the point where we can see the quantum of proof and that is the earliest time we can make such a motion.

By the Court: You certainly have a right to rest, if you want to, at the end of the government's case. There is no way I can force you to offer any testimony and if you want to rest now, you certainly have that right but I know of no way that a severance can be granted at this point of the trial, a severance such as you have outlined to me. You suggest that if the defendant Sullivan rests and you make a motion for acquittal on all the evidence and I deny it, then you contend that you should go to the jury at this time and have the jury consider the guilt or innocence of the defendant Sullivan and we disrupt this trial as to the other defendants until that issue has been determined.

By Mr. Kirby: I see no other way to do it.

By the Court: I know of no such procedure in a criminal trial.

By Mr. Kirby: It would be highly prejudicial to Sullivan if there was—if he had to abide all the remaining events of the trial and you couldn't possibly cure that by an instruction.

3091 By the Court: I know of no such procedure in a criminal trial.

By Mr. Kirby: I will concede it is unusual.

I will call the Court's attention to the only two references I have found and reading from a Nebraska case, Cole vs. Fenton, 174 NW 509—during the course of trial, one of several defendants withdrew his plea of not guilty and entered a plea of guilty.

Then in that State, in the State of Nebraska, it was necessary to have the jury pass upon the punishment so that he, even though he had pled guilty did have a question for decision by the jury.

And they said this:

"When one of two defendants jointly charged with murder enters a plea of guilty even if it is entered in the progress of the trial and there had been no request for separate trials, the practice regularly would be to proceed with the trial as to the defendant not pleading guilty separately and not take the evidence as to the degree of the crime of the defendant pleading guilty in and as a part of the trial of

3092 the other defendant, but if neither defendant asks for such a separation and if the evidence against both is taken together, the parties so consenting to that

matter of procedure cannot afterwards contend that for that reason the judgment finally rendered is absolutely void."

In other words, that man, if he had asked for a separate jury to pass upon that question of the burden of punishment that he was to have to meet, he would have been entitled to it, but having consented to go along, he waived it.

By the Court: Well, the motion of Harold Sullivan for acquittal at the close of the government's case is denied and exception is allowed, and the motion of Harold Sullivan for severance is likewise denied and exception is allowed.

By Mr. Kirby: How would the trial be conducted now?

By the Court: I don't know. You haven't rested as yet. I don't know what you are going to do. You have a right to offer evidence on behalf of defendant Sullivan or you have a right to rest.

By Mr. Kirby: All right. But my question is, if
3093 we rest, your Honor, how would the trial then be conducted?

By the Court: I assume that the trial would be conducted as to the remaining defendants, in so far as they then desire to offer evidence. I haven't given any thought to just all of the possible problems that may arise, but I know of no way that we can go to the jury now on the question of the guilt or innocence of the defendant Sullivan before the conclusion of the entire proceedings.

3094 By Mr. Kirby: But that, I submit, would defeat his right to have the evidence considered separately and entirely as against himself, if he rests at this time.

By Mr. Lockley: I would like to observe that it might be highly prejudicial to the other defendants to submit Mr. Sullivan's case to the jury, particularly if a verdict of guilty were returned.

By Mr. Kirby: Well, the Government put these people together at a time when they admitted that the case against Sullivan was weak.

By the Court: Was what?

By Mr. Kirby: Was weak.

Here is a man, Judge, and I appreciate your ruling this morning—who has had an honorable lifetime, and yet the whole, the whole of his life, in effect, is to be ruined simply by one statement later substantially withdrawn.

I just can't feel that the Government should press that. I don't feel the Government should press his position here in this regard, and I again ask the Court to think seriously about the motion for acquittal for this man.

Heavens, Judge! That is so little, to ruin a man's
3095 life, or to expose him to the risk of ruin, with a witness that actually contradicts himself. It is really a weak case, and I think Mr. Lockley—isn't that true?

By Mr. Lockley: I have no question in my mind as to Mr. Sullivan's guilt. The evidence to support it, from a legal viewpoint, might not be overwhelming, but I have no question whatsoever but what he is guilty of the crime charged.

By Mr. Kirby: Well, the evidence—

By the Court: Well, gentlemen, I don't think we have to have any further discussion about that. I have ruled on the motions which have been presented.

By Mr. Kirby: Well, all right, your Honor.

(And thereupon the following proceedings were had and taken in open court, in the presence and hearing of the jury:)

By the Marshal: This Honorable Court will now resume its session.

By Mr. Kirby: Having in mind the specific ruling that I requested in Chambers, without having to repeat it in the presence of the Jury, I except to the ruling. I feel that in view of the ruling I cannot take the risk that I
3096 indicated in there, and that I must proceed.

By the Court: Very well.

By Mr. Kirby: But, I think the status of the record and what I asked leave to do, is amply plain, is it not, your Honor?

By the Court: So far as I know.

By Mr. Kirby: Yes, thank you.

By the Court: You may proceed, gentlemen, with your opening statements.

Nos. 470-471

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In the

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11108 *vs.*

THE SHOTWELL MANUFACTURING COMPANY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11109 *vs.*

BYRON A. CAIN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11110 *vs.*

FRANK J. HUEBNER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11111 *vs.*

HAROLD E. SULLIVAN,
Defendant-Appellant.

U. S. C. A. - 7
FILED
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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

The Schaffer Press, Inc.—ANdover 3-6850

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And Thereupon, The Defendants To Maintain The Issues In Their Behalf Offered And Introduced The Following Evidence:

And Thereupon, Mr. McConnell Addressed The Jury In Opening Statement On Behalf Of The Defendant, The Shotwell Manufacturing Company.

By Mr. McConnell: May it please the Court,—
By the Court: Mr. McConnell,
By Mr. McConnell: —and ladies and gentlemen of the jury:

We now come to our statement of the case. The Government made an opening statement at the time they opened their case, and I think Mr. Lockley pointed out, and I want to say the same thing, that what I say to
3097 you about this case in this opening statement is not evidence. What I may suggest is the law in this opening statement is not law, and the facts are within your province, and the law is in the Court's province; and the only point and purpose of this opening statement is to get before you the position of the particular defendant that I represent in this litigation.

3098 I represent the Shotwell Manufacturing Company which is an Illinois corporation. It has many stockholders, as the proofs will show. In 1945, I think, aside from the individual defendants, the stock holdings of this corporation were approximately 67 per cent, which was held by outside interests, independent, who are not charged with any criminal wrongdoing or who are not charged with anything in the way of income tax evasion.

In the year 1946 the situation was somewhat different but not greatly different. The Shotwell interests had been bought by the corporation and that stock had been turned in to the corporation.

So, I stand before this Court and jury in a position distinct, I think, and independent from individual defendants. Not that they may be antagonistic at all, but nevertheless, on the record, I am not representing an alter ego of the individual defendants; I am representing an individual corporation which has distinct and independent interests, and which will come to you asking a verdict at the end of this case, independent and distinct from any of the interests or contentions of any of the individual
3099 defendants.

Now, this corporation gave its officers no authority, express or implied, to engage in black marketing opera-

tions of any kind, character or description. The proofs will show that there was no such authority given its officers and certainly such authority could not be implied.

However, the officers of this company faced with a situation in the latter part of 1945 and 1946, did certain things and performed certain acts which violated OPA regulations.

The proofs will show that along the latter part of 1945 there developed an acute situation in the corn syrup market. The proofs will show that this corporation, in order to exist at all and in order to produce and supply candy to its various accounts, had to obtain the necessary ingredients of its candy, corn syrup.

As I say, in the latter part of 1945, extending up through June, July and possibly into the early part of August of 1946, there was an acute shortage in corn syrup and it was occasioned for this reason, as the proofs will show, that the ceiling price which was placed upon raw corn

3100 was so low that the farmers refused to ship that corn to the elevators and the elevators that were holding it for farmers refused to ship it to refineries at the ceiling prices. The refiners which made corn syrup could not pay a premium without violating OPA prices, so they refused to produce and couldn't produce, as a matter of fact, corn syrup without the corn and they required of the trade and particularly, as the proofs will show, of the Shotwell Company that if the Shotwell Company wanted corn syrup for use in the making of candies, it would have to supply to the refineries, raw corn—the refineries not caring how it was obtained, simply stating that as a condition upon which they were willing to grind the corn and make corn syrup and ship it to the Shotwell Company so they could conduct their business.

Now, in that situation, the proofs will show the officers of this company were faced with the situation of either going out into the corn market and buying raw corn at over-ceiling prices and shipping that to the refineries or being unable to proceed with the manufacture of candy in the Shotwell situation.

3101 And the proofs will show, I believe, that that situation was universal in the candy industry at that time.

Now, with that background, I want to be specific about what the position of this corporation is with reference to this proof. It is the contention of the Shotwell Company that it did not at any time, regardless of what state-

ments its officers may have made in different situations, and I am going to get to those statements in my opening statement—that it did not at any time receive the shipments of money which Mr. Lubben has claimed that he paid to Mr. Huebner.

The time that I am talking about as to the purchase of raw corn to be sent to refineries, is limited to a period starting in October of 1945 and ending in July or possibly the first week of August of 1946.

It is the contention of the Shotwell Company that they received outside that period not one single dime from Mr. Lubben or from anyone else and that no money went into the treasury of that company—no money went to that company, no money went where it could be dis-
3102 tributed to stockholders for dividends; that there simply was no money received out of that particular period of time.

Now, it is not clear how much that money amounted to but the outside limit would be what Lubben assigned to it on his books and records, although it is the position of Shotwell that Mr. Lubben's books are unreliable.

We will show by proofs that they have been falsified. We will show by proofs that he had every motive in the world to lay money off here as against us to protect his own income tax situation and that from this position and that position, by bringing in people who dealt with him, who were shown on his books, he paid money to, and that they didn't get money—that his books are impeached.
3103 So part of our proof will be the impeachment of the bookkeeping record which has been displayed before you by Mr. Lubben and by Miss Feldman, and we will show Miss Feldman knew nothing about this matter at all, had no knowledge of it at all, knew nothing of it from her own knowledge, and took only the position of accepting the statements which were given her by Mr. Lubben.

Now, from the point of view of the corporation, there is a most unusual situation presented in this case, and I can understand how the jury would be confused by it, because I am confused by it, and I stand here representing an independent entity, a corporation. We are met with the proof of the Government that the monies which were paid in all instances, except in a few instances, I think, from Mr. Lubben's testimony, were monies paid to Mr. Huebner, with the description of their being di-

vided into three piles: One for Mr. Cain, one for Mr. Huebner, and one for Mr. Sullivan, and something for the horses.

Now, that is the Government's proof. It isn't my proof, but I stand here with that proof before me, represent-
3104 ing the corporation in this case. The defendants deny those payments. The defendants, the individual defendants say "No, we did not." Mr. Huebner says, "We did not." He says, "I did not get that money. I did not make any such statement." That is what the proof will show, as I understand.

The corporation, therefore, stands in the middle of that dispute. The Government sponsors one version which would mean the corporation would never get the money, and the defendants take the position that they didn't receive the money; that Mr. Lubben lied, that he falsified, that he is assigning to this corporation and to its officers, money which they never received. That is an issue of proof which this jury will have to decide when all the evidence is in, as to whether this corporation received any money outside the period that I have mentioned, and whether or not, if they should by the largest stretch of the imagination believe the testimony of Mr. Lubben about this division of money—whether under that showing a corpora-
tion could be assigned and held as having received
3105 the money for its stockholders.

All right. Along in 1947, or 1946, the latter part of July, ceilings went off corn. There came an open market. The black market was ended. There was no purpose for a black market after that date. There is no reason for this corporation to receive any receipts for corn after that day. There is no reason for engaging in any black market operations whatever.

Nevertheless, the Government claims that monies were received after that time. The proof will be shown—and one payment I remember was about twenty thousand dollars, four $5,000 checks, which were supposed to have been cashed out in a south side bank—the proof will be offered to show that that is utterly false, that no such transaction took place, that no such transaction could have taken place.

3106 There was proof offered by Mr. Lubben of the two payments which I think total $49,000 on corn syrup, which he said Mr. Huebner told him to take down and give to Mr. Graflund; and Mr. Graflund, the Government's own witness, denied that he ever received so much for the

payment which came for the corn syrup, the corn market. And when the black market on corn went off, it seems to me that that part of the proof is pretty well negatived by the Government's own situation.

Now, after the black market went off, Mr. Lubben was a black marketer. There is no question about that, and the proof will show it beyond any question. He was one of the biggest black marketing operators in the country. The proof will show he testified as such before the Kefauver Committee. He claimed that and made no bones about it.

He started out with Burry Biscuit Company as a sort of an employee. First he was with Kroger, at $150 a week. Then he gets into operations where he buys out Burry Biscuit Company, and pays $157,000 for it, I believe, in one year's work.

3107 There is no showing how he got the money. Anyway, a black marketer. As the black market ran out, he went broke, no more black market transactions, so ostensibly his corporations went insolvent.

Having finished with the black market, Mr. Lubben changed and turned to blackmail.

By Mr. Lockley: I object, your Honor.

By Mr. McConnell: Well, the proof will show it.

By Mr. Lockley: The nature of his statements is argument. There is no opening statement here. It is a closing argument.

By the Court: I think some of your statements are more in the nature of argument instead of being an opening statement.

By Mr. McConnell: Blackmail isn't an argument. I will show that.

By the Court: Confine your statements to what you intend to prove.

By Mr, McConnell: I intend to prove that, after the close of the black market, that Mr. Lubben started out to blackmail the officials of the Shotwell Company.

3108 Bear in mind, he owed us $47,000 at the end of 1946 on his open account, on invoiced items.

And then he called Mr. Cain, I believe, one of the officials of the Shotwell Company in the early part of '47, and told him he intended to expose his OPA violations, unless he was given $75,000. I believe it was $125,000 that he wanted. Yes, it was.

Mr. Cain met with him, knowing what Lubben could do

with his business and his customers and so forth—it would be disastrous possibly, from a business point of view.

So, he met with him and negotiated and agreed to guarantee a loan for Lubben at the Sterling Bank, and Mr. Cain personally guaranteed that loan, and Mr. Lubben received $75,000.

It wasn't more than a few weeks until he was back and he wanted $50,000 more. That was refused. Later, at the end of 1947, he again attempted blackmail, I believe, on several occasions, and in 1948, he attempted to extort further money from the officials of the Shotwell Com-
3109 pany. There was first the meeting down in Hillsdale.

At that time, Mr. Huebner was shown a package, a paper purporting to show transactions which had occurred at a time and a place which Mr. Huebner knew could not have occurred, beyond the period we have been talking about here, beyond the period in November, or October, of 1945, up to 1946.

3110 At that time, the proofs will show that Mr. Lubben was threatening to take those papers to the Internal Revenue Department and charge that Shotwell had received not only the amounts which could be assigned and allocated to the period I am talking about and which went out as cost of goods sold or goods purchased, but the further period in the early part of 1946 and on beyond 1946.

The officials of the company were then faced with the situation of meeting proofs supposedly kept by Mr. Lubben, where they had no records; where he purported to have records of these transactions, and they were faced with the difficult situation of whether to yield to his blackmail or not.

The proofs will show that they didn't. They went through with a deal on the Haberkorn Company which was referred to in the government's case. We will show that in that conversation, Mr. Lubben said, "I am never going to pay the $75,000.00 note", he said, "I am never going to pay the $75,000.00 open account" and he suggested the Haberkorn deal. And the result of it was that the corporation bought Haberkorn for $101,000.00, so the corporation ended up with the Haberkorn Company
3111 which the proofs will show was practically worthless and for which it paid directly or indirectly through offsets of one kind or another on the books and records of the company, some $101,000.00.

There was a later meeting. Not content, Mr. Lubben sought a meeting with Mr. Cain at the night club, the Riviera night club and the proofs will show that that meeting—far from the way Mr. Lubben stated it—that at that meeting, Mr. Lubben said that unless he received $125,000.00, he was going to go to the Revenue and have these men indicted for Internal Revenue violation.

And he said he had a passport all ready; that he was ready to leave the country; that he would take his passport and he would go to South America. To that, Mr. Cain said, "We have already gone into the United States government and made a disclosure of any tax liability of any possible amount there could ever be in this situation and we are not interested" and the proofs will show that Mr. Lubben attempted to argue there was no disclosure on the part of the corporation; that the money had gone to the individual officers and he was talking about their individual income tax liability.

3112 And then after that meeting, the proofs will show that Mr. Lubben went to see the attorney and tried to reinstate the negotiations and tried again to make a deal whereby he would use his passport and go if our people would pay him money and the answer was no.

Again he sought out a Mr. Kramer up in Boston. The proofs will show he came up there and in Mr. Kramer's office said, "I must have $125,000.00" and Mr. Kramer said, "I won't pay you. I haven't got the money. Call Mr. Cain."

And he called Mr. Cain on the telephone and Mr. Cain said, "We have made a disclosure of this matter and we are not interested" and the proofs will show that then Mr. Lubben turned to Mr. Kramer and said, "You are guilty." He tried to collect blackmail from him.

The proofs will pose a question of credibility as between Lubben on the one hand, who will be shown to have falsified his record, who will be shown to have testified falsely in this case, who will be shown to have been impeached on his testimony on material matters and that his records were impeached on material items and

3113 amounts—that raises a question of credibility as between the witnesses you will hear on the defense

and those that you have already heard from the government.

3114 Now, the corporation faces in this case—and I want my position to be understood by the jury—the corporation faces in this case admissions which were made in certain so-called disclosure hearings, made by the officers of this company under the point of a blackmail gun where the officers, in desperation, were making any admissions, as the proof will show, which they thought would cover and obviate any possible objection that the Government could have as to the amount of tax so that they might pay their taxes, in any amount, and get away from this blackmailer and go back to their business of selling candy.

I want to make it clear to the jury that I do not and I will not attempt in the proof of this case to condone black marketing, income tax evasion or any of those things, but this corporation has a right to be indulged the presumption of innocence which the Court told you must be indulged until all the evidence in this case has been heard and then considered by you people.

Now, there is one thing that is obscure and it hasn't been clear from the statements, and that is this: The amount of over-ceiling payments that Shotwell made

3115 to obtain necessary materials for its business was a deduction from any income it received and there could be no income, and therefore no income tax evasion by Shotwell if the payments which it made equaled the payments which it received. That, I am sure the Court will instruct you on, because it is a matter of constitutional law that you cannot tax a man except on his net income and not his gross income.

We will show that the people who dealt with us and Shotwell believed that from all their knowledge of this situation there was no net income available in that corporation and that they didn't return it because it didn't exist.

True, it should be on the tax return, but we are not indicted and we are not charged with any charge except evading tax and the Government, and the Court I am sure will instruct you, must show that this corporation had income tax which it owed the Government and which it did not return, or that it is not sufficient according to the receipts and disbursements which were on the

return. They must show there was a net income
3116 tax which was due and owing the Government as a result of the proofs in this case.

Now, there is one other thing. As I pointed out at the beginning, it is a difficult position for me to develop because it is only supported by the testimony of Lubben, who I know from what I have seen and what the proofs will show, cannot be relied on—that is, that there were payments made to some officers of this company which never got to this corporation. If that is so, it is not income, and I am sure the Court will instruct you that if it is shown by the proof that that income went to individuals, it is not income that went to this corporation and cannot be considered as part of the net income of this corporation. If that happened, which, as I say, in view of Mr. Lubben's credibility, I cannot sponsor and I cannot believe—but if the jury came to that position and believed Lubben's testimony, that there might be some claim that the Government had against individuals, but the claim before this jury, as I understand it, and I am sure the Court will instruct you, is simply this: That this corporation, as a corporation, as a distinct
3117 entity—this is not a conspiracy case—that this corporation received net taxable income which it did not show in its returns and which it deliberately intended not to show in its return in order to evade its income tax, and the officers, in so far as they are indicted here are simply indicted as performing acts for the corporation to obtain and reach that end result. They are not indicted and not charged with putting money—

By Mr. Lockley: I object to this portion of the argument, your Honor, on the ground that it relates to a legal argument. It is not an opening argument in the sense that it says what he intends to prove. He is already anticipating your Honor's instructions and is talking about what they are going to be.

3118 By the Court: I don't think it is proper to tell the jury that the individuals are charged with evading their taxes. It is the corporate taxes that you are concerned with.

By Mr. McConnell: That is all I am doing, your Honor.

So, I say, I ask, in hearing this case, that this jury follow this evidence to determine as between these wit-

nesses; particularly between Lubben, who is the Government's case—

By the Court: Don't argue your case, Mr. McConnell. Make your statement as to what you intend to prove. You are indulging in personal observations, and they are not proper in an opening statement.

By Mr. McConnell: And Mr. Lubben on the one hand, and our defense witnesses on the other.

And thereupon Mr. O'Brien addressed the jury in opening statement on behalf of the defendant, Byron A. Cain:

By Mr. O'Brien: May it please the Court?

By the Court: Mr. O'Brien.

By Mr. O'Brien: Ladies and Gentlemen of the jury:

3119 During your absence, we have been intent on motions and legal matters, and it is a little bit difficult to get my mind back to the precise and detailed facts that we shall want to prove upon the defense of this case.

I think it is true, at the outset, that I should note this is not an action against any of the individual defendants, nor particularly against the defendants Cain and Huebner, for whom I appear, on account of their individual income tax returns. Those are in no way in question in this proceeding. The thing which is in question is the income tax return of The Shotwell Manufacturing Company for each of the years 1945 and 1946.

And the question is whether the corporation either alone or aided by the individual defendants, failed to report the net taxable income with the intent and willful intent of defrauding the revenue.

Now, on that issue, I think that the testimony and evidence which we shall adduce before you will show, as Mr. McConnell has pointed out, that any receipts, any payments which were made to the corporation, which

3120 were income to the corporation were received during the period October, 1945 down to approximately the end of July, 1946.

That being so, we think that the proof will show, in one way or another—which it is unnecessary to take your time on now—but which you will see as the proof comes in, that these proofs will show Mr. Lubben did not pay the amount of money which he said he did. Nor did he pay it over the length of time that he said he paid it.

The proof will, of course, in that connection also show what is wrong with the books and memoranda and papers which Mr. Lubben relies on to support his testimony, and the proofs will show in detail through his dealings with others, and right from the books themselves, what was wrong, but more particularly, I think, we shall be able to bring evidence before you which will take up specific items that have been brought up, specific checks alleged to have been cashed, and used for payment to us, where when we unravel and bring to you the detail of that proof which we have painstakingly gathered
3121 from records and data in the east, you will clearly see that it just isn't true that the proceeds of any such checks were ever paid to anybody in Chicago, anybody of interest in this case.

Next, as to the money which was received by the corporation, and during the period which I have bracketed—I think you will see from the evidence that we adduce, that there was nothing secret, nothing surreptitious or clandestine about the situation on that money.

The evidence, contrary to what has been claimed here, will show we did not have greedy people standing by waiting for that money, hovering over those who had custody of the money, hastening the procedure of getting it in and getting it out, and calling on them to account for the money of which they had custody.

3122 On the contrary, the evidence will show that the moneys which came to the corporation were handled physically by the lower or next lower level of officials and employees. There was no secret about it, the evidence will show. There was neither any direction to them to keep an accounting of the moneys. Such notations that were kept, the evidence will show, these people kept on their own and for their own protection, so they would have a record from time to time as to what they had done with the money.

The proof will show that notwithstanding that they did that, the record was never examined, never audited by any of the defendants nor by anyone for them, but that it continued and was maintained and kept down to the time that the corn came into good supply and the operations terminated and that they were then disposed of without anyone ever having called or questioned any item on that

record, any of the amounts of money which were handled by these folks.

Then the proof will show that the moneys which so came in, went out and that they went out—when I say that they went out, I mean they were paid out, paid
3123 as premiums to procure the materials that were necessary in the manufacture of the candy and without which the plant would close and no candy at all would have been made and no income would have been derived and no tax would have been paid.

The materials were procured. We will show you by the evidence in considerable detail, but we hope not to drag it and detain you longer than necessary, but within that, we will show you in considerable detail what made that market, just exactly where the corn came from, what we and everybody else who needed it had to do to get it and I think we will show you finally, by evidence of public audits of the United States of America, that the United States of America had to pay far more money per carload for corn and did pay it, than we will ever claim to have paid here, and during the same period.

And everybody else, from the United States of America down, the proof will show did the same thing. Else, they got no corn syrup or other corn products from these refineries.

And so it was that the moneys which came in, came
3124 in for that purpose and that particular situation. They were disbursed for that purpose. That box was closed. That will be shown by the testimony. You don't have to take the words of the men here, but the lower echelon of employees, none of whom, with the exception of Gladys Morrill, is employed by The Shotwell Manufacturing Company.

When that box was closed, when the transactions broke, there was some $14,500.00 plus in that box, but the evidence will show that back in the early days when the corn syrup shortage became acute, when they needed money and didn't have it on hand to get that corn, that they procured and borrowed the sum of $14,000.00 which was put into that box in cash and consequently when the party was over, when the corn was in supply, when no such operation was any longer necessary, they took the $14,500.00 from the box and they used it to repay the loan

which theretofore had been made, leaving a matter of a couple of dollars and a few cents as a balance in that box, and that money that was there went into the company's bank account, was credited on the proper record to accomplish what I have just told you—to show the
3125 repayment of that loan.

Now let me make one further thing clear, if I may, in the matter of the proof. I think the evidence will show here that nobody on our side enjoys having been in a black market situation. Nobody boasts about that. It may be that under conditions, all of us to some extent, so that we will understand, have been forced to, or have been chosen to do things which were violative of that law, but the evidence and the testimony will show here that no one was peculiar on that.

3126 Shotwell had 16,000 customers, as the evidence will show, and not a single customer was charged over the ceiling for any of that candy, and the Government does not so contend. The evidence will further show that the only customer of Shotwell, and the Government has shown to emphasize the size—but you ladies and gentlemen have heard the evidence here on the total sales of the company, and the evidence will show in proper perspective the relationship and proportion of the transactions of Lubben in comparison of the total sales of the company.

In short, I think the evidence will show that neither this company nor any official connected with it, was engaged in a black marketing operation as such, gouging the public, or engaging in any kind of a transaction.

Finally, although they were relegated to this man Lubben, to whom they were initially introduced, as you have heard, I think the evidence will show that their feelings about black marketing, even under that kind of pressure, were such that it is precisely that which led them to the east rather than here.

3127 And then when these occurrences arose which Mr. McConnell has called to your attention and which I need not repeat, and more precisely, when Mr. Busby got back from the east and asked some of these men whether there had been any over ceiling receipts and over ceiling pay outs as he had heard from Mr. Graflund,

on his trip east, when he asked him that, they readily told him.

3128 He further asked him, the evidence will show, "Well, why didn't you tell me?"

Mr. Cain responded that he was not told because—and they were not put on the books because to put them on there would have been to convict them of violations of the OPA and render them liable to criminal prosecution and to treble damages, civally, as well.

But I call the jury's attention to the fact again, on the matter at issue, that we are not here trying an OPA case. This is not a charge of violation That is not the charge that the Government brings. We are not proud of it, but we are not here on that charge.

Now, when Mr. Busby got back and told them this, Mr. Cain said to him, "What difference does it make? Why should we embarrass you? It makes no difference taxwise, because the moneys that were received were paid out as part of the materials that we had to buy to make the goods."

So if we had five dollars in premium receipts, we had five dollars in premium disbursements for those goods and one balanced and washed out the other. If they were

3129 both put in the tax return it would not have increased the amount of the tax by one dollar.

But Mr. Busby, the evidence will show, said, "Oh, that is where you are wrong. The Commissioner of Internal Revenue rules by his regulation that you cannot deduct the amounts which you paid out over ceiling to acquire corn or any overceiling payments. You can't deduct it, so you would have to pay tax on the receipts."

The evidence will show that Mr. Cain said, "That does not seem fair. We never thought that. We never thought that we were defeating the revenue of one dime of tax. We thought they were in balance and that they would be deductible. But if you say that that is the Commissioner's ruling, then what are we to do?"

And Busby told him the policy of the Bureau, the published, promulgated policy under which anyone who had made any errors or omissions in his tax return was invited to come in and tell them about it and assured that if they did they would be immune from criminal prosecution, but that they would be liable to pay, civilly,

such proper assessment and penalties as the Revenue
3130 might properly assess.

Mr. Cain said, "You go on right over there and tell them about it, and tell them the nature of the transactions, find out that that policy is still in effect, find out that that still can be done."

And the proof will show that Busby did just that. He went and found out and came back and reported.

And Cain sent him in. And they didn't care what the amount was. They wanted to get a bill, the proof will show, they wanted to pay it. They didn't want to have any argument. They were willing to—and, in fact, in one way the proof will show they did take the very maximum that you have heard stated from Lubben right here. They didn't want to argue about the matter with the Revenue. They didn't want to say, "We didn't get this or we didn't get that," something which would take years to determine, whether they did or didn't. The very questions that you ladies and gentlemen of the jury have to decide now.
3131 Rather than that, Cain said, "Pay them. Pay them at the very utmost of the possible claim that that man can assert."

And that is the position they took. And then as the matter went on, the agents came. They came to look at their books. They investigated. They had been doing it, the evidence will show, ever since '48. They never got a bill, the evidence will show. They never heard what amount it was the Government claimed until this indictment was brought.

Contrary, the evidence will show, to the promise of immunity the proceedings went on, notwithstanding their willingness to pay and notwithstanding their compliance, as the proof will show, with that invitation and all the terms of it.

Now, I submit that the central issue will be, and the proof will therefore concern itself with the question of what receipts did this corporation have, what income was there to the corporation; what was done with it; was it paid for the cost of goods.

And if it was, there is no tax, whether the receipts—either the receipts or the pay-outs, or both, were
3132 omitted from the returns, I know the Court will instruct you in that event, makes no difference.

Thank you.

And thereupon Mr. Kirby addressed the jury in opening statement on behalf of the defendant Harold E. Sullivan:

By Mr. Kirby: I represent Harold Sullivan. And there hasn't been in the proof very much about him at all. The proof shows, and we will call it to your attention by reading it from the corporate minute books, that Harold Sullivan became the vice president of this company on the first of July of 1946. The proof will show that the 1945 tax return had already long since been made up and filed.

One of the counts in the indictment as to which the jury will be asked to pass in the question of whether Harold Sullivan individually, personally, wilfully, did acts to produce a false return of the corporation.

3133 Now, I want to say that that is one of the things that in all good conscience you should bear in mind, that of persons connected by the Government in an indictment the proof must be considered separately and weighed separately as to each. And I say that particularly because at the end of the Government's case there is only the one conversation which Mr. Lubben first said he had with Sullivan and then, after seeking divine guidance, as he expressed it, he retracted the next day.

But, nevertheless, we have the problem, all of us in the defense, of somehow making our proof on this issue of whether what happened, happened because of a criminal intent to evade income tax laws. It isn't a question, so far as the jury is concerned, what the era was, but I don't think you can decide whether what was done was done with a criminal intent to defeat the income tax unless you do, and the proof will attempt to let you relive that era.

Now, already you have been told much of the factors that would motivate people in business in those days, and I am just going to go quickly through a little

3134 summary of my own on behalf of the defendant Sullivan of what were some of those problems.

Harold Sullivan, you will understand—the proof will show, is a lawyer. He is a man whom I said is one of thirteen children. I confused the size of his family with my mother's family. He was one of seventeen children.

The proof will show that he was in overseas service in World War I, that he came back, that he married Stella, that they had two boys, that he has practiced law honorably and with the respect of the community all his life, and that a candy company called the Shotwell Candy Company, run by a man by the name of Alfred Shotwell, was in very poor shape, that Harold Sullivan knew of that, and that he and some others tried to work out some method whereby the company might be put back on its feet.

The proof will show that they made an agreement with Alfred Shotwell under which they had a right to buy him out for a given figure.

The proof will show that they went in, they brought some more energetic methods to the business, and the business did revive.

3135 The proof will show that they then tore up the old agreement with Mr. Shotwell for the price at which they were to buy him out and they wrote a new agreement and they bought him out at a vastly higher price and kept him on as chairman of the board until his death. Indeed, he was chairman of the board during the years '45 and '46.

3136 The proof will show that nothing in Harold Sullivan's conduct in the acquisition of this business, or his relations with Shotwell, indeed nothing in the man's life, has ever been characterized as criminal, or malignant, or as vicious. And unless you find he had that intent in these proceedings, you must acquit him.

But this company that they picked up was a company that depended basically upon three raw materials. And they were chocolate, sugar and corn syrup. All were under the OPA.

Now, what did that mean? Well, the proof will show that it meant a very, very great deal. In the first place, the sugar. It was rationed and it was hard to get at any price, if you wanted to get it in quantity.

Secondly, chocolate was extremely difficult to get. Cocoa beans, the raw ingredient of chocolate, they were rationed.

You have already heard, I might remark—Lubben testified they had to give one fellow ten thousand dollars in cash—that was the fellow the time they bought Haber-

korn—Lubben said he gave the fellow ten thousand
3137 dollars to just keep the chocolate coming, not for the chocolate. He just gave the salesman ten thousand dollars to keep him friendly.

Another thing about chocolate was that in order to get chocolate, you had to supply sugar to the chocolate makers. And the proof will show that Shotwell furnished hundreds of thousands of pounds of sugar to the chocolate makers in order to get chocolate from them, hundreds of thousands of pounds of sugar, which Shotwell had to procure.

The proof will also show that in this class of hard-to-get, and black market items, chocolate—Lubben was one of the country's great chocolate black marketeers. He has already testified as to one carload that he got for Shotwell.

We will show proof of more, and we will show proof that when he got that other chocolate for Shotwell, he did it only on the demand that he get candy at ceiling in return.

And that is what he got. He got us chocolate, and he got candy at ceiling in return.

But we are now faced with the charge that not only did he get the bargain that he made, namely, we got
3138 chocolate, and we would send him candy, but he has now on his books said in addition that these checks to cash that he took and had in his own pocket, he is now testifying he gave us that, too. The chocolate, and the cash, too.

We have got to meet that. Harold Sullivan, he is one of the defendants. We have to come in and meet that. And we will, on our proof.

3139 Then there was a big black market period in sugar, too. He at one time, the proof will show, when there was 535,000 pounds of what is called turbinato sugar—it is a very, very poor grade of sugar—it will show that he made arrangements for us to get the 535,000 pounds of turbinato sugar, and insisted that he get candy at ceiling if he got us the 535,000 pounds of turbinato sugar, for which we paid.

Well, the proof will show that we did get the sugar, that we paid the supplier for the sugar, we used it, and we did send Lubben, as he asked; the candy, and we sent it to

him at ceiling. We also had to send the sugar man some candy. We had to sell it to him at ceiling.

And now we are faced with the proof that not only we did that, but that there were a lot of checks made out in New York, and cashed at that time, and put in Lubben's pocket, and he gave us that, too. And we have to meet it as best we can.

And, representing Harold Sullivan, I tell you that in the proofs we will show that he did get us that 535,000 pounds of sugar, we did pay the supplier for it, we did give him the candy he bargained for, and that the
3140 rest of this is a lie.

Now, the corn syrup market you have already had mentioned to you. Mr. Lubben was not only one of the leaders in that, but he had as his partner a man by the name of Michael Cohen.

Michael Cohen, the proof will show, is a worthy successor to his father, who was the greatest of the corn syrup black marketeers in World War I. And Michael Cohen—quite an engaging fellow, he will be a witness here, quite an engaging fellow—oh, very frank about it. I think he is proud of his father. And I will say this, you will like him. I rather like him myself. He is in that business. But at least he is honest about it. And we don't think Lubben is.

But, anyway, in corn syrup the same thing happened in World War I. The same thing happened in World War II.

Incidentally, the proof will show that in World War I the government also had a—

By the Court: We are not going to go into World War I in this case.

By Mr. Kirby: Well, I certainly can only go to it from memory, but there will be some proof about those
3141 matters, Judge.

Basically, the problem, so far as corn syrup is concerned, is going to be a little plainer when we get into it, but basically you use corn syrup really more than you use sugar in candy. That isn't a shoddy thing to do. That is just a good thing to do. The proof will show its importance to the manufacture of the products called for by Shotwell's product schedule.

And it will also be shown that they were making for the government and for the Army candy in which they

needed to use corn syrup, but could get no allocations. They had to go and get it on the open market as best they could.

3142 But the corn syrup market was influenced, the proof will show, by a peculiarity of the OPA law.

The OPA, the proof will show, had one price for corn and then, of course, they had a price for hogs. And the price that the OPA had for corn was so low that a farmer could make a lot more money by not selling his corn, but feeding it to his hogs and selling the hogs and getting the price for pork that he could get.

The net effect of that was, and the proof will be very clear on it, that the corn just didn't move off the farms.

The proof will show that in Chicago, the great central corn market of the whole world, that there were days on end in '45 and '46 when not one single carload of corn was available for sale on the floor of the Chicago Board of Trade, not one, that whole building.

And you couldn't buy a car of corn on the open market. And that went on for days and days and days. Some months on the great Chicago Board of Trade, the proof will show, there weren't as many as twenty cars of

3143 corn sold on the open spot market in the whole month.

And that will illustrate the disappearance of corn from the market.

So what happened? The proof will show just automatically the corn products refiners, they had to close down. They didn't have the corn.

So then what happened? Well, the only way you could get corn off the farm—and whether this is decent or indecent, it is the truth—was to pay the elevator man or to pay the farmer something in cash.

And the proof will show that the reason there was no corn coming on the open market was because it was all being picked up out in the country for cash.

Now, Mr. O'Brien already briefly mentioned this, but I want to stress it. And that is that we—and I, in defense of Harold Sullivan, in explaining about this am not conjuring up something, but the proof will show that not only was anybody that wanted—

Let me pass that for a minute. Let me follow the transaction down.

The corn products refiners, they said to their cus-

3144 tomers, like Shotwell, they said, "You want corn syrup. You have to have corn syrup if you don't

want to close down. Well, you have got to move the corn in off the farm. We can't take all the money it would take to keep us running and buying that corn out on the farm. If you can get it and get that corn sent in to us then we will give you a part of the syrup we can grind from it. Not all of it, mind you, but a part of it, at ceiling. You get us the corn at ceiling. You can have a part of the grindings at ceiling."

That is what they said. It is in writing. We will produce it in writing. No doubt about that at all.

So how did you get it? Well, there were men that came around. There were men in that business. Sometimes you could identify them by name. Many a time you could not. Those men, they would go out and they would get these different cars of corn. They would get the bills of lading on them and then they would come in and they would sell for so many hundred dollars a car and they wouldn't take a check. They had to have cash. They would sell you the right to have that go to the refinery.

3145 Then you would have to go to the refinery, after you paid that fellow the cash, just the over-ceiling price, pay him in cash, that would go to the refinery, and then the refinery would let you have some corn syrup.

3146 Now, Shotwell did that. There isn't the slightest doubt about it that they did it.

Now, then, I will say—and Mr. O'Brien already hinted it—something else. The proof will show that the Government did it, too. The Government was in the back market bigger than Shotwell. The proof will show that the Government went out and by an official order they took some money from one agency and they gave it to another agency and they said to that agency, "You go out and buy fifty million bushels of corn"—this is at the time that this indictment period relates to—"and you buy it at ceiling plus thirty cents a bushel, black,"

And they did it, to ship it across the seas. And that is what it says in the order. And we will bring you a certified copy of that order right here.

Thirty cents a bushel amounts to $540.00 a car. And the Government was paying $540.00 a car, black.

What were the sizes of the transactions so far as the company was concerned? The actual consumption of this company in the short and black market products in

3147 1945 and 1946 will be shown. The corn syrup that they used in those two years, and this was a sizable operation, was 16,361,626 pounds.

Sugar was 11,996,824 pounds.

Chocolate was 7,054,440 pounds.

Or a total used by this company in the two years in question of 35,411,890 pounds of critically short and black market materials.

Where can you get the money to keep your business alive, where people demand cash from you or they will not supply this thirty-six—

By the Court: I wonder if you would try to close by twelve-thirty?

By Mr. Kirby: I will.

—the thirty-six million pounds.

Well, Shotwell did not go into the black market on the selling end with their sixteen thousand customers. But there was a fellow by the name of Lubben introduced to them, and that was a black day. Lubben was introduced by one of Shotwell's most responsible and finest representatives, a man who had been a vice president of a big chocolate company, and he introduced Lubben as a 3148 fellow that could get them chocolate.

Well, Lubben could get them chocolate, he could get them sugar, he could get them corn, he could get them corn syrup.

And the trade deals where he said, "If you can get me the candy I will get you the materials," they went on until finally there came a time when the corn market was so terrible that they couldn't work it out with these trade deals, and then was the first time a dollar in cash came in.

And then it was paid out.

3149 Now, everything that Shotwell did with this cash was a violation of the OPA. And let's assume for a minute that Shotwell took in ten thousand dollars, so they could get some cars of corn, so they could get some corn syrup and live up to their Government contracts.

Suppose they took that ten thousand and they paid it out for raw materials, and put it right on the books, and the OPA fellow came in and saw that. Shotwell would have to pay $30,000 in penalties to the Government for what they did.

So it would have been a never-ending spiral. If you put it on your books and let the OPA see it, you never could

have gotten in enough money to both get your raw materials, and pay their triple damages. It would have been impossible.

So it didn't go on the books. But in an income tax proceeding that doesn't make the slightest bit of difference. The proof will show that for a time it made a difference. The proof will show that the government had a regulation which was that if you took in over the ceiling money,
3150 if you took it in, you had to pay a tax on it. But if you paid out over ceiling to get the raw materials, you couldn't take a deduction on it. The fellow that got it had to pay a tax on it, but as far as you were concerned, it was just like you never paid it out at all. You couldn't take a deduction.

But that other fellow who got it, he had to pay a tax. The Government, up to the date of the indictment in this case, the proof will show, was enforcing that rule. Since the date of the indictment, the Courts have beaten them so often on it that the rule has been abandoned.

So that now, no matter what the Government's position was up to the time of the indictment, it is now true, under the law, as Mr. McConnell and Mr. O'Brien have said, that the money which we had to pay out to get these materials, is a deduction, and if it equals the amount that came in, there is no conceivable tax.

And if there is no tax, there simply cannot be a conviction of the corporation, or of Harold Sullivan.

3151 Now, I have indicated—and I am about through, that of necessity—and one might say following the lead of the Government, which was in the black market itself—they endured Lubben. He is the only one they endured, but they endured him. But in the OPA violations they didn't want to get hit triple damages, so it didn't go on the books.

You and I would think, as indeed they did, that as far as the income tax is concerned, it washed it out. Gladys Morrill said, "We got more materials. We made more candy. And the candy we sold we paid a tax on. It actually helped the tax thing, because it kept us going."

But they learned one day from this fellow, Busby, that the Government put on, that that wasn't so. They learned that the Government had this rule that the over-ceiling money that they took in they had to pay a tax on, but the over-ceiling money that they paid out they couldn't take

tax, and they opened their arms and they said, "We don't a credit for. The Government was going to make that other fellow pay, but they couldn't get credit. Busby told them that. Then for the first time, the proof will show, they
3152 knew there was a tax question involved.

And the proof is already in the record that they went right straight to the Government, immediately, the minute it became apparent that there was a tax question involved. The minute they were told the Government takes this position, it stunned them. It would, naturally, that if you got it over the ceiling you have got to pay a tax on it, but if you paid it out over the ceiling it doesn't make any difference. You can't have a deduction on it.

Well, the first thing they did, when they heard that, they went running to the Government, because the Government had announced, as the proof will show, that there had been a lot of black market transactions in this country and they felt that the Government should be paid some accuse you. It isn't a moral question. It was a war question. Our arms are open. If you are in it, come in and tell us and we won't prosecute you."

So the first time they heard that there was a tax question involved, and that anybody was taking this posi-
3153 tion that I have outlined, they went right to the Government, in accordance with the Government's announced position that they should do that.

And now Harold Sullivan, whom I represent as best I can, he is met with the situation. There is no proof against him. We are going to have to go through a lot of embarrassing proof about a respectable group of men being in the black market. It is embarrassing. But I hope the jury will keep in mind that this is an income tax case. If they ever had all the black marketeers in jail you wouldn't have room fo. them.

And the proof will show that every candy company in the country was in the black market, handling cash, and that there is only one little company, Shotwell, in the whole United States as to whom the Government has ever made an income tax fraud criminal case against them.

By Mr. Lockley: Well, now, your Honor, I object to that. In the first place, it is an improper and inaccurate statement.

By the Court: You must know that, Mr. Kirby. You

are arguing a matter and injecting into an opening
3154 statement matters that are entirely foreign to what is proper in an opening statement.

By Mr. Kirby: That was not the intent.

By the Court: We will recess until two o'clock.

By the Marshal: Will the audience please remain standing while the Judge and jury file out of the court room. This honorable court will recess until two o'clock this afternoon.

(Whereupon a recess was taken in the above-entitled cause until 2:00 o'clock P. M. of the same day, being Thursday, October 1, 1953.)

3155

• • (Caption—No. 52 CR 143) • •

September
Chicago, Illinois
Thusday, October 1, 1953
2:00 o'clock P.M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley.
Mr. Vincent O'Brien
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following proceedings were had herein, in the presence and hearing of the Jury:

By the Court: I might say this to the Jury before we commence this afternoon. You will remember that last Friday I referred to an article which appeared in
3156 one of the newspapers regarding the alleged civil tax liability of one of the defendants, and I called to your attention that the proceedings mentioned were pending in the Tax Court in Washington, and were in no way related or connected with this case which we are now trying.

And I called to your attention that the headline of the news item might be misleading in that it referred to the Shotwell case, and I stated to you that if any of you had read the article you should disregard it, and entirely

remove from your mind any inference or suggestion that the proceeding in Washington had any connection or relation with the matter we are now trying.

Counsel for the defendants now suggest that I ask the jury whether any of you ever read this article. Therefore, for the record, I would like to know whether or not any of the jury did read this article.

If so, will you raise your hands?

By a Juror: I just read it, but didn't—

By the Court: Did the reading of this article in any way prejudice you against any one of these defendants?

3157 By the Juror: No, sir.

By the Court: Do you feel that you can give each one of the parties a fair and impartial trial regardless of anything that may have been stated in that article?

By the Juror: Yes, sir.

By the Court: You may proceed.

By Mr. O'Brien: Was there anyone else who raised their hand?

By the Court: I didn't notice anybody else.

By Mr. O'Brien: Just the one gentleman.

By the Court: That is all.

You may proceed.

EDWIN DANE BOOKMAN, a witness called herein on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. Edwin Dane Bookman.

Q. What?

A. Edwin Dane Bookman.

Q. Are you sometimes known as Eddie Dane?

A. That's right.

3158 Q. Where do you live?

A. San Juan, Puerto Rico.

Q. With Mr. Lubben?

A. Yes, sir, that's right.

By Mr. Kirby: I wonder if the Reporter will mark these exhibits Defendants' Exhibits 49 to 52, inclusive, for identification.

(Said documents were marked Defendants' Exhibits 49 to 52, inclusive, for identification.)

3159 By Mr. Kirby:

Q. Mr. Dane, do you recall that under an order of court we took your deposition down in Puerto Rico at the same time we took Mr. Lubben's?

A. That is right.

Q. Do you recall of a general nature the testimony that you gave there?

A. That is right.

By the Court: Speak up, Mr. Dane, so the jury may hear your answer.

By the Witness:

A. Yes, I do.

By Mr. Kirby:

Q. I guess I have been calling you Mr. Dane, do you mind?

A. It doesn't make any difference. Whatever you choose.

Q. Whatever I like.

A. That is correct.

Q. All right. Well, Mr. Dane, when I questioned you down there, I think your testimony was that you became the purchaser of all of the assets of Mr. Lubben's New Jersey real estate, business and so on, is that right?

3160 A. Yes, sir.

By Mr. Lockley: If your Honor please, I would like to object to the nature of this examination. Counsel is so used to cross examining that I am sure he has forgotten he is now leading his witness.

By the Court: The objection is sustained.

By Mr. Kirby: I think you are right. I will drop the leading. I don't mean to do it, really.

By the Court: All right.

By Mr. Kirby:

Q. And is the purchase that you made the purchase which is covered by this deed to you and assignment which is marked Defendants' Exhibit 51 for identification?

By Mr. Lockley: Well, I object, your Honor, to any testimony along these lines, as to the purchase of any property by Mr. Dane, unless it is shown that it has some relevancy to the issues here. I believe the testimony was this happened in 1948 or 1949.

By the Court: Well, I assume this is preliminary.
3161 He may answer.
By the Witness:
A. I believe it is.
By Mr. Kirby:
Q. And at the time that you made that purchase, was it subject to a mortgage?
A. Yes, it was.
Q. To Byron Cain, or don't you know?
A. No, I don't believe it was subject to a mortgage to Byron Cain. I am not sure.
Q. Well, you bought the property, though?
A. I said it was subject to mortgage but to whom, I am not sure.
Q. All right. I show you—how much was the mortgage?
A. I don't recall the figure.
Q. I show you a document marked Defendants' Exhibit 49 for identification, and ask you whether you know whether that is the mortgage to which the property was subject when you bought it, if you know.
A. I really don't know.
Q. That appears to be a mortgage to Byron Cain?
A. It looks like it, I guess.
3162 Q. I show you a document which is marked Defendants' Exhibit for identification No. 50, and ask if you know Janet Moran?
A. Yes, I do.
Q. And who is she?
A. The sister of Mr. Lubben.
Q. And what did she have to do, so far as you know, with the mortgage at the time you bought the property?
By Mr. Lockley: Well, I object, your Honor. I fail to see the materiality or the relevancy of it.
By the Court: He may answer.
By the Witness:
A. Well, I know that she held a mortgage. I am not sure if it was at that time or before or later.
By Mr. Kirby:
Q. You mean, you are not sure whether it is at the time you bought it or before?
A. No, I am not.
Q. Was the mortgage on this property you bought paid, do you know?

A. The mortgage to Mrs. Moran?
Q. Yes.
3163 A. No. I don't believe it has been paid.
Q. Now I show you a document which is marked Defendants' Exhibit No. 52 and ask you if you have ever seen that before.
A. Yes, I have seen it.
Q. In fact, you signed it, didn't you?
A. I did.
Q. I believe the name of Nebbul, Incorporated. You have heard that name before?
A. Yes, sir.
Q. Is that Lubben spelled backwards?
A. Yes, sir, it is.
Q. And you conveyed the property, did you, to this Nebbul, Incorporated?
A. That is right.
Q. Were you paid anything for the conveyance?
A. I was given a qualifying share of stock in Nebbul, Incorporated.
Q. A single share?
A. Yes, a qualifying share. I don't recall just if it was one or two shares, or what it was.
3164 Q. That is what you got for the conveyance?
A. That is right.
Q. Lubben had the rest of the shares, did he?
A. That, I don't know.

By Mr. Lockley: Your Honor, there is nothing improper about that transaction. I object on the grounds that I fail to see the materiality of it.

By the Court: I don't know that I do, but I guess counsel has a right to make reference with reference to it and then he can offer it and we can determine whether it is material.

By Mr. Kirby:

Q. Are there any other documents that you know of that you signed in connection with the conveyance to Nebbul, Incorporated, other than this one you just had in your hand, Defendants' Exhibit 52?
A. I don't recall if there are or not.
Q. And the property that I am talking about, does that include—what does it include, Mr. Dane?
A. That includes two dwellings and a factory and a garage and I forget just what the acreage was.

Q. And the equipment of the factory?

3165 A. And the equipment of the factory, yes.

Q. And all of that came to you?

A. Yes.

Q. And that is what you conveyed to Nebbul, Inc. for one share of stock?

A. I believe it was, yes.

Q. Now, this Janet Moran, Mr. Lubben's sister, did you ever pay her any money in connection with this transaction?

A. The mortgage, do you mean?

Q. Did you pay her any money at all?

A. I don't recall whether there was any money paid to Mrs. Moran or not.

Q. Do you know a lawyer by the name of Sam Davidson?

A. Yes, I do.

Q. He handled all this?

A. Yes, sir, I believe so.

Q. How long have you lived with Mr. Lubben?

By Mr. Lockley: Well, I object to the materiality of that statement.

By the Court: He may answer.

By the Witness:

A. Since about 1944, I believe.

3166 By Mr. Kirby:

Q. In New York and then in New Jersey and then in Puerto Rico?

A. That is right.

Q. In connection with General Confections, Inc., the New York corporation, did you ever handle their books or records?

A. Never.

Q. When they moved to New Jersey they took books and records with them there. Did you handle any of the books and records then?

A. No.

Q. Did you do any work for them?

A. I had done work, off and on for either Mr. Lubben or General.

Q. What do you mean off and on?

A. Well, when that was—when they were getting the

factory ready, I helped paint the place and things like that. I mean, I didn't punch a time clock. I did not work in the factory.

Q. Well, were you working at some other occupation?

By Mr. Lockley: Well, I object to that.

By the Court: Yes. I will sustain the objection.

3167 By Mr. Lockley: I don't see what materiality it has.

By Mr. Kirby:

Q. Well, did you have anything whatever to do with the storage or the keeping of the books?

A. No.

Q. Now, we do not have on General Confections, or the government doesn't have and we don't, an accounts payable ledger. Now, as the purchaser from the receiver, did you ever get an accounts payable ledger?

A. I do not believe so, but I am not sure.

3168 Q. Another book that is missing in Mr. Lubben's books is the purchases book. As the purchaser from the receiver, did you ever get that record?

A. I do not believe so.

Q. Do you have some reason for saying that, some particular reason?

A. Well, any books that were received should have been there. I don't recall seeing those books.

Q. Did you ever see them?

A. No, I don't believe I ever did.

Q. Did you ever turn them over to Lubben?

A. No.

Q. Another book that is missing is the cash disbursements book of Mr. Lubben's company. As the purchaser or the receiver, did you ever see that?

A. No, I didn't.

Q. At any place, either at Mr. Lubben's home—you were living at Mr. Lubben's home, weren't you?

A. That is right.

Q. Did you see it around there?

A. No. I didn't.

3169 Q. Did you see it in the office?

A. No.

Q. In the chicken barn?

A. No.

Q. You didn't get it from the receiver?

A. No.

Q. That is true of all the others?
A. That is right.
Q. Now before it went into receivership, you had the physical custody of the books and records?
A. Before it went into receivership?
Q. Yes.
A. I wouldn't know.
Q. Well, you lived there, didn't you?
A. I did not live at the office. I believe the books were all in the office.
Q. That is just the next building to where you did live, isn't it?
A. That is right, but I was very seldom in the office.
Q. You were away in the home?
A. That is right.
Q. Taking care of that?
A. That is right.
Q. Now, who had custody of such books as Mr.
3170 Lubben had, someb y in the office, or Mr. Lubben, or who? You were there.
A. I would imagine the bookkeeper or somebody in the office.
Q. Did Mr. Lubben have them?
A. No.
Q. Was he there?
A. Well, yes, he was there.
Q. And you were also there, but you have absolutely no memory of what happened to those books?
A. I know nothing about the books from General Confections of New York.
Q. Did you ever see Mr. Lubben destroy them?
A. I certainly didn't.
Q. Or take them away?
A. No.
Q. But as far as you know, the last place you ever saw them was in the office of General Confections before the receiver?
A. Before the receiver.
Q. That is right. And you didn't get them?
A. No.
Q. When you purchased everything from the receiver?
A. No.
3171 Q. Mr. Dane, you have been living with Mr. Lubben since 1944?

A. Thereabouts.
Q. And your work has been in the theatrical line?
A. That is right.
Q. Are you a chorus—
By Mr. Lockley: I object, your Honor. I just objected to that a few minutes ago.
By the Court: Yes, the materiality of that.
By Mr. Lockley: And he is continually leading the witness. This is your witness.
By the Court: I don't think it is material.
By Mr. Lockley: It is not cross examination.
By Mr. Kirby: I will ask you this:
By Mr. Kirby:
Q. During the indictment period of 1944 and 1946, what work were you doing?
By Mr. Lockley: Well, I object to that for the third time.
By the Court: He may answer.
You may answer.
3172 By the Witness:
A. Theatrical work.
By Mr. Kirby:
Q. Of what kind?
A. Singing, dancing, acting.
By Mr. Lockley: I object on the ground it is irrelevant.
By Mr. Kirby:
Q. But the books now that existed in the indictment period of 1945 and 1946—the one thing I want to get clear with you, the last you know of them, Lubben had them, is that right?
A. No, that isn't right.
Q. What is right?
A. They were in the office the last I knew of them. I knew nothing of them, actually.
Q. You what?
A. I knew nothing of them, actually.
Q. Well, they were in the office?
A. I suppose so, You need books to run an office.
Q. You mean Mr. Lubben's office?
By Mr. Lockley: I object to his arguing with his own witness.
3173 By Mr. Kirby: That is my last question.
By Mr. Kirby:

Q. You mean Mr. Lubben's office?

A. Yes. Not his private office—outside.

By Mr. Kirby: I now offer as material particularly to the transactions which were involved in the $75,000 mortgage at the Sterling Bank—that is the mortgage which is covered by Exhibit 50—no, 49, and the assignment of it, to Janet Moran, that was tied into the Haberkorn deal, your Honor, which is No. 50, and then the transfer to Mr. Dane also of the assets covered by that, which is Exhibit 51, and then his conveyance back to this Lubben Company, which is Exhibit 52, and I offer all of those as a connected chain of events in the documentary fashion.

That is all of this witness.

By the Court: Well, is there any objection to the exhibits, counsel?

By Mr. Lockley: I have never seen them before, your Honor. If I may have your indulgence a moment, I would like to look at them.

3174 By Mr. Kirby: There are a couple more questions that I overlooked.

By Mr. Lockley: I object to them on the grounds they are immaterial.

By the Court: You have objected to the foundation, and to the fact that they are—

By Mr. Lockley: You mean that they are photostats instead of originals?

By the Court: Yes.

By Mr. Lockley: Your Honor, I will not quibble, no, sir.

By Mr. Kirby: They are certified in the case.

By the Court: Complete your examination in the case.

By Mr. Kirby:

Q. Now, Mr. Dane, going to the period of General Confections in New York and the Eatsum, that was in 1945 and 1946, that was when you started to live on this farm?

A. I believe about that time.

Q. And Mr. Lubben bought it?

A. I believe so, yes.

Q. And did you see Mr. Lubben pay contractors 3175 and others with large sums of cash?

By Mr. Lockley: I object to the leading nature of the question.

By the Court: Let him complete it and then you can make your objection. Complete your question.

By Mr. Kirby: It is completed, I think. I think, if the

reporter will read it—

By Mr. Lockley: By that time he has completed his testimony too. I object on the ground it is a leading question and on the ground it is immaterial.

By the Court: Let the reporter read the question.

(Question read.)

By the Witness:

A. No, I didn't.

By the Court: Well, the answer may stand.

By Mr. Kirby:

Q. Have you ever seen Mr. Lubben pay for items in the way of purchases of machinery and things around the farm or the house with cash?

A. No.

By the Court: When are you talking about, what
3176 period?

By Mr. Kirby: During the indictment years.

By the Court: He doesn't know what the indictment years were.

By Mr. Kirby: 1945 and 1946. That is when they were spending that money.

By the Court: You have to state the years.

By Mr. Kirby: All right.

By Mr. Kirby:

Q. I mean 1945 and 1946.

A. I don't believe I ever did. It is so long ago, I don't know.

Q. You might have?

A. No, I don't say might have. I say I don't believe he ever did that I know of.

Q. Did you see him pay for any of those contractors' bills or for any of the work or the machinery or the furniture? Did you ever see him pay for any of that with a check?

A. I didn't handle the checks, so I don't know. I didn't pay them. I don't know what they were paid with.

Q. Let me inquire about—did Mr. Lubben, yourself and some others take a trip to Haiti?

3177 By Mr. Lockley: I object on the ground it is immaterial.

By the Court: Well, it may not be. I don't know. He may answer.

By the Witness:

A. Not with others. Mr. Lubben and I went to Haiti.

By Mr. Kirby:

Q. Just the two of you?
A. Yes.
Q. When?
A. Gee, I don't remember the year.
Q. It was earlier than 1948, wasn't it?
A. It could have been, or it could have been a little later. It was about that time. I don't remember just when it was.
Q. How long did the trip last?
A. About three weeks.
Q. There was nobody else along?
A. No.

By Mr. Kirby: That's all.

By the Court: Have you any examination, Mr. Lockley?

By Mr. Lockley: No, sir.

3178 By the Court: Apparently that's all, Mr. Dane.

I can defer my ruling on these exhibits until I have looked them over and hear counsel later as to the materiality. I am not entirely clear on them.

By Mr. Kirby: Your Honor, you might even want to defer them until there are other witnesses that tie into that Haberkorn transaction and the whole question of whether it was or wasn't blackmail.

By the Court: All right.

(Witness excused.)

WILLIAM BELLANDI, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?
A. William Bellandi, B-e-l-l-a-n-d-i.
Q. Where do you live, Mr. Bellandi?
A. I live at 806 South Portsmouth Avenue, Westchester.

3179 Q. And what is your occupation?

A. At the present, I am the auditor of the Mid City National Bank, Madison and Halsted, Chicago, Illinois.

Q. And for how long has that been true?
A. Two and a half years.
Q. What was your position with the bank in 1946?
A. In 1946 I was a receiving teller.

Q. Do you know a James Moran?
A. No, I don't.
3180 Q. As auditor of the bank, would you briefly describe your duties?
A. Well, my duty is—well, I say watch dog for the board of directors, to conduct audits of various departments and also I am custodian of the records of the bank.
Q. During the year 1946, how many paying tellers did that bank have?
A. We had two regular paying tellers and an extra one on a Friday and a Saturday.
Q. Did the bank, in the year 1946, make a practice of microfilming checks?
A. Yes, we did.
Q. Are the microfilms of checks made in 1946 still available?
A. No, they are not.
Q. In so far as the cashing or payment of checks is concerned, did the paying tellers in the year 1946 maintain a record of checks paid to the trade?
A. Yes, they did.
Q. What is that record called?
A. The teller's sheet.
Q. Have you brought with you the teller's sheets, the paying teller's sheets for that year?
3181 A. Yes, I have.
Q. Is it true that we requested you to inspect the teller's sheets, that is, the paying teller's sheets for that entire year to see if on any day there was a record at your bank of the payment of four $5,000.00 checks?
A. Yes.
Q. And did you inspect those records for that purpose?
A. Yes, I did, personally.
Q. Did you find among the teller's records whether four $5,000.00 checks were so cashed on any given day?
A. I did not find any evidence to substantiate that fact that four checks were cashed.
Q. Did you look to see if there were four such checks on a given or a succeeding day?
A. Yes, I did.
Q. And with what results?
A. I could not find any evidence to that effect.
Q. Now, in the course of your search, did you examine the daily paying teller's sheet of each of the paying tellers

who were there in the employ of your bank in the whole of the year 1946?

3182 A. Yes, I did.

Q. What if any practice did the bank have in the year 1946 with respect to returning to the Treasury Department a form pertaining to transactions in cash checks?

A. If they were large, unusual transactions, the teller concerned would fill out a form which in turn was forwarded to the Federal Reserve Bank.

Q. Did you, in your search, find any record of such a sum pertaining to four $5,000.00 checks in the year 1946?

A. No, I did not.

Q. And the teller's sheets which you examined, will you state directly whether they do or do not disclo.e these four $5,000.00 checks to which I have referred?

A. To my knowledge, they do not disclose it.

Q. And by your knowledge in this case, you mean the knowledge that you gained from the inspection of those sheets?

A. That is correct.

Q. And the sheets are here available—

A. They are.

Q. —for use if use is desired?

A. They are, sir,

3183 By Mr. O'Brien: You may cross examine.

Cross Examination by Mr. Lockley.

Q. Mr. Bellandi, is it?

A. That is correct, sir.

Q. Do you have all of those sheets with you which you referred to, the teller's sheets?

A. Yes, I have.

Q. I understand that you were a receiving teller and not the paying teller?

A. I was a receiving teller, yes.

Q. Are you familiar with what the practice was on the paying tellers?

A. Yes, sir, I was. I was relieving during vacation periods in the paying cage and I had been with the bank for a long time, so I have a good knowledge of what

occurred or what the practice was in the paying tellers' cages.

Q. What was the nature of this record that the paying tellers kept? Just what information did it contain?

A. As to the checks cashed, they would run them up on a so-called teller's sheet, and that record in totals
3184 which, in turn, is turned over to the clearing house and they are processed from there to the other banks they are drawn on.

3185 Q. What I mean is this: Would each individual check be entered on that teller's sheet if it was exchanged for cash?

A. Yes.

Q. Suppose there was a situation where there were four checks totaling $20,000.00; would the entry be four $5,000.00 items or one $20,000.00 item?

A. It would be the practice and it is the policy of the bank in that case, of putting four $5,000.00 items on.

Q. That is the practice and policy. Do you know if it was invariably followed?

A. To my knowledge, I believe they followed that closely.

Q. How many of the days' records did you examine?

A. The entire year of 1946.

Q. For 1946?

A. Yes.

Q. When did you do that?

A. Oh, I started four days ago or so and—

Q. And how long did it take you?

A. In all it took me, I would say, about eight or nine hours.

Q. And you were able to go through the total
3186 amount of the paying sheets with the entries on them. How many entries a day would there be?

A. Each teller, sir?

Q. Yes.

A. Oh, it averaged two hundred.

Q. Each teller averaging two hundred and there were two and sometimes three tellers?

A. Yes, sir.

Q. And I suppose around 250 bank days a year? Am I correct?

A. Approximately, it would be that.
Q. And you went through all of those?
A. Yes, I did.
Q. Do you know a man named Eddie Urban?
A. I know him, yes. Not too friendly, but I know him as a customer.
Q. Do you know who he is?
A. Yes.
Q. He is a customer of the bank. Do you know if he was in the habit of cashing checks at the bank?
A. What kind of checks?
Q. I mean, checks for cash?
A. During that year or any year?
3187 Q. During the year 1946.
A. As I say, I wasn't in the payers' cages at the time and what his habits were during 1946, I wouldn't know.
Q. So that there might have been a teller in the payer's cage who was friendly to Mr. Urban who would have cashed those checks without your knowing about it, is that so?
A. Possibly.
Q. And he might not have made a record of it on this record you refer to?
A. No, it could not be possible that way.
Q. Well, how is that?
A. Because any check that cleared through our bank has to be recorded in order to account for it on our general ledger.
Q. Well, if this was a check on an out of town bank, woud that make any difference?
A. No, it has to be recorded on the teller's sheet at all times.
Q. Well, what is the purpose of the teller's sheet?
A. Well, for one thing, to record the transaction of the day and to also balance the cage.
3188 Q. So that if the entry isn't on the sheet it doesn't balance out for the day?
A. That is correct. The teller would be out that amount.
Q. How much money is usually kept in each one of the teller's cages? In 1946, I am referring to all the time, to that year.
A. It is hard to say, but I would say approximately $70,000.00, $75,000.00.

Q. Seventy or $75,000.00?
A. Yes.
Q. So that a teller could make a payment of $20,000.00 from his cash on hand without the necessity of obtaining it from any other department of the bank, is that correct?
A. Yes.
Q. Was it possible that a teller might have reported on this sheet two $10,000.00 items instead of four $5,000.00 items?
A. No, I can't see where he would do something of that nature.
Q. Well, is it possible?
A. Well, yes.
Q. Is it possible that he might have made an entry
3189 of one $20,000.00 item?
A. Well, it wouldn't be the practice of the bank. It is possible.
3190 Q. Is it possible?
A. But I also checked on that type of entry.
Q. To either any two ten thousand dollar items?
A. No, sir.
Q. Did you look for them?
A. Yes, sir. I had that in mind at all times.
Q. You looked for any combination that might add up to $20,000?
A. Yes.
By Mr. Lockley: That is all.
By Mr. O'Brien: Just one question.

Redirect Examination by Mr. O'Brien.

Q. Whenever any cash was paid out of that cash, out of the $70,000, you said the teller might have there, it would have to be accounted for by an entry on the sheet, is that right?
A. Yes.
By Mr. O'Brien: That is all.

Recross Examination by Mr. Lockley.

Q. Mr. Bellandi, how many $10,000 entries did you run across in the course of your examination of these pages?
3191 A. Well, offhand, I can't say.
Q. Well, you found some, did you?

A. A few, not too many.
Q. Did you find any $5,000 entries?
A. We had several $5,000 entries on different dates, yes.
Q. Did you find any $20,000 ones?
A, No, not in a lump sum of $20,000.
By Mr. Lockley: All right, thank you, Mr. Bellandi.
By Mr. O'Brien: That is all, sir.
(Witness excused.)

3192 FLORIAN A. GROENWALD, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?
A. Florian A. Groenwald.
Q. And, Mr. Groenwald, you are president of the Mid-City National Bank of Chicago?
A. I am.
Q. And have been for how long?
A. Since June 6, 1946.
Q. And would you tell the jury briefly your duties as president of the bank?
A. Well, as president of the bank—
By the Court: Speak up, Mr. Groenwald. Face the jury so that they can hear you.
By the Witness:
A. As the president of the bank, I am the presiding officer at the board meetings. Of course, I am the chief officer of the bank. We have our discount committee, whom we present our loan applications to. And being the president, it is just the top man in the organiza-
3193 tion, who knows all about the policies, the programs and the entire workings of the institution.
By Mr. O'Brien:
Q. In your bank, Mr. Groenwald, I assume you have a number of departments?
A. Oh, yes.
Q. Including a commercial department?
A. Commercial department.
Q. Which is the one through which checks are deposited and paid?

A. That's correct.

Q. And from your experience have you become and are you familiar with the practices and procedures which obtained in the year 1946 in that department?

A. I am, sir.

Q. What, if any, rule or procedure did the bank in that year have in respect of the cashing of checks for strangers?

A. We have a very simple rule, and that is not to cash checks for strangers.

Q. Do you know James Moran?

A. No, sir.

Q. You never met him—or have you ever met him, 3194 to your knowledge?

A. I don't know the man.

Q. Is the Shotwell Manufacturing Company a customer of your bank?

A. No, sir.

Q. And was it in 1946?

A. No, sir.

Q. Are any, or either, of the defendants, Harold E. Sullivan, Byron A. Cain or Frank Huebner customers of your bank?

A. No, sir.

Q. Or were they in the year 1946?

A. I would say no.

Q. What was the procedure of your bank in regard to the cashing of cash or currency checks in the year 1946?

A. What was the procedure?

Q. Perhaps I better be a little more specific. In the case of the presentation for payment of a check payable to cash or to currency in a large amount, what was the procedure in 1946 that the presentor of the check would be compelled to follow to get that money?

A. That's correct. And that is not only in 1946, but 3195 it has been the procedure of the bank for many, many years, as long as I have been with the institution, that where a large check—when I say a large check I mean a check, say, over $500.00—is presented for cashing, that the tellers—in the first place they have strict instructions that they are not permitted to cash checks on another bank without an officer's O.K.

Now, the procedure at that time would be, if a check were presented for O.K. to an officer at an officer's desk,

that it was the duty of that officer to escort the person or persons cashing the check to the teller's window, and at that time the cashing of the check would be performed, or the money would be paid out.

But we have had a strict rule, and it has been a rule of the bank for many years, that where a large check is presented for cashing that the officer must verify by direct contact with the teller that he approved or initialed the check. Now, the reason for that is that forgery of an officer's O.K.—that is the reason for it.

3196 Now, in the event an officer would neglect to do it, then it would be the teller's duty to contact that officer who approved the check, who initialed the check, on the house phone and verify his okay on the check. Does that answer the question?

Q. And what, if anything, would be required in the way of an endorsement of the check by a person presenting it for payment?

A. Well, there again, we have a rule and it is, I imagine, followed by most banks, that where a check is payable to cash it must be endorsed by the person who receives the cash, and in the case where the person might be identified by some one, or at the request of a customer of the bank that we cash the check, that person naturally would have to endorse the check, in the presence of the officer who is approving the check.

Q. And would that mean, Mr. Groenwald, in such case as you last mentioned that there would then be two endorsements, the one introducing or vouching for the man, and the man receiving the money?

A. The person receiving the money and the person vouching.

3197 Q. Is there any distinction, in so far as those procedures are concerned, between checks drawn on your own bank and checks drawn on other banks?

A. Oh, yes, there would be a distinction. In the first place, a check on our own bank, drawn on our own bank, we can verify the signature of the maker, we can verify the signature of the endorser, if it is a check payable to cash, we can verify the amount, as to the goodness of the check, and so forth. So there is a distinction.

Q. And none of those things would be true in the case of a check drawn on another bank, particularly a foreign bill of exchange?

A. That is correct.

Q. By foreign bill I mean, of course, one drawn at one place, one state, and payable in another.

A. That's correct.

By Mr. O'Brien: You may cross examine.

Cross Examination by Mr. Lockley.

Q. Mr. Groenwald, did you just begin with the bank in June of 1946?

A. No, I started in 1919.

Q. You became president on that date?

3198 A. I became president on that date.

Q. Are you familiar then with the personnel problems of the bank?

A. I am.

Q. You were having a bit of difficulty in 1946, weren't you, in keeping your employees?

A. We all have had difficulty, not only in banking, but all lines.

Q. Did you have quite a bit of turn-over in your employees?

A. Well, we have had turn-over.

Q. Now, you told us what your policy and instructions were. Despite the instructions respecting the cashing and endorsing of checks, might not a teller have broken those rules?

A. That is entirely possible, unbeknownst to the management.

Q. I want to show you three checks, which are Government's Exhibits Nos. 133, 158 and 160, and ask you if those were cashed at your bank.

A. I will take them one at a time, is that correct?

Q. Yes. Will you read off the number.

A. Is this the number?

Q. You speak up, please.

3199 A. I am asking you the number.

Q. It is right here. It is No. 133.

A. No. 133, that is a check drawn by the General Confections, Incorporated, David Lubben signing, $17,190.25 the amount, payable to cash, dated December 4, 1946. On the reverse side it has the endorsement, David Lubben, and the inscription "Okay to cash only, Edward T. Urban," and an officer's okay.

3200 Q. And who is the officer who okayed it?
A. Rudolph G. Had.
Q. What was his position at that time?
A. Assistant Cashier.
Q. Assistant Cashier?
A. That's right.
Q. Now, will you look at the others?
A. Exhibit 156, check dated October 12, 1946, payable to cash, $10,000 in amount, drawn by Reserve Trading Corporation, David Lubben signing, endorsed David Lubben, also the inscription, "Okay to cash, Edward T. Urban", and the initial "B", which is the initial of Mr. Frank Bush, formerly an assistant cashier of the bank.

By the Court: The question was whether or not they were cashed at his bank. I don't know that that has been answered.

By the Witness:
A. Yes, these checks were cashed at the bank.
By Mr. Lockley:
Q. All right.
A. This doesn't have an exhibit on it. Oh, yes, on the face.

160, check dated November 7, no year, drawn in
3201 favor of cash, $14,146.70, drawn by Reserve Trading Corporation, David Lubben signing, endorsed David Lubben, and the inscription, "Okay to cash only, Edward T. Urban."

And that check likewise okayed with the initial "B". That would indicate that Mr. Frank Bush, former assistant cashier of the bank, okayed the check. And that check was cashed at the bank.

Q. Now, if the statement was made that these checks were not cashed by Mr. Urban, but the money was given to somebody else, would you say that was wrong?

3202 By Mr. O'Brien: I will object to that, if the Court please. That is no part of the direct, there is no connection.

By the Court: I don't suppose he has any personal knowledge of what took place.
By Mr. Lockley:
Q. You have no knowledge of whether this particular money was handed to Mr. Edward T. Urban or to anybody else?

A. I wouldn't have any way in the world of knowing.
By Mr. Lockley: All right. Thank you.
By Mr. O'Brien: Just one question, Mr. Groenwald.

Redirect Examination by Mr. O'Brien.

Q. Each of the last three checks which were handed you, Government's Exhibits 133, 158 and 160, was, in fact, endorsed by your depositor, Urban?
A. That's correct.
Q. And was likewise endorsed by the man who got the money, Lubben?
A. I would say so.

3203 *Recross Examination by Mr. Lockley.*

Q. May I show you again. Whose endorsement appears last?
A. Mr. Edward T. Urban.
Q. Who then would get the money.
A. If I understand the endorsement on that check, Mr. Urban endorsed that for the accommodation of the prior endorser.
By Mr. Lockley: All right.

Redirect Examination by Mr. O'Brien.

Q. So Mr. Lubben got the money?
A. Naturally I suppose that. I would say.

Recross Examination by Mr. Lockley.

Q. You don't know?
A. Knowing bank procedure, I would say that.
Q. You don't know?
A. I don't know, but you asked me the question what I thought about it.
By Mr. Lockley: All right. Thank you, Mr. Groen-
3204 wald.
By Mr. O'Brien: Thank you, sir.
(Witness excused.)

RUDOLPH G. HAD, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your full name, Mr. Had?
A. Rudolph G. Had, H-a-d.
By the Court: H-a-g?
By the Witness: H-a-d.
By Mr. O'Brien:
Q. Where do you live?
A. 5834 South Sawyer Avenue.
Q. Chicago?
A. Chicago.
Q. And are you, too, connected with the Mid-City National Bank of Chicago?
A. I am.
Q. In what capacity?
A. Assistant cashier.
3205 Q. And was that also your position with the bank in the year 1946?
A. That's right.
Q. You are in the commercial department of the bank?
A. That's right.
3206 Q. Did your duties as assistant cashier in the year 1946 include the O.K.-ing of checks for payment?
A. Yes, sir.
Q. Including those presented to the paying tellers?
A. Yes.
Q. I show you a check which is marked Government's Exhibit 133 and ask you to examine it and to state whether it bears any indication of your approval?
A. It bears my O.K.
Q. On the front or reverse side?
A. On the back.
Q. By initials?
A. H.
Q. And is the significance of that initial endorsement that you were approving the payment of the check by the paying teller?
A. By the endorsement on the back of the check.

Q. Yes, sir. That is what it means, is it not?
A. Correct.
Q. And prior to the time that you affixed your approval was the check exhibited to you either by the teller or by Mr. Edward—what is it, Edward or Edwin?
3207 A. Edward T. Urban. It was presented by him.
Q. And did you observe Mr. Urban make his endorsement?
A. I did.
Q. And also the endorsement of Mr. David G. Lubben, which appears above?
A. It was an unidentified person.
Q. Who was with Mr. Urban?
A. Mr. Urban.
Q. What happened from there on, what did you do after you had marked the check "Approved"?
A. I immediately took the check to the teller's cage.
Q. You carried this check over yourself?
A. To the teller's cage and told the teller that I affixed my O.K. on there and immediately returned to my desk.
Q. Is there anything on this check to indicate who the teller was?
A. Payer No. 2.
Q. And that would indicate through your records which teller had paid the check?
A. That's right.
Q. Is it true that the daily teller record of teller
3208 No. 2—is that what you call him, teller No. 2?
A. Payer No. 2.
Q. Paying teller No. 2?
A. That's right.
Q. —would reflect an entry in this amount, seventeen thousand one hundred ninety dollars and a quarter; do you understand the question?
A. I didn't understand that last.
Q. Well, it is pretty long. Let's withdraw that and let me ask you this.
When the teller paid this item would he make an entry upon any record in his cage?
A. He would make a listing on his teller's sheets.
Q. Descriptive of this check and its amount?
A. Just the amount he would.

By Mr. O'Brien: Yes, sir.
You may cross-examine.
By Mr. Lockley: No. Thank you, Mr. Had.
By the Court: That is all.
(Witness excused.)

3209 EMMET HOGAN, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?
A. Emmet Hogan.
Q. Where do you live, Mr. Hogan?
A. I live in Los Angeles.
Q. You used to live in Chicago?
A. Yes, I did.
Q. Where did you live?
A. I lived at 5517 Lakewood.
Q. For how long?
A. Approximately three years, I believe.
Q. Are you married, Mr. Hogan?
A. Yes.
Q. Any family?
A. Yes, I have four children.
Q. And your wife and four children and yourself live now in Los Angeles?
A. Los Angeles.
3210 Q. Did you used to work for the Shotwell Company?
A. Yes, I did.
Q. And when did you go to work for them?
A. I believe it was January of 1943.
Q. And how long did you work for them?
A. Well, I resigned February of 1946, but I continued on for three or four months to break in my successor.
Q. Well, what type of work did you do at that time with the company?
A. I was a sales manager.
Q. And that would be true in 1945 and for part of 1946?
A. Yes.
Q. And then who succeeded you?
A. Howard Roeser.

Q. Howard Roeser has already appeared here. He had been in the comptroller's office?

A. Yes.

Q. And so in early '46, he took over sales and you went to California?

A. Yes, I moved there around the middle of the year.

Q. And what position did you take in California?

3211 A. I became the West Coast representative for Shotwell.

Q. Now, did you know a man by the name of Lubben when you were working in Chicago for Shotwell?

A. Yes, I did.

Q. When did you first see him?

A. I really don't know when I first saw him. He was introduced to me in our office shortly after he was appointed as our New York representative. I am not clear as to that date.

Q. The exact date?

A. No.

Q. Well, you were sales manager, and you knew something of the territory he had and what work he was or was not doing?

A. Yes, I did.

Q. In early 1945, as sales manager, did you have any conversations with Mr. Cain about the performance of his work, by Mr. Lubben?

A. Yes, I did.

Q. About when was it?

A. As clearly as I can recall, it was in March or the early part of April in 1945.

Q. Where?

A. In Mr. Cain's office.

3212 Q. And what was said between the two of you about Lubben?

A. Well, I recommended that we replace Mr. Lubben as our New York representative.

Q. Fire him?

A. That's right.

Q. And what did Cain say?

A. Well, Mr. Cain said that he did not want to make a change at the present time because Mr. Lubben was securing for us certain raw materials which were very scarce and which we needed to stay in business, that he

was shipping those raw materials to us at ceiling prices, and that we were paying for them with finished goods at our ceiling prices, and that for the time being he did not want to disturb that relationship.

Q. And were those what was known in the trade as trade deals?

A. That's correct.

Q. And explain in the trade during those OPA days what was meant by trade deals.

A. Well, many companies who had quotas of scarce goods in those days in some cases were not able to use them and they—I think the word for it was tolling—

3213 they frequently tolled those goods, which was, according to my understanding, a legitimate procedure. In our case, we were getting these—

By Mr. Lockley: Well, just a moment, Mr. Hogan. I object, your Honor, to the generalities, unless he is able to state some specific circumstances in which these trade deals he refers to actually occurred and of which he has particular knowledge.

By Mr. Kirby: I am asking about the course of the trade generally in those OPA periods, your Honor.

By Mr. Lockley: I object.

By the Court: Yes, unless he refers to some specific deals that throw some light upon the issues of this lawsuit.

By Mr. Kirby:

Q. And have you covered the substance of the conversation about these deals with Lubben between yourself and Cain?

A. Yes.

Q. So you weren't able to get him fired?

A. That's right.

3214 By Mr. Lockley: I didn't hear any testimony about any deals.

By Mr. Kirby: When he tried to get Lubben fired Cain told him he couldn't fire him because Lubben was trying to get some raw materials for candy.

By Mr. Kirby:

Q. Isn't that what you said?

A. That's correct.

By Mr. Lockley: What deal?

By Mr. Kirby:

Q. Did Mr. Cain go further in detailing what the trade deals were than you have told us about?

A. He only mentioned that the raw materials involved were chocolate, and in some cases sugar, and as far as I can remember, in some cases, it was either skim milk or condensed milk, something like that.

Q. And was there a product called sweetened condensed milk?

A. Yes.

Q. Did he mention that?

A. Yes, to the best of my recollection.

Q. And am I correct in believing that sweetened
3215 condensed milk contained 42 per cent sugar?

A. I couldn't answer that question.

Q. Well, it was heavily sugared.

By Mr. Lockley: Let him testify. If he knows he will tell you.

By Mr. Kirby:

Q. Well, was it a product in which the sugar content was important?

A. That was my understanding, yes.

Q. And so far as the Shotwell Company is concerned, what use did they have for sweetened condensed milk?

A. I believe we used it in the manufacture of chocolate goods.

Q. And was sweetened condensed milk also used by chocolate manufacturers?

A. I believe so.

Q. Was that mentioned by Mr. Cain?

A. Well, the item was mentioned but its use was not discussed.

Q. After that attempt by you to have Lubben fired, did you make any more attempts one way or another about Lubben's activities?

A. Well, I had recommended that we fire Lubben on more than one occasion, but in this particular occasion
3216 I was more insistent than others because I had found out certain things in New York which led me to believe that he was doing our company harm in that market.

3217 Q. Did you take the matter up again with Mr. Cain?

A. I don't think I took it up after that. I am not sure, however, whether that was the first time I discussed it or whether it was the second time.

Q. Mr. Hogan, do you recall—or did you ever hear of a Dr. Doe?

A. Yes, I did.

Q. Is there a real live person by the name of Doe?

A. Well, I had contact with a man whom I believe was a Dr. Doe.

Q. And where was his office?

A. In the Board of Trade Building.

Q. And when was that?

A. I don't remember the date. It undoubtedly was either in January of '46, before I resigned, or some month subsequent to that during '45, but I have no idea other than that when the exact date was.

Q. Well, you resigned and went out to California to work for Shotwell out there early in '46?

A. Yes. Well, I resigned in February. I didn't leave until—I don't know whether it was April or May, but I am sure that my contact with Doe was prior to my resignation, because from that time on I spent all my time traveling with Howard Roeser, breaking him in as my suc-

3218 cessor.

Q. And where did you find this—how did you find this Dr. Doe?

A. Well, I was given an envelope to deliver to him in the Board of Trade Building.

Q. Who gave it to you?

A. I hesitate to mention specifically names, because I am not sure whether it was one of three persons, or one or two of three persons. To the best of my recollection, the envelope was consigned to me outside my desk. I was getting ready to go downtown on an errand of my own and one or two of these men came up and asked me—

Q. One or two of which men?

A. Well, there were—I don't like to mention any name in connection with this unless I am sure, but there were either Frank Huebner, Sam Graflund or Howard Roeser. It was one of those three men, or there may have been two men involved at the time. I can't remember.

Q. All right. It was one of those people in the office?

A. That's right.

Q. And you have later learned the envelope had

3219 money in it?

A. Yes, I did.

Q. You were told that?

By Mr. Lockley: I object, your Honor. Do I understand you were told that?

By the Witness:

A. Not at the time, no.

By Mr. Lockley: You learned it later?

By the Witness: I was told it later.

By Mr. Lockley: I move that his answer be stricken, your Honor.

By the Court: Yes, the fact that he learned it was money may be stricken as hearsay.

By Mr. Kirby:

Q. They gave you something?

A. Yes, they gave me an envelope.

Q. What did it look like?

A. Well, it was an envelope. It contained—I can't tell you what it contained, but I naturally was suspicious that it—

By Mr. Lockley: Well, I object to what his suspicions were.

By the Court: Yes. If you can't tell what it con-
3220 tained, you can't tell what your suspicions were.

By the Witness:

A. I didn't open the envelope and I didn't see what was in it.

By Mr. Kirby:

Q. But did you press it?

A. Well, I held it in my hand.

Q. And did it have some softness?

A. Yes.

Q. All right. Now, then, where did you go with this envelope?

A. I went down to the Board of Trade Building and I consulted the directory in the Board of Trade Building, because the Doctor's name—or the room number was not on the envelope, and I saw a Dr. Doe listed after a room number.

Q. Now, wait a minute. You are inside the Board of Trade Building, right over here?

A. That's right.

Q. And you look at the board and you are looking for the name of Dr. Doe?

A. Yes.

Q. Was one there?

A. Yes, absolutely.

3221 Q. So then what did you do?

A. I went up in the elevator to the room number of Dr. Doe. And I walked in the outer office, and as I did so, a man came out of the inner office. And I said, "Dr. Doe?" And he said, "Yes."

And I handed him the envelope, and he said,—I don't know whether he said thank you or not, but I mean that is the extent—I wasn't in his office more than the time it takes to tell about it.

Q. Did you ever take any money—wait a minute, now. Excuse me. I have got to withdraw that. I will have an argument with my brother here. Of course, I think anybody going to a dentist's office has to have a good reason, Judge.

Mr. Hogan, were you ever in Dr. Doe's office on any other occasion?

A. No, I never was.

Q. You never saw the man on any other occasion?

A. No.

Q. When you came back to the plant, did you say anything about whether you did or did not want to make any more such trips?

3222 A. Yes, I did. I said that I didn't want to be involved in any errands of that kind in the future.

By Mr. Lockley: I would like to have the time and place of the conversation, if you please.

By Mr. Kirby:

Q. When was it?

A. Immediately after coming back from making that delivery.

Q. Who did you tell that to?

A. It was—the party or parties who had originally given me the envelope, one of those three men, or two of those three men.

By the Court: I think we will take our afternoon recess now.

We will suspend for ten minutes.

By the Marshal: Will the audience please remain standing while the Jury, as well as the Judge, leave the court room.

By the Marshal: This Honorable Court will now recess for ten minutes.

(Short recess.)

3223 By Mr. Kirby: I have no further questions of Mr. Hogan.

By Mr. O'Brien: I have a question, but as a matter of procedure, Mr. Lockley should perhaps interrogate him first.

By Mr. Lockley: You may proceed, Mr. O'Brien. I will cross examine him all at one time.

By Mr. O'Brien: Will you read the last question and answer? Well, the other Reporter has left and I will go on recollection.

Direct Examination by Mr. O'Brien.

Q. Mr. Hogan, you say you were going downtown on an errand?

A. Yes.

Q. The errand was to Dr. Doe?

By the Court: I have difficulty hearing you. I am not so sure it is my own hearing. I think you should bear in mind the jury may have a little difficulty.

By Mr. O'Brien: I think you are right. When I
3224 get tired, especially, my voice goes down. I know there have been times when it was a little hard to hear you too.

By Mr. O'Brien:

Q. Mr. Hogan, were you going downtown on your own account?

A. Why, yes. That is what I meant by an errand.

Q. Where were you going?

A. I was going into Finchley's to buy a suit.

Q. That is somewhat near to the Board of Trade Building. Now, as I understand you, when you got back and immediately upon your return, you said you did not want any similar or further assignments?

A. That is correct.

Q. Can you tell us just what that conversation was?

A. Well, I remember—

Q. Tell us precisely what you said about it.

A. Well, I said that I did not know what was going on and I did not want to know what was going on and I did not want to be involved in any more errands of that kind.

Q. What, if anything, about it was there that you knew which caused you to make that statement?

3225 A. Well, I would have had to be a lot more naive than I am if I didn't recognize—

By Mr. Lockley: I object, your Honor. Your Honor, I object to his state of mind at the time.

By the Court: Oh, I think so.

By Mr. O'Brien: Well, I didn't want your state of mind and I don't think I inquired for it, but my question, Mr. Hogan, was:

By Mr. O'Brien:

Q. What was it that you knew which led you to make that statement?

A. Well, the circumstances under which the envelope was given to me, there was a certain amount of hush hush about it. As I drove—as I went downtown and began thinking about it. I had left the office in a hurry. I was going down on my own errand and I wanted to get back out there. I didn't give it too much time at the time, but I rode on the L and began thinking about the circumstances and I began to get more and more uneasy as I walked in the office and gave the envelope to Dr. Doe. The whole thing to me seemed to be very unusual.

By Mr. Lockley: I object, your Honor, to what it 3226 seemed to be to him. If he can't tell us exactly what happened and what was said—

By the Witness:

A. I have already told you what was said. There was nothing further said at that time, to the best of my recollection.

By Mr. O'Brien:

Q. Did you know at that time that the company was buying or paying premium money for corn?

A. I did not know of my own knowledge, no. I had heard—

Q. Had you heard anything of that sort?

By Mr. Lockley: I object, your Honor. It is hearsay.

By Mr. O'Brien: I am not asking him—

By the Court: You are asking him now what he heard. It certainly can't constitute admissible testimony.

By Mr. O'Brien:

Q. Did you yourself have any such knowledge?

By Mr. Lockley: He already answered.

By the Witness:

A. No, I did not.

3227 By Mr. O'Brien: I think that is all.

Cross Examination by Mr. Lockley.

Q. Mr. Hogan, you were in the sales department, as I understand it?

A. That is correct.

Q. Well, as part of your duties in the sales department, did you have anything to do at all with the acquisition of raw materials?

A. No, I did not.

3228 Q. You had only to do with sales?

A. That is correct.

Q. Now did you have quotas in The Shotwell Manufacturing Company?

A. Yes, sir.

Q. For your brokers at that time?

A. Yes, we did.

Q. Did David Lubben have a quota?

A. Yes, he did.

Q. Had he a quota—or rather, had he bought from you in 1941 and 1942?

By Mr. O'Brien: Your Honor, that would be objected to as beyond the scope of the direct examination.

By the Witness:

A. Well, I think—

By the Court: If it is not connected with the direct, the objection is well taken.

By the Witness:

A. I probably answered this first question.

By the Court: I think I will sustain the objection.

By Mr. Lockley: Your Honor, he stated he had 3229 recommended—

By the Court: The objection is sustained. You may proceed.

By Mr. Lockley:

Q. Well, when you told Mr. Cain you thought Mr. Lubben should be discharged, wasn't it because he was disrupting your quota arrangement?

A. No.

Q. That had nothing to do with it?

A. I don't quite understand the question. What I should have said probably was that the territories had quotas. See, our territory had quotas based on the usage in that market in pre-war years, and if we appointed a new broker to a territory, he automatically came into

possession of quotas that belonged to the territory. The quotas did not belong to the brokers. They belonged to the customers in the particular territory, and the broker was assigned those territories each month for distribution.

It is part of my duty to see that customers got what was coming to them.

Q. You also had quotas for principals as well as brokers?

3230 A. By principals, you mean—

Q. People who bought for themselves rather than for resale to somebody else? I mean people who bought for themselves rather than as employees of The Shotwell Manufacturing Company?

A. I didn't—the only quotas that we had were for customers. Now we had jobbers as customers. We had five and ten-cent store syndicates. We had department stores, and in most cases the buyers of those groups knew what they were entitled to because they had kept track of what they had bought from us in years when materials were not scarce. The brokers in a particular territory, in order to facilitate distribution for the customers, we would set up brokers who serviced those particular customers, and he would send in orders against his quota for these customers, and we would ship them out to the customers.

Is that clear?

Q. Yes. Did you also have house accounts?

A. Well, we considered—yes, we had house accounts.

Q. And were there quotas for house accounts?

A. Yes.

3231 Q. Did Mr. Lubben have a quota?

A. When I say house accounts, I mean accounts which our brokers did not have any control over.

For example, when I went to New York, I called on the buyers of the various syndicated items. Those were house accounts.

Q. Did Mr. Lubben have such a quota?

A. Not to my knowledge.

3232 Q. Now you also referred to a conversation with Mr. Cain when he told you that there were some trade deals. Do you have any personal knowledge of a single trade deal with Mr. Lubben?

A. I don't believe I do.

Q. That was all what Mr. Cain told you, is that right?

A. That is correct.

Q. When you went to Dr. Doe's office, are you able to tell us what sort of envelope you took, the size of it?
A. I really don't remember.
Q. You don't remember the color of it?
A. I can't even remember that. I can't remember.
Q. Do you remember what you did with it when you carried it there? Did you put it in your inside pocket, or did you carry it in your hand?
A. I believe I put it in my pocket but I am testifying about an incident that occurred six years ago, and I have given it very little thought in the interim and certain details completely escape my mind. I couldn't identify the doctor. I couldn't remember what he looks like, but other things are easy to remember. For instance, his name
3233 is such an unusual name that it is hard to forget a name like that.
Q. When you received the envelope, was it sealed?
A. Yes.
Q. Did you see anybody putting anything in it?
A. No, I didn't.
Q. Was it still sealed when you gave it to Dr. Doe?
A. That is right.
Q. Had you opened it in the meantime?
A. No.
Q. Did you see Dr. Doe open it?
A. No.
Q. You didn't see what was in it?
A. Of my own knowledge, no.
By Mr. Lockley: That's all, Mr. Hogan.

Redirect Examination by Mr Kirby.

Q. Mr. Lockley was asking about some quotas and allocations. That was in your department?
A. Yes.
Q. And you had a secretary that handled it, handled the books and kept track of those?
A. Yes, I did.
3234 Q. Was there some difficulty with Mr. Lubben in connection with that?
A. Well, he tried to bribe my secretary on one occasion to increase the amount of his allotments.
Q. You blocked that?
A. She came in and told me what happened.

By Mr. Lockley: Were you present, Mr. Hogan?
By the Witness: What?
By Mr. Lockley: Were you present, Mr. Hogan?
By the Witness: No, I was not.
By Mr. Lockley: I move that the answer be stricken.
By the Court: It may be stricken.
By Mr. Kirby: He was in charge of the allocations about which they just inquired.
By the Court: He is relating something somebody told him.
By Mr. Kirby: The girl worked right with him and under his supervision.
By the Court: Yes, but that is hearsay.
By Mr. O'Brien: Have you finished?
3235 By Mr. Kirby: That's all, Mr. Hogan.
By Mr. O'Brien: I have a question.
By Mr. Kirby: All right.

Redirect Examination by Mr. O'Brien.

Q. Mr. Hogan, what was it that you found in the New York market and Mr. Lubben's handling of the accounts which led to the suggestion which you made to Mr. Cain?

A. Well, in the first place, he was not calling on the trade regularly. The customers that I contacted when I went into New York where they did know him were almost universal in stating that he was not doing the job for us and the thing that brought it to a head at that particular time was a very good customer of ours who told me that Dave had come into his office with a sheaf of thousand dollar bills and had told him that he was going out and buying—

By Mr. Lockley: I object, your Honor, to any more recitation of hearsay by this witness.

By the Court: I will sustain the objection. The answer may be stricken.

3236 By Mr. O'Brien:

Q. What if anything else was there that you had in mind or know of your own knowledge, Mr. Hogan?

A. Nothing that I can recall. I mean, he just didn't measure up to the status of a representative in a market as important as New York.

By Mr. O'Brien: That is all.

Recross Examination by Mr. Lockley.

Q. Mr. Hogan, in 1945, was it necessary for a salesman to go out and sell candy?

A. Not to dispose of goods, no.

By Mr. Lockley: That is all.

By the Court: That is all.

(Witness excused.)

MICHAEL COHEN, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?

A. Michael Cohen.

Q. Where do you live, Mr. Cohen?

3237 A. 275 Linden Boulevard, Brooklyn.

Q. What is your business or occupation?

A. Right now?

Q. Yes, sir.

A. I am in the ve ding business.

By the Court: They don't hear you, Mr. Cohen. You will have to raise your voice.

By the Witness:

A. Vending the five-cent drinks.

By Mr. O'Brien:

Q. What was your business in 1945 and 1946?

A. Buying and selling.

Q. What commodity?

A. Syrup, chocolate syrup, cocoa. There may be one or two other things I can't think of—corn sugar.

Q. Corn sugar? Is that dextrose?

A. That is right.

Q. Was your office at the same place at that time?

A. My office in 1946?

Q. Yes.

A. It was 204 Franklin Street, New York.

3238 Q. Did you do business in your own name, or in the—

A. My own name.

Q. —trade name?

A. No, my name. That was my boy's business.

Q. What was his company's name?

A. What was what?
Q. What was the name of his company?
A. Cold Trade and Cold Food Products.
Q. Was there also a Commodity Trading Company or Corporation?
A. I didn't get that.
Q. Did you also have a Commodity Trading Corporation?
A. No. I dealt with them, but I never had it.
Q. Did you know the principals or owners of the Commodity Trading Corporation?
A. Was that in Wall Street? If you give me the address, I can remember.
Q. Yes, it was in Wall Street.
A. Was that Bettencourt?
Q. Yes.
A. Yes, I know him very well.
Q. Was that Mario Bettencourt?
3239 A. Yes, that is right.
Q. Do you know David G. Lubben?
A. Yes, sir.
Q. And when did you first meet him?
A. Oh, I guess in 1944 or 1945.
Q. What was the condition of the market in 1945, as to the supply of corn syrup?
By Mr. Lockley: I object, your Honor, unless this man is qualified as an expert witness.
By Mr. O'Brien: Well, that is a good objection.
By Mr. O'Brien:
Q. Let me ask you, Mr. Cohen, during the year 1945, one of the commodities you were dealing in was corn syrup, was it not?
A. We were dealing in corn syrup, yes.
Q. Were you dealing in tank truck or carload lots?
A. Both kinds.
Q. And also in smaller lots?
A. Yes.
Q. And for how long prior to 1945 had you been dealing in corn syrup?
3240 A. Before 1945?
Q. Yes, sir.
A. I don't think I dealt with any. It was either 1944 or 1945.
By the Court: Mr. Cohen, when you face him, I am

afraid the Jury can't hear you. Face straight ahead.

By the Witness: If the lawyers will speak a little louder—I am a little hard of hearing myself.

By Mr. O'Brien:

Q. You were dealing in corn syrup in 1944?

A. Yes.

Q. And in 1945, how extensive were your dealings?

A. How much what?

Q. Well, what volume of business were you doing?

A. I don't remember—in 1946, it was a big volume, and 1945 was small.

Q. Taking the year as a whole, it was small?

A. 1945, yes.

3241 Q. Was there a time in 1945 when your dealings grew bigger?

A. 1946 it grew bigger.

Q. What time in 1946?

A. What was that?

Q. What time in 1946?

A. And what?

Q. At what time in 1946 did that grow noticeably bigger?

A. Maybe the twelve months.

Q. During the whole twelve months?

A. Maybe twelve or eleven, I don't remember.

Q. When did you first notice it in 1946?

A. When I got orders.

Q. Did you have a good many orders for corn syrup in 1946?

A. Yes.

Q. Where would you buy the corn syrup, generally speaking?

A. Whoever sold it to me. I have no direct contract. I bought from Lubben. I bought from a lot of people.

Q. Did you buy from Eiger or did you sell to Eiger?

A. No. We were together. I was partners with 3242 him that certain time in 1945.

Q. In the year 1946?

A. In 1945.

Q. In 1945 you were partners with Eiger?

A. That is right.

Q. What was the name of your firm?

A. Eiger Trading Company.

Q. And while you were with him, you also bought

corn syrup?

A. Yes. In a small way, yes.

Q. And while you were doing that, were you also buying for your own account separately?

A. No. We were together. When I was with him, we did everything together. I was with him five or six months or less.

Q. During what year?

A. 1945.

Q. How long did that continue before you took off on your own?

A. Well, we only got together about five months and then I went for myself.

Q. I see. Now, when you went for yourself, where would you buy the corn syrup, from what sources?

A. From Lubben and from anybody who had it.

3243 Q. When you say "Lubben" do you include any of his companies?

A. Naturally, Eatsum Food Products, that was Lubben's.

Q. The Eatsum Food Products?

A. Yes.

Q. What other sources for corn syrup did you have?

A. To buy or sell?

Q. As a buyer.

A. Well, from jobbers, big supplies from out of town, Philadelphia, Chicago and other places.

Q. In the year 1946, you were buying heavily?

A. Very heavily.

Q. Do you remember, Mr. Cohen, what the ceiling price of corn syrup was?

A. Approximately six cents, six and a half.

Q. And in the purchases which you were making in 1946, what was the price that you paid?

A. I used to pay, six, six and a half cents a bill and five and a half cents cash, sometimes seven and a half cents cash. Certain people I paid more and certain people I paid less.

Q. Were you able, in the year 1946, to buy corn syrup in any quantity at six cents a pound, just six cents 3244 a pound?

A. Just six cents a pound?

Q. Yes, sir.

A. I couldn't get a half an ounce.

Q. Is it true that in all of the syrup you bought during the first half of the year 1946 that you paid—withdraw that.

I must confess I have forgotten what you said the ceiling was. Was it six cents or five cents?

A. It was six and a half cents.

Q. Six what?

A. Six, six and a half, something like that.

Q. It ran about six or six and a half?

A. That is right.

Q. And five and a half cents—

A. The cash.

Q. Was cash overage?

A. That is right.

Q. Over the ceiling?

A. Over the ceiling.

Q. So that the market price at that time was about twelve cents?

A. The market price was six and a half cents but they wouldn't give me any.

3245 Q. That is the ceiling price?

A. That was still the market price.

Q. Sir?

A. That was the market price.

Q. What was the market price?

A. Six and a half cents, but they didn't sell it for that.

Q. Could you buy any at that?

A. No.

Q. If you bought it, you paid twelve cents?

A. Twelve, thirteen and fourteen cents and sometimes sixteen cents in some cases.

Q. As high as sixteen cents?

A. That is right.

Q. That is sixteen cents a pound?

A. That is right.

Q. Do you recall, did you have any dealing in corn, raw corn?

A. Yes.

Q. Can you tell us what the ceiling was on raw corn in 1946?

3246 By Mr. Lockley: Well, your Honor, I object to this line of testimony unless there is some relation-

ship to the Shotwell Manufacturing Company. What Mr. Cohen did has no relationship to what Shotwell did.

By the Court: Unless they are seeking to establish the market price.

By Mr. O'Brien: Of course that is what I am doing, Judge, yes, sir.

By Mr. Lockley: I think there is a better way of doing it.

By Mr. O'Brien: I doubt that very much. We certainly are here to prove it as to the OPA, to prove it as to the people in it. That is the way to prove a market. That is what I had in mind doing.

By the Court: Well, if you can do it so far as the testimony is concerned, proceed.

By Mr. O'Brien: Would you read the last question?

(Question read.)

By the Witness:

A. About two and a half cents or something like it a bushel—two twenty-five a bushel or two and a half
3247 a bushel.

By Mr. O'Brien.

Q. And what did you pay for the raw corn?

A. Well, here is what I worked out—

By Mr. Lockley: I object. What happened in his case no relationship to what Shotwell may have paid.

By the Court: I don't think we are concerned with what Mr. Cohen had to pay in his operation.

By Mr. O'Brien:

Q. What was the market price on raw corn?

A. The market price was approximately two and one half dollars a bushel, but a farmer would not sell it to the refineries for the price so the refineries came to Michael Cohen and Dave Lubben and said, "You get us corn and we will get you corn." So I paid the farmers fifty to one hundred cars, to the Penick & Ford people.

By Mr. Lockley: I object to the answer as not responsive.

By the Court: Yes. Wait a minute, Mr. Cohen.

By Mr. Lockley: I move that it be stricken.

3248 By Mr. O'Brien:

Q. What was the price of the corn?

A. I told you about two and a half dollars a bushel.

Q. If I understood you correctly, that was the ceiling price?

A. That is right, OPA ceiling.

Q. Yes, but what was being paid for raw corn in 1946?

By Mr. Lockley: I object, your Honor.

By the Court: Yes. I will sustain the objection.

By Mr. Lockley: I don't see the materiality.

By Mr. O'Brien: Your Honor, I have a right to prove the market.

By the Court: Well, what he may have paid for raw corn—

By Mr. O'Brien: I wasn't asking him what he paid.

By the Court: You certainly were asking him.

By Mr. O'Brien: Will you read the last question?

(Question read.)

3249 By the Court: How would he know what other people paid for raw corn?

By Mr. O'Brien:

Q. I will ask: Were you familiar with the market in corn, raw corn, and corn syrup in 1946, Mr. Cohen?

A. Pretty near, yes.

Q. Do you know what the dealers in raw corn and corn syrup were paying?

A. Yes.

By Mr. Lockley: What dealers?

By Mr. O'Brien:

Q. In the year 1946?

By Mr. Lockley: I object again, your Honor.

By the Court: Well, what area?

By Mr. O'Brien:

Q. In and about the city of New York.

By Mr. Lockley: Well, I fail to see where that has any relevance to the company doing business in the city of Chicago. I would also like to know where the corn originated, whether in Idaho, Iowa, or Nebraska or Illinois. It make a great deal of difference.

3250 By the Court: I think if there were dealings above the market price on raw corn, it would be a matter of barter between who was buying and the one who was selling.

By Mr. O'Brien: No, that isn't true. There was a market.

By the Court: Well, you will have to establish an area which would throw light on any issue that may arise here.

By Mr. O'Brien:

Q. Speaking of syrup, Mr. Cohen, did you ever have occasion to get syrup from the refineries?

A. No.

Q. Did you have any dealings yourself with the refineries?

A. Yes, when I was with Excelsior Company. I have dealt with them for twenty years.

By Mr. Lockley: I object. Mr. Cohen, you have answered the question.

By Mr. O'Brien: I don't know that he has answered the question.

By Mr. Lockley: He said yes.

By the Court: I didn't hear the answer.

3251 You will have to have it read.

By Mr. O'Brien: Will you please read the answer.

(Answer read.)

By Mr. O'Brien:

Q. When was that, Mr. Cohen?

A. When I dealt with them?

Q. Yes.

A. My father was in business for fifty years, with Excelsior Company. We bought corn products under Corn Refining Company.

Q. During the year 1946 did you buy corn syrup in Iowa?

A. Lubben did. With Lubben, we bought.

Q. You both bought?

A. Yes. We had that deal with the corn.

3252 Q. Yes, sir. Was that through the Reserve Trading Company?

A. Yes.

Q. Or Trading Corporation?

A. Yes, sir.

Q. What was the deal that you are speaking of?

By Mr. Lockley: I object, your Honor, to any deal he may have had with Reserve Trading Corporation.

By the Court: Yes. The objection is sustained.

By Mr. O'Brien:

Q. You did, however, in your deals with Lubben or Reserve Trading Company have occasion to procure corn or corn syrup?

A. Yes. Yes, sir.

Q. From what source did you procure it?

By Mr. Lockley: Your Honor. I object. I fail to see the materiality of what Mr. Cohen did.

By Mr. O'Brien: I am trying to show the man's experience and then I will ask him the question.

By the Court: You mean the area where he may
3253 have purchased it?

By Mr. O'Brien: Yes.

By the Court: He may answer.

By the Witness:

A. We bought it from Penick & Ford.

By the Court: What? I don't hear you.

By the Witness: Penick & Ford, Hubbinger. They are both in Iowa, one in DesMoines and one in Grand Rapids, Iowa.

By Mr. O'Brien:

Q. Mr. Cohen, who were the refineries that you can recall which were then refining corn?

A. I just named the two of them.

Q. Can you name any others that you remember?

A. Yes. The Clinton people.

Q. What was their name?

A. Well, we had deals with them. We gave them chemicals.

Q. What was their name?

A. Clinton Refining, Clinton, Iowa.

Q. And how about the Corn Products Refining?

A. Never dealt with them this way.

Q. Or Union Sales?

A. Union Starch, you mean.

3254 Q. Union Starch. Your dealings were with Penick & Ford and Hubbinger?

A. That is right.

Q. Were you, in connection with those transactions, buy raw corn in the market?

By Mr. Lockley: Well, I object, your Honor, to what this witness did. I fail to see that it has any materiality.

By the Court: Well, if it is for the purpose of establishing a so-called market price—

By Mr. O'Brien: That is right.

By the Court: I take it, I understood the testimony here is you contend that the Shotwell Company purchased raw corn. I assume what they paid for it is what

we are concerned with and not what somebody else paid for it.

By Mr. O'Brien: If the Court please, I don't understand that that is the way to establish the market price. The market price—

By the Court: Well, we are not primarily concerned with the market price. I suppose you are concerned with what Shotwell paid for raw corn, isn't that right?

3255 By Mr. O'Brien: In that connection we are concerned with the market price from time to time.

By Mr. Lockley: Your Honor, the best evidence of that would be what Shotwell actually did.

By the Court: Not the market but what you actually did.

By Mr. O'Brien: I understand that, if the Court please, but the market at any given time in corn is a rather definite thing and the same is true of corn syrup.

By the Court: Well, you mean the ceiling price?

By Mr. O'Brien: No. I don't mean the ceiling price. I don't think there was any relationship between the ceiling price.

By the Court: You mean the black market price?

By Mr. O'Brien: Well, if you call it that.

By the Court: Well, what else would you call it?

By the Witness: I call it under the table.

By the Court: Be that as it may, I don't think

3256 we are going to go into Mr. Cohen's dealings so far as corn and corn syrup are concerned unless it has some relationship to Shotwell.

By Mr. O'Brien: Well, that is the relationship and I submit—

By the Court: What is the relationship?

By Mr. O'Brien: The one which I have just described that I will repeat again, if the Court please. I say that during that time, at any given time in those years of shortage there was a definite market price on corn syrup.

By the Court: Well, if you can establish that with this witness.

By Mr. O'Brien: What I am trying to do is show what that was and the relationship and the hook-up will be what Shotwell paid, because it isn't enough for me, as I see it, to prove what they paid without establishing some occasion for the payment of that amount.

3257 By the Court: Well, you can establish through this witness the fact that there was a shortage of corn syrup, or that in order to get their corn syrup, it was necessary to buy the raw corn and send it to the refineries for the production of syrup. You can assume all such facts may be a matter within his knowledge.

By Mr. O'Brien: Yes.

By the Witness: Well, I would answer it—do you want me to answer?

By Mr. O'Brien:

Q. No. I will ask a question, Mr. Cohen.

By the Court: Let him ask you a question, Mr. Cohen.

By Mr. O'Brien:

Q. Let us go back to the procurement of corn syrup. Your procured some corn syrup from Hubbinger?

A. Yes.

Q. Did you provide the corn?

A. I didn't handle that personally to Hubbinger. That was Dave Lubben handling that. Not with Reserve. He handled that with Eatsum.

3258 By Mr. Lockley: I object. He has no personal knowledge.

By the Court: He said he didn't handle it. The balance may be stricken.

By Mr. O'Brien:

Q. Now did you handle any of the transactions which involved the procurement of corn?

A. Yes, sir.

Q. And was the corn available in the year 1946?

A. Yes, for the extra money it was always available.

Q. Sir?

A. It was always available for extra money.

Q. And how much extra over the ceiling?

A. It would cost approximately two and a half cents on the corn syrup extra. That is how it worked out.

Q. That is too fast calculating for me, Mr. Cohen. How much was the raw corn, and then how much was the syrup?

A. It was approximately two and a quarter a bushel and you had to give the farmers two and a half a bushel, so it cost us approximately two and a half cents a

3259 pound for the corn syrup, extra.

Q. That means fifty cents a bushel?

A. I did not say that. I said two and a quarter a bushel.

Q. Two and a half a bushel?

A. Yes.

Q. Two and a quarter over?

A. That is right.

Q. Translating that into corn syrup—

A. Instead of costing him six cents, it would cost him eight and nine cents for the corn syrup.

Q. Now the corn syrup ceiling price was six cents?

A. Approximately. I don't know the exact price. It changed daily.

Q. It changes according to the supply and demand?

A. No, not according to the supply and demand. The supply of corn.

Q. Supply of corn?

A. Shortage of corn at any time and it goes up a fraction. They don't go up much higher than a fraction of a cent, or a quarter, not much higher.

3260 Q. And the price, the ceiling price of corn syrup, did that remain the same through 1945 and 1946, at six cents?

A. About a half a cent more or less, that is how it worked out.

Q. That was the ceiling, six cents, or a half a cent one way or the other?

A. That is right.

Q. Well, I think you said the total price ran from 12 to 14 cents a pound?

A. 16, too.

Q. 12 to 16 cents?

A. 13, 14, 15, 16.

Q. Do you know how many pounds of syrup can be processed from a bushel of corn?

A. No.

Q. Approximately?

A. No. I haven't got the figures with me.

Q. Have you known in the past what those figures were?

A. I used to have a record, but I haven't got it with me now.

Q. To refresh your recollection, would you say
3261 that a bushel of corn would produce approximately 34 pounds of syrup?

A. I think 43 pounds, if I am not mistaken. Maybe I am wrong.

Q. And in instances where you did procure the corn, how much per bushel of syrup did the refineries give you?

By Mr. Lockley: Well, your Honor, I object to this general nature of the testimony. We are extending over a period of two years. I don't know whether we are talking of 1945 or 1946.

By the Court: We are not concerned with Mr. Cohen's dealings in the corn market. That hasn't any bearing on the Shotwell dealings.

By Mr. O'Brien: Your Honor, I certainly intend to connect it up, and there is a very definite reason. I would like an opportunity to do it while Mr. Cohen is here. He is from New York City, Brooklyn. If you decide I am not connecting it up and it has no bearing, I suggest you strike it at that time, but I certainly think it is es-
3262 sential in my theory of the case, and I would like to be permitted to ask him many questions. I don't intend to pursue him in this way.

By the Court: You say you are going to connect it up?

By Mr. O'Brien: Yes, sir, I do.

By the Court: And if you do not, I will entertain a motion to strike.

By Mr. O'Brien: What is the last question?

(Question read by the reporter.)

By the Witness:

A. I told you approximately 43 pounds.

By the Court: Mr. Cohen, you don't speak loud enough for the jury to hear.

By the Witness: Approximately 43 pounds.

By Mr. O'Brien:

Q. That is what a bushel would produce?

A. Oh, it would produce twice as much, but it wasn't what the refineries gave you.

Q. They would give you half of what it would produce?

A. That is right.

3263 Q. Were there some times that you remember when they would give you less than half?

A. No.

Q. That was not in your experience?

A. No, sir.

Q. Speaking of corn syrup, Mr. Cohen, the prices per

pound which you have mentioned, from twelve cents—varying from twelve cents to sixteen cents, was that in carload or tank car lots?

A. Well, tank cars would be a penny a pound less and barreled cars, it would be more. It cost approximately a penny a pound a barrel, the barrel plus labor.

Q. What was the resale price on syrup, Mr. Cohen?

A. It all depends on conditions. If a man needed it he paid a big price. If he didn't need it, he didn't buy it.

Q. In 1946.

A. Fourteen, fifteen, sixteen cents. It all depends.

By the Court: You will have to raise your voice.

By Mr. O'Brien:

Q. A little louder, please.

3264 A. Fourteen and fifteen a pound and sometimes more.

Q. You told us some of the sources from which you would acquire syrup. Did you use the syrup in any business or did you buy it for resale?

By Mr. Lockley: I think that is immaterial, your Honor, what he did with it.

By Mr. O'Brien: I just want to—

By the Court: He may answer.

By the Witness:

A. I bought it for resale.

By Mr. O'Brien:

Q. And as I understand it, you paid at least twelve cents a pound and the resale price per pound was around fourteen, fifteen cents?

A. Sometimes thirteen and twelve and a half cents, it all depends on the market.

Q. In the first half of 1946?

A. Sometimes you get more. You don't know the exact price. If I am stuck with a couple of cars and I got to move it or pay extra storage, I do it at half a cent a pound and sometimes break even not to have any expenses on it.

Q. In instances where you bought—where you supplied corn to the refineries, did you get anything 3265 other than corn syrup? Did you get any other by-products of the corn?

A. No, sir.

Q. Just the corn syrup?

A. That was the agreement.

3266 Q. And who got the other by-products?

A. The refinery. They got two or three products out of it.

Q. What were they?

A. They got oil, starch. And they got something else.

By Mr. Lockley: I think that is immaterial, too.

By the Court: I think so.

By Mr. Lockley: What the refinery got out of it is certainly going far afield.

By Mr. O'Brien: I don't think it is immaterial.

By the Court: Well, we disagree on it. That is all.

By Mr. O'Brien: I am speaking of counsel, of course, and just thinking out loud. You provide a bushel of corn, you get the corn syrup, the refinery keeps the by-products. Some part of what you pay for you don't get.

By Mr. O'Brien:

Q. Can you tell me, Mr. Cohen, whether there was any variation or difference in the price for corn syrup, 3267 depending on the part of the country you were selling it in?

A. Well, I sold it f.o.b. New York. What the freight was—I never paid freight.

Q. Did the syrup command the same or a different price in Texas?

A. The same price. Well, we ship lots from Chicago. It still would be the same price. The corn syrup really comes from here.

Q. During your transactions in corn, or corn syrup, did you meet a Charles Ryan?

By Mr. Lockley: I object, your Honor, on the ground that it is immaterial.

By the Court: He may answer.

By Mr. O'Brien:

Q. Major Ryan.

A. Oh, yes. I thought you said Reiner.

Q. Speaking of the volume of your transactions in 1946, 1945 and 1946, what quantity of syrup did you procure through Lubben or his companies?

A. I don't know the exact amount, but a big volume.

Q. What do you mean by a big volume?

A. A big volume.

Q. What would that amount to?

A. A couple million pounds, maybe.

3268 Q. Did you have any occasion to procure corn syrup from Dukorsky?

A. No, I only had one deal with him with Lubben. We went in partnership on a corn deal, but I never dealt with him outside of that, as far as my memory is concerned.

Q. Did he have the Sweet Tooth Company?

A. Yes.

Q. Did you have any transactions with that company which involved the procurement of corn for the refineries?

A. What company.

Q. The Sweet Tooth Company.

By Mr. Lockley: I object, your Honor.

By the Witness: He was only one of the partners.

By the Court: Yes, I will sustain the objection.

By Mr. O'Brien:

Q. Now, in the deals in which corn was procured, Mr. Cohen, procured by you, did you pay for the corn, or did you pay only the overage?

A. Only the overage.

Q. Who paid for the corn?

A. The refinery.

3269 Q. And the syrup which the refinery furnished you, did they bill you for that with an invoice—

A. No, they gave us a certain amount of corn syrup at the legitimate price.

Q. At the ceiling price?

A. That's right.

Q. And did the refineries pay the ceiling price for the corn?

A. They paid us—that's right.

Q. And when you paid the overage did the refineries make the syrup, or part of the syrup, available to you?

A. Certainly. That was the agreement.

Q. From the corn on which you had paid the overage?

A. That's right.

Q. Was there any instance in which you paid overage that you failed to get the syrup from the refinery?

A. No.

Q. How many pounds of syrup in a tank car, do you know?

A. Oh, about 96,000 pounds.

3270 Q. And if it is barreled up, how much in a car?
A. Half of it.
Q. About half, forty-five, forty-six thousand?
A. And less still.
Q. I asked you about Major Ryan. Did you also tell me in connection with these corn or corn syrup deals, meet a Lieutenant Harris?
A. I don't think so. I may have seen him in the office, but I was never introduced to him. It is enough to know one Major. How many do I have to know?
Q. Did Ryan have any connection with the procurement of corn, with your procurement of corn?
A. Yes, sir.
Q. What was his connection with that?
A. He was the originator of it.
Q. What does that mean?
A. He had the contact with the refineries, and with the farmers, to get the corn. He originally started with Lubben. Eatsum Food Products showed him how to work it, and he got a big bonus, I understood.
Q. And is it he who would pay the overage for
3271 the raw corn?
By Mr. Lockley: I object, your Honor, as to what he—
By Mr. O'Brien:
Q. To your knowledge?
By the Court: Yes, I will sustain the objection.
By Mr. O'Brien:
Q. Did he have any connection other than the one you have just described, Mr. Cohen?
A. What do you mean? Connection with what?
Q. Well, with the corn deals, or corn syrup deals?
By Mr. Lockley: That's a very general question, your Honor. I feel I have to object to it.
By the Court: Yes, I will sustain the objection.
By Mr. O'Brien: I don't want to lead him, if the Court please. I am just trying to find out what his activities were.
By the Court: No, I will sustain the objection.
By Mr. O'Brien:
3272 Q. I ask you, Mr. Cohen, to tell us, if you can, the total volume of corn syrup transactions that you had in the year 1946?
A. You are asking me big questions.

By the Court: I can't see that we are concerned with that.

By the Witness: One kid by the name of Kupperman in Chicago, he knows the answers.

By the Court: I can't see any purpose in going into Mr. Cohen's transactions, as to the volumes of business. He was qualified as one who can express an opinion as to what the so-called overages were, generally paid, and we are not concerned with the many ramifications of his own business.

By Mr. O'Brien: I didn't want to go into that.

By the Court: That is what you are going into.

By Mr. O'Brien: I just mean as with a doctor's qualifications, some are more expert than others, and I think the volume of business this man had—

3273 By the Court: I think I must place some reasonable limit on your interrogation of his activities.

By Mr. O'Brien: All right.

By Mr. O'Brien:

Q. Well, Mr. McConnell calls my attention to Major Ryan, and you say he had some special method which he originated for the procurement of corn and corn syrup?

A. That was the method.

Q. Was that it?

A. The way we did it.

Q. Oh, you mean that until your contact with Major Ryan—

A. Lubben's contact. It wasn't my contact.

Q. —the corn and the corn syrup was not procured in that way?

A. Not by us. Other people have done it.

Q. And that was Ryan's idea?

A. Oh, yes. A good idea.

By Mr. O'Brien: I think that is all.

By the Court: Well, it is about adjournment time. We will be in recess, members of the jury, until ten

3274 o'clock tomorrow morning.

By the Witness: Is that all, your Honor?

By the Marshal: Will the audience remain standing until the Jury files out, and the Judge, please?

This Honorable Court will recess until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken in the

above-entitled cause until the following day, being Friday, October 2, 1953, at the hour of 10:00 o'clock a.m.)

(Caption—No. 52 CR 143)

3275 Chicago, Illinois, Friday, October 2, 1953, 10:00 o'clock a.m.

Court met pursuant to adjournment.

Present:
Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:—

By the Clerk: 52 CR 143, United States of America v. The Shotwell Manufacturing Company, et al., case on trial.

3276 MICHAEL COHEN, a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination by Mr. Lockley.

Q. Mr. Cohen, did you during 1945 or 1946 have any—

By Mr. Kirby: If the Court please.

By Mr. Lockley: I am sorry, Mr. Kirby.

By Mr. Kirby: It is not plain to me whether Mr. O'Brien was through with Mr. Cohen and Mr. O'Brien isn't here to be asked.

By the Court: I am sorry. I think we will wait for him.

By Mr. Kirby: Yes. There is only one bank of elevators this morning and it is hard to get up here. As for me, a young man like me, I can walk up a floor.

By Mr. Lockley: I was going by the transcript, Mr. Kirby; on page 3273 Mr. O'Brien said, "I think that is all."

By the Court: We will wait for him.

By Mr. Kirby: We can still wait for him, I assume.

3277 By the Court: I walk up the stairs every morning, Mr. Kirby.

(Mr. O'Brien arrived at this point.)

By Mr. O'Brien: I apologize for being late, Judge. I had a long distance phone message. I am sorry.

By the Court: I think you were through, Mr. O'Brien, with your direct?

By Mr. O'Brien: Yes, Judge.

By the Court: All right, Mr. Lockley.

By Mr. Lockley: Mr. Kirby, and Mr. McConnell, are you going to make any examination?

By Mr. McConnell: No.

By Mr. Kirby: No.

By Mr. Lockley: All right.

By Mr. Lockley:

Q. Mr. Cohen, during the years 1945 and 1946 did you have any transactions of any nature with The Shotwell Manufacturing Company or any of the individual defendants here, Mr. Cain, Sullivan or Huebner?

A. No, sir.

3278 Q. When did you first meet Mr. Cain or Mr. Huebner or Mr. Sullivan, if you ever met them?

A. I met Mr. Sullivan.

Q. When was that?

A. He gave me the summons.

Q. When was that?

A. Last year.

By Mr. Lockley: Your Honor, at this time, then, I move to strike the portion of the witness's testimony which related to the generalities on the condition of the corn and corn syrup market on the ground that it is irrelevant to the issues in this case. It is immaterial and incompetent and in no way identified with The Shotwell Manufacturing Company.

By the Court: Well, I will take your motion under advisement and defer my ruling on it. Mr. O'Brien says he is going to connect it up.

By Mr. Lockley: All right, sir.

By Mr. Lockley:

Q. Mr. Cohen, do you know of your own knowledge whether The Shotwell Manufacturing Company or any

3279 one of the individual defendants were ever paid a

single penny by anybody in the black market for corn or corn syrup?

A. No, sir.

Q. Isn't it true that established candy manufacturers had a quota with corn syrup processors?

A. Yes, sir. All big outfits, yes, sir.

Q. Did you have such a quota?

A. No, sir.

Q. If you had had such a quota, would you have found it necessary to buy on the black market?

A. No, sir.

3280 Q. You said you knew a Major Ryan?

A. Yes, sir.

Q. Did you ever pay any money to him?

A. Oh, yes.

Q. Is that in connection with the corn market?

A. Yes, sir. I bought corn syrup off of him.

Q. How much did you ever pay him?

A. Well, he gave me a bill of six and a half cents and I paid him seven cents cash, fifteen cents a pound.

Q. What was the total amount of the money?

A. What?

Q. What was the total amount of money?

A. Between 150 and 200 thousand dollars, I give him.

Q. Do you know if Mr. Lubben ever paid any money to Mr. Ryan?

A. I haven't seen it.

Q. I don't understand you. I say, do you know if Mr. Lubben paid any money to him?

A. I never seen him give any money.

Q. I see. You weren't there?

A. No, sir.

Q. You testified that the corn syrup market in 1945
3281 and 1946 was about six and a half cents OPA price and about five and a half cents over-ceiling, is that correct?

A. That is right.

Q. And that that could be, in turn, sold from anywhere from fourteen to fifteen or sixteen cents?

A. That is right.

Q. That is correct?

A. Yes.

Q. Now, did you mean by your testimony that every-

body who ever bought any corn syrup in 1945 and 1946 had to pay this price?

A. If he didn't pay—if he bought it from the refineries, he got the legitimate price. If he bought it outside the refineries, he had to pay the black market price.

Q. People who had quotas, did they have to pay those black market prices?

A. No, sir.

3282 By Mr. Lockley: That is all, Mr. Cohen.

By Mr. McConnell: Just a minute.

By the Court: I think they want to question you.

Redirect Examination by Mr. McConnell.

Q. As I understand it, you had no quota yourself?

A. That's right.

Q. Did you know any company that did have a quota for corn?

A. I didn't get that.

Q. Did you know any company that did have a quota that tried to get corn under the quota—I mean, corn syrup, under the quota?

A. Every one that had a quota, had the legitimate quota from the refinery. There's about a half dozen refineries that got all they were entitled to. They—if they bought it in '46, they would get the same quota they had in '44, or '45, the same amount. They couldn't get more than they had the year before.

Q. The refinery had to get the corn from some place to grind it, no matter whether they had a quota or not?

3283 A. I don't know. I know from my experience they give all their customers a quota. The people that were in business ten or 15 years got all they wanted.

Q. What company do you know that operated on a quota?

A. All of them. In New York, either Paul, Lofts, Baricini, all of them. Everybody had a quota. They all got just what they were entitled to. They got the same amount they got the year previous.

Q. How did the refinery get the corn then? Would the refinery get the corn and from where?

A. From the farmers. They paid the legitimate price. They dealt with the farmers that always took care of them. But the new farmers, they got their quota, but they couldn't

get more than they wanted. When they wanted extra, they had to get out and get it the other way.

Q. I thought you said here that you couldn't get any corn moved to the refiners without paying a black market price.

A. That's the new people. But the old people, like the big corn refiners, like Corn Products, had their
3284 quota. They wouldn't give any new customers any, but the old customers got all they wanted, all they needed.

Q. The farmers didn't know anything about that?

A. But they had their farmers that gave them for years and years the same amount.

When they wanted extra corn syrup, they couldn't get it without paying black market.

3285 Q. If they wanted to go beyond the quota?

A. That's right.

Redirect Examination by Mr. Kirby.

Q. You say you paid some money to Ryan?

A. Yes.

Q. And was that when he was with Lubben?

A. No, when they left Lubben.

Q. After he was with Lubben?

A. That's right.

Q. He went in business for himself?

A. That's right.

By Mr. Kirby: O.K. Thank you.

By the Witness: Am I through now?

By Mr. Lockley: Not yet, Mr. Cohen.

Recross Examination by Mr. Lockley.

Q. You said that when the corn refiners received raw corn through this arrangement the person who procured the raw corn for them would get a half, or a portion of the corn syrup—

A. That's right.

3286 Q. —derived from that?

A. That's right.

Q. Now, that was sold to the black marketeer who arranged the purchase of raw corn?

A. That's right.

Q. Now, what happened to the other half that the refiner kept?

A. Kept for themselves.

Q. And what did they do with it?

A. They sold it to the legitimate trade.

By Mr. O'Brien: If he knows.

By Mr. Lockley:

Q. Do you know what the condition of the corn market was during all of 1945?

A. Shortage.

Q. All of '45?

A. '45 and '46.

Q. January, February, March?

A. All the way through.

Q. How about November, December?

A. '45 and '46. The last two months of '46 it eased up a little.

Q. It eased up a little. It was still tight?

A. A little tight. '47 there was surplus.

3287 By Mr. Lockley: All right. Thank you.

By the Witness: Am I through now?

By the Court: I think you are through now.

By Mr. Lockley: Just a minute.

By the Court: I think you are through.

By the Witness: He told me to wait.

By Mr. Lockley: Just a moment, your Honor. I am conferring with my co-counsel here.

By Mr. Lockley:

Q. Do you know if Major Ryan worked for Mr. Lubben in the procurement of corn?

A. Yes, sir.

By Mr. Lockley: Thank you.

3288 *Redirect Examination by Mr. O'Brien.*

By Mr. O'Brien: Just a minute now, Mr. Cohen. The World Series doesn't start at Brooklyn until this afternoon.

By Mr. Cohen: You held me back last year, too, you know.

By Mr. O'Brien:

Q. Did you ever have any dealings with Corn Products Refining?

A. No, not in the last ten years.

Q. Did you know that Corn Products Refining—well, you had no dealings, you had no communications with them whatsoever?

A. No, sir.

Q. So you do not know of what position Corn Products Refining took with reference to its ability to furnish past quotas?

A. My experience with the Corn Products for 30, 40 years, during the 1st World War—

Q. I am not talking about the 1st World War now, but just during this period of 1945 and '46. Did you have any dealings with Corn Products?

A. No, sir.

3289 Q. And you don't know what their position was on quotas?

A. I know from my experience how they would act, because I have been with them for thirty, forty years. I dealt with them.

Q. I understand. But you had no dealings yourself with them?

A. Not in the last war, no.

Q. And when the corn went short, do you know whether Penick and Ford was still fulfilling its quotas?

A. How would I know about it?

Q. Allright. And do you know whether Union Starch was fulfilling its quotas?

A. I don't know.

Q. Do you know whether Hubbinger was fulfilling its quotas?

A. No.

Q. You mean you do not know, or they were not?

A. I wasn't in that line to know. I wasn't dealing with them.

Q. Were you acquainted with the Staley people down in southern Illinois?

A. Yes. I never dealt with them in the last twenty

3290 years, but I dealt with them back years ago. I know them personally.

Q. Do you remember whether it is true that the Staley people during all of '45 and 1946, continued to operate as usual?

A. I don't know whether they did or not.

By Mr. O'Brien: I think that is all.

Redirect Examination by Mr. Kirby.

Q. Mr. Cohen, when you said you saw Mr. Sullivan last November, this is the fellow you saw (indicating) isn't it?

A. Yes.

Q. The young Sullivan?

A. That's right.

Q. That was at the deposition hearing, that was in New York when they took your deposition under court order, wasn't it?

A. He met me in Brooklyn.

Q. All right. When he served the papers on you?

A. Yes.

By Mr. Lockley: Thank you, Mr. Cohen.

By the Witness: You are all through with me?

3291 By Mr. Lockley: Yes, sir.

By the Witness: Make sure O'Brien don't call me back now.

(Witness excused.)

3292 CHARLES A. RYAN, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. Charles A. Ryan.

Q. And, Mr. Ryan, you have known a David Lubben for some years?

A. Yes, sir.

Q. In 1945 did you go to work in October for a corporation in which he was interested called the Burlan Corporation?

A. Yes, sir.

Q. Now, before that, in 1945, did you have anything to do with making any arrangements with respect to a corn deal with the refinery known as Penick & Ford for Mr. Lubben?

A. Yes, sir.

Q. And when did that take place?

A. In the summer of 1945.

Q. And at whose request did you arrange to make the deal?

3293 A. I went to Penick & Ford Company because—

Q. Mr. Ryan, if you will just kind of shout like I do we will all hear you better. Now, I talk louder than I should, but you do like I do and talk real loud.

A. I went to the Penick & Ford Company to ask if they had corn syrup available for Mr. Lubben, for his factory in the Bronx, New York.

Q. Did they?

A. They told me that due to the corn shortage that they were on allocation for corn syrup.

Q. Was there any way that you could get corn syrup?

A. I discussed that with Mr. Lubben and arrangements were made to supply the corn to get corn syrup.

Q. If you got the corn for the refinery you could buy corn syrup?

A. Yes, sir.

Q. And that was in the summer of '45?

A. Yes, sir.

By Mr. Kirby: That is all.

Cross Examination by Mr. Lockley.

Q. Mr. Ryan, when you said Penick & Ford were on
3294 allocation, what did you mean?

A. I meant that their regular customers were allocated corn syrup according to the past performance of the industry.

By Mr. Lockley: Thank you. That is all.

By Mr. Kirby: That is all.

(Witness excused.)

By Mr. Lockley: Your Honor, at this time I would like to make a motion that the testimony of Major Ryan be stricken as being incompetent, immaterial and entirely irrelevant to the issues in this case.

By the Court: Well, I will defer my ruling.

ARDON BOWMAN, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. Ardon Bowman.

3295 By Mr. Kirby: Mr. Bowman, I kind of shout so people can hear, and I have very few questions to ask, but will you shout your answers?

By the Witness: O.K.

By Mr. Kirby:

Q. Ardon Bowman is your name?

A. Right.

Q. Where do you live?

A. Minneapolis.

Q. You lived there some years?

A. Yes.

Q. You own your own home?

A. Yes.

3296 Q. You have been in business for some many years there?

A. Yes.

Q. Did you ever know of Frank Loperfido?

A. Yes.

Q. He was connected with Dave Lubben?

A. I think so, yes.

Q. And did you know him in the summer of 1945?

A. It may have been in the fall, summer or fall, probably.

Q. Did you ever meet Dave Lubben?

A. Yes.

Q. When?

A. I would have to guess on the date.

Q. Well, give us your best memory?

A. Probably the latter part of '45.

Q. Are you and have you been for some years known as Red Bowman?

A. Yes.

Q. Did your hair used to be redder than it is now?

A. Before it all came out, it was red.

Q. Well, Mr. Bowman, did Mr. Lubben or Mr. Loperfido, or anybody connected with Mr. Lubben, ever give

3297 you any currency?

A. No, sir.

Q. And specifically, on or about the 10th of October, 1945, were you given, by Mr. Lubben, or Mr. Loperfido, or anybody connected with them, currency in the amount of $79,100.00?

A. No, sir.

Q. Any amount whatever in the year 1945?
A. No, sir.
By Mr. Kirby: Thank you. That is all.

Cross Examination by Mr. Lockley.

Q. Do you know a Mr. Heitmann?
A. I met Mr. Heitmann..
Q. Did you ever get any money from him?
A. No, sir.
Q. Do you know a Mr. Hankermeyer?
A. No, I don't believe so.
Q. Did you ever get any money from him?
A. I don't believe I know him.
Q. What were you doing in 1945, Mr. Bowman; what was your occupation?
A. Well, I was a business consultant, and in public relations.
3298 Q. Will you please speak up?
A. A business consultant, and did some public relations work.
Q. Where?
A. In Minneapolis.
Q. A business consultant for what sort of businesses?
A. Well, businesses such as—you want names, you mean?
Q. Well, at least the nature of the business.
A. Well, one business was in the business of manufacturing machines to produce cement blocks and bricks. I was employed by Brown & Bigelow, St. Paul.
Q. You mean you were a business consultant for just one firm in the business of manufacturing bricks?
A. No, no, no. No, I am not—I said there was a company that manufactured machines to make concrete blocks and bricks. I was employed by Brown & Bigelow during 1945. I believe that during that period I worked for the 7-Up Company of Minneapolis. I don't have—
Q. Where do you live in Minneapolis?
3299 A. I live at 42 Park Lane.
Q. Did you know Bob Hannegan?
A. No.
Q. Do you know a man named Howard Lawn?
A. I don't believe I do. I am not—I may, but I don't believe I do. I don't remember him.

Q. Do you know an organization known as Clinton Industries?

A. No, I don't think I do.

3300 Q. You don't think you do?

A. I am sure I don't. If I do, I don't remember. If I ever did, I mean.

Q. Will you tell me just what was the nature of the services you performed for your clients?

By Mr. Kirby: Well, I object. It is far beyond the scope of my questioning.

By the Court: I suppose counsel has a right to know what his business is,

By Mr. Kirby: Well, the examination in chief was limited to any dealings with Lubben or his company.

By Mr. Lockley: I intend to lay a foundation for impeachment of this witness, if your Honor please, and it is necessary. I have some information about him.

By the Court: He may answer.

By Mr. Lockley:

Q. What was the nature of the services that you performed for your clients in 1945 and 1946?

A. Well, for one company, for instance, that I recall, I secured or helped them secure a price for a new—this new machine that I just mentioned. It was a general program of trying to advise and be helpful

3301 in any way that I could. The nature of my services, you ask—I did what they asked me to do.

Q. Did you arrange for the procurement of raw materials for any of your clients?

A. No, I don't believe I did. I don't remember doing anything like that.

Q. I am sorry. You have to speak louder. I didn't hear the last part of the answer.

A. I say, I don't remember. I did attempt to secure materials for any of my clients, yes.

Q. Did you ever attempt to secure any corn for any of your clients?

A. Not directly, no.

Q. Well, what do you mean by not directly?

A. Well, I mean I attempted to secure sweetenings for some of my clients.

Q. To secure what?

A. Sweetenings.

Q. Sweetenings?

A. Yes, corn sugar.
Q. Corn sugar?
A. Yes.
Q. Is that dextrose?
3302 A. Yes.
Q. Does that come from corn syrup?
A. I am not a chemist. I don't think so.
Q. Is it a by-product of raw corn?
A. Yes, it would be.
Q. Who were the clients that you were attempting to procure this sweetening for?
A. I don't have my records here, but among them was the 7-Up Company of Minneapolis. And I think the Garrett Candy Company.
Q. Which candy company?
A. The Garrett Candy Company.
Q. The Garrett Candy Company?
A. Yes. I don't have my records here. I can't tell you.
Q. Were you subpoenaed by the defense to bring your records with you?
A. I was.
Q. Did you bring them?
A. As to what?
Q. As to the years 1945 or 1946 or whatever the subpoena called for.
A. Records of what?
Q. I don't know what they called for.
3303 A. I didn't have any records that they required. They asked me to bring the records of any business that I had done with the Shotwell Manufacturing Company which I didn't know anything about and they asked me to bring any records that I may have with the Eatsum—I believe it was Eatsum Candy Company. I don't remember what the subpoena said even, but I know I didn't have any records and hadn't done any business with these people.
3304 Q. You say you knew Frank Loperfido?
A. Yes.
Q. In what connection did you know him?
A. I knew him as—he was working for a New York concern and I met him. I don't remember where, in what connection.
Q. Did you ever make a trip with him?

A. I don't—I don't remember.
Q. During 1945 or 1946?
A. I don't remember of any trip.
Q. Did you make a trip with Mr. Loperfido throughout the Midwest in the process of procuring corn?
A. I don't remember making any trip with Mr. Loperfido.
Q. Do you remember that you didn't make such a trip?
A. Well, I don't remember of making it.
Q. What other candy company did you work for or try to procure raw materials for?
A. I don't remember. I don't have any records here. I mean as to all the business that I did during that period.
Q. What were you doing for these candy companies?
A. For candy companies?
Q. Yes.
3305 A. Well, the candy companies, the same as every other company, had many problems. There was everchanging regulations in the OPA and sometimes there was an advantage for them if they bought, procured equipment at a certain period of time because they were given larger sugar base. I don't remember the orders, but—
Q. Are you what is commonly known as a five percenter?
A. No, I don't believe I am.
Q. That is what you called it, anyway?
A. Well—
Q. What did your call it again? What did you say your occupation was again?
A. Part of my work was as a business consultant and in public relations.
Q. You are a good friend of the Governor of Minnesota? Weren't you?
A. No, I don't think so.
Q. Did you ever attempt or arrange to obtain corn from any of the elevators in the Midwest?
A. I don't ever remember attempting to arrange corn from any of the elevators.
Q. Or the purchase of corn?
A. No.

3306 Q. Would you say positively you didn't do such a thing?

A. I don't remember of doing it.

Q. Did you ever attempt to arrange for the purchase of corn from farmers for delivery to elevators?

A. No, I don't remember doing that.

Q. Do you ever remember arranging for the purchase of corn from elevators to corn refineries?

A. No.

Q. Do you ever remember arranging for the purchase of dextrose, corn sugar or corn syrup from the corn refiners?

A. From the corn refiners?

Q. Well, maybe I have the wrong name for them. I mean the people who process corn and the corn syrup and other by-products.

A. I don't remember. Now, wait a minute. What was that? May I have the question again?

(Question read.)

By the Witness:

A. You mean did I ever arrange—did I ever send corn to a refiner or arrange to buy from a corn refiner?

3307 Q. Right.

A. Sugar? Corn sugar, dextrose?

Q. Correct.

A. Yes, I got some sugar from a corn refiner.

Q. And for whose account did you buy it?

A. I don't remember exactly, but I am sure part of it was 7-Up Company of Minneapolis. I am sure it wasn't for anybody's account that was mentioned here, if that is—

Q. Are you sure it wasn't for the Eatsum Food Products Company?

A. I am positive.

Q. Are you sure it wasn't for General Confections?

A. I am positive.

Q. Or Reserve Trading?

A. I had no business with any of those people.

Q. You say you knew Frank Loperfido?

A. Yes.

Q. And you also knew Dave Lubben?

A. Yes.

Q. When did you meet Dave Lubben?

A. I don't recall. I only met him once and it was just for a moment.

Q. In what connection did you meet him?

3308 A. Well, during this period when I was representing different companies that needed sugar or syrup, I necessarily went any place I could learn to find out about it. I would go down to the sugar brokers and the syrup people in New York and there are dozens of them, and among them, I suppose I ran into the name —"Go see these people."—So I went down there. I think that is the time I met Mr. Lubben.

Q. Where was this? At whose office was it?

A. It was in his office, but I don't remember the address.

Q. Was that at 19 Rector Street?

A. It could be. I don't know.

Q. Did you pick up some cash money at that time?

A. No. No.

Q. Do you know Bill Giglio?

A. Yes.

Q. Where did you meet him?

A. I don't remember where I met him.

3309 Q. Did you meet him at 19 Rector Street?

A. I believe that's where I met him, I am not sure.

Q. All right. In what connection did you meet him?

A. Well, I just met him, he was there; as I recall it.

Q. Did he give you any cash money at that time?

A. No, sir.

Q. Did any of the people I have mentioned, Mr. Lubben, Mr. Giglio, or anybody else?

A. No.

Q. At 19 Rector Street, did they give you any money?

A. No, sir. No, sir.

Q. Did Mr. Heitmann give you any money in Minneapolis?

A. No, sir.

Q. Did you ever tell Loperfido that your wife was a lawyer?

A. That I don't know.

Q. Well, is she a lawyer?

A. Yes.

Q. Do you have presently any records of any kind
3310 of business transactions during 1945 and 1946 with relation to the purchase of corn or corn by-products?

A. No, I don't have, relating to the purchase of corn or corn by-products.

Q. Do you have any of your 1945 records at the present time?

A. Actually I didn't buy any corn or corn by-products.

Q. Well, do you have any records of any of your activities on behalf of your clients with respect to those matters in 1945 and 1946?

A. My clients would have the records. I have records of what they—of what I was paid by these people, if anything—so—

Q. You say you didn't buy any—do you mean that you arranged for somebody else to make the purchase?

A. I didn't—do you mean did I buy the corn sugar and sell it?

Q. Did you arrange for somebody else to do that?

A. Well, I arranged for my clients to buy wherever they could, yes, if that was the thing they were
3311 after.

Q. Did you get any kind of a commission for that?

A. I was paid a retainer, usually, and my expenses were paid.

Q. Do you know a Major Ryan?

A. No, I don't believe so.

Q. Charles Ryan, I believe it is.

A. I don't remember ever meeting him.

Q. Do you know a Lieutenant Harris?

A. No.

Q. I believe his first name is Frank, Frank Harris?

A. Not to my knowledge.

By Mr. Lockley: All right, Mr. Bowman.

By Mr. Kirby: Thank you, Mr. Bowman. That's all.

(Witness excused.)

JOHN T. BOND, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

3312 Q. Now, what is your name?

A. John T. Bond.

Q. You speak up like a witness should. We have been having trouble this morning hearing these people, so you speak up nice and loud.

Where do you live, Mr. Bond?

A. Los Angeles, California.

Q. And how long have you lived on the West Coast?

A. All my life.

Q. In Los Angeles all your life?

A. Since 1927.

Q. What has been your business career, Mr. Bond?

A. I have been 35 years in the candy business.

Q. With a variety of companies?

A. Three.

Q. Which ones?

A. My own for nine years, Rockwood and Company for 13 years, and in the brokerage business the balance of the time.

Q. Is the Rockwood Company—is that the Rockwood Chocolate Company?

A. The legal name is Rockwood and Company, but they manufacture chocolate in Brooklyn.

Q. Well, are they one of the largest chocolate 3313 companies in the country?

A. The second largest.

Q. Who is the largest.

A. Hershey.

Q. And Hershey is the largest, and Rockwood is next?

A. That is right.

Q. What was your office with the Rockwood Company?

A. The past number of years that I was with them, I was Vice President in charge of West Coast Sales.

Q. Did you at any time become a representative of Shotwell Candy Company?

A. I did, sir.

Q. When?

A. Either late in 1940 or 1941.

Q. And that continued until when?
A. Until it was terminated by them, I believe, in 1945.
3314 Q. Now, Mr. Bond, did you know a David Lubben?
A. I did.
Q. Had you known him for some years prior to 1944, 1945 and 1946?
A. I met David Lubben, I would say, in about 1943 for the first time.
Q. What was Mr. Lubben doing then?
A. Lubben had just gone with Mr. Burry, or Burry Biscuit Company.
Q. And they were where?
A. Elizabeth, New Jersey.
Q. And did you at any time introduce Lubben to the Shotwell people?
A. To the best of my knowledge, I did.
Q. So far as you know, they hadn't known him before?
A. That is correct.
Q. To whom did you introduce Lubben at Shotwell?
A. Mr. Huebner.
Q. In what connection? What did you tell him about Lubben?
A. Do you want details?
Q. Well, I want your best present memory, yes.
A. As a broker for various concerns.
3315 Q. Is this what you know?
By Mr. Lockley: Tell the conversations.
By Mr. Kirby:
Q. Tell what you told Huebner. That is what we want to know.
A. Well, I think you should have the background, if you want to know.
Q. Well, all right, if the government doesn't object, well, give it.
A. As a broker, I was always concerned with getting additional merchandise. Being an ex-vice president of Rockwood, I knew where many contracts were that were not being used after the war started and I was told that if I could get additional merchandise that I, in turn, would get additional quotas of candy to sell.
As a consequence, I suggested that they contact Mr.

Lubben or that I introduce them to Mr. Lubben, and as a result of that I did get additional quantities of merchandise to sell.

Q. That is, Lubben was presented to the Shotwell people then as a person who could get raw materials?

A. As a person who had access to raw materials.

Q. That were in short supply?

3316 A. That is correct.

Q. And your experience was particularly in chocolate, in the chocolate field?

A. Correct.

Q. And you say that there were some companies that had allocations of chocolate that were not using them?

A. That is correct.

Q. Did you consult with Mr. Lubben and tell him about such companies?

A. Certain companies, yes.

Q. And they were which companies?

A. The Burry Biscuit Company, Palmer Candy Company, and then there was also the people who manufacture Mounds.

Q. Is that the Peter Paul Candy Company?

A. The Peter Paul Candy Company.

Q. Do you know that actually chocolate was shipped from all of those companies to Shotwell?

A. I do not know anything regarding any shipments.

Q. You just made the arrangements for them to get started?

A. I made no arrangements.

Q. Well, I mean—

3317 A. I told them where the contracts were that were not being used.

Q. Told Lubben?

A. That is correct.

Q. So he could get them for Shotwell?

A. That is correct. I do not know that.

Q. Now, your business on the West Coast so far as Shotwell was concerned then increased?

A. It did, sir.

Q. You got more materials?

A. I got more merchandise to sell.

Q. Now, was a pound of it sent to you and you were charged over the ceiling?

A. I never purchased any merchandise.

By Mr. Lockley: When?

By Mr. Kirby:

Q. Was a pound of it sent to any of your customers from Shotwell for which they were charged over ceiling?

By Mr. Lockley: May I suggest a foundation.

By Mr. Kirby:

Q. In 1945 or 1946?

A. To my knowledge, there was never a pound of
3318 Shotwell merchandise shipped on which I received my regular brokerage on which there was an overage, over, above ceiling, ever charged.

3319 Q. Now what candy was increased to you, you sold that to your regular customers?

A. That is correct.

Q. And did that candy that Shotwell shipped to you go into the black market?

A. To my knowledge, no.

Q. You placed it with your regular customers?

A. Legitimate customers.

Q. Mr. Bond, from your experience in the chocolate field, would the shipments of cocoa beans—where did they fit into the picture?

A. Cocoa beans are the prime factor in the manufacture of any piece of chocolate. They are imported from the Gold Coast of Africa and from Central and South America. I don't imagine you want the processes by which it is manufactured into chocolate.

Q. No. They are imported and they are the basic materials for the manufacture of chocolate?

A. That is correct.

Q. Now in the years 1944, 1945 and 1946, was there a system of Government restriction on the purchase of cocoa beans?

By Mr. Lockley: Well, I object, your Honor, to
3320 this witness testifying to such matters. He is not an expert in that.

By Mr. Kirby: Well, there are not many men in the United States more expert than this witness.

By Mr. Lockley: He wasn't in the chocolate business at that time. He was in the candy business and he didn't work for Shotwell in 1945 so I hardly see how his testimony can be competent.

By Mr. Kirby: 1946, I am inquiring about, Mr. Lockley.

By the Court: If he knows from his own experience, he may answer.

By Mr. Kirby:

Q. Did you know, Mr. Bond, from your experience in the chocolate field what you are now telling us about the import of the cocoa beans and where they come from?

A. I have always kept track of the daily market up to the present time on cocoa beans.

Q. Did you, during the war years, keep track of existing regulations of the Government with respect to cocoa beans?

3321 A. To a certain extent.

Q. Do you yourself have a familiarity with them or can you tell us or describe the state of the market in cocoa beans in 1944, 1945, and 1946?

A. Well, the market was pretty well frozen at that time.

Q. What do you mean by that?

A. The quotas, for instance, that people had received before, they were permitted to have again, and it was very hard to get any additional quantity unless it was what we call second hand merchandise.

Q. And what do you mean by second hand merchandise?

A. Second hand merchandise—a manufacturer, for instance, might decide he was going to discontinue making chocolate eclairs or chocolate coated grams, in which event he usually took his quotas of chocolate and then resold them to someone else, which he was permitted to do.

Q. And then that chocolate was available on the market and that is one of the things that you talked to Lubben about?

A. That is correct.

Q. There were quotas for cocoa beans?

A. That is correct.

3322 Q. Do you know anything personally about whether Mr. Lubben was engaged in the purchase and sale of cocoa beans during 1944 and 1945?

A. I do not know of his activities.

Q. Were you involved at all in any consultations in connection with Shotwell attempting to purchase cocoa

beans and getting allocations of cocoa beans in 1944, 1945 and 1946?

A. I knew where some of these contracts were. I told him I had advised Mr. Lubben and he was the one that would know regarding it.

Q. So, for their search or for their further work in that field, you turned them over to Lubben?

A. That is right.

By Mr. Kirby: That's all, Mr. Bond.

By Mr. Lockley: Do you have any questions, Mr. O'Brien?

By Mr. O'Brien: No.

Cross Examination by Mr. Lockley.

Q. Mr. Bond, you stated that you introduced Mr. Lubben to Mr. Huebner. Do you know where that was?

A. In Chicago.

Q. Do you know about when?

3323 A. No, I do not remember the date.

Q. Well, can you give us the year?

A. I wouldn't want to say the year. It is either 1943 or 1944.

3324 Q. At that time you introduced him as a person who might assist Shotwell? Assist them in acquiring some raw materials?

A. That is correct.

Q. Was there a specific raw material that you had in mind?

A. Chocolate, primarily.

Q. And were you present when there was a conversation between Mr. Huebner and Mr. Lubben regarding the arrangement for purchase of chocolates?

A. At the time that I introduced him, we discussed the matter of additional quantities of chocolate, and I told him that, where certain contracts were, and Mr. Lubben and Mr. Huebner were present at that time.

Q. That is, you told Mr. Lubben where certain contracts were?

A. That is right. I had previously discussed it with him.

Q. With Mr. Lubben?

A. That is correct. I had also previously discussed it with Mr. Huebner.

Q. Now will you tell me as best you can exactly what was said during the conference with Mr. Huebner and Mr. Lubben?

3325 A. Well, I knew at that time Mr. Lubben was trying to get their line in New York on the same kind of brokerage business that I had, and I also stated that if they could get some of the Burry contracts and get some of the Palmer Candy Company contracts on other merchandise that I knew about, and knew the contracts with the Rockwood Chocolate salesmen, that perhaps I could get additional merchandise as a result of their having additional quotas to sell in my territory.

Q. Did Mr. Lubben agree to attempt to arrange such purchases of chocolate?

A. He said that he would try.

Q. Do you recall the terms that he laid down to Mr. Huebner at that time?

A. There were no terms that I remember.

Q. Well, do you recall whether as a condition for selling the chocolate he was to become a broker for Shotwell on the East Coast?

A. No, I do not.

Q. You don't remember whether that was discussed at that time?

A. No, I do not.

Q. Do you recall whether there was any discussion 3326 as to whether Mr. Lubben would sell this chocolate at the ceiling price, or at the black market price?

A. No, I do not recall any conversation regarding that.

Q. All you did then was just bring the two men together?

A. That is correct.

Q. Now you said there was a quota of chocolate at Peter Paul's? They made chocolate—they made candy, too, didn't they?

A. They made candy, yes.

Q. Are you in a position to tell us why they would have a surplus of chocolate to be disposed of?

A. At that time cocoanut was very short. Their main product was cocoanut and they couldn't get sufficient cocoanut to use the quantity of chocolate that they had available.

Q. So they were willing to sell their quota of chocolate, is that correct, to somebody else?

A. That was a common practice.

Q. Was it likewise true of the Burry Biscuit Company, if you know?

3327 A. They discontinued completely their chocolate operation, and therefore had the quota available.

Q. The quotas were the property of Mr. Lubben, weren't they, of Burry Biscuit Company, and he had bought it out in the meantime?

A. That, I do not know. I do know when he discontinued working for the Burry Biscuit Company, he set up the Eatsum Food Products, in which the Burry Biscuit Company, I understood, had a financial interest.

Q. Did you ever lend Mr. Lubben any money?

A. I did.

3328 Q. Did you ever get paid back?

A. I did.

Q. Did you ever know him to lie to you?

A. Never.

Q. You were fired, you said, in 1945?

A. That is correct.

Q. About what time? About what time, by Shotwell?

A. I don't remember the date.

Q. Do you know who took your place?

A. Their sales manager, Emmet Hogan.

Q. Did you have a contract with them?

A. I had no contracts. I have no contract today.

Q. Were you told why you were being replaced?

By Mr. Kirby: If the Court please, I don't think that has anything to do with the matter.

By the Court: No, I don't.

By Mr. Kirby: I object to it.

By the Court: The objection is sustained.

By Mr. Lockley:

Q. Well, after you were fired by The Shotwell Manufacturing Company—

By Mr. Kirby: I don't think the use of the word 3329 "fired" was used by this witness. They made a change in the distribution method on the West Coast.

By Mr. Lockley: You used the same expression.

By Mr. Kirby: That does not mean there can be any implication that this gentleman was fired. They have the highest regard for him.

By Mr. Lockley: You used the same expression when

Mr Lubben said he was to be retired from his position as broker on the East Coast.

By Mr. Kirby: Well, our attitude as to the merit and worth of Mr. Bond and Mr. Lubben is strikingly different, and I use the word "fired" advisedly. But it doesn't apply to Mr. Bond.

By the Court: The objection is sustained.

By Mr. Lockley:

Q. Well, in any event, after your services with The Shotwell Manufacturing Company were terminated, did you continue to sell as a broker, Shotwell merchandise on the West Coast?

A. I did.

3330 Q. Where did you get it?

A. From Eatsum Food Products and later known as General Confections.

Q. Were they in large or small quantities?

A. Quite large quantities.

Q. In carloads?

A. Yes, sir.

Q. Did you ever sell any Cardinal chocolates?

A. Lots of them.

Q. As a broker?

A. Lots of them.

Q. For whom?

A. For General Confections.

Q. Whose merchandise was Cardinal chocolates?

A. Shotwell Manufacturing Company.

Q. Now you stated that there was a quota on both cocoa beans and chocolate. Were people who were in the business of using such products in 1941 or 1942 able to secure a supply in 1945 and 1946?

A. Any manufacturer who had a quota was able to secure the same quota based upon whatever the Government allowed on that particular commodity.

Q. Do you know of your own knowledge whether Shotwell had such quotas in cocoa and cocoa beans
3331 in 1945 and 1946?

A. They had lots of quotas.

Q. They had lots of quotas. Do you have any personal knowledge of Mr. Lubben obtaining any raw materials for The Shotwell Manufacturing Company in 1945 or 1946?

A. What do you mean by raw materials, chocolate?

Q. I mean chocolate or corn syrup or sugar or anything else that goes into the manufacture of candy.

A. Well, these quotas that I told him about I know later went to Shotwell, according to his story.

Q. But which year? What year did those quotas go to Shotwell, if you know?

A. I wouldn't know the year. It was probably 1945 or 1946.

Q. And you introduced him in 1943 or 1944?

A. That is correct.

Q. How soon after that did he become their broker?

A. That I don't know.

Q. Could it had been 1944?

A. Yes, it could have.

Q. And he arranged the procurement of chocolate for Shotwell?

3332 A. He could have.

Q. Do you know of any other such arrangement Mr. Lubben had with Shotwell after the original one you participated in?

A. No. I was not familiar with those arrangements after the original.

By Mr. Lockley: Thank you, sir.

By Mr. Kirby: That's all. Thank you, Mr. Bond.

By Mr. O'Brien: Mr. Mammel, will you take the stand, please.

By the Court: You have been sworn, Mr. Mammel. You don't have to be sworn again.

CHARLES MAMMEL, called as a witness on behalf of the defendants, having been heretofore first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. Mr. Mammel, you testified the other day to a summary which you had made based on the testimony and the Government's exhibits?

A. Yes, sir.

Q. And I think you said, did you not, that the 3333 $10,000.00 payment made by Mr. Heitmann was not included in your figures for the year 1945?

A. It was not included as such, no.

Q. Just what, if any, consideration—withdraw that. Was it included in your figures for the year 1946?

A. It was not as such, no.

3334 Q. Was it given consideration in any way in either of those two years?

A. I considered it a part of the currency payment for which we had no checks in support—cash checks, checks made to cash.

Q. Well, you did give it some consideration in one year or the other?

A. Well, I did not top the other currency items that Lubben had testified were paid.

Q. You are telling me what you did not do, Mr. Mammel. I would like to know how you did consider it, and in which year you gave it consideration?

A. I can best explain that by giving you the exact—

Q. Will you get your summary and tell us exactly from that?

A. Yes, right. I can tell you from that.

By Mr. Lockley: Just the summary you had the other day?

By the Witness: Yes.

By Mr. O'Brien:

Q. Now, will you look at this summary, Mr. Mam-
3335 mel, and tell me where and how any consideration was given to the Heitmann testimony, or to the—well, it is the Heitmann testimony, rather than an exhibit.

A. There is nothing in here.

Q. Is your total for the year 1945, $177,000.00?

A. That is correct.

Q. $177,146.23?

A. That is correct.

Q. Is there any item that you have used in reaching that total which you have given consideration to the Heitmann—on which you have given consideration to the Heitmann testimony?

A. No.

Q. What are the individual items that go to make that total?

A. Do you want me to read them all?

Q. Yes. There are only about 12 or 15, aren't there?

A. Only. Exhibit No. 27, $10,849.00. Exhibit 28, $6,-183.00. Exhibit 40, $18,000.00. Exhibit 40-B, $15,000.00.

By the Court: Sixteen?

By the Witness: Fifteen, 15.

3336 By Mr. O'Brien:

Q. Fifteen?

A. 15. Exhibit 40-D, $22,124.13. Now, those last three items, there is a settlement sheet, 40-E, which makes it $55,124.13, so of course, that was considered in connection with it.

Exhibit 43, $2,403.00. Exhibit 45, $6,459.74. Exhibit 48, $4,455.00. Exhibit 55, $20,000.00. Then there is $5,524.00, and those two items together are on—

Q. 55-B?

A Settlement sheets, 55-A and 55-B. Then we have an item of $36,148.35, and the latter one is Exhibit 63.

By the Court: What is that figure again?

By the Witness: $36,148.35.

A. And those two that I mention are combined in settlement Exhibit 63-A and B, and that makes a total of $177,146.23.

3337 Q. Now, tell me this, before you get to that 30,000 and that 36,148, which are lumped to make $66,148.35, are they not?

A. That's correct.

Q. Before you get to that, what is the last—or latest date of payment that you have in your schedule?

A. Well, I didn't put the dates down here, but it would be that Exhibit 55.

Q. And the date?

A. A and B there.

Q. Yes, sir. 55, that is a check—

A. That's right.

Q. —dated May 25, 1945, is it not?

A. That's about right.

Q. That's the $20,000.00 check?

A. That's right.

Q. Now, when you go past that to the fifty five twenty four item—

A. Right.

Q. —you have a memo which is Exhibit 55-A?

A. Well, yes, either A or B. They are both, I guess.

Q. All right. And that relates to, on its face, May and June, 1945, overages?

3338 A. That is, I think, about right, yes.

Q. Yes, sir. And then you get to the 30,000, did you consider Lubben's testimony that he had paid that?

A. I considered Lubben's testimony that he had paid that $5,524.00 and the $30,000.00.

Q. Right. Now did you consider Lubben's testimony that he had paid the $36,148.35?

A. Correct.

Q. Now, when I say he had paid, I mean he personally.

A. That's right.

3339 Q. Now, if in addition to the items you mentioned, it is to be considered, as Mr. Heitmann testified, that he made a payment of $10,000.00 to Mr. Huebner late in the year 1945, that is in addition to anything which you mentioned?

A. If he made the payment and it is not part of the thirty-five thousand, then it would be in addition to the hundred and seventy-seven thousand.

Q. Now, which thirty-five thousand are you talking about?

A. That's the thirty thousand that we just talked about and the $5,524.00 which I considered Mr. Lubben paid.

Q. Correct.

A. See—

Q. Lubben so stated.

A. That is correct.

Q. And Lubben stated that Heitmann separately paid some money too, did he not?

A. Yes. Well, you got two of them there at that time, see. It could be on top or it could be apart. I, of course, wouldn't know.

By Mr. O'Brien: Will you mark this Defendants' Exhibit No. 53 for identifiation.

3340 (Said document was marked Defendants' exhibit 53 for identification.)

By Mr. O'Brien:

Q. Going for a moment to the year '46, Mr. Mammel—I am sorry, I forgot that—without going through the detail of the items in '46 perhaps you can tell us whether you know if you have considered separately the $10,000.00 payment that Heitmann said he made, have you considered it in your figures for '46, or given it any recognition?

A. No, I excluded it in '46 for the same reason that I did in '45.

By Mr. O'Brien: I would like to offer in evidence, if

the Court please, the affidavit of Arthur B. Cunningham, former counsel for the Government in these proceedings, which I have had the reporter mark Defendant's Exhibit 53 for identification.

(Document handed to counsel.)

By the Court. Well, I think it is about recess time. We will recess for ten minutes.

(Short recess.)

3341 By Mr. Lockley: If your Honor please, the Government objects to the admission of Defendants' Exhibit 53 for identification. It is an affidavit by former counsel for the Government at the time a motion for a continuance was made.

By the Court: Let me see it.

(Document handed to the Court.)

By Mr. Lockley: It is pure hearsay, and I believe it is incompetent.

By the Court: Yes. I will sustain the objection.

By Mr. O'Brien: I may say, Judge, for the record, that such a statement made by the Government—

By the Court: I will defer my ruling if you want to be heard on it later.

By Mr. O'Brien: Yes.

By the Court: Yes. All right.

Is that all Mr. Mammel?

By Mr. O'Brien: That is all that I have.

By Mr. Lockley: No questions.

(Witness excused.)

3342 By the Court: I wonder if I might examine more carefully the Cunningham affidavit. Then I will be better prepared when you renew your offer.

(Document handed to the Court.)

WELLINGTON MORLEY CRAMER, JR., a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your full name, Mr. Cramer?

A. Wellington Morley Cramer, Jr. Cramer spelled with a "C".

Q. And you live where?
A. 72 North Main Street, Cohassett, Massachusetts.
Q. What is your occupation?
A. I am a manufacturer of chewing gum.
Q. At the present time?
A. Yes.
Q. And what is the name of your company or companies?
A. Gum Products, Incorporated, and Two Star
3343 Confectionery Company, Incorporated. And several other smaller subsidiaries.
Q. Are you the folks who make the bubble gum?
A. Yes, we do.
Q. And was that your business in 1945 and 1946?
A. No, we didn't make bubble gum, too much, in those years. We made a straight gum, for adults, and candy, also.
Q. Also candies?
A. Yes.
Q. And you have dropped or disposed of the candy line?
A. Yes, entirely.
Q. During the years 1945 and 1946 did you or your companies have any dealings with David Lubben or his companies?
A. Yes.
Q. Did they involve the purchase and sale of candies or raw materials?
A. The purchase of raw materials and the sale of the finished goods, the candy from those raw materials.
Q. You would purchase raw materials and you would manufacture and sell candies?
3344 A. Yes.
Q. Do you know Mr. Cary of the Blue Ribbon Trucking Company?
A. Yes.
Q. What, if any, dealings, briefly, did you have with that company or with Mr. Cary in the years '45 and '46?
A. We had no dealings with—
By Mr. Lockley: If your Honor please, I object. I fail to see what materiality Mr. Cramer's dealings with the Blue Ribbon Trucking Company has to do with the issues in this case.
By Mr. O'Brien: I will develop that.

By the Court: It is a preliminary question, I suppose. He may answer.

By Mr. O'Brien: Will you read the question?

(Question read.)

By the Witness:

A. We had no dealings with the Blue Ribbon Trucking Company as a company. Mr. Cary sent trucks to Boston with sugar in them for us and he would collect —he would come the next morning, or that same
3345 day, and collect for the sugar, himself.

By Mr. O'Brien:

Q. And did those collections include cash payments over the ceiling for the sugar?

A. Well, it was not only over the ceiling, but was for the sugar itself. It was for the total price of the sugar.

Q. I see.

A. Plus the trucking.

Q. Made in cash?

A. Paid in cash, plus the trucking charges.

Q. In the year 1947 did you have a transaction with Mr. Lubben involving $15,000.00?

A. Yes, I did.

3346 Q. Will you tell us the circumstances of that and about when it was?

By Mr. Lockley: Well, I object, your Honor, unless there is some relevance to the issues in this case.

What Mr. Cramer's transactions were with Mr. Lubben, would appear to be completely immaterial.

By Mr. O'Brien: Again it is a preliminary question, Judge.

By the Court: You are going into the transaction now?

By Mr. O'Brien: I think that is essential as a preliminary. I will connect it.

By Mr. Lockley: Connect it with what?

By Mr. O'Brien: Oh, I don't have to blueprint my examination.

By the Court: No.

By Mr. O'Brien: I say I will connect it.

By the Court: You couldn't ask a witness what happened ten years ago and then say you are going to connect it up, I suppose.

By Mr. O'Brien: Well, it is not that.

3347 By the Court: I must have some inkling as to whether or not it is going to be competent.

By Mr. O'Brien: I think unquestionably so. I am interrogating the witness about a series of two transactions which occurred and of which there is evidence in the record.

By the Court: Well, what is the question now, before the witness?

(Question read by the reporter.)

By the Court: I think I must have an offer of proof.

(Whereupon the following proceedings were had before the Bench, beyond the hearing of the Jury:)

By Mr. O'Brien: There are two pieces of testimony in the record. First, on Mr. Lubben's examination, we asked if he had borrowed $15,000 from Mr. Cramer. He said no. That was on Mr. McConnell's examination. On my further examination he said that he had procured

By the Court: Procured the cash?

By Mr. O'Bien: The check for the $15,000. Not
3348 cash, a check. From Mr. Hart. And Mr. Hart was Mr. Cramer's subordinate.

In other words, they are different names in the office. It was all from the same source. That is in the record.

Number two, of course, there is a great deal in the record, brought in by the Government and by Mr. Lubben, on the Riviera meeting in August of 1948, your Honor will recall.

By the Court: Yes.

By Mr. O'Brien: And in that same connection, there is admittedly, both on the testimony of Mr. Lubben, and on the testimony of Mr. Davidson, in the record, the statements that they went to Mr. Cramer, and there is an account given as to what transpired there.

Now, my primary purpose is to show his version of what did occur.

By the Court: To show what?

By Mr. O'Brien: For Mr. Cramer to show what happened in the meeting at Boston with Lubben, Davidson

By Mr. O'Brien: No, your Honor.

3349 By the Court: Subsequent to the Riviera meeting?

By Mr. O'Brien: Yes. There was a Riviera meeting, and then, if your Honor will remember, Lubben went up to see Cramer.

By the Court: That's right.

By Mr. O'Brien: Now, the things which his testimoney will show occurred at the meeting in his office are connected with the thing itself—is the primary thing, but nevertheless it is connected with, and in sequence with the event that I am now interrogating him about, which happened some few months earlier, about six months earlier.

By Mr. Lockley: Well, if this is impeachment your Honor, it is impeachment entirely on a collateral issue.

By the Court: I think so.

By Mr. O'Brien: No.

By the Court: As far as any loan of money is concerned, it is impeachment on an entirely immaterial issue.

By Mr. O'Brien: It isn't. I am not saying it is a matter of impeachment in respect of borrowed
3350 money.

The so-called loan of money is the first step which explains some of the things which transpired at the meeting. It is exceedingly material. It is serious subject matter as to what occurred at that meeting. And it is a matter that can't be an immaterial matter, because the Government in Lubben's direct examination—

By the Court: Well, I didn't remember the meeting with Cramer.

By Mr. Lockley: You brought it out on cross examination.

By Mr. O'Brien: But they brought out the whole Riviera meeting.

By the Court: Yes, the Riviera meeting hasn't anything to do with it. The Riviera meeting is separate and distinct. Cramer wasn't there.

By Mr. O'Brien: That's true, but then the terminal conversation in that meeting, according to the testimony, ties up directly with that.

By the Court: I think you did ask Mr. Lubben about his meeting with Cramer after the Riviera meeting, and you asked Davidson some questions about that, also.

3351 By Mr. O'Brien: That's true.

By the Court: That may have some bearing on some of the issues of this law suit, but I don't see that whether or not he ever borrowed money from Cramer has any bearing on the issues of this law suit.

By Mr. Lockley: This is an attempt to broaden the scope of an already broad cross examination. It is matters which they brought out on cross examination, which relate to an entirely immaterial and unconnected issue, and now they are attempting to impeach the witness on that collateral matter.

By Mr. O'Brien: No, you call it impeachment—

By the Court: What you have done continuously, and what I have tried to indicate my objection to, you have brought out certain matters on cross examination which are foreign to the issues and then you want to impeach on those foreign issues.

By Mr. O'Brien: No. There is a lot of talk about impeachment, Judge, but what happened in the Riviera meeting, and what happened in connection with it after the Riviera meeting, is quite important, and has a lot
3352 to do with all of the issues in this case.

It is a matter of direct testimony, as well.

By the Court: Well, supposing I hear the testimony, and I will receive it, subject to the motion to strike.

(Whereupon the following proceedings were had in open court, within the presence and hearing of the Jury:)

By the Court: I will receive the testimony subject to a motion to strike.

3353 By Mr. O'Brien: Would you read the question, Mr. Reporter?

(Question read by the reporter.)

By Mr. Lockley: I object to the form of the question, unless he first lays a proper foundation for it.

By the Court: What are you calling for now, conversations with Lubben; is that it?

By Mr. O'Brien: Yes, your Honor. It is the transaction.

By the Court: Then I suppose you should limit it to that.

By Mr. O'Brien: Well, of course, that is what we were talking about in the prior conversation. I asked if Mr. Cramer had a transaction with Lubben in 1947, concerning an item of $15,000, and now I am asking about when.

By the Court: Ask him more directly what took place.
By Mr. O'Brien: Yes.
By Mr. O'Brien:
Q. What took place, Mr. Cramer?
3354 A. In October, 1947, Mr. Lubben came to my office in Boston and told me that he needed money, he was raising money to pay his income taxes. He said he had been to several others, and got money from them, and he asked $25,000 from me.
I explained to him that that was too much money for me, I didn't have it, and any money I did give him, I would have to have thirty days in which to raise it.
So on November 10, 1947, I issued a check to him for $15,000, which was delivered to him by—I don't know, someone else delivered it to him.
By the Court: When was this?
By the Witness: November 10, 1947.
By the Court: 1947?
By the Witness: Yes, 1947.
By Mr. O'Brien:
Q. The conversation was in October?
A. Early in October of the same year.
Q. Were you ever reimbursed for the money?
A. Never.
Q. Thereafter, when did you next hear in any way from Mr. Lubben?
3355 A. In August of 1948, eleven months after that, about eleven months. 1948, in August. I think it was early in August.
Q. And what transpired at that time?
A. One afternoon about four o'clock, the switchboard operator announced to me that there were three men in the outer lobby waiting for me. And I walked out, and two of them I knew, Mr. Lubben and Mr. Cary. And they introduced me to a Mr. Davidson.
Mr. Lubben said he had to see me right away. And I said, "Well, our office closes at four thirty. My wife has made other arrangements for this evening. I did not know you were coming, so I can't see you now. I will see you tomorrow morning."
So they departed and came over the next morning, ten, ten thirty, some time.
Q. All three of them came in the morning?
A. No, there were only two.

Q. Which two?

A. Mr. Cary and Mr. Lubben.

Q. And did you have a talk with them then?

A. I had a talk with Mr. Lubben. Mr. Cary was
3356 in my office, was in and out. He did no talking. He would sit a few minutes, then he would leave, and he would come back, and so forth. I talked with Mr. Lubben.

3357 Q. And what was said?

A. Mr. Lubben said, "Boss,"—he always referred to me as "Boss"—"I am in trouble. The Internal Revenue agents—"

Q. Keep your voice up, Mr. Cramer.

A. "The Internal Revenue agents are after me for records and taxes, and so forth, and I have come up to see you about it."

He said that he and Eddie had taken a slow boat to—it was either the Dominican Republic or Haiti, with a bundle of money. He told me that the living conditions were wonderful, you could live down there for very little money, servants were cheap, and the business opportunities were great.

I told him—I hadn't seen him for eleven months and I told him that we had had our troubles, with the deflationary period of business. And then he said, "May I use your phone? I want to call Byron Cain in Chicago."

And I said, "Yes."

Q. Before that, Mr. Cramer, let me ask, after he told you of their trip, did he say what it was that he wanted?

A. After the trip on the boat—he told me all about
3358 the living conditions, and he said he needed $135,000.00 to go away, either to Haiti or Dominican Republic. I don't remember which country, but he needed $135,000.00.

I thought he was joking, because to me $135,000.00 is a large sum of money.

By Mr. Lockley: I object to what you thought.

By Mr. O'Brien:

Q. Never mind that.

By Mr. Lockley: Just keep it on what the conversation was.

By the Witness: Thank you.

By Mr. O'Brien:

Q. Now, what was it that was said about the telephone?

A. He asked me—he said he was going to call Byron Cain in Chicago. He said, "May I use your wire, Boss?" I said, "Go right ahead."

He called a number—he called for an outside wire and then he called a number in Chicago and he said, "Byron Cain—is this Byron Cain?" or something like that,
3359 and he said, "This is Dave Lubben. I am talking from Morley Cramer's office."

He said, "I need $135,000.00 to leave the country and I am calling you to see what you can do to help me."

And they had a conversation. I don't know how long it was. But he finally hung up the phone and turned to me and said, "Well, Boss, you're it. You have got to raise the 135,000. Byron Cain has made a disclosure."

I said, "Well, look, Dave, $135,000.00 is a lot of money. We have lost $473,000.00 in this company up to July 31st of this year. I have no money. That is ridiculous."

So he immediately dropped it and asked me for $2,000.00. He said, "Well, give me $2,000.00 so I can get my books back from the accountants in New York, Sproul & Scholz."

He said, "If I have those books I can do lots of things."

"Well," I said, "I haven't got $2,000.00 to give you."

He said, "Would you give me one thousand?"

I said, 'No, I wouldn't give you one thousand. I haven't got it." I didn't, either.

3360 So he said, "Well, you think it over. It is a serious thing."

So I said, "Well, call us up Monday. Maybe Mr. Hart, our treasurer, would give it to you. But I haven't any money at all."

And he left the office. I have never seen him since.

3361 Q. At the time of that meeting, was anything said about a meeting at the Riviera Club?

A. No, no.

Q. Had you heard, or did you know that there had been a meeting at the Club Riviera?

A. No, sir.

Q. Was anything said in that conversation about the sale of Mr. Lubben's properties?

A. No, sir.

Q. Did Lubben tell you that Cain had suggested that he get in touch with you?

A. No, sir.

Q. Did he tell you anything of a syndicate for the purpose of raising money for him to leave the country?

A. No, sir.

Q. Had you had any prior conversation with Byron Cain, or anybody at Shotwell, about any such subject matter prior to the time that Lubben, Cary and Davidson came?

A. No, sir.

Q. Or prior to the time that you had this meeting with the two of them?

A. No, sir.

3362 Q. Did you call Byron Cain at Chicago, or did Lubben call him?

A. Mr. Lubben called him.

Q. Do you remember an incident which occurred in your office early in the year 1945, concerning chocolate?

A. Yes, sir.

Q. When Mr. Lubben was present?

A. Yes, sir.

Q. Will you state about when it was?

A. I think it was early in the spring of 1945.

Q. And who was present?

A. Mr. Lubben and myself.

Q. And what occurred, what was said, tell us the circumstances.

A. Mr. Lubben came in to my office and said, "Well, Boss, I just got two cars of chocolate from Augie Nelson for Shotwell."

Q. Who is Augie Nelson?

A. Augie Nelson is the New England sales representative for United Chocolate Refiners, Mansfield, Massachusetts.

Q. They are at Mansfield, Massachusetts?

A. Mansfield.

3363 By Mr. O'Brien: You may cross examine.

Cross Examination by Mr. Lockley.

Q. Mr. Cramer, you stated that you made a loan to Mr. Lubben of $15,000?

A. Yes.

Q. Did you get a note for that loan?

A. I believe there is one somewheres.

Q. You know there is, don't you?

A. No, I never saw it.
Q. Did you give him the $15,000 check?
A. No, I did not.
Q. Who did give it to him?
A. Mr. Hart, my treasurer. I was in San Francisco on that date, November 10.
By Mr. Lockley: All right. That is all.
By Mr. O'Brien: That is all, Mr. Cramer. Thank you.
(Witness excused.)
By Mr. Lockley: If your Honor please, I move to strike the testimony as being incompetent, irrelevant and immaterial to the issues in the case.
By the Court: Well, the portion of his testimony regarding the $15,000 loan may be stricken as imma-
3364 terial. The other may stand.

PATRICK J. GRACE, JR., a witness called herein on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?
A. Patrick J. Grace, Jr.
Q. And where do you live, Mr. Grace?
A. 418 67th Street, in Brooklyn.
Q. What is your profession?
A. I am an attorney at law.
Q. Practicing in the State of New York?
A. Yes, sir.
Q. Do you recall an occasion in 1948, on which you went to the Club Riviera in New Jersey with Byron Cain?
A. I do, sir.
3365 Q. About when was it?
A. I would place it the end of June of 1948.
Q. And prior to going had you had dinner with Mr. Cain?
A. I had.
Q. Where?
A. At the Hotel Gotham.
Q. And after dinner were you visiting with him?
A. I was, in his room at the Hotel Gotham.
Q. During that visit was there a telephone call?

A. There was, sir.

Q. Did Mr. Cain make the call or did he receive the call?

A. Mr. Cain received a phone call while I was there.

Q. At the conclusion of that phone conversation what if anything did Mr. Cain say to you?

A. Mr. Cain asked me if I would ride over with him to the Club Riviera, which is at the Jersey end of the George Washington Bridge.

Q. And did you?

A. I did, sir.

Q. Did you have any discussion on the way concerning the visit?

3366 A. We did.

Q. What, if anything, was said?

A. Mr. Cain stated that he had made an appointment to meet a Mr. Lubben, and he mentioned in the cab on the way to the club that Mr. Lubben had represented him as a sales representative, and that he had some business dealings with him during the sugar shortage.

Q. When you arrived, you and Mr. Cain, at the Riviera, was Mr. Lubben there?

A. Not at that time, sir.

Q. What did you do, go in and get a table?

A. We got a table; yes, sir.

Q. Did Mr. Lubben later arrive?

A. About fifteen or twenty minutes after we arrived, Mr. Lubben arrived.

Q. Was he alone?

A. No, there was another gentleman with him.

Q. Do you recall who it was?

A. I was introduced him, and his name was Mr. Davidson, an attorney.

Q. Did they join you at your table?

A. They did, sir.

Q. Was there conversation?

3367 A. There was a conversation.

Q. Between you folks at the table?

A. Yes, sir.

Q. Did Mr. Davidson participate in the conversation?

A. Generally, about to the same extent that I participated.

Q. And will you tell us what was said?

A. Mr. Cain and Mr. Lubben discussed generally what

Mr. Lubben was doing, how his business was, and everything else.

Mr. Lubben stated that his business in Jersey was not too good. And Mr. Cain said that he was an excellent salesman and would suggest that if he stayed in the selling end rather than the manufacturing end he would be better served.

Then there was some other conversation of general business conditions and state of current events.

And Mr. Lubben said to Mr. Cain, "Byron, I think I am being investigated for taxes." And he said, "It would be in connection with some of the transactions that we had some time back."

I have no recollection of Mr. Cain making any reply
3368 to Mr. Lubben's statement as to the fact of him being investigated for taxes. General matters were discussed.

3369 Mr. Lubben then said that he thought he was to be able to secure either a Coca Cola or Pepsi Cola franchise outside of the country and that he was making—or had made an application for a passport, and that he had no money, but in order to secure the franchise he would need a substantial amount of money. And he asked Mr. Cain whether or not, if he secured the franchise, if he would lend him some money.

Q. Did he say how much money?

A. No, sir; he did not.

Q. What, if anything, else was said?

A. Mr. Cain said, "The question is kind of premature, Mr. Lubben"—or "Dave"—"because actually you have no franchise." But he said, "If the thing should crystallize," he said, "I am going back to Chicago tomorrow and I won't be available in Chicago for two or three weeks. But if anything develops where you have the franchise, and you know just what it is going to cost, contact Mr. Grace and Mr. Grace can always contact me in Chicago or wherever we are."

That was generally the end of the conversation.

3370 Q. I ask you two other things. First, in that conversation was any mention made of Mr. Hannegan's name?

A. No, sir.

Q. Or of Mr. Giglio's name?

A. No, sir.
Q. Do you know—or did you know Mr. Hannegan?
A. No, sir.
Q. You do know that he was the former Postmaster General of the United States?
A. That I did. I knew that.
Q. He is deceased, is he not?
A. Yes, sir.
Q. And do you know Giglio?
A. No, sir.
Q. Had you ever heard of Giglio?
A. No, sir.
3371 Q. Have you told the jury the whole substance of that conversation?
A. I think so.
Q. As you recall it?
A. Yes.
Q. During the conversation on that subject matter, did Mr. Davidson participate?
A. To about the same extent that I participated. That was casual comments, but there was no general participation by either Mr. Davidson or myself.
Q. Now following that and immediately upon your leaving the Riviera, did you all leave together?
A. Yes, we all left the Riviera together.
Q. How did you and Mr. Cain get back to New York?
A. Mr. Lubben drove Mr. Cain and myself back to the Hotel Gotham. Mr. Davidson stayed outside of the club.
Q. He did not accompany you?
A. He did not accompany us.
Q. Following that when, if at all, did you next meet Mr. Lubben?
A. Some time around the—between the 10th and the 15th of July I received a telephone call from Mr.
3372 Davidson requesting an appointment at my office for Mr. Lubben. I made an appointment for the 15th of June at three-thirty in the afternoon—July—at three-thirty in the afternoon. Mr. Davidson and Mr. Lubben appeared in my office on July 15th at three-thirty.
Q. Now when they appeared, what was the first conversation that you had?

A. The very first conversation that we had was when Mr. Lubben came into my office, which is a room probably eighteen by twenty. He said, "We would like to discuss something with you, Mr. Grace." I said, "Fine."

He said, "Now, could we have the discussion downstairs in the restaurant?"

I said, "I see no reason for any discussion in the restaurant. We can have it right here in my office." He says, "I am always concerned about a recording device."

By the Court: What was that? I didn't hear it.

By the Witness: A recording device. "I am concerned about a recording device."

3373 I said, "You need have no concern about a recording device. I know nothing about what you are going to discuss and it can be discussed freely in my office."

By Mr. O'Brien:

Q. Then what was said?

A. He then said that he had secured a Pepsi-Cola or a Coca Cola franchise, I can't remember whether it was Pepsi-Cola or Coca Cola, but he had secured a franchise and needed $40,000.00 to tie it up and wanted to know if Mr. Cain would lend him $40,000.00.

He stated at that time that he had or was then securing his passport for South America. I said, "I can't commit myself with Mr. Cain, but I will contact him within the next three or four days and let you know."

Q. Was that all that transpired during that visit?

A. That's all that transpired.

Q. Did Mr. Davidson say anything?

A. Nothing at all.

Q. Did you thereafter talk to Mr. Lubben?

A. Mr. Lubben called me on the 5th of August. I attempted to return his call and couldn't contact him,

3374 and shortly thereafter, Mr. Davidson called me and I told him I then communicated with Mr. Cain and Mr. Cain had no desire to lend any money to Mr. Lubben.

3375 Q. Was that the end of it?

A. That is the end of the conversation, except that I did omit one thing. At that time when he asked for the

loan of $40,000.00, he said whatever property he had in Jersey would—he would give as collateral security for the loan.

By Mr. O'Brien: You may cross examine.

Cross Examination by Mr. Lockley.

Q. Mr. Grace, when did you first meet Mr. Cain?
A. I met Mr. Cain in the middle of June of 1948.
Q. And when did this meeting take place at the Riviera?
A. I would place it the last week in June.
Q. And you had met him then just before that?
A. Prior thereto, yes, sir.
Q. Well, was that in connection with a legal matter?
A. No, sir. It was social.
Q. Through whom did you meet him?
A. A Mr. O'Neil.
Q. Who is he?
A. He is a man who was in the candy business that 3376 i knew from Brooklyn.
Q. Did you ever represent him?
A. No, sir.
Q. Did you ever represent Mr. Cain?
A. No, sir.
Q. What was the nature of your law practice in 1948?
A. General practice, sir.
Q. Did you handle any tax matters?
A. None whatsoever.
Q. Do you know what 253 Broadway is?
A. Yes, sir, I do.
Q. Have you ever been there?
A. I may have, on one occasion.
Q. And when was that?
A. That would be maybe in 1951.
Q. Did you know a Mr. Dan Bolick?
A. Yes, sir, I do.
Q. Did you know that he was the Special Agent in charge of the Intelligence Unit of the Treasury Department at that time?
A. I knew he was a man of prominence in the Internal Revenue.

Q. Did you ever have any meetings with him in 1948?

3377 A. I met Mr. Bolick in and around Labor Day of 1948.

Q. That would be around September?

A. September, 1948.

Q. The early part of September.

A. That was at Prospect Park West and Union Street, on the street. I was walking and he was walking.

Q. Just a casual meeting?

A. A casual meeting, sir.

Q. Had you ever met him before that?

A. Oh, yes.

Q. That is the only time you met him in 1948?

A. The only time that I can recall meeting him in 1948.

Q. How long had you known him?

A. I had known Mr. Bolick for approximately fifteen years. I had known Mrs. Bolick for thirty-five years and Mrs. Bolick's mother, I have known—my family has known for fifty years.

Q. What is at Prospect Park and Union Street that you should recall so vividly that you met him on that particular corner?

A. Because it is right around the corner from where my brother lives at 886 Carroll Street.

3378 Q. Who is your brother?

A. My associate in the practice of law.

Q. How long were you at the Club Riviera?

A. I would say about two hours.

Q. How long had you been with Mr. Cain prior to that time?

A. We had dinner. I met him, I would say, around 7:30. We had dinner at the Gotham, probably finished around 9:30 or a quarter to 10:00 and got upstairs to his room to change and wash up and we decided we might go someplace else.

Q. This was about 7:30 that you met him?

A. Right.

Q. And then you had dinner?

A. Yes.

Q. How many meetings had you had with Mr. Cain prior to that one in the Gotham?

A. I met him for the first time at the Waldorf when I was introduced and met Mr. Cain. Between that and the Riviera, I had dinner with him once before.

3379 Q. Who arranged this meeting at the Gotham Hotel?

A. Mr. Cain called me when he got to New York and asked if I would have dinner with him. My family were away and I said I would have dinner with him.

Q. Did he state the purpose of his desire to have dinner with you?

A. No, sir.

Q. What did you discuss?

A. We discussed nothing. It was a social meeting.

Q. You had met him just a couple of weeks before?

A. That is correct, sir.

Q. He called you and asked you to come over and have dinner with him?

A. Yes.

Q. And you didn't discuss any business?

A. None whatsoever.

Q. Now can you recall any particular place where you were in the Club Riviera?

A. We were on an elevated platform to the left of what would be the band stand. In other words, it would be about corresponding to where the jury is sitting on my left in a large room.

Q. Does your law firm do tax work?

A. No.

3380 Q. Was your brother employed by the Government at that time?

A. I had one brother who was in the Federal Housing Administration.

Q. Did the name of Mr. Hannegan come up during the course of this meeting?

A. No, sir.

Q. Had you ever met Mr. Hannegan?

A. No, sir.

Q. Did Mr. Cain mention that Mr. Hannegan had been a guest at his home?

A. No, sir.

Q. Did you say that you had been down to the office of Mr. Dan Bolick?

A. No, sir.
Q. Do you know a Daniel Tobias?
A. Yes.
Q. When did you meet him?
A. I think Mr. Tobias called me on a couple of occasions and on one occasion came to my office.
Q. And did you give him some money at that time?
A. I did, sir.
Q. At whose instructions?
A. At Mr. Cain's.
Q. What did Mr. Cain tell you to give him?
3381 A. He had told me that he wanted Tobias to get certain records in connection with one of the companies that he took care of the books for that was owned or ostensibly owned by Lubben; that he wanted supplemental information in connection with the voluntary disclosure which he was making or had made in Chicago.
Q. Did you pay Tobias?
A. I did. I paid Tobias $500.00 in check.
Q. Is that all you gave him?
A. That was all I ever gave him. It was a check payment.
Q. Didn't you give him another $250.00 in cash?
A. Never, sir.
Q. Do you know whether or not those records that Mr. Cain was seeking to have Mr. Tobias get for him were ever delivered to Mr. Cain?
A. I don't know.
Q. Did Mr. Tobias ever bring any of them to your office?
A. No, sir. He was to send them directly to Mr. Cain.
Q. You mentioned something about Mr. Cain—wait. First, when did Mr. Tobias come to your office?
3382 A. I would place that around the 20th of July. In fact, I can give you the exact date if I can have my diary.

(Witness refers to document.)

July 21st.
Q. July 21st. Have you ever discussed any tax matter with Mr. Cain?
A. No, sir.
Q. What did you mean by "disclosure?"
A. He had told me that he had made a disclosure to the Government.

Q. Who did.
A. Mr. Cain.
Q. I thought you said that you never discussed any tax matters with Mr. Cain?
A. I don't consider that a discussion as to a tax matter.
Q. He told you that he had made a disclosure?
A. That is correct.
Q. And he asked you to pay Mr. Tobias?
A. To ask Mr. Tobias to get certain information and for me to advance the check which I did and I received reimbursement from Mr. Cain.
Q. Did you get a receipt from Mr. Tobias?
3383 A. I did, sir.
Q. What sort was it?
A. "Received $500.00 for services rendered in connection with the books," and I forget the name of the corporation.
Q. Did you know that those books didn't belong to Tobias?
A. I had no knowledge as to whom the books belonged to.
Q. When did Cain tell you to give the money to Tobias?
A. It would have been about the same time.
Q. How did he tell you?
A. I spoke with him on the telephone and told him that Mr. Tobias wanted $500.00 for the work he was going to perform, and would he authorize me to draw my check and he said yes, and I did.
Q. Where was Mr. Cain at that time, if you know?
A. Chicago.
3384 Q. He was in Chicago?
A. If I recall, yes.
Q. This is July 21st?
A. No. In and around July—it could have been the 16th, the 17th. I think I paid Mr. Tobias on the 21st. That is when he came into my office.
Q. Did you ever write to Mr. Tobias?
A. No, sir.
Q. Do you recall during the conversation at the Club Riviera you suggested that Mr. Lubben take a trip to South America as he wouldn't be available as a witness?
A. Never such a suggestion.

Q. That would be a serious breach of professional ethics as a lawyer, wouldn't it?

A. Yes, sir.

Q. And you are aware of that?

A. Very well aware of it.

Q. Was there any conversation at the Club Riviera about a syndicate being formed?

A. No, sir.

Q. Do you know whether your brother ever went to see Mr. Bolick at Mr. Cain's request?

A. I am quite sure he did not.

3385 Q. Or any member of your law firm?

A. I wouldn't say whether he did or didn't. I am quite sure he did not.

Q. Have you ever been in Mr. Bolick's office at 253 Broadway?

A. No, sir.

Q. Has Mr. Cain or any of the defendants here or the Shotwell Company, the Shotwell Manufacturing Company, ever paid you a fee?

A. Yes, sir.

Q. For your services?

A. Yes, sir.

By Mr. Kirby: I object to what fee they paid.

By the Court: He said his relationship was wholly on a social basis. If it was otherwise, I suppose counsel has a right to explore it.

By Mr. Kirby: That was a different time entirely. He is talking about a different time now.

By the Court: He may answer.

By the Witness: I answered: yes.

By Mr. Lockley:

3386 Q. When was this?

A. In October of 1948.

Q. October of 1948?

A. October of 1948.

Q. And in what connection was that fee paid?

By Mr. Kirby: I object to that as a matter of privilege between attorney and client, as to what his services were for.

By the Court: He may answer.

By the Witness:

A. Mr. Cain spoke with me. He at that time said he expected to open up another plant in New York. He said

that he was very much disturbed about the fact that he could not get his taxes straightened out in Chicago and he wanted to know whether or not there was any possible way that he could have the thing paid, no matter how much the taxes were, to get the thing disposed of.

He asked if I would speak to somebody to find out whether or not that could be accomplished. In the case that I met Mr. Bolick that I testified to, I met him and asked him whether or not there was any possible way of the taxes being paid no matter what it was, to get
3387 the thing completed so the representatives would be out of the Shotwell Candy Company offices and he said there is nothing that can be done, that it had to proceed the way it is proceeding.

By Mr. Lockley:

Q. What did Mr. Bolick have to do with a Chicago taxpayer?

A. That was purely getting an opinion from a friend as to whether or not it could be done as a matter of record.

Q. Did you get a fee for getting an opinion for a friend?

A. Mr. Cain retained me in the event the thing was to be brought to Washington and he then said, in connection with a retainer, if I rendered no services, it would be applied on account of services to be rendered to Shotwell on other matters.

3388 Q. Did he specify what he meant by the case being sent to Washington?

A. To have the thing down there so that all the taxes could be paid and determine the final amount.

Q. Did you have any connections in Washington?

A. No, sir, I did not.

Q. Well, are you a tax lawyer?

A. I am not, sir.

Q. At the time of your conversation with Mr. Bolick on the street corner, as I understand it, were the words "voluntary disclosure" discussed?

A. I wouldn't remember whether or not it was or wasn't.

Q. You remember exactly where you met him and the exact day, but you don't remember what was said?

A. I didn't remember the exact day. I said it was in and around Labor Day, as I recall.

Q. Now, can you remember what was said?

A. No, sir.

Q. Do you recall, did you arrange a meeting?

A. No, sir.

Q. You were talking to Mr. Bolick as a lawyer on behalf of your client. Did you make any memoranda
3389 of that meeting?

A. I did not, sir.

Q. Did you ever inform Mr. Cain of that meeting?

A. I think I did.

Q. And how?

A. I don't recall whether or not I called him or sent the letter to him.

Q. What did you tell him?

A. I related the substance of the conversation. I said unfortunately the thing will have to be straightened out in Chicago.

Q. What was the substance of the conversation you related?

A. Just what I related to you.

Q. Tell me again, please.

A. That the matter would have to stay in the Chicago office and there was no summary way in which the additional tax could be fixed and paid and that investigation would have to proceed in Mr. Cain's office.

Q. How much was the fee you received?

By Mr. McConnell: I object to that.

By the Witness: I don't think that is—

By the Court: I don't think we are concerned with
3390 the amount. The objetion is sustained.

By Mr. Lockley:

Q. Did you ever render any other services for Mr. Cain?

A. No, I did not.

By Mr. Lockley: All right. That's all.

By Mr. O'Brien: That's all. Thank you.

(Witness excused.)

By the Court: Well, it is about adjournment time, members of the jury. We will be in recess until two o'clock.

By the Marshal: Will the audience please remain

standing while the jury and the Judge leave the court room.

This honorable court will recess until two o'clock this afternoon.

(Whereupon an adjournment was taken in the above entitled cause to 2:00 o'clock p.m. of the same day, being Friday, October 2, 1953.)

* * (Caption—No. 52 CR 143) * *

3391 Chicago, Illinois, Friday, October 2, 1953, 2:00 o'clock P.M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:—

By Mr. O'Brien: If the Court please, Mr. McConnell went over to Judge Hoffman's court room. He said he had spoken to you about it.

3392 By the Court: Yes, he had.

By Mr. O'Brien: It will be about an hour.

ANDREW B. ROSE, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?

A. My name is Andrew B. Rose.

Q. And where do you live, Mr. Rose?

A. I live in Louisville, Kentucky.

Q. What is your business or occupation?

A. I am a vice president of the Liberty National Bank of Louisville.

Q. Were you formerly connected with the Manufacturers Trust Company of New York City?

A. I was.

Q. In the main bank or one of its branches?

A. No, sir; it was in the Columbus Circle branch.

Q. And were you with them in the years 1945 and 1946?

3393 A. Yes, sir.

Q. In what capacity?

A. I was an assistant vice president and was acting as officer in charge of that branch at Columbus Circle.

Q. In what division or department of the bank?

A. Sir?

Q. In what division or department of the bank?

A. Well, I had complete charge of the branch, all branch operations, credit, business development, everything.

Q. That included the commercial department?

A. Yes, that's right.

Q. And did you in that capacity have any transactions with David G. Lubben or any of his companies?

A. Yes.

Q. When did you first meet Mr. Lubben, approximately?

A. It was probably '43 or '44.

Q. And did you remain with the bank all through the year '46?

A. Yes, sir.

Q. Did each of Mr. Lubben's companies maintain 3394 an account with the bank?

A. Well, as far as I know; yes, sir. He might have had some I didn't know about.

Q. Perhaps I should specify. That would be Eatsum Food Products Company?

A. Yes.

Q. Both the proprietorship and the partnership. And General Confections, Inc.?

A. Yes, that's right.

Q. Of New York?

A. Right.

Q. During those transactions—well, let me ask you, Mr. Rose, do you recall whether the checks on those companies were drawn or might be drawn by Mr. Lubben; did Mr. Lubben have authority to draw checks?

A. Well, according to my recollection, Mr. Lubben had power to draw checks, but I think there were two other

people who also had the power.

Q. Yes, sir. And do you recall who they were?

A. Well, I believe Mr. Hankermyer and then I think there was a girl named Freda. I have forgotten her last name.

Q. Would it be Freda Seiderer?

3395 A. No, I don't remember that name. Maybe there was some other one.

Q. Was Strum, Freda Strum, or was it Miss Beatrice Feldman?

A. I think Miss Feldman.

Q. And during the transactions with those companies were there occasions on which the bank would be asked to cash checks payable to currency or to cash?

A. Yes, I believe there were.

Q. Were those occasions infrequent or numerous?

A. I think it fairly frequently.

Q. And during the course of those transactions did you become acquainted with Mr. Lubben?

A. Well, I had become acquainted with him before that.

Q. Yes, sir. And you maintained that acquaintanceship—

A. That's right.

Q. —throughout the year '46, at least?

A. That's right.

Q. Could Miss Feldman cash checks at the bank?

A. Well, you are asking me to go back eight years. To the best of my recollection, she could. Though I can't be sure.

3396 Q. And Mr. Hankermyer, would you know?

A. Yes, I think he could, too.

Q. Anyone else that you can think of?

A. No, sir; I can't be sure that there was anybody else.

Q. Do you remember Mr. Lubben's home at Hillside, New Jersey?

A. Yes, sir.

Q. Were you a neighbor of his?

A. Yes, I lived a mile and a half or two miles away from there in New Jersey.

Q. Were you of any assistance to him in finding that home?

A. Yes, sir; according to my recollection, I suggested that place to him as being a good place for him to buy.

Q. And did he buy it?

A. Yes, sir.

3397 Q. When was that, approximately?

Mr. Lockley: Well, your Honor, I object. I fail to see the materiality of when Mr. Lubben bought his home, or the circumstances.

By the Court: Well, he may ask him.

By the Witness:

A. Well, I would say that it was probably in 1945.

By Mr. O'Brien:

Q. Do you remember the cost of the home?

By Mr. Lockley: I object, your Honor. I don't see it is material.

By Mr. O'Brien: The price of the home.

By the Court: I don't understand the materiality of that.

By Mr. O'Brien: Maybe I should explain it. Mr. Lockley—

(Whereupon the following proceedings were had at the Bench, outside the hearing of the Jury:)

By Mr. O'Brien: I am generally interested to some extent, through this witness, to show Lubben's mode of living and his expenditures on the issue of whether he

3398 did or did not pay out the money he said he paid out, in relation to the monies or income which he had.

By the Court: I think that is entirely too remote. It doesn't have any reasonable relationship to the issues in this law suit.

By Mr. O'Brien: I beg your pardon.

By the Court: It doesn't have any reasonable relationship to the issues in this law suit. I will sustain the objection.

By Mr. O'Brien: Perhaps that calls for an explanation. Perhaps I should say now then, by way of other proof, that I offer to prove by this witness, if permitted by the Court, that in 1945, Mr. Lubben paid $45,000 cash—I don't say in currency, but $45,000 of money—

By the Court: Yes.

By Mr. O'Brien: —for his home at Hillsdale, that place, and that he spent shortly thereafter $20,000 for the remodeling of the home, and an additional $10,000—he spent $20,000 remodeling the home, and for the landscap-

3399 ing, and construction of driveways, and work of that kind, and $10,000 in furniture, furnishings, which he

procured from Altman's in New York primarily, and that Mr. Lubben had a practice of entertaining on a very broad scale at the different night places and supper clubs. That he entertained not only the witness, but others, in large groups, and that he was a free spender of money.

By Mr. Lockley: Well, do you intend to prove all of that by this witness alone?

By Mr. O'Brien: Well, no, not by this witness alone.

By Mr. Lockley: Well, your Honor, I fail to see that it is material or relevant in any way.

By the Court: No. I agree. I will sustain the objection.

(Thereupon the following proceedings were had and taken in the presence and hearing of the Jury:)

By Mr. O'Brien: I think that is all.

By Mr. Lockley: No questions.

(Witness excused.)

3400 WILLIAM HENRY SMOCK, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name, please?

A. William Henry Smock, S-m-o-c-k.

Q. Mr. Smock, will you talk in a loud voice so that we can all readily hear you, please?

A. Yes, sir.

Q. Mr. Smock, have you been in the candy business for some time?

A. Yes, sir.

Q. How many years?

A. Thirty-one years.

Q. Where have your different places of candy businesses been?

A. The northwest, down in Minneapolis, and Milwaukee.

3401 Q. Do you know a man by the name of David Lubben who was in the candy business?

A. Yes, sir.

Q. And over what period of years did you know him?

A. Well, I first met Mr. Lubben, I think, about 1942.

Q. And you have known him continuously since then?

A. Yes, sir.

Q. Did you have some business dealings with him?
A. Yes, sir.
Q. Now Mr. Smock, have you belonged to some organizations in the candy trade?
A. Yes, sir.
Q. Trade associations?
A. Yes, sir.
Q. Name some of them, please?
A. Oh, the New York Candy Association, Chicago Candy Club, Western Candy Brokers Association, Gopher Candy Club, I think, and that is about all.
Q. Have you ever written on any of the trade problems for publication in the candy field?
A. Yes, sir.
Q. Tell us about that.
A. Well, it is a small magazine edited in Mil-
3402 waukee called The Confectioner.
Q. Have you written for that?
A. Yes, sir.
Q. Have you, in the course of these associations become familiar with the general reputation of David G. Lubben?
By Mr. Lockley: I object to that.
By Mr. Kirby:
Q. In the candy trade in the United States?
A. Yes, sir.
By Mr. Lockley: I object, your Honor. I fail to see that is the proper way to impeach.
By the Court: He may answer yes or no.
By Mr. Kirby: Yes.
By the Court: Has he answered yes?
By Mr. Kirby: Well, he answered he knows his reputation in the candy trade.
By Mr. Kirby:
Q. Isn't that right?
A. Yes.
Q. And is that reputation good or bad?
By Mr. Lockley: Well, I object, your Honor. The proper way to impeach Mr. Lubben is to question as to
3403 his truth and veracity, if it is at all admissable. I object on the ground it is immaterial.
By the Court: I think your question is too broad.
By Mr. Kirby: I will limit the question then to the question of truth and veracity.

By Mr. Kirby:

Q. Do you know his reputation in the candy trade for truth and veracity?

A. Yes, sir.

Q. And what is that reputation?

By Mr. Lockley: I object.

By Mr. Kirby:

Q. Good or bad?

By Mr. Lockley: I object, your Honor, on the ground that it is immaterial and irrelevant.

By the Court: Well, you object to the foundation? I did not understand. What is the scope of your objection?

By Mr. Lockley: Yes, your Honor, and I object furthermore to the foundation. He hasn't laid any basis for showing how long he has known Mr. Lubben, how intimate his acquaintance was and how he arrived at his opinion.

3404

Furthermore, I object on the ground that it is not proper attempted impeachment.

By Mr. Kirby: If the Court please, he says he has known the witness since 1942. He has been extensively acquainted in the candy field and he knows the reputation of the witness. That is the complete foundation.

By the Court: You can examine him as to the foundation, I assume, Mr. Lockley, as to the sufficiency of the foundation.

I am not entirely clear as to the relevancy of the testimony. I would like to be refreshed on it.

By Mr. Kirby: I will pass to the Court Held vs. United States, which appears in 260 Federal Reporter. It is a short opinion and I am trying to do just exactly what Judge Walker speaks of in the first two paragraphs.

By the Court: Well, my recollection is that the testimony is competent and relevant. If you want to examine as to the sufficiency of the foundation, Mr. Lockley, and of course you have that right, you can examine him on cross.

3405

By Mr. Lockley: May I inquire at this time, your Honor?

By the Court: You may.

Cross Examination by Mr. Lockley.

Q. Mr. Smock, you have known Mr. Lubben since 1942?

A. Yes, sir.

Q. Have you had personal business dealings with him since that time?

A. Yes.

Q. Do you base your opinion of him on the basis of those business dealings?

A. No, sir.

Q. Do you base it on the fact that he was in the black market?

A. Nope, no, sir.

Q. Have you ever heard anyone in the candy trade discuss Mr. Lubben's reputation?

3406 A. Yes, sir.

Q. For truth and veracity?

A. Yes, sir.

By Mr. Lockley: That's all.

By the Court: Very well. He may answer.

Direct Examination (Ctd.) by Mr. Kirby.

Q. What is his reputation for truth and veracity?

A. Questionable.

Q. By that you mean bad?

A. That is right.

3407 Q. From your knowledge of Mr. Lubben's general reputation for truth and veracity, would you believe him on oath?

A. No, sir.

By Mr. Kirby: Thank you. That's all.

By the Witness: It got kind of warmed up.

By the Court: What is that?

By the Witness: It got kind of warmed up.

By the Court: Well, he just whispered something about the weather to me.

Cross Examination (Ctd.) by Mr. Lockley.

Q. Mr. Smock, you had dealings with Mr. Lubben?

A. Yes, sir.

Q. Those were dealings in the black market, weren't they?

A. No, sir.

Q. You paid him currency?

A. No, sir.

Q. He paid you currency?

A. No, sir.
3408 Q. Not at any time?
A. No, sir.
Q. You never paid him anything over the ceiling?
A. No, sir.
Q. You never received anything over the ceiling from him?
A. No, sir.
3409 Q. During 1945?
A. No, sir.
Q. In the purchase of candy?
A. Well, when you say Mr. Lubben, all I know is that he was supposed to have been connected with a concern that I was buying from.
Q. Let us say that.
A. When you say Mr. Lubben, no.
Q. Did you purchase any candy from the Eatsum Food Products Company in '45?
A. No.
By Mr. Kirby: If the Court please, I want to object to particular transactions because I, indeed, think the rule is that he can testify except as to his general reputation.
By the Court: I think he may show the relationship. I think the question is competent.
By Mr. Kirby: It is his general reputation.
By Mr. Lockley: I wish to show his motive for testifying.
By Mr. Kirby: He is testifying because he was subpoenaed.
3410 By the Court: Go ahead.
By Mr. Lockley:
Q. Did you ever pay any premium to the Haberkorn Candy Company during the years '45 and '46?
A. Yes, sir.
Q. Those were black market premiums?
A. Yes, sir.
Q. And did you sell candy that you so obtained in the black market?
A. Yes, sir.
Q. You were in the black market yourself?
A. Well, that is questionable. When I sold the candy and resold it, it is questionable whether I say I was in the black market.
Q. Didn't you operate your business out of a room in

the Hotel Sherman?

A. Part of the time.

Q. Where you had hundreds of thousands of dollars?

A. Where I had what?

Q. Hundreds of thousands of dollars?

A. You mean that I had?

Q. Yes.

3411 A. No, no. I never had hundreds of—

Q. You handled that much.

A. I imagine over the years, yes.

Q. Did you ever know Dave Lubben to tell a lie?

By Mr. Kirby: I object on the ground that specific lies are not in issue.

By the Court: He may answer.

By Mr. Kirby: For instance, I couldn't ask this witness, or any other witness, to tell me each time he ever heard Lubben lie.

By Mr. Lockley: This is cross examination.

By the Court: I know, but this is cross examination.

By Mr. Lockley:

Q. Did you?

A. Will you repeat that again?

Q. Did you ever know David Lubben to tell a lie?

A. No, he never told me a lie.

Redirect Examination by Mr. Kirby.

Q. Did you ever know of lies he told to others?

By Mr. Lockley: I object on the grounds that it is hearsay.

3412 By the Court: Yes, I will sustain the objection.

By Mr. Kirby: All right. That is all. Thank you.

By the Court: That is all.

(Witness excused.)

3413 EDWARD I. SPROULL, a witness called herein on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?

A. Edward I. Sproull.

By the Court: You will have to speak up, sir.

By the Witness:

A. Edward I. Sproull, S-p-r-o-u-l-l.

By Mr. O'Brien:

Q. Mr. Sproull, you have the same trouble I do. You have to talk so the people down at the end, including the lady in the corner, can hear you. Don't pay any attention to him.

What is your occupation or profession, Mr. Sproull?

A. A certified public accountant.

Q. And you are a member of what firm?

A. Sproull, Scholz & Company.

Q. Where are your offices?

A. 17 East 42nd Street, New York.

3414 Q. Do you know David G. Lubben?

A. I do.

Q. When did you first meet him?

A. Early in 1945.

Q. What, if any, dealings or transactions did you have with him at the time?

A. At the time I met him?

Q. Yes.

A. I had none at all. I was introduced to him by Morley Cramer, who brought him into my office and introduced me.

Q. Thereafter when did you next see him?

A. I next saw him on one occasion shortly after that when he brought in his—some income tax returns that he had filed for prior years.

Q. Was there an occasion when he brought into your office and left with you for safekeeping the books of Eatsum Food Products proprietorship?

A. That was approximately May, 1945.

Q. And did that happen?

A. That did.

Q. And how long did the books remain there?

A. Until September, 1948.

Q. Now, in between those times did Mr. Lubben 3415 retain you or your firm to do accounting work for General Confections?

A. He did.

Q. About when was that that he first talked to you?

A. About May, 1946.

Q. What did he say?

A. He said he would like for us to be the accountant for the General Confections, Incorporated, which was a new firm he had started, and that was presently then up in the Bronx.

Q. Did you accept that employment at that time?

A. I did. At that particular time, though, he indicated there was another accountant, a Mr. Bercu who was presently employed as an accountant, and he says, "I would rather that you wouldn't start until after a few months" because he didn't want to incur the wrath of Mr. Bercu. So we did not start on the audit until August of—

Q. Ed, they can't hear you.

A. I am sorry. So we did not start actively on the audit until August of 1948—'46.

By Mr. Kirby: Mr. Sproull, they have got a concrete breaker outside so, added to our usual troubles, we have got to have a louder voice from you.

3416 By the Witness: I am sorry. Shall I repeat the answer?

By Mr. O'Brien:

Q. I think you better.

A. We did not actively start on the audit until August, 1946, although we had been retained in May, 1946, to do so.

Q. Now, when you first did start did you do the work or did someone else do the work?

A. I did not do any of the work, but I took—

3417 Q. Who did?

A. My partner, Frederick W. Scholz, who was in charge of the audit work of our firm. I took him up to the Bronx, and introduced him to Mr. Lubben. And he thereafter became in complete charge of the audit.

Q. And who worked with him?

A. Mr. Joseph P. Meyer, M-e-y-e-r, senior accountant in our firm. There were others employed, other junior accountants employed from time to time, but those two were mainly in charge of all the work.

Q. And is it true that your firm from that time during the duration of its employment, furnished a general accounting service to his company?

A. Up until after the close of the fiscal period in 1947, the first fiscal year of General Confections.

Q. Well, at any rate, it was true all during the year 1946?

A. That's right.

By Mr. Lockley: I am sorry, Mr. O'Brien. I think you made a misstatement. Not all through 1946, was it?

By the Witness: From the time of the—

3418 By Mr. Lockley: August to the end of the year.

By Mr. O'Brien: I should say the remainder of the year '46.

By Mr. Lockley: All right.

By the Witness: But our work covered from the inception of the corporation, our Audit did.

By Mr. O'Brien:

Q. Well, there is no point about it. When I said the whole year, I surely didn't mean it. It is throughout the balance of the year of '46, at least, your general accounting service continued?

A. That is correct.

Q. And now you say it is true also that you doubled back and did some accounting work from the time of the inception of General Confections?

A. That's true.

Q. Now, those books and records of the proprietorship remained with you until September of 1948.

A. That's true.

Q. And what happened to them then?

A. I was served with a subpoena by Special Agent Twohig, to produce all books, records, and any records

3419 pertaining to the Eatsum Food Products or David G. Lubben.

Q. Mr. Twohig is the Special Agent at the end of the table?

A. That's right.

Q. And was he accompanied at that time by someone else?

A. He was accompanied by three other individuals, David G. Lubben, Mr. Lubben's attorney, and, also, I believe Special Agent Cortez.

Q. Sometimes called Cordez?

A. Cordez.

Q. Well, did they take the books and records of the proprietorship at that time?

A. They did. And I received a receipt therefor.

Q. Prior to that time had Mr. Lubben asked for those records?

A. He had, at different times.
Q. And had you given them to him?
A. I had not.
Q. Why?
A. Because he had an unpaid bill he owed me.
Q. How much?
A. $2,000.
3420 Q. Were you holding the records until the bill was paid?
A. That's correct. I so informed him on several occasions.

By Mr. O'Brien: Will you mark these sheets Defendants' Exhibits 54 and 55 for identification?

(Said documents were marked Defendants' Exhibits 54 and 55 for identification.)

By Mr. O'Brien:

Q. Mr. Witness, will you look at these two sheets, respectively marked Defendants' Exhibits 54 and 55 for identification, and tell me if those are sheets you handed me in response to the subpoena here?
A. They are.
Q. And where did you obtain them?
A. From David Lubben, who brought them into my office.
Q. Are you familiar with his handwriting?
A. Yes, sir.
Q. And is each sheet in the handwriting of Mr. Lubben?
A. Yes.
3421 Q. What did he say when he left that with you?

By the Witness: Will you repeat that, please?

(Question read.)

By the Witness:

A. He said, "These might be of help to you in my income tax return for 1945."

By Mr. Lockley: May I have a foundation as to the time and place, Mr. O'Brien?

By Mr. O'Brien: Yes.

By Mr. O'Brien:

Q. When was it that they were left with you?
A. Early in 1946.
Q. And I notice the pencil figures, 1945. Is that in your writing or Mr. Lubben's?

A. That's my writing.

Q. Was that placed on there at the time?

A. It was placed on there at the time because the sheets did not have a year designated thereon and I asked Mr. Lubben, "Are these for '45?" And he said, "Yes."

By Mr. O'Brien: You may cross examine.

By Mr. Lockley: May I see those?

By Mr. O'Brien: They are not offered.

3422 By the Court: I think he has a right to examine them, even though you haven't offered them. He has a right to examine them, in the scope of your direct. You had the witness identify certain sheets.

By Mr. O'Brien: Yes.

By the Court: Counsel has a right to take the sheets and inquire of the witness with reference to anything that is within the scope of the direct.

By Mr. O'Brien: Well, I have no objection to—

By the Court: Isn't that right?

By Mr. O'Brien: I do not so understand it. I can hold the sheets for further identification and then offer them.

By the Court: Well, supposing you offer them tomorrow?

By Mr. O'Brien: Then they wouldn't get in evidence. No question about it.

By the Court: Are you laying a foundation for these exhibits with this witness?

By Mr. O'Brien: In part.

By the Court: Well, he has a right to inquire as to
3423 the foundation.

(Documents handed to counsel.)

Cross Examination by Mr. Lockley.

Q. Mr. Sproull, did you prepare Mr. Lubben's 1945 tax return?

A. I did.

Q. These are sheets which you say Mr. Lubben brought in and gave to you?

A. They are.

Q. Well, I note that they are only for the months of November and December. Is this all that he gave you?

A. That is all he gave me.

Q. Now, had you done any work on the books of the Eatsum sole proprietorship?

A. I merely took the trial balance off and prepared the tax return from that.

Q. You prepared the 1945 returns?

A. That's right.

Q. In 1946?

A. That's right.

Q. Did you also have his books for the year 1944?

3424 A. They were contained therein.

Q. Did you prepare Lubben's personal income tax return for 1945?

A. I did.

By Mr. Lockley: May I have your indulgence for just a moment, your Honor, while we look at these papers? It will just take a second.

By Mr. O'Brien: Judge, I don't think the right that you are talking about extends to copying from the papers.

By the Court: No, I don't think that you can do any more than examine the witness with reference to the scope of the direct. If there is objection made, the objection will be—

By Mr. O'Brien: And I object to Mr. Krane taking a mental photograph of them, too.

3425 By Mr. Lockley:

Q. Did you have any records of the General Confections Company when you were served with that subpoena by Mr. Twohig?

A. We had working papers.

Q. You had working papers?

A. We had none of the books of account.

Q. Did you have the 1945 return of Mr. Lubben at that time?

A. The '45 return?

Q. A copy of Mr. Lubben's '45 return?

A. I did.

Q. Did you have the two exhibits which Mr. O'Brien has just shown you at that time.

A. They possibly were around.

By Mr. O'Brien: Your Honor, I fail to see the materiality.

By Mr. Lockley: I intend to show it, your Honor.

By the Court: I think he has a right to ask whether or not they were in his possession.

By Mr. Lockley: This subpoena calls for—

By Mr. Lockley:

3426 Q. May I show you this subpoena first, Mr. Sproull, and ask you if that is a copy of the subpoena which was served on you?

By Mr. O'Brien: The subpoena relates to Eatsum.

3427 By the Witness:

A. That is a copy of the subpoena that was served by Special Agent Twohig.

By Mr. Lockley: It calls for all books and papers and memoranda of any nature whatsoever.

By Mr. O'Brien: I object to that. That document is the best evidence.

By Mr. Lockley: Well, I offer it in evidence.

By Mr. O'Brien: Why? It refers to Eatsum Food Products and nothing more.

By Mr. Lockley: Will you please mark this Government's Exhibit 168 for identification.

(Said document was marked Government's Exhibit 168 for identification.)

And please make that Government Exhibit No. 168-A for identification, and this one 168-B for identification.

(Said documents were marked Government's Exhibits 168-A and 168-B for identification.)

By Mr. Lockley:

Q. I also show you Government's Exhibit for iden-
3428 tification No. 168-B and 168-A. I ask you if Government's Exhibit 168-B is a copy of a letter you received from Mr. Lubben and while you are comparing, will you also compare Exhibit 168-A and see if that is a copy of a letter which you received.

By the Court: 168-A and 168-B?

By Mr. Lockley: Yes, sir. There are two of them.

By the Witness:

A. 168-A is not a letter I received but it is a letter that was prepared in my office in the nature of a receipt which was signed by a Mr. Twohig at the time I would release the records.

By Mr. Lockley:

Q. What is 168-B?

A. I don't recall anything about this letter.
Q. Is that in Mr. Lubben's handwriting?
A. That is in his handwriting.
Q. It is addressed to you?
A. It is addressed to E. Sproull.
Q. That was you?
A. This is not necessary for the reason that I had a subpoena on the same date.

3429 By Mr. Lockley: I offer Government's Exhibit 168 and 168-A.

By Mr. O'Brien: No objection. I have a better one.

By Mr. Lockley:

Q. I call your attention to the fact that that Exhibit No.—

By the Court: Well, let us get a ruling on your offer now.

By Mr. Lockley: I am sorry. I understood counsel had no objection, your Honor. I merely jumped the gun.

By the Court: All right. Are you offering 168, 168-A and 168-B?

By Mr. Lockley: Yes, your Honor.

By the Court: No objection. They may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 168, 168-A and 168-B.)

By Mr. Lockley:

Q. Mr. Sproull, I call your attention to the fact that this summons to appear, to testify, to produce books,

3430 etc., in the matter of the tax liability of David G. Lubben, d/b/a Eatsum Food Products Company which calls for all books, papers, memoranda of whatever nature, including journals, ledger, checks, invoices, and bills relating to Eatsum Food Products Company and David G. Lubben, did you have those books which I just identified in your possession at that time?

A. I apparently did but in all the confusion at that particular time, the four people coming in asking for books, and I also call attention to the fact that it would take considerable time to list all the items contained in those five transfer files of vouchers, checks, cancelled checks, twenty-two books of account.

Q. You mean you had these two pieces of paper some place else?

A. The tax return was in my tax file, the tax file.

Q. You had the tax return too?

A. Yes.

Q. Did you turn that one over to Mr. Twohig?

A. It escaped my notice.

Q. Did you do it eventually?

3431 A. I have it here with me.

Q. What did you do with it eventually?

A. I have it here with me.

Q. When did you discover you had it?

A. When this subpoena—not this subpoena, but the subpoena for the defense to produce anything was received. So I went through every file I had and I found these particular papers.

Q. When did you receive that subpoena?

A. I received the subpoena last—the original subpoena to appear into court, I received it last fall, I believe a year ago.

Q. And when did you make the search?

A. Well, not until recently because the case had been postponed and postponed several times.

Q. Did you notify anybody in the Bureau of Internal Revenue that you had in the meantime turned up these additional papers which were called for on the subpoena?

By Mr. O'Brien: I object to that, your Honor. If the Court will look at the subpoena he will see that it is an agent's subpoena from Twohig and not a court subpoena, and that it has to do and is directed to

3432 Lubben d/b/a Eatsum Food Products.

By Mr. Lockley: Well, I suppose—

By Mr. O'Brien: The papers which the witness gave me are two sheets of the partnership.

By the Court: Well, a special agent has a right to issue a subpoena.

By Mr. O'Brien: I know, but it is a statutory right that is not involved here and the papers that counsel is talking about are not papers that are called for in that subpoena.

By the Court: Well—

By Mr. Lockley:

Q. Well, Mr. Sproull, did you consider them to be

such papers? I notice here in Exhibit 168-A that you did turn over—

By Mr. O'Brien: These are the papers, Judge.

By Mr. Lockley:

Q. —transfer of files containing papers, records, cancelled checks of the Eatsum Food Products, David G. Lubben, individual, and twenty-two books of account 3433 purporting to be the books of the Eatsum Food Products and David G. Lubben, Individual, and red folders containing the working papers and so forth for the calendar year 1946 for David G. Lubben, individual?

A. That is right.

By Mr. Kirby: If the Court please, I want to add my objection. He is running this witness up and down the street.

By the Court: If you will state your objection instead of making a speech I will be glad to rule.

By Mr. Kirby: All right. I got impatient with him and I don't blame you for getting impatient with me, your Honor. The subpoena is for individual proprietorship papers. These papers he is quizzing him about are partnership papers. They aren't the same thing at all.

By the Court: The subpoena covers both Eatsum Food Products and David Lubben.

By Mr. Kirby: Not the way I read it. It is David G. Lubben.

By the Court: I read it very hurriedly. I stand corrected if I am wrong.

3434 By Mr. Kirby: David Lubben as a proprietorship. The books that are turned over are the proprietorship books. These are partnership books.

By the Court: "All books, papers, memoranda of whatever nature including journals, ledgers, checks, invoices and bills relating to Eatsum Food Products Company and David G. Lubben."

By Mr. O'Brien: Here is the company (Indicating). Here is Lubben doing business—that is the proprietorship.

By the Court: I don't know. I won't argue with you about how to construe a subpoena. I think the question is a proper one. He said that he didn't have the papers available or he overlooked them. He doesn't take the position it didn't cover David G. Lubben's papers. He

said they were in the other place. He had the Eatsum papers and he overlooked them. That is his position.

By Mr. Lockley:

Q. It is possible you could have overlooked other papers?

A. I made a very thorough search recently.

3435 By Mr. Lockley: Will you please mark this Government's Exhibit No. 169 for identification.

(Said document was marked Government's Exhibit No. 169 for identification.)

By Mr. Lockley:

Q. I show you Government's Exhibit for identification 169 and ask you if you know what that is?

A. That is a report on audit of General Confections, Incorporated, prepared by our firm, signed by my partner, Frederick W. Scholz.

Q. Do you recognize his signature on the first page, do you?

A. I do.

Q. Was that an audit report prepared by you in your professional capacity as certified public accountants?

A. It was not prepared by—you say me?

Q. By your office?

A. By my office, not me.

Q. It would be prepared under your supervision and direction?

A. Under Mr. Scholz's supervision and direction.

3436 I had nothing to do with the audit.

Q. Well, is Sproull-Scholz & Company your firm?

A. Yes, sir. I was a partner of it.

Q. Do you deny that this report was filed by your firm?

A. I do not deny it.

Q. To the best of your knowledge, is it correct?

A. So far as I know.

Q. All right.

By the Court: Any further questions?

By Mr. Lockley:

Q. Do you still maintain that you filed Mr. Lubben's individual 1945 tax return?

A. It was prepared by me.

Q. All right.

A. I did not personally file it.
By Mr. Lockley: That's all.
By the Court: Is that all of this man?
By Mr. Lockley: That's all.
By Mr. O'Brien: I have no further questions.
By the Court: That's all.

(Witness excused.)

3437 JOSEPH P. MEYER, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?
A. Joseph P. Meyer.
Q. Now, Mr. Meyer, it is difficult to hear in this court room and they are breaking up some concrete outside and the matters I want to go over with you are important and you are going to have to talk loud. Now, will you try to do that?
A. I will.
Q. That wasn't a very good effort, now.
Where do you live?
A. 128 78th Street, Brooklyn, New York.
Q. Now, talk just that loud. It is strange, but it will be helpful.
What is your business?
A. I am a senior accountant.
Q. And how long have you been an accountant?
A. For about twenty years.
Q. Are you a certified public accountant?
3438 A. No, I am not.
Q. You are licensed as a senior accountant in New York State?
A. No. There is no such thing as licensed senior accountants.
Q. Well, we have them in Illinois.
A. In New York State there isn't.
Q. But have you been engaged in your profession in New York continuously?
A. Yes.
Q. And with what company in the years through 1940? Who were you with then?

A. I worked in private accounting until 1942. I was engaged as an accountant in June of—in September of 1942, and was so occupied until June of 1943 by Sproull-Scholz & Company.

Q. And that was Sproull, Edward Sproull, that just left the stand?

A. That is right.

Q. How long did you work for Sproull-Scholz & Company?

A. In June of 1943 I was drafted into the armed services, into the United States Navy, and became a payroll accountant for the government. I continued until
3439 December, 1945. I was discharged January, 1946, reengaged by Sproull-Scholz & Company and have continued to work for them until the present time.

Q. So you work for that company now?

A. That is right.

Q. Now, Mr. Meyer, you have heard of a company called General Confections?

A. Yes, I have.

Q. Now, in the course of the trial here we have talked about three different entities that Lubben was connected with. One was the proprietorship, that was the first one. Now, you didn't have anything to do with that, did you?

A. I had nothing to do with the proprietorship.

Q. Now, the next thing was a partnership. You didn't handle the books of the partnership, did you?

A. That is right.

Q. So the entity that you had to do with is General Confections, the corporation?

A. General Confections is right.

Q. What was the period of General Confections' life? When did it start?

A. It started March 1, 1946, to February 28, 1947.

3440 Q. You mean the corporation or your connection?

A. Our audit covered the one fiscal year.

Q. Now, during the period of that audit, that covered how much of the year 1946?

A. From March of 1946 until December 31st of 1946.

3441 Q. Now, Mr. Sproull said you didn't actually start the work until August, but you went in and picked up from the beginning, is that right?

A. That is right.

Q. So that your work covers the books and the accounting done on the books by outside auditors for the indictment year, 1946, is that right?

A. That is right.

Q. Now one of the things that we have come to learn in this trial about that General Confections is that the purchase book is missing, but was there a purchase book when you were there?

A. Yes, there was a purchase book.

Q. And what importance would a purchase book have in connection, for example, with purchases from Shotwell? What would it mean? How does it work?

A. Well, a purchase book is a book of original entry of your purchases. All your purchases should be placed in that book.

By Mr. Kirby: Now, I will ask the Court—I have the feeling that Mr. Meyer and myself have been talking
3442 loud. If you feel I am talking too loud—is it all right?

By the Court: I am not complaining.

By Mr. Kirby: I think it is better to be noisy than not to be heard.

By Mr. Kirby:

Q. So that that book is the book, Mr. Meyer, the purchase book, in which they would post purchases from Shotwell?

A. That is right.

Q. And with that gone, we can't look at it, and we don't have it to check against, is that right?

A. That is right.

Q. Now, another book which we have learned—well, where was the purchase book the last time you saw it? Who had it?

A. It was in General Confections office.

Q. Lubben had it?

A. I don't know if Lubben had it, but it was in the office of General Confections.

Q. His company?

A. His company.

Q. When was that?

A. Well, sometime in 1947, after February, be-
3443 cause we made our final audit up to the 28th or 27th of February, 1947, and in order to do that all the records had to be up to date as of that date. As account-

ants, we proceeded on their audit after that date, so it must have been after February of 1947.

Q. Now another book that we have learned is missing is the accounts payable book. Now that, I assume, would include the accounts payable sheet which respects Shotwell, wouldn't it?

A. That is right.

Q. And was there such a sheet?

A. There certainly was.

Q. Did you work on it?

A. I worked on it.

Q. And were overages posted to it or not?

A. On General Confections books? Overages were posted in one case on Shotwell's account.

Q. Any time more than just once?

A. I couldn't definitely say more than once, but I know of one case where one overage was placed against Shotwell.

Q. By a journal entry?

By Mr. Lockley: Well, please, Mr. Kirby.

3444 By the Court:

If he knows he can answer.

By the Witness:

A. By a cash entry.

By Mr. Lockley: We can't have you leading him.

By Mr. Kirby:

Q. But other than that one when you saw the accounts payable of Shotwell, were there any others?

A. Not that I know of.

Q. Well, we have had a lot of other—we have had Lubben's word, and so on, about a lot of things. Where is that book now, if you know?

By Mr. Lockley: Mr. Kirby, if you will just ask the questions and not make more speeches.

By Mr. Kirby:

Q. Where is the accounts payable book, if you know?

A. I don't know.

Q. The last time you saw it, who had it?

A. General Confections office.

Q. Now then, another book we have learned is missing is the cash disbursements book. What would be the importance of that with respect to transactions with

3445 suppliers of General Confections?

A. The cash disbursements book is used to list

every check that the corporation issues. It would give you information about payments on all these purchases, or on any expenses of a corporation for the proper operation of its business.

Q. Well, does it include any check made simply to cash?

A. It includes all checks.

Q. Of any kind?

A. Of any kind.

Q. And is that the only bound book that tells us about those checks?

A. Whom they were charged to?

Q. The only bound book, is the cash disbursements book?

3446 Q. And where was that?

A. Unless—that is a book of original entry. Are you talking about the books of original entry?

Q. Yes.

A. That is the only book of original entry that designates cash.

By Mr. Lockley: Are you referring to General Confections?

By the Witness: General Confections.

By Mr. Kirby:

Q. Now where did you last see that book?

A. In General Confections office.

Q. Mr. Lubben's office?

A. In Mr. Lubben's office.

Q. Now what was the first study in an accounting way that you set up in connection with your work at General Confections?

A. We set up an audit program.

Q. And that was a program of the different things that should be carried out in connection with the books?

A. That is right, how each accountant had to proceed in order to verify, audit the books, make proper corrections, proper adjustments, place anything on the books 3447 which had to be placed on which was overlooked in order to do a proper audit for the verification of the audit, the preparation of the tax return for General Confections.

Q. Now in the case of the instructions that you so prepared, did you make or give instructions as to the records that should be kept of any cash disbursements?

A. Our audit program included the strict analysis of all cash checks of all cash items in order to reconcile with the bank statement each month.

Q. Now have I—

By Mr. Lockley: Just a moment, please, Mr. Kirby. I move that the response be stricken, your Honor. He didn't answer the question.

By Mr. Kirby: He spo' of the instructions given.

By the Court: Well, it ay stand.

By Mr. Kirby:

Q. Now, with respect to the checks to cash, did I ask you—oh, I will withdraw that. How about checks to cash in the course of your audit? Did you come across some?

3448 A. Very many.

Q. Tell us about that, what you would find when you came there about checks to cash and who you talked to.

A. On our first audit which covered the period from March 1st to June 30th, after our bank reconciliation, we made a list of three pages of cash checks. Many of these cash checks were in the cash disbursements book but actually, there was no way of charging them from the cash disbursements book due to the lack of information.

Q. And how much in total of cash checks in that period lacked adequate explanation?

A. I would have to refer to my records.

Q. I asked you to check that out. Will you take a look at it? I asked you to make a summary of that. Give me the dates, please, the periods you are talking about.

A. In the first period, from March 1st to June 30th, there were eighty-one checks to cash totaling $323,663.23.

Q. And how many of those checks to cash were checks as to which there was inadequate information to tell who got the money?

3449 A. There were twenty-eight checks totaling $150,599.13.

Q. What did you do when you found that amount of checks unexplained to cash? Who did you talk to?

A. Mr. Scholz, Mr. Lubben and I talked about these checks.

Q. Was there anything given to you with respect to how those unexplained checks should be charged?

By Mr. Lockley: May I have a foundation as to the time and place?

By Mr. Kirby: Yes.

By Mr. Kirby:

Q. About when would it have been?

A. About August of 1946, I would say the latter part. We started our audit about August 19th. I would say the end of August or the first part of September.

Q. So at the end of August or the first of September, you were asking about these checks that run back as far as March and there was no explanation on them, and what did Lubben tell you? What support did he give?

A. Mr. Lubben endeavored to locate what he called cash authorization slips but we did not receive cash
3450 authorization slips for the entire checks that we questioned him about.

Q. Did he give an oral explanation about what he did with the money?

A. In some cases he did give an oral explanation about his handling of the money.

Q. And then did you enter it in accordance with the oral explanation he gave you?

A. We entered his explanation on our schedule prepared just for that purpose.

3451 Q. Which then would be charged against whomever he said to charge it against?

A, That is right.

Q. Now in the next period of the audit, did you again come across a lot of checks to cash?

A. That is right, we did.

Q. Tell us how many and the amount and what is the period?

A. The second—

By Mr. Lockley: May I have the time for this, too, Mr. Kirby?

By Mr. Kirby: Yes.

By the Witness: The second period—I will give the time as I give the whole details.

A. The second period covered from July 1st to October 30, 1946. Our audit was in the latter part of November, and it stretched into December.

I may be able to give you exact dates of when the audit is, but referring—by referring to my diary book, if you want the exact date.

By Mr. Lockley: That is satisfactory.

By the Witness:

A. In the second period there were 131 checks
3452 drawn to the order of cash, totaling $286,506.13.

By Mr. Kirby:

Q. What was the dollar amount?

A. In the second period, 16 of those checks were questioned, totaling $84,620.00.

Q. Did you again talk to Mr. Lubben for an explanation of those?

A. We did.

Q. Did you ever talk to Miss Feldman and ask her for an explanation of those?

A. Mr. Lubben referred me to Miss Feldman for additional information about some of the cash checks, and Miss Feldman endeavored to locate some further cash authorizations.

Q. And did she—

A. We received a few cash authorizations, but we did not receive cash authorizations for all 16 of these checks.

Q. Now Miss Feldman testified here and she said she had some recap sheets from time to time. The gentleman at this table liked to call them settlement checks. But these recap sheets, she said, explained where these cash checks went. Did she ever show you anything like that?

3453 A. No.

Q. But did you ask her for some kind of proof?

A. Mr. Lubben instructed her to give us any kind of proof regarding cash.

Q. Did she ever come up with that kind of information, that is, summary slips?

A. Never saw any cash summary slips. The only slips we saw had marked on them, "Cash authorization".

Q. Little white slips?

A. White slips.

Q. And they weren't complete?

A. In some cases they were complete, and in other cases they were not.

Q. Now, then, what was the next period of your audit?

By the Court: I think we will take our afternoon recess. We will suspend for ten minutes, members of the Jury.

By the Marshal: Will the audience remain standing while the Jury leaves the court room, as well as the Judge.

This Honorable Court will recess for ten minutes.

(Short recess.)

3454 By Mr. Kirby:

Q. Mr. Meyer, you say you would ask Miss Feldman for some evidence to support the distribution of these checks to cash? And just tell Judge Nordbye and the jury, how did she do it, immediately was she able to come up with it right away or did you have to talk to her more than once, just tell what happened in those days?

A. I talked with Miss Feldman about ten times during the course of the first audit. The second period—

Q. What do you mean, you talked to her?

A. In order to get additional information. We would try to get additional cash authorization slips, or sufficient explanation, so we could properly find out what happened to the cash, so we could make adjustments for the proper distribution of the cash, whether it was purchases, did it cover expenses, or what the proper expense was, in order to properly audit the books.

Q. And even after you had gone to her the ten times you still didn't get the complete information, is that right?

A. We finally—on the first audit we finally had
3455 to sit down with Mr. Lubben and ask him further questions about cash.

Q. And take his word for it?

A. Take his word in order to make our adjustments.

Q. And over how long a period of time on that first audit were you bothering Miss Feldman to come up with some support?

A. Our first audit covered approximately three to four weeks. We endeavored to get the information from time to time. It may have been, as I said, about ten times. I can't recall exactly.

Q. Well, Miss Feldman testified here that she never heard of any list of cash checks that needed support. Now, that is what you talked to her about, wasn't it?

A. Talked to both Mr. Lubben and Miss Feldman about cash checks.

Q. Now, then, you told us about the first period and you have told us about the second period, and am I correct that you have brought us down now to November 1, 1946?

A. That's right.

Q. What was the next audit period?

A. The next audit period was from November 1,
3456 1946, to February 28, 1947.

Q. And how many checks to cash and what amounts were involved in that audit period?

A. Let me give you dates on it, also.

By Mr. Lockley: Can you please break it down to from November 1 to December 30 or 31?

By the Witness: I do not have that information.

By Mr. Lockley: I object to any portion of it that goes over to 1947, your Honor.

By Mr. Kirby: If the Court please, the audit was made in the normal course of business and in the normal course of business it included that three month period. Now, I can't change the fact that that is the audit that was made, your Honor, and I have to take it that way.

By the Court: All right. Go ahead.

By the Witness:

A. The third period covered from November 1 to February 28th, 1947. 51 checks drawn to the order of cash, totaling $145,875.91. 29 of these checks were questioned totaling $71,725.77.

3457 By Mr. Kirby:

Q. Now, in the three periods of the audit, what was the total dollar amount of checks to cash?

A. The total dollar amount for the three period audit was $756,045.27.

Q. And what was the total of the unexplained checks to cash?

A. The total amount of questioned checks or unexplained checks amounted to $306,944.90.

3458 Q. I am going slow, because I don't want to make a mistake if I can avoid it. This is one.

I would like you to look at an exhibit that the Government produced. It is No. 101, and Mr. Lubben said that that was in his handwriting. Did you ever see that before?

By Mr. Lockley: Well, your Honor, I think we can save the Court's time. He has already testified he had never seen any of those recap sheets.

By the Witness: I never saw it.

By the Court: Well, he has answered it.

By Mr. Kirby:

Q. Now, I call your attention to the fact that that recap sheet supposedly explains some deals with Shotwell, some cash deals with Shotwell for the period of your first audit. Now, is that a period in which you asked Mr. Lubben what happened to some of this cash?

A. Yes.

Q. Did Mr. Lubben at that time produce that sheet or anything like it for you to see?

A. No.

Q. I show you an exhibit, 102, which the young lady, Miss Feldman, said was a retype that she had made of
3459 the facts Mr. Lubben gave her about some cash to Shotwell on shipments, and I ask you if that is the period during which you on ten different times went back to Miss Feldman and asked her to produce some information; does it cover that period?

A. It covers the period in question.

Q. Did she show you that exhibit?

A. I saw no exhibit of this type.

Q. Ever?

A. Ever.

Q. Let me start out now with you at the beginning of this General Confections Corporation in '46. Lubben set that up when he wound up the partnership, didn't he?

A. That's right.

Q. And when he wound up the partnership there were some written agreements with respect to it?

A. That's right.

Q. And as an accountant did you set up on paper the deal that was made closing the partnership and opening General Confections in dollars and cents?

A. Yes, we did.

3460 Q. And did you make a summary then of General Confections' start, and what it owed as it started in business?

A. We did.

Q. Did it owe anything at all when it started in business? Let me put it this way—that question is too general; of course it owed money to people—but did it owe any-

thing to the group that dropped out, the old Eatsum group, the Giglio group?

A. Yes, it owed to Eatsum for the inventory that was taken over by the new corporation.

3461 Q. In other words, the new corporation got all the inventory but was supposed to pay for it?

A. That's right.

Q. And did you set that up on paper, how much they were supposed to pay for it?

A. That's right.

Q. And have I asked you to review your figures on that?

A. We have examined schedules on it.

Q. Well, I have asked you particularly to look that up.

A. That's right.

Q. All right. Now, how much money, when General Confections got all this inventory, were they supposed to pay for it?

A. In the neighborhood of $300,000.00.

Q. And did you keep a record of whether they did pay for it?

A. We kept the record of all their payments to Eatsum against that inventory.

Q. Now, I show you a photostat of a check which is identified as Government's Exhibit 73 in the amount of $35,536.00 and ask you to look at that. That is a check to cash, isn't it?

3462 A. That's right.

Q. Have you got the work sheet that you made up in 1946, seven years ago, as to the payments that were to be made for that inventory to the old partnership?

A. I made sheets in connection with that inventory and payments against that inventory.

Q. Do you have them here?

A. Yes.

Q. Where are they? Do I have them or did I leave them at the table, or do you have them? Where did I leave those? Did I pick them up?

I don't see it. I remember it is a long yellow sheet.

(Documents handed to counsel.)

By Mr. Kirby: Will the Reporter mark these then Defendants' Exhibits 56 to 59, inclusive, for identification.

(Said documents were marked Defendants' Exhibits 56 to 59, inclusive, for identification.)

By Mr. Kirby:

Q. Are these sheets, which have been marked Defendants' Exhibits 56 through 59, the sheets which I asked you about that represent the setting up of the obligations of General Confections to pay for that inventory?

3463

A. That's right.

Q. Now, let me ask you whether that check for $35,536.00 is posted in any way on these sheets that you made seven years ago?

A. It is.

Q. Mr. Lubben testified that he cashed the check and he brought it out and gave it to Shotwell. Now, how is it posted on the records you made six years ago?

A. It is posted March 28th, cash disbursement sheet 4, check No. 149, a debit to Eatsum Food Products, $35,536.00.

The check in my hand is 149 for the same amount.

Q. The same date?

A. The date on the check appears March 29th.

Q. Now, what that means in substance, Mr. Meyer—and I hope I don't offend you. I will try to be right about this.

By Mr. Lockley: You will, unless you ask him what it means.

3464

By Mr. Kirby:

Q. What does it mean; where did the money go according to the record six years ago?

A. According to the record, the money was paid to Eatsum Food Products.

Q. In other words, the company got the inventory and they were supposed to pay those other fellows that cash, is that right?

A. That's right.

Q. And it was posted that that is where it went?

A. That's right.

Q. Was it ever changed?

A. It was never changed on our records.

Q. Did they ever say it was wrong?

A. Nobody ever questioned us about it.

Q. Well, now, they came up in the trial here with an exhibit, 73-A, which I show you, and I ask you, did they ever show you that?

A. I never saw anything except cash authorization slips and invoices.

Q. Yes. The question is, did they ever show you that?

A. No.

Q. Well, that was introduced here and they said—

3465 does that show that $35,536.00 check—or, I mean, does it show an amount?

A. There is a pencil figure of 35,536.

3466 Q. What is the exhibit number on the back of it? Will you turn it over and see?

A. Exhibit 73-A.

Q. Well, that amount of $35,536.00 is the same amount as is shown on the books as actually having been paid to Eatsum, isn't it?

A. That's right.

Q. Well, did they ever hand you a piece of paper like that and say, "Look, you have got it posted the wrong way. It didn't go there. It went to Shotwell"?

A. I never saw this sheet or any duplicate, or any original of this photostat.

Q. They accepted the posting to Eatsum?

A. It was in the books and records of General Confections as such.

Q. If you will bear with me, Mr. Meyer, I want to go down a number of exhibits which have been introduced with respect to supposed cash paid to Shotwell, and the first memo for the General Confections period that they showed was this 73-A, which you just said they never showed you?

A. That's right.

3467 Q. And a payment of $35,536.00 on the bottom of it, which you say—at least that amount—was represented by this check which went to Eatsum, this check being 73, is that right?

By Mr. O'Brien: Exhibit 73?

By the Witness: Exhibit 73.

By Mr. Kirby:

Q. Yes. Am I correct about that?

A. Right.

Q. So this bit of proof we have had here was not posted that way at that time?

A. That's right.

Q. Now, the next one that they talked about was an

Exhibit 13, which is in Lubben's handwriting. Now, did you ever see that before?

A. No.

Q. Well, that is supposedly an explanation of where some cash checks and cash went, and that is in the period you asked Miss Feldman and Lubben if they had any reco.. to show it, isn't it?

A. It is.

Q. And they didn't show that to you?

A. No, sir.

Q. Well, do you notice part way down in there,
3468 in that so-called instruction sheet, it says, "Now you have two checks totaling $4,600", do you see that?

A. Right.

Q. So in the proof they showed two checks, each for $2,300, Exhibits 92 and 93, which I now show you, and those two checks obviously total $4,600, like it says on that memo there, don't they?

A. Yes.

Q. Well, Mr. Meyer, those checks were posted seven years ago, weren't they?

A. That's right.

Q. And can you look up for me in the working papers of seven years ago and tell me how they were posted then?

A. Yes, I can look on my work sheets to try and identify them.

Q. All right. Is that this pile over here? I left some papers here which I think I should move over here. Oh, maybe they are here. I am not too good at these papers. You figure out, will you, where that is?

A. Yes, I can locate three ninety-six, and four seventy-four on my schedules.

3469 Q. All right. Check 396 is Exhibit 92, isn't it?

A. 396 is Exhibit 92.

Q. Who endorsed the check?

A. William Heitmann and Edward L. Urban.

Q. Now, will you look at the records you made seven years ago and tell me what it says about that check then?

A. The heading is "It was charged to accounts payable."

Q. First of all, does it show No. 396?

A. It shows the date first, 4-29-46, No. 396, cash, 2300, endorser William H. Heitmann, Edward L. Urban, charge

to accounts payable. The explanation column says, "Liquid syrup 25 drums."

By the Court: Sit back, Mr. Meyer. I don't hear you. State it again, please.

By the Witness: Sorry. I will repeat it entirely. 4-29-46, check No. 396, cash, $2,300.00, the endorsers William H. Heitmann, Edward L. Urban, charge to accounts payable. The explanation, "Liquid syrup 25 drums".

By Mr. Kirby:

Q. Well, do you have on your work sheets of
3470 seven years ago the check to cash which is Exhibit 93, check No. 474?

A. Exhibit 93, check—yes, I have.

Q. Well, who endorsed that check to cash?

A. William Heitmann, Edward L. Urban.

Q. Now, will you look at the entry you made in those days and see how it was charged?

By the Court: Which exhibit is this?

By Mr. Kirby: 93.

By the Witness: This is 93.

By the Court: Oh, the second check.

By the Witness: The second check.

By Mr. Kirby: Yes, it so happens, Judge, there are two checks, each of 2300.

By the Witness:

A. May 2, 1946, check No. 474, cash, 2300, endorsers, William H. Heitmann, Edward L. Urban, accounts payable, 25 drums liquid syrup.

By Mr. Kirby:

Q. So that these two checks, each for 2300, were entered at that time as having gone for the purchase of liquid syrup?

A. Syrup, that's right.

Q. And that information was given to you by
3471 whom, do you know?

A. I do not remember whether Mr. Lubben or Miss Feldman gave me that information, in this particular instance.

Q. Well, did they ever show you a document, such as this Government's Exhibit 13, and say that was overage for candy to Shotwell and "You can look right here where it says plus two checks for 4600, or a total of 4600," did they ever tell you that they cashed the money and took it and gave it to Shotwell?

A. I never received that information. I never saw this sheet before.

Q. And that thing in Lubben's handwriting, he didn't come up and show that to you to explain what he did with the money?

A. I never saw the sheet before.

Q. Now, it was posted, so far as you know, the last time you saw the books for the purchase of some liquid syrup from somebody?

A. That's right.

Q. And not candy at all.

A. Not candy at all.

Q. Now, then, this memorandum goes on down
3472 past this 4600, and it has a number of figures which there never were any checks produced on, but did they ever say to you to charge those kind of figures to Shotwell on the accounts payable book?

A. I have no recollection of having any instructions about charging Shotwell in connection with this sheet. I never saw the sheet.

3473 Q. And were those amounts following the 4600 on that sheet, shown in the purchases book of the company, representing purchases of any candy?

A. I don't recollect any amounts being in that purchase book.

Q. So that so far as you remember, that series of transactions following the two checks totaling 4600, you never saw that at all?

A. That's right.

Q. Now, your books, they came in balance from time to time, didn't they?

A. Right.

Q. If the amount of money which is on this sheet, Exhibit 13, were not entered, your books would be badly out of balance, wouldn't they?

A. That's right.

Q. But they did balance?

A. I proved that by mail confirmation.

Q. With Shotwell?

A. With Shotwell.

Q. That is, that the accounts as shown on the books of General Confections on Shotwell jibed up?

A. It was proper audit procedure to confirm accounts payable and accounts receivable by mail.

3474 Q. And with no such amounts as this on the books charged against Shotwell, isn't that true?

A. That's right.

Q. Now, the next item of proof that they gave us for the period when you were the auditor is a group of three so-called memorandums, being Exhibits 94, 95 and 96, and I show them to you and ask you if you ever were shown that type—or those memorandums?

A. I never saw those memorandums before.

Q. Well, were those memoranda posted to the books then in existence?

A. Not that I know of.

Q. Well, they didn't show us any checks on it, we just have those memoranda. You never saw them, in the seven years ago period?

A. I never saw them.

3475 Q. Is that also in the period when you were asking Miss Feldman to show you everything that did exist?

A. That's right.

Q. The next item of proof in the period when you were the auditor that they showed us was a couple of pages again of memorandums which are in Hankermeyer's handwriting, I think, 97 and 98; did you ever see those before?

A. I never saw those sheets before.

Q. So far as you know, were they ever posted to the books in your period there?

A. So far as I know, they never were posted to the books.

Q. The next material that they showed us as to payments they alleged to have made were two memoranda I have already shown you, Exhibit 101 in Lubben's handwriting, and Exhibit 102 which is supposedly a typewritten copy of the same with some added material at the bottom, and I will ask you if you ever saw those before. And I think that you answered already that you didn't.

A. I have already stated I did not see these sheets.

3476 Q. Now those sheets that you have total $33,567. No checks were shown on it, but there are some supposed payments mentioned on the bottom there. Did Mr. Lubben ever report to you that he had made a payment to Frank on the way to the barn in the amount of $1,488. that should be entered on the books?

A. No.

Q. Did he ever report to you that there was a payment of fourteen thousand in Chicago for Frank?

A. No.

Q. Or any of the other payments on there?

A. I never saw or heard anything about any of these payments.

Q. The next two that they showed us were Exhibits 112 and 120, Exhibit 120, coming down to December 17 of 1946, and did they ever show you those memos at that time?

A. I never saw these memoranda.

Q. The remaining memoranda which they introduced were 122-A, 122-C, 126-A, 126-B, and 126-C, and I will ask you if Miss Feldman showed you those memoranda?

A. I never saw these memoranda.

3477 Q. But what you were shown, or what they did have available at that time was posted to the then books, is that right?

A. We checked purchases—the purchase book was checked by means of getting actual bills from suppliers. We went through their purchase book, and all the bills that we could locate we checked and verified. We made schedules of all the purchases for General Confections.

Q. I think you already told me that you reconciled the Shotwell accounts payable on the books of the General Confections?

A. That's right, as of February 28, 1947, we have a record—rather, a signed confirmation, and we reconciled against Shotwell's letter to Mr. Lubben as of that date.

By Mr. Kirby: Will you mark this Defendants' Exhibit 60-A and 60-B.

(Said documents were marked Defendants' Exhibits 60-A and 60-B for identification.)

By Mr. Kirby: All right.

Q. And is the conciliation letter which I have had marked 60-A and 60-B; is this the letter?

A. That's right.

3478 A. And did the accounts check out, that is to say, the Shotwell books and the General Confections books balance out—I don't mean the General Confections had paid all they owed, but I mean there was an agreement?

A. There was an agreement after we made certain adjustments.

3479 Q. Well, those adjustments were to reflect that there had been some commissions applied against the account, and things like that.

By Mr. Lockley: If you don't mind, just ask him a question and I won't have to object to your testifying so often.

By Mr. Kirby: Well, that is a good objection, and I apologize.

By Mr. Kirby:

Q. Mr. Meyer, what were the adjustments, please?

A. The adjustments covered commissions in two periods that the General Confections had not reflected on their books, which we, as auditors, had to pick up in order to reconcile.

Q. You mean sales commissions?

A. That is right.

Q. Now, Mr. Meyer, there were some checks cashed which you were told back seven years ago are to be charged against Shotwell, is that right?

A. That's right.

By Mr. Lockley: Please, Mr. Kirby. I don't like to have to object to your constant testimony in this case.

By the Court: Yes.

3480 By Mr. Kirby: Yes, that's right, Judge.

By Mr. Kirby:

Q. Were there any checks at any time to cash which they did tell you back in those days should be charged against Shotwell?

A. Yes.

Q. And they were?

A. Yes.

Q. But how about these that I have gone down with you, none of them were, were they?

A. I don't recollect any. I don't remember charging any.

Q. Well, the 35,536.00 I showed you, the two—

A. That was not questioned. That was in our records as actually charged against Eatsum. I had no reason to question that check. That was actually charged in the account and verified as paid to Eatsum.

Q. But the items that I have gone over with you represent items that were not charged on the books to Shotwell, is that right?

A. That's right.

Q. All right. Now, those entries with respect to Shotwell, were they made concurrently or later?

3481 By Mr. Lockley: I object, your Honor, unless he is a little more specific as to which entries he is re-

ferring to.

By the Court: Yes. I don't know what you mean by concurrently. With what?

By Mr. Kirby:

Q. Well, were they already posted when you came there or did you post them when you asked what happened to the cash and they said to charge it; what was the fact?

By Mr. Lockley: Were what posted?

By Mr. Kirby: Any checks to cash.

By Mr. Lockley: What checks to cash?

By Mr. Kirby:

Q. Do you ever remember any?

A. Yes, some checks.

By the Court: You mean the checks to cash which he posted as going to Shotwell?

By Mr. Kirby: Yes.

By Mr. Kirby:

Q. And that was based on information given to you by Lubben or Miss Feldman?

A. Well, I remember one check was charged to Shotwell, of cash, and there was a cash authorization 3482 slip in connection with it. And when we did confirm this accounts payable item, it was necessary to set up a purchase in order to agree with Shotwell. I think, if I recollect, the amount was $17,000.00 that was charged to Shotwell, but there was a cash authorization slip in connection with that charge to Shotwell.

Q. Made out by Miss Feldman?

A. Made out by Miss Feldman in that. As far as I know, it was made out by Miss Feldman. I would have to look at the cash authorization slip to verify her handwriting.

Q. But am I correct in believing that except for those instances that you have just related these other items were not charged to Shotwell?

A. That's right.

Q. Now, what is a journal entry?

A. A journal entry represents either an adjustment, a correction, additional information. That is, as far as an auditor is concerned.

A journal entry in the regular course of business could be any type information that cannot be handled by any

other book of original entry. You can use a journal
3483 during the normal operations of a business.

It is an auditor's means of correcting, adjusting, placing additional information on the books and records of a corporation.

Q. Well, in layman's language a journal entry by an auditor means he has to make some kind of an addition or correction to what he finds when he comes there?

A. That's right.

Q. Now, did you have to make journal entries in order to change or correct what you found in this bookkeeping system when you came there?

A. We made very many entries in this system.

3484 Q. And I asked you one time how many you made during this General Confections audit, how many different things did they tell you had to be changed or corrected from what you found when you got there?

A. We made about 450 journal entries during the course of a one-year audit.

Q. At their request?

A. Well, it isn't at their request. An auditor makes a journal entry because he knows something has to be corrected. We couldn't put out a statement for them unless we made those journal entries. Actually, after we get the information, we compile it and we find out what accounts have been incorrectly charged and correct them by means of a journal entry.

Q. And there were some 457 of those journalizing or correcting entries on this set of books?

A. That's right.

Q. Based on information supplied by Lubben or Feldman?

A. Or employees—also employees during the course of our investigation and audit.

Q. Now, do you remember making a special audit one time which would be captioned "General Confec-
3485 tions list of checks requiring additional information"?

A. Yes, I did. I think it was in the first—if I remember, it was in the first period of the audit.

Q. And as you remember now, did you have to charge a substantial amount of checks off to Lubben personally?

A. I did.

Q. Because there was no explanation at all?

A. There was no explanation of those checks, so we had to charge it against Lubben's personal account.

Q. Now, one of the items of proof—

Yes. There wasn't even an oral explanation from Lubben on what happened to that money, is that right?

A. There was no explanation.

By Mr. Lockley: I object again to your testifying, Mr. Kirby.

By the Court: The answer may stand.

By Mr. Kirby:

Q. Mr. Meyer, one bit of proof that we have had here—a man said he went to a bank in the summer of '46 and he cashed four checks for $5,000.00 each and he took the money and he put it in his shirt and he went over and paid it to Shotwell. Now, I can't show you those
3486 checks because they haven't been produced. But I ask you, did you ever work as an auditor at General Confections on their bank statements, such as these marked in the 38 series?

A. We reconciled every bank statement that they had.

Q. And checked the checks to the bank statement?

A. We checked all of their checks against their cash disbursements and then verified actually what cash they had at the bank at specific periods of time, and at the three periods in question.

Q. And those sheets that you hold in your hand are photostats of their account at the Manufacturers Bank?

A. That's right.

Q. And if any checks cleared would they show on there?

A. That's right,

3487 Q. That is for the period April on into November, 1946, isn't that, that group of sheets?

A. I can't verify that here. It is so—wait a minute now.

By the Court: What exhibits are they?

By Mr. Kirby: They are in the 38 series, your Honor.

By the Witness: Wait a minute now. I see April. April, right.

By Mr. Kirby:

Q. They go from April to November of 1946?

A. That is right.

Q. Now before you testified here to-day—

By the Court: What did you say, 38?

By Mr. Kirby: Yes.
By the Court: Are you sure of that?
By Mr. Kirby: Well, it is the defense.
By the Court: Oh, the defense.
By the Witness: That is right. It says so here.
By the Court: All right,
By Mr. Kirby:
Q. Now, before you got in here to testify and while you were waiting to be called, did I hand you those 3488 sheets and ask you to look at them?
A. Yes.
Q. And did I ask you to look for some particular thing?
A. I was asked to look for four consecutive checks for $5,000.00 each.
Q. Clearing the bank account?
A. Clearing the bank account.
Q. And did any such group of four checks ever clear?
A. I couldn't locate four checks consecutive at $5,000.00 each.
Q. Well, you couldn't even find any on the same day?
A. That is right.
Q. Or the same week?
A. I can't say in the same week. I didn't verify dates. I just looked in the different sections and from looking on those sections I saw maybe five thousand on one and never more than two on one page, as I recollect.
Q. But never a group of four?
A. Never a group of four.
By Mr. Kirby: I offer in evidence Defendants' 3489 Exhibits for identification 56, 57, 58 and 59, and I have no further questions of Mr. Meyer.
Thank you. Thank you especially for speaking up, Mr. Meyer.

Cross Examination by Mr. Lockley.

Q. Are these all of the work papers to which Mr. Meyer had reference during the period on the stand?
A. No. There are additional ones here. I think here were some questions about cash checks about which there are papers here in connection.
By Mr. Lockley: I have no objection to this then, your Honor.
By the Court: Very well. They may be received.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 56, 57, 58 and 59.)

By the Court: Gentlemen, are we making good progress?

By Mr. O'Brien: I think so, Judge. I don't think
3490 we will be as long as we anticipated.

By the Court: You aren't able to prognosticate it? I don't mean to—

By Mr. O'Brien: No. I feel it will be noticeably shorter than I thought.

By the Court: I am sorry.

By Mr. O'Brien: I feel it will be noticeably shorter than I thought.

By Mr. McConnell: I am going to make a prognostication. I am going fishing on the 14th.

By the Court: Ladies and gentlemen of the jury, I was just asking counsel if things were going slower or faster than they anticipated. Mr. O'Brien tells me we are going faster than anticipated. I thought that might be good news for the jury. It is twenty minutes after four o'clock—

By Mr. Lockley: Your Honor, may I temporarily at least withdraw my agreement to Defendants' Exhibit 56 until I have had an opportunity to examine it and might I also ask that the witness make available to me
3491 for examination the other work papers which he testified to so that I might cross examine him on those Monday morning?

3492 By the Court: I assume you couldn't complete your cross examination in ten minutes?

By Mr. Lockley: No, sir, I couldn't I can ask some questions, however, if you care to use up that time.

By the Court: Well—

By Mr. Kirby: I wish he would clear up with Mr. Meyer what the audit sheets are, and I wish Mr. Meyer would give him the audit sheet now.

By the Court: Yes.

By Mr. Kirby: Because your Honor could see, I didn't know just which ones were important.

By the Witness: Well, I gave him all the sheets necessary.

By the Court: Wait a minute, Mr. Meyer.

Mr. Lockley, just what do you have in mind?

By Mr. Lockley: Mr. Meyer referred to a list of cash checks which were made up. Is that this exhibit, Mr. Meyer?

By the Witness: I would have to look that up.

3493 There may be more exhibits.

By Mr. Lockley:

Q. I may be able to shorten it by asking you, are these all of the work sheets from which you testified while you were on direct examination?

A. There is one other.

By the Court: Mr. Meyer, I am afraid you will have to take the stand.

By the Witness: I think there is one other sheet that says, "Is further additional information on checks." Outside of that, I think it covers it.

By Mr. Lockley:

Q. May I have that sheet, too, then?

A. I think I testified about the seventy-four thousand. I think that was the sheet that was used to question Mr. Lubben about additional checks.

By Mr. Kirby: Well, he didn't refer to this. He didn't have it in his hand, but I think this is the one (indicating.)

By the Witness: This is the one you asked about additional—

By Mr. Kirby: Yes.

By the Witness: That would be the additional one,

3494 because there is where the seventy-four thousand dollar item applies.

By Mr. Kirby: Let Mr. Lockley have that, will you?

By the Witness: Sure.

By the Court: Well, now, I understand, Mr. Meyer, you have turned over to Mr. Lockley all of the work papers or additional computations that refer to the testimony you have given in your direct examination?

By the Witness: That is right.

By Mr. O'Brien: May the record show just what sheets were delivered now?

By Mr. Lockley: Mr. Meyer, perhaps you had better describe the sheets, item by item for the record, please?

By the Witness:

A. Right. General Confections general schedule of checks drawn to cash, and others, for the period March

1st to June 30, 1946. Schedule of checks drawn to cash and others, July to October, 1946. Schedule of checks drawn to cash and others, November, 1946 to February 28, 1947.

3495 List of checks requiring additional information from the period March 1st to June 29, 1946. Analysis of Eatsum Food Products Company, based on sources of books of original entry, June 30, 1946, covering the period March 1st to June 30, 1946.

Analysis Eatsum Food Products based on sources of books of original entry, March 1st to June 30, 1946.

Pardon me. The first of those were the debits, and the second part were the credits. In other words, the debits and credits covering that period in the accounts payable.

Last, the confirmation by The Shotwell Manufacturing Company on April 21, 1947, addressed to Mr. David Lubben in New York, which we reconcile, that we have a schedule, a separate schedule which gave us our reconciliation after we had certain adjustments.

By Mr. Lockley:

Q. Does that set of work papers include the list of checks to cash for all of the period to which you have testified?

A. That is right.

3496 By Mr. Lockley: All right.

By the Court: Well, I gather that completes——

By Mr. Kirby: Can we have those photostated and returned to us tomorrow morning?

By Mr. Lockley: Yes, indeed. We will arrange to have them back to counsel tomorrow morning.

3497 By the Court: Well, members of the jury, we will adjourn now until Monday morning at 10:00 o'clock. Counsel told me that we are going along a little faster than they anticipated and I am sure it is good news to us and if you will be patient, I am sure the time will come when we will have the case concluded.

As I told you the other day, I am sure you will want to do a good job and will be as patient as you possibly can be.

I realize your jury service may be burdensome but it isn't very often that the government asks you to perform duties of citizenship and I am sure you will want to approach your duties with that idea in mind. This is an important lawsuit. It is important to the government and it is important to the defendants.

I don't know that I encourage you very much when I say this but I try to. I know it is hard to sit on a jury for this period of time.

We will be adjourned until 10:00 o'clock Monday
3498 morning. Remember the admonition that I have given you not to talk to anybody about this case and not to permit anyone to talk to you about it. If they do, I want you to report it to the Court. Refrain from reading any newspaper accounts of the proceedings of this trial as long as you are on the jury in this case.

By the Marshal: Will the audience remain standing while the Judge and the jury leave the court room?

This Honorable Court will recess until Monday morning at 10:00 o'clock.

(Whereupon an adjournment was taken in the above-entitled cause to Monday, October 5, 1953, at the hour of 10:00 o'clock A. M.)

3499

* * (Caption—No. 52 CR 143) * *

Chicago, Illinois,
Monday, October 5, 1953,
10:00 o'clock A. M.

Court met pusuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:—

By the Clerk: No. 52 CR 143, United States vs. Shotwell Manufacturing Company, et al. Case on trial.

3500 JOSEPH P. MEYER, a witness heretofore called herein on behalf of the Defendants, having been heretofore first duly sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. Lockley.

Q. Mr. Meyer, how long have you been an accountant?

A. I have been an accountant for about twenty years.

Q. About how many sets of books have you worked on in that length of time?

A. In the neighborhood of about 200.

Q. How many of those since 1946?

A. About 150, I'd say, approximately.

Q. And did you conduct audits on all of them?

A. I was in private accounting before I became a public accountant.

Q. Well, since you have been a public accountant, that has been since 1946?

A. No, I was a public accountant from September of '42 to June of '43.

Q. Then when you came back from the war did you go back into public accounting?

A. That's right.

Q. And a public accountant does conduct audits,

3501 doesn't he?

A. That's right.

Q. I mean, that's about all a public accountant does?

A. They conduct audits and—in other words, there are other investigations, possibly, but mostly in the nature of audits and audit procedure, audit practice, preparation of tax returns, and anything applicable to accounting indirectly has to do with audit procedure.

Q. In other words, you don't actually make entries in the books of original entry, that is left to a bookkeeper?

A. That's right.

Q. What you do is come in, go over those books after they have been set up by the bookkeeper and you post to the general ledger?

A. No, we don't post to a general ledger, I beg to differ. The posting is all done by employees.

3502 Q. I see. Well, you take off a profit and loss statement, is that so?

A. We take it off our own working papers. We audit the books and records, prove those books and records, make all our statements from our own working papers. In other words, we make journal entries, we put those journal entries on our working papers and compile our certified statement from our working papers.

Q. Not from the books and records?

A. Not from the books and records. We then proceed to give the bookkeeper those adjustments necessary to bring the books and records in line with the certified statement and the tax return.

Q. Okay. Thank you. Now, as I understand it, you began your audit of this first period in General Confections from March 1st to June 30th about August, 1946, is that correct?

A. I can give you the exact date.

Q. Well, what was it?

A. August 19th the audit started.

Q. And Miss Feldman was there at that time?

A. Miss Feldman was present at General Confections.

3503 Q. Did she tell you that she had just arrived on August 1st?

A. I don't know when she arrived, but I know it was approximately around that date. I couldn't say definitely the exact date at this time when she arrived.

Q. Now, General Confections had what is commonly known as a double entry set of books, didn't they?

A. That is right.

Q. And did you consider those to be adequate from an accounting viewpoint?

A. Yes, double entry books are adequate from a double entry viewpoint, if properly maintained.

Q. Now, did you recommend any changes in that set of books when you audited them?

A. After our audit we recommended a number of changes. I personally made a list of all the changes in connection with General Confections.

Q. Did you recommend among other things any change in the method of handling cash checks?

A. Yes, we recommended quite a number of changes in connection with cash checks.

Q. And were those changes carried out?

A. Those changes were never carried out—those
3504 changes—the recommendation we gave in connection with that change was given during the course and after the audit, but the recommendations about cash were not carried out because in the third period there were still numerous cash checks.

Q. Do you have a list of those recommended changes that you made?

A. Well, I had a typewritten list in my working papers.

Q. You had one. Do you have it now?

A. I don't have it with me. I know—I think it is in my working papers.

Q. Do you have your other working papers with you, the ones you testified from Friday?

A. I just have the ones that are applicable to my testimony in connection with those cash schedules and also the letter, the accounts payable.

Q. Now, when did you say those working papers from which you testified on direct examination were prepared?

A. All of those cash schedules were prepared at the time of the audits.

Q. And is all the handwriting on them yours?

A. Not all mine. There were two other account-
3505 ants accompanying me in connection with that audit and sometimes Mr. Scholz came up. And there might have been four at that time when he was present.

Q. When is the last time you did any work on them?

A. The last time we did work at General Confections audit was the end of April and I am not positive, but it might have carried into the beginning of May, 1947.

Q. I said what is the last time you worked on the papers, not on the audit, on your work papers.

A. On our work papers, well, we examined the work papers before—when we were subpoenaed by the Shotwell people to present them. I was working on them, examining them and looking them over when we brought them out to Shotwell in Chicago. That was about a year ago, I suppose.

Q. Have you gone over them recently with the defendants' counsel?

A. Yes. I went over the work papers.

Q. All right. Now, are you prepared to state that

those are in the same condition now as they were when they were prepared by you in 1946 and 1947?

A. As far as I could see, those working papers were the same working papers we had when we com-
3506 pleted the audit.

By Mr. Lockley: Well, your Honor, we have no objection to the introduction of Defendants' Exhibits 56, 57, 58, 59 and 60-A and 60-B.

By the Court: Very well. They may be received.

(Said documents were received in evidence by the Court and marked Defendant's Exhibits 56, 57, 58, 59, and 60-A and 60-B.)

3507 By Mr. Lockley:

Q. Will you please get the remainder of your work papers, Mr. Meyer?

By Mr. O'Brien: I don't think we offered them as yet.

By Mr. Kirby: Yes, I offered those particular ones.

By Mr. O'Brien: I wasn't sure.

By Mr. Lockley:

Q. May I have the remainder of your working papers?

A. This is stuff—this wasn't work papers in connection with the audit at all. Those were the only work papers I had on the audit. This is correspondence I had in connection with it, that I had since that time, with people. You have all—.

Q. Where are the originals of these documents which were given to us to photostat Friday?

A. I haven't got those. Mr. Kirby may have them.

By Mr. Kirby: Here they are.

By Mr. Lockley: These are only Exhibits 56, 57, 58 and 59, 60-A and 60-B.

By Mr. Kirby: That is all we offered.

By Mr. Lockley: Well, I would like to have the three schedules of checks drawn to cash from which you
3508 testified Friday and also the list of checks requiring additional information from which you testified Friday, if your Honor please.

By Mr. Kirby: We gave him photostats of all that material which they have. If they want to introduce it in evidence—

By Mr. Lockley: Yes, if you please, Mr. Kirby.

By Mr. Kirby: They have photostats of all that. We gave them the originals to photostat on Friday when Mr. Meyer left the stand.

By Mr. Lockley: Do you have any objection to the admission of the photostats in lieu of the originals?

By Mr. Kirby: No. It makes no difference at all.

By Mr. O'Brien: No. Neither do we have any objection to the originals, Mr. Lockley, but we just didn't bring them.

By Mr. Lockley: Would you prefer to put in the originals?

By Mr. O'Brien: We don't have them here.

By Mr. Lockley:

3509 Q. Does defense counsel now have custody of those original work papers, Mr. Meyer, if you know?

A. Yes, sir. They subpoenaed all our work papers.

Q. The government had previously subpoenaed them, hadn't they?

A. No, sir, not General Confections audit work papers.

By Mr. Lockley: Will you mark this Government's Exhibit 175 and this one 175-A.

By Mr. O'Brien: What were those numbers?

By Mr. Lockley: 175 and 175-A, Mr. O'Brien, which is a schedule of checks drawn to cash from the period March to June. 176 is the list of checks requiring additional information.

(Said documents were marked Government's Exhibits 175, 175-A and 176 for identification.)

By the Court: What do you call it again?

By Mr. Lockley: It is called the list of checks requiring additional information.

Will you please mark these 177, 177-A and 177-B, for identification.

3510 (Said documents were marked Government's Exhibits 177, 177-A and 177-B for identification.)

By Mr. Lockley: It is the schedule of checks for July to August.

By the Court: From what?

By Mr. Lockley: It is a schedule of checks drawn to cash for the period July to August. I am sorry. It is July to October, your Honor.

178 and 178-A is the list of checks drawn to cash from the period November to February, 1947.

By Mr. O'Brien: What were those dates, Mr. Lockley?

By Mr. Lockley.: November 6th to February 28th, 1947.

By Mr. Lockley:

Q. Now, are those photostatic copies true and correct copies of the work sheets originally prepared by you, Mr. Meyer, and to which you testified Friday?

A. They appear to be, yes.

3511 Q. Were they made by you, the originals?

A. Some were made by me and some were made by other accountants.

Q. Under your supervision?

A. Under my supervision.

Q. Were those records taken from the books and records of the corporation which are not now available?

A. These records were taken from—

By Mr. Kirby: You mean the sheets themselves?

By Mr. Lockley: The sheets themselves, the work sheets.

By the Witness:

A. The sheets themselves were taken from actual checks of the corporation.

By Mr. Lockley:

Q. Are those true and correct, to the best of your knowledge?

A. They are true and correct, to the best of my knowledge.

By Mr. Lockley: Your Honor, I wish to offer Exhibits—

You just hold on to them.

3512 By the Witness: Hold on to them?

By Mr. Lockley: Yes.

By the Witness: All right.

By Mr. Lockley: I wish to offer Government's Exhibits 175, 175-A, 176, 177, 177-A and B, 178 and 178-A. Is there any objection?

By the Court: They may be received.

(Said documents were received in evidence by the Court and marked Government's Exhibits 175, 175-A, 176, 177, 177-A, 177-B, 178 and 178-A.)

By Mr. Lockley:

Q. Now, Mr. Meyer, will you examine Government's Exhibit 175 and 175-A which relate to the first audit period. You testified last Friday on page 3448:

"On our first audit we covered the period from March 1st to June 30th, after our bank reconciliation, we made a list of three pages of cash checks. Many of these cash checks were in the cash disbursements book but actually, there was no way of charging them from the cash disbursements book due to the
3513 lack of information."

Now, was it Exhibit 175 and 175-A, the list that you referred to?

A. That is right.

Q. It is two pages and not three, isn't that so?

A. These are two pages, that is right.

Q. Now, you also stated at page 3448:

"In the first period, from March 1st to June 30th, there were 81 checks to cash totaling $323,663.23." Will you show me where those totals are on that work paper?

A. There are no totals on this work paper. I compiled that by examination.

Q. Well, then there is something that you used Friday that you didn't give us, is that so?

A. Well, I compiled that information after the audit.

Q. Well, when did you compile that?

A. August of last year.

Q. Where is it now?

A. I have it with me.

Q. May I see it? So, you are not testifying from the work papers but from the schedules you prepared from work papers, is that right?

3514 A. These schedules were prepared on the basis of the work papers. That is the first period, the second period, the third period, but all of those checks are listed right here, (indicating).

By Mr. McConnell: "Right here", what do you mean?

By the Witness: Right on the schedule.

By Mr. O'Brien: 175 and 175-A.

By the Witness: Well, the first period would be on the first exhibit and schedule and the second period on the second one and the third period on the third one.

By Mr. Lockley:

Q. This paper you showed me, the work paper headed "First Period"—

By the Court: Headed what?

By Mr. Lockley:

Q. The work paper headed "First Period Checks Inquired About" has a total of $150,599.13.

A. Those were the checks questioned. If you look a little further you will find that is the checks numbering 28. You will find listing of 28 questioned.

Q. Where are the 81 checks for $323,000.00?

3515 A. Every one of these checks on this.

Q. There is no total on that of $323,000.00, is there?

A. I think if they were totaled you will find they total that much money. There are tapes to prove it.

By Mr. Kirby: If the Court please, I think Mr. Lockley read on page 3448 this answer:

"In the first period, from March 1st to June 30th, there were 81 checks to cash totaling $323,663.23," but he neglected to read the next question and answer:

"And how many of those checks to cash"—

By Mr. Lockley: You will please, Mr. Kirby, I would like to conduct my own examination of the witness.

By Mr. Kirby: You are implying he said to the contrary on Friday and I would like to read the next question and answer.

"And how many of those"—

By Mr. Lockley: I will get to it, if you don't mind.

3516 By the Court: I think Mr. Lockley has to conduct his own examination.

By Mr. Kirby: Assuming the witness testified to the contrary on Friday—

By the Court: If there is anything you would like to clear up, you can clear it up on redirect examination.

By Mr. Lockley:

Q. All right. All I was asking, Mr. Meyer, is if you would show me on those work pages 175 and 175-A where you got the figures of 81 checks and $323,000?

By Mr. Kirby: I object on the grounds he said those work sheets were the questioned checks, not the total checks to cash and counsel is assuming precisely the opposite.

By the Court: He may answer.

By Mr. Lockley:

Q. Are such figures on Exhibit 175 and 175-A?

A. What figures?

Q. The figure of 81 checks and $323,000.00?

A. The 81 checks are listed here, and an adding machine tape of those total checks will result in the figure of $323,663.23.

Q. That's all I wanted you to tell me before. Now,
3517 as Mr. Kirby pointed out, the next question is:

"And how many of those checks to cash were checks as to which there was inadequate information to tell who got the money?"

And did you reply: "There were 18 checks totaling $150,599.13"?

A. That is right.

Q. Now going back to Exhibit 175 and 175-A for just a moment. That is the list of checks to cash which you referred to, isn't it?

A. That is right.

3518 Q. Well, that is actually headed Schedule of Checks drawn to cash and others, isn't it?

A. That is right.

Q. Will you please examine that list and tell me how many checks are drawn to cash? I don't mean checks that are drawn to payroll or petty cash, or to David Lubben or to somebody else. I want to know how many checks are drawn to cash.

By Mr. McConnell: I object to that question. It assumes the check is drawn to Lubben and that a check endorsed by Lubben is not a check to cash.

By Mr. Lockley: It certainly isn't. This witness has testified they are checks drawn to cash.

By the Court: I don't know what the witness testified to with respect to checks to cash. I assume a check to cash is made out to cash.

By the Witness: We considered David Lubben checks—

By Mr. Lockley:

Q. I asked you a question. Will you count the checks to cash?

3519 By Mr. O'Brien: I think he has a right to define it, if the Court please.

By the Court: This is proper examination. You mean the payee is cash?

By Mr. Lockley: Yes, your Honor. There is a column on this work sheet which has "Payee' and there are various names under it.

By the Court: You may ask the question.

By Mr. Lockley:

Q. I want to know how many of those are drawn to cash?

A. You mean to eliminate petty cash in that respect?

Q. Well, petty cash is for a specific purpose.

A. But they were still drawn to cash.

Q. Did you require an explanation for petty cash checks?

A. Yes.

Q. Will you still do exactly as I told you and just count those that are drawn to cash, c-a-s-h?

A. Right.

By Mr. O'Brien: How about currency Mr. Lockley?

3520 By Mr. Lockley: There are none.

By the Witness: I counted 43, but if you wish, I will check it.

By Mr. Lockley:

Q. Well, your figures agree with mine, Mr. Meyer. So you were wrong Friday when you said there were 81 checks to cash? There are only 43?

A. That is a misinterpretation.

Q. That is no misinterpretation.

A. That is a misinterpretation of what cash is. If David Lubben checks are drawn to the order of David Lubben and he goes to the bank and endorses that David Lubben, we consider it as auditors, cash transactions because he received the cash.

Q. You didn't testify that is how you interpreted it last Friday. You said last Friday there were 81 checks to cash.

A. I said cash and the schedule says "and others."

Q. The schedule is "and others" and your testimony Friday on the first period was: "In the first period, from March 1st to June 30th, there were 81 checks to cash totaling $323,663.23"?

A. My testimony was—

Q. Was that your testimony?

3521 A. My testimony was to cash but my interpretation as to cash as an auditor may be somewhat different than yours.

Q. I am asking you if that was your testimony last Friday and not your interpretation?

A. My answer was made.

Q. All right. Now, I call your attention to this schedule which is headed "Checks drawn to cash and others", isn't it?

A. That is right.

Q. There are checks in here to Myron Roth?

A. Yes.

Q. And they were endorsed by Myron Roth?

A. And cash was received in connection with those checks.

Q. And there were checks on David Lubben?

A. That is right, and cash was received on those checks.

3522 Q. Is David Lubben—

A. Possibly the bank teller may be able to explain when he endorsed it that he received cash in connection with those checks.

Q. Why do you issue a check, Mr. Roth—or, Mr. Meyer, rather; to get cash, isn't it?

A. You issue a check in payment of bills and when we find there is cash received for it we want an explanation, as auditors.

Q. And when you get to a bank you get cash for it, don't you?

A. You get cash or you get credit for it.

Q. Will you please examine that list, schedule, 175 and 175-A, and tell me how many of those checks are drawn to cash payroll or payroll cash?

A. 15, I think it is. Unless you want me to check. If that agrees with your analysis.

Q. Isn't it a common practice for companies to issue checks to cash for the purpose of obtaining payroll cash?

A. The most common practice is to issue checks in

connection with payrolls. But it is done—it is possible that you can draw cash.

Q. And it is a perfectly proper practice, isn't
3523 it?

A. It is a perfectly proper practice and it is perfectly proper for an auditor to also check that cash against payrolls.

Q. And you did check it, didn't you?

A. That's right. That's why we investigated.

Q. It says so right on here, "Checked."

A. That's right.

Q. And you found it was all charged out to the payroll book, didn't you?

A. That's right.

Q. And it was paid out to the employees?

A. That's right.

Q. What was so unusual about checks being drawn to cash for money to pay employees?

A. We wanted to be sure the cash was distributed to the proper people.

Q. And did you find that it was?

A. In most cases, as far as I know, yes. Because we proved out the payrolls.

Q. Was that among the 81 checks that you said Friday were issued to cash?

A. Yes, it was.

Q. Did you bother to explain to the jury that
3524 there were those checks to cash included in your 81 checks?

A. I only explained what was on our schedule.

By Mr. McConnell: I object to that as argumentative, did he bother to explain it to the jury.

By Mr. Lockley:

Q. Will you look at Exhibits 175 and 175-A and tell me how many checks are payable to petty cash?

A. I picked out seven. I may have missed one.

3525 Q. Isn't it common and customary practice for concerns to issue checks for the purpose of getting petty cash?

A. Yes, sir.

Q. And weren't you able to check out those petty cash checks against the petty cash records?

A. We checked the petty cash records against the records.

Q. And was there anything unusual in issuing such checks to cash?

A. Nothing unusual, except that it had to be checked, as any other cash check had to be checked.

Q. And did you check it?

A. Yes.

Q. And you found it had been used for petty cash?

A. Yes.

Q. Nothing unusual about it?

A. Nothing unusual about petty cash checks, no, but they still had to be checked against the records and vouchers, because those items are paid out to different people in cash.

Q. But you found out that they were used for that purpose?

A. For the petty cash items, yes.

3526 Q. And now you told us Friday that there were 18 checks payable to David Lubben, is that so?

A. To David Lubben? I didn't say—I don't think I said how many were payable to David Lubben, did I?

Q. You said there was a list of checks requiring additional information.

A. I didn't say they were all payable to David Lubben, I said they required additional information.

Q. Check the number of checks.

A. Is this on the first one?

Q. On the first one, 175 and 175-A. Will you count the number of checks in which David Lubben is the payee.

A. I counted 17, but it could be 18. I may have overlooked one.

Q. Well, I counted 18. It is not too important. And were those included in the 81 checks to cash that you testified to on Friday?

A. That's right.

Q. They are actually drawn to David Lubben, aren't they?

A. And endorsed by David Lubben and considered 3527 by us to be cash.

Q. But you didn't mention that last Friday?

A. No, I didn't.

Q. Now, will you please tell me how many of those checks drawn to David Lubben's order and endorsed by David Lubben were checks charged to David Lubben's personal account?

A. I think all of them were charged to David Lubben.

Q. Is there anything improper in the president of a corporation having checks made payable to himself and having them charged to his own account?

A. On this period they were charged to his account. I think—

Q. I just asked you if they were charged—

By Mr. McConnell: Let him answer the question.

By Mr. Lockley: I didn't ask what he thought, I just asked whether there was anything improper about it.

By the Court: He may answer.

By Mr. O'Brien: I would like to have the witness, in general, permitted to complete his answer before he is interrupted.

By the Court: He may answer.

3528 By the Witness:

A. These checks, at the moment were charged to David Lubben. At the end of the audit period we analyzed David Lubben's account, and went over it with Mr. David Lubben and he—we told him about all these items in there, we had an analysis of David Lubben's account, and some of these items which were originally charged to David Lubben eventually were in the purchase account when the audit was completed.

By Mr. Lockley:

Q. And is that the list, Exhibit 176, those listed checks that you referred to?

A. Where there was seventy-four thousand, on the first period audit, where you have that—

Q. Will you examine it, 176.

A. It is 176.

Q. That's the list of checks.

A. That was a list of checks that totaled seventy-four thousand. In the first period they were charged to David Lubben's account. But when we completed the audit, we had made a summary and an analysis of David Lubben's account, and we have that in our working

3529 papers, and from that analysis there were certain adjustments made. And those adjustments were made

at the last audit and we talked with Mr. Lubben about his account and made our entries accordingly.

Q. Have you got Exhibit 176 in your hand?

A. Yes.

Q. And that is headed "A list of checks requiring additional information."

A. That was after we had already inquired about it.

3530 Q. Will you just answer the question, please, Mr. Meyer? I asked you if that is headed "List of checks requiring additional information."

A. Yes.

Q. And there are 18 checks, is that correct?

A. No, there aren't 18.

Q. 23 checks?

A. 15 on that, I think, for the seventy four thousand, if I count right.

Q. There is a total of 23 in all, I believe, Mr. Meyer?

A. Yes, but some of them were charged in other categories.

Q. And of those 23 checks $74,000.00 was transferred to Mr. Lubben's personal account and he was charged for them, isn't that so?

A. That's right.

Q. Is there anything wrong in that?

A. There is nothing wrong in that.

Q. As a matter of fact, by charging them to his personal account he became liable for any income—

A. He became liable for that period, until we analyzed his personal account, and then we had to charge other

3531 accounts because he specified that many of those checks were in payment of purchases.

Q. Not the seventy-four thousand?

A. Yes, the seventy four thousand. At the end of the audit some of those $74,000.00 checks eventually found their way into purchases.

Q. And he satisfactorily explained those, didn't he?

A. He explained them, yes, by verbal notes only.

Q. Were you satisfied with them; were you satisfied with the explanation?

A. For the audit, the explanations, we had to make entries on those seventy-four thousand—

Q. I asked you: Were you satisfied with them, Mr. Meyer?

A. At the time we were satisfied with them.

Q. You prepared a certified public accountant's statement on the basis of it, didn't you?

A. That's right.

Q. You prepared his tax return on the basis of it, didn't you?

A. Not his tax return.

Q. General Confections.

A. I mean we prepared the corporation's tax return, which was a separate entity from Mr. Lubben.

3532 Q. If you weren't satisfied with the explanation would you have signed that income tax return and the certified public accountant's statement?

A. We had to be satisfied with his explanation.

3533 Q. Now, you look at Exhibit 175 again, and on line 13 you find an entry, "Our Lady of Bethlehem Academy, a thousand dollars," endorsed by Our Lady of Bethlehem Academy. Is that a check to cash?

A. No, it is not a check to cash.

Q. Was it included in the 81 checks that you mentioned?

A. Yes, because we wanted an explanation.

Q. And you got an explanation, didn't you, that that was a donation?

A. That's right.

Q. And it was endorsed by Our Lady of Bethlehem Academy?

A. That's right.

Q. Did you have any question as to whether or not this money went to Our Lady of Bethlehem Academy?

A. No.

Q. Go over on Exhibit 175-A, about seven lines from the bottom of the page, you find a notation M. Cohen, 25 checks, $1,000.00 each, $25,000.00, endorsed M. Cohen, and charged to Loans Payable. Now, were those checks to cash?

A. That is not a check for cash.

Q. It is a check to M. Cohen?

3534 A. That's right.

Q. Did you include that in the 81 checks you mentioned?

A. Because we had to get additional information for our audit in connection with that check.

Q. And to what account were those 25 checks charged?

A. To the accounts as listed at that time, but they may have been adjusted.

Q. I am not asking what they may have been. What is it charged to on the work sheet?

A. On the work sheet—at that time it was charged there—

Q. How is it charged?

A. To the account named.

Q. And what is that?

A. In this one particular, the Mike Cohen check was charged to Loans Payable.

Q. And is there anything improper in issuing checks to somebody for a loan and setting up as a loan payable?

A. No.

Q. As a matter of fact, when you said there were 81 checks to cash Friday you were somewhat in error, weren't you?

3535 Well, Mr. Meyer?

A. I didn't hear the question.

Q. I said when you told the Court and the jury there were 81 checks to cash issued Friday you were in error?

A. Cash and other.

Q. You didn't say "and other", did you?

A. I am amplifying my statement to mean other, because the schedules prove it is such.

Q. I am glad to hear that now. Now, again on page 3449 you said that there was inadequate information for 28 checks totaling $150,599.13?

A. That's right.

Q. Is there any notation on this Exhibit 175 and 175-A which indicates the 28 checks on which there was inadequate information?

A. No, you would have to have the numbers, and then you could see that we questioned—for that matter, we questioned all of these checks.

Q. Can you tell me today from examination of this work sheet, 175 and 175-A, which of the 28 checks—which 28 checks are questioned?

A. Well, I drew them off.

Q. Do you know which ones they are?

3536 A. I know the ones that we questioned. I went through it and checked out to be sure that—

Q. When did you draw them off?

A. About a year ago.

Q. So you remembered a year ago that back in '47 you questioned 28 of these checks?

A. We questioned 28 to get additional information. I went through my work papers.

Q. How were you able to tell a year ago which ones of these checks were the 28 you questioned.

A. I examined my work papers and made that list.

Q. You were relying on your recollection, is that it?

A. To a certain extent.

3537 Q. Is there anything on Exhibit 175 and 175-A which says "This check questioned"?

A. No, there isn't, but there are explanations here showing everything that was questioned. This schedule was set up right up to "charge to account", and actually we went down and questioned either Mr. Lubben or Miss Feldman on all these checks.

Q. And did you get an explanation for each one of those 28 checks?

A. No, not all of them, some of them.

Q. Which ones didn't you get an explanation for?

A. We did not get an explanation—we inquired about these 28. We eventually got verbal explanations, finally, possibly. There are some lines there that are still not filled in.

Q. I hope I understand you correctly. But you say that you questioned 28 of these in 1946, and you got verbal information from Mr. Lubben or Miss Feldman on a part of the 28, is that correct?

A. That's right.

Q. And were you able to recall last year the 28 checks out of the 81 which you questioned back in 1946?

A. There are marks here and I looked at each
3538 checks and went through—

Q. That isn't what I asked you. I asked you if there was anything on this sheet.

A. I had a list of the checks. I went through the working papers.

By Mr. Kirby: Just a minute, Mr. Meyer. I insist, if I may, that the witness be permitted to answer his questions, so that—

By the Court: Are they marked on that sheet. That is what he asked.

By the Witness:

A. There are markings here. But I went through this and picked out the 28 that—at the time when I looked at it, where the explanations are.

By Mr. Lockley:

Q. Will you show me which ones are marked; where are the markings?

A. There are no markings on the paper.

Q. That is all I asked you, Mr. Meyer. Are there markings on this paper.

A. No.

Q. Markings which can tell you which of the 81 checks you questioned back in '46. I made a listing of the checks I looked at.

3539 Q. When did you make a list of it?

A. About a year ago.

Q. Did you have anything else other than 175 and 175-A at that time by which you could refresh your recollection?

A. Nothing outside of possibly audit notes that are with our working papers. But this was the main schedule I examined. This was the schedule I looked at to get a list of those checks.

Q. Did you bring your audit notes with you?

A. The audit notes are with our working papers. I would have to check into that to see if there was any additional information. But that schedule is actually the schedule we used when we talked with Lubben and Miss Feldman.

Q. You mean then that a year ago you looked at Exhibits 175 and 175-A and you were able to tell which ones of these 81 checks you had questioned back in 1946?

A. That's right.

Q. All right. Now, here is check No. 137 in the amount of $150.00—pardon me, 37—that was charged to the petty cash account.

A. That's right. We questioned that.

3540 Q. You questioned that. You got a satisfactory explanation, didn't you?

A. Yes.

Q. So that is one less of the 28. And here is one check, No. 81, for $2,500.00, endorsed by Freda Strum, and charged to sundries for deposit on 800 bags of dex-

trose, see checks Nos. 108 and 453, amount to seventy-two and seventy-five hundred. That is one of the checks you questioned, is it?

A. If it is on the list, it must be.

Q. And you got an explanation for it, didn't you?

A. That's right.

Q. And were you satisfied with that explanation?

A. Yes.

Q. That is one less out of the 28, isn't it? All right. Then the next one is No. 112, a check to cash in the amount of $38.29, endorsed by Freda Strum and charged to petty cash. You got an explanation for that, didn't you?

A. That is right.

Q. And you were satisfied, weren't you?

A. That is right.

Q. That is one less from the 28. The next one
3541 charged is drawn to David Lubben, endorsed by David Lubben, charged to Loans Receivable, and the explanation, "Charge to Loans Receivable," David Lubben. You got an explanation for that, didn't you?

A. That's right.

Q. And you were satisfied with the explanation, weren't you?

A. That's right.

Q. That is one less.

A. It was still questioned, of course. We questioned him about it.

Q. Were you satisfied with it?

A. That's right.

Q. After you questioned him, you were satisfied?

A. After I questioned them, I was satisfied.

Q. Were there any of the 28 checks you had questioned that weren't eventually explained to you?

A. Read the numbers there. Can I see my work sheet?

Q. We will go down them all, if you just bear with me for a few minutes.

A. Let me have my work sheet and I can give you the ones there is no explanation here. You can see it right on your schedule.

3542 Q. We can't both work on it at the same time, so I will read them off to you.

Check No, 178 is another one to David Lubben, endorsed

by David Lubben, charged to David Lubben, with the information, "Charge to David Lubben, no details."

Now, did you get a satisfactory explanation for that check?

A. It says "No details" there. I may have gotten an explanation.

3543 Q. So you didn't get a satisfactory explanation?

A. Well, I got an explanation at the time and had to be satisfied with it at that moment.

Q. And if you weren't satisfied, it was charged to David Lubben, anyway, wasn't it?

A. That's right, at that moment.

By Mr. Kirby: If the Court please, Mr. Lockley has refused to allow the witness to see the witness's work papers, which are in evidence. May I hand him a copy?

By the Court: He obtained the information from the exhibit that he has before him.

By Mr. Kirby: You have a photostat?

By the Witness: Yes.

By Mr. Kirby: I misunderstood. I apologize. When he asked for it, I thought he was asking for something—

By the Witness: I am thinking about my other sheet.

By Mr. Kirby: —something which he did not have.

By Mr. Lockley: And which he did not turn over to the Government last Friday.

3544 By Mr. Kirby: By the way, could I look at 176, Mr. Lockley, while you are examining about 175?

By Mr. Lockley: You have the original.

By Mr. Kirby: I don't know the order in which you numbered them.

By the Court: Proceed with the examination.

By Mr. Lockley:

Q. The next check is No. 249, that is drawn to David Lubben, endorsed by David Lubben, charged to David Lubben. Were you satisfied with the explanation you got on that check?

A. Just one moment, please.

By Mr. McConnell: I object to this question. I don't know what difference it makes, whether the auditor is satisfied because he got an oral explanation from Mr. Lubben of what he did with the money.

By the Court: Overruled.

By Mr. McConnell: I don't see how it applies to us.

By the Witness:

A. At the time I was satisfied.

By Mr. Lockley:

3545 Q. And it was charged to Mr. Lubben?

A. It was charged to Mr. Lubben at that time.

A. And Mr. Lubben was the president of the company?

A. That's right.

Q. And it wasn't charged to Shotwell, it wasn't charged to accounts payable, it wasn't charged to purchases?

A. No, not at that time.

Q. It was Mr. Lubben's income?

A. Not at this particular audit.

Q. Do you recall that that particular check was ever transferred back into the books of account?

A. An analysis of David Lubben's—

Q. Do you recall that that particular check was ever transferred back into the general books of the company out of Mr. Lubben's personal account?

A. I would have to refer to David Lubben's analysis to say the answer to that question.

Q. You don't recall?

A. No. I would have to look at the analysis of David Lubben's account.

Q. Well, maybe we can save a little time. Will you go down the remainder of those 28 checks and tell
3546 me which ones you did not eventually get satisfactory explanations for?

A. There was a check for—330—$6,000.00.

Q. Check No. 330. All right. That is one.

A. There was no explanation about it, but it was charged to David Lubben.

3547 Q. Was it charged to Shotwell?

A. No.

Q. Or purchases?

A. No, it was not. The same applies to 331, six thousand. It was charged to David Lubben.

Q. All right.

A. There were no other explanations about 375 and 379, each in the amount of $3,000.00.

Q. And how were they charged?

A. They were charged to David Lubben.

Q O. K.

A. And the same applies to 451 in the amount of $2,000.00.

Q. And how was it charged?
A. David Lubben.
Q. It wasn't charged to Shotwell?
A. It wasn't charged to Shotwell.
Q. It wasn't charged to accounts payable?
A. It was not.
Q. It wasn't charged to purchases?
A. It was charged to David Lubben.
Q. All right.
A. Check No. 708.
Q. All right.
3548 A. $8,191.84.
Q. How was that charged?
A. It was endorsed by David Lubben and Roy Hankermyer, and it was charged to David G. Lubben. There was no explanation on the schedule on it.
Q. That wasn't charged to Shotwell or purchases?
A. It was charged to David Lubben.
Check No. 803 in the amount of $2,000.00, endorser, David Lubben, and it was charged to David Lubben, but there was no explanation of it.
Q. All right.
A. Check No. 877, a thousand dollars, endorser, David Lubben, charged to David Lubben. There was no explanation on it.
Check No. 946 to cash, $4,000.00, was endorsed by David Lubben, and it was charged to David Lubben.
Check No. 962—that is not the one—check No. 966, David Lubben, $2500.00, endorser, David Lubben, charged to David Lubben.
Check No. 0637—I think it is—David Lubben, $3,000.00; endorser, David Lubben; charged to David Lubben.
And check No. 0716, David Lubben, $23,000.00, was
3549 endorsed by David Lubben, charged to David Lubben. It was outstanding on June 30, 1946.
Check No. 0731, $1500.00, David Lubben, charged to David Lubben, no explanation.
Q. So in every one of those cases I recall where you had mentioned that you got no explanation, the check ended up being charged to Mr. Lubben's personal account?
A. In that first period audit.
Q. And there is nothing improper with the president

of a corporation drawing a check and charging it to himself, is there?

A. Except that we want to get the information.

Q. I am just asking you for an answer to that question. Is there anything improper in it?

By Mr. Kirby: It might very well be improper.

By Mr. Lockley: He may answer it yes or no.

By the Court: He may answer. He is speaking from an obvious standpoint.

By the Witness:

A. Let me answer it the way I can then.

By Mr. Lockley:

3550 Q. I want you to tell me whether there is anything improper about a president of a corporation drawing a check to himself and having it charged to himself on the accounts of the—on the books of the company?

A. There is nothing improper in drawing it, but we like—as auditors we want an explanation about the check.

Q. And did you get an explanation on these?

A. The ones I listed, where it says "no explanation" I didn't get an explanation.

Q. So if you didn't get an explanation it remained charged to him, didn't it?

A. On the first period audit only.

Q. That is what we are talking about right now, is the first period audit.

3551 So, instead of having 28 checks on which you didn't get any adequate explanation, you ended up with how many? None at all. You got explanations for all of them, didn't you?

A. We questioned those checks, those 28.

Q. You questioned 28?

A. That is right.

Q. And you got explanations for all 28?

A. That is right.

Q. You were satisfied with those explanations?

A. On the first period audit only.

Q. We are talking about the first period audit only.

A. Right.

Q. You were satisfied with those explanations?

A. At the time.

Q. So when you said Friday there were 28 checks for

which you didn't get explanations, you were wrong, weren't you?

A. I considered questioning at the time that we questioned them about that. We did—

Q. You didn't tell us that.

A. Those were the list that I gave as check questioned.

3552 Q. Are those charged off—are any of those checks charged off to Shotwell in that period?

A. I didn't see any; unless there were general entries in connection with it, but from this schedule I did not see any against Shotwell.

Q. When you went to Mr. Lubben and asked him for an explanation for these various checks, he didn't tell you, "Why, that is money I sent to Shotwell—I gave to Shotwell"?

A. I did not see the name of Shotwell on any of those exhibits—on that exhibit I looked at.

By Mr. McConnell: I don't believe the witness has answered the question. He asked whether or not he told him any of those were charged to Shotwell.

By the Witness: I said no. I don't see any name "Shotwell", or any charge against "Shotwell" on this schedule.

By Mr. Lockley:

Q. Now I call your attention to check No. 906 dated June 18, 1946 for $27,000.00.

A. Oh, I see, yes. There is one check.

Q. And that carries the explanation, endorsed by David Lubben, charged to accounts payable, pur-

3553 chases from Shotwell?

By the Court: Which period is that, now?

By the Witness: That is in the first period.

By Mr. Lockley:

Q. The first period. The witness was in error when he said they were not charged to Shotwell.

A. I see one now in the information, one charged, purchases from Shotwell.

Q. There is an adjusting journal entry, isn't there?

A. That is right.

Q. And it says that the information on your Exhibit 175-A refers to that $27,000.00 as "Purchases from Shotwell".

Now, I show you Government's Exhibit No. 153, a check from General Confections to David Lubben for $27,000.00, dated June 18, 1946, and endorsed by him. Is this the $27,000.00 check listed on Exhibit 175-A?

A. Yes.

By the Court: Which exhibit is that, please?

By Mr. Lockley: It is Exhibit 153, your Honor. It is in evidence.

3554 By Mr. O'Brien: What was the date of the check, Mr. Meyer?

By the Witness: Pardon?

By Mr. O'Brien: That date of the check.

By the Witness: The date is June. It looks like June 18th, or I think it is on the 16th. June 18th.

By Mr. Lockley:

Q. And that is the date for the $27,000.00 check on your work sheet, is it not?

By Mr. O'Brien: May I have the date, Mr. Lockley?

By Mr. Lockley: June 18th, he told you, Mr. O'Brien, 1946.

By Mr. O'Brien: Thank you.

3555 By Mr. Lockley:

Q. All right. I show you Government's Exhibit 153-A which is a cash authorization slip with General Confections dated June 17, 1946 and which reads "Paid to cash. Amount, $27,322.67, for 2,059 cases, two dozen each, one pound chocolates. Sold to McDonald Candy Company and Billy Barron" and bearing the notation "McDonald 1,989 cases and Barron 70 cases."

I ask you if that is not the cash authorization slip to support Government's Exhibit 153?

A. That is the cash authorization slip.

Q. Now, I show you Government's Exhibit 151 which is a bill of lading for 1,989 cases of candy to McDonald Candy Company and 152, a bill of lading for 70 cases of candy shipped to William Barron, both of which have been identified as shipments on which no invoices were rendered by the Shotwell Manufacturing Company.

Are those bills of lading the documents which reflect the shipments shown on Exhibit 153-A?

A. That is right.

Q. So that when you questioned Mr. Lubben about the

$27,000.00 check shown on your work sheets, he
3556 was able to show you a check, a cash authorization slip?

A. That is right.

Q. And two bills of lading to support the purpose for which that $27,000.00 check was issued, isn't that so?

A. That is right.

Q. That was satisfactory to you, wasn't it?

A. That is right.

Q. Are you now satisfied that that $27,000.00 was issued for the purchase of the candy shown on those bills of lading?

By Mr. O'Brien: I object to the question.

By the Court: You mean as an auditor?

By Mr. Lockley: Yes.

By the Court: He may answer.

By the Witness:

A. As an auditor, yes.

By Mr. Lockley:

Q. And was the certified statement that you prepared based upon information shown on the Exhibit 153-A, the cash authorization slip?

A. That is right.

3557 Q. And is the tax return that you prepared for the General Confections based upon your certified statement?

A. Yes.

Q. Now, this was also mentioned Friday that the checks for $2300.00, Government's Exhibits 92 and 93 endorsed by Mr. Heitmann and Mr. Urban and shown on your work papers, Exhibits 175 and 175-A, as used for the purchase of 25 drums of liquid syrup, will you please look at that Exhibit 175 and Exhibit 175-A and tell me how many $2300.00 checks appear on it?

A. I counted five.

Q. Five of them. And all of them bear the same explanation, for 25 drums of liquid syrup, don't they?

A. I didn't look at the explanation, but I will. That is right.

Q. Do you recall whether Miss Feldman or Mr. Lubben gave you that information?

A. I can't say whether it was Miss Feldman or Mr. Lubben, either one of them. I talked to both of them

but there is no way of identifying it on the schedule, whether Mr. Lubben or Miss Feldman gave it to me.

3558 Q. Did Mr. Lubben usually refer you to Miss Feldman for such explanations?

A. Well, I had a number of conferences with Mr. Lubben. I may have talked a few more times with Miss Feldman and Mr. Lubben.

Q. Well, both of them gave you some explanation?

A. That is right, but I couldn't actually go down and say which ones Mr. Lubben gave and which ones Miss Feldman gave.

Q. Now, those checks were issued in April, weren't they, those two checks for $2300.00 which were endorsed by Heitmann and Urban?

A. That is right. I think the number—is the number 396 and 474? Are those the ones you have reference to?

Q. That is correct. Both in April.

A. That is right.

Q. Now, Miss Feldman wasn't working at General Confections in April, was she?

A. The check was drawn in April. Don't forget we only started our audit in August.

Q. That is right. You talked about it in August?

A. That is right.

3559 Q. The checks were drawn in April?

A. That is right.

Q. Miss Feldman wasn't working in General Confections when the checks were drawn?

A. That is right, but Miss Feldman may have drawn cash authorization slips when Mr. Lubben wasn't there, if she had the information.

Q. There were three other checks all for $2300.00 and all for 25 drums of syrup?

A. That is correct.

Q. It is perfectly possible Miss Feldman may have assumed those two checks here for the same purpose?

A. I can't assume anything. I have to take our audit program. That is how the audit schedule was maintained throughout. We proceeded on the basis of an audit program and followed that audit program.

3560 Q. Now, will you please take Government's Exhibits 177 and 177-A and B. They relate to the second period of your audit, do they not?

A. That is right, July to October.

Q. And that is also headed "Schedule of checks drawn to cash and others"?

A. That is right.

Q. And you testified, I believe, Friday—is this correct—in the second period there were 131 checks drawn to the order of cash totaling $286,506.13.

Now, it is almost time for recess so I won't ask you to check now but when we have our recess time, I wish you would count for me the checks under the payee column which are actually drawn to cash and let me know if there are 131 checks.

At the same time will you also count for me the number of checks drawn to payroll cash and the number of checks drawn to petty cash so that we may proceed with your testimony after the period.

By Mr. O'Brien: Mr. Lockley, I suppose the witness himself, as much as anybody, should have some recess.
3561 I mean, he shouldn't have to employ all his time going over it.

By Mr. Lockley: All right. I have already counted them but I didn't want to use my mathematics.

By the Court: Proceed.

By Mr. Lockley: Well, according to my calculations on that Exhibit 177 and 177-A and B—

By Mr. Lockley:

Q. Mr. Meyer, there are 43 rather than 133 checks drawn to cash. Will you check to see if that is correct?

A. The question means exclusive of checks that say cash and then are drawn, that are charged to petty cash, is that correct?

Q. That is correct. Just where the payee is cash.

A. It could be in the neighborhood of 43, that is right.

Q. So there weren't 131 checks drawn to cash?

By Mr. McConnell: I object to that as argumentative. It gets back to the question of whether the checks were
3562 negotiable instruments. The negotiable instruments law doesn't agree with counsel.

By the Court: Mr. Lockley, do you mean there were not 131 checks drawn to cash as payee?

By Mr. Lockley: This witness did not tell us the balance of those checks were drawn to various others.

By the Witness:

A. It is a matter of interpretation, what we consider cash and what a lawyer considers cash, as far as the payee.

By Mr. McConnell: The negotiable instruments law says a check drawn that way is a check drawn on currency. He has a right to state it.

By Mr. Lockley: He did not state it Friday.

By Mr. McConnell: He is trying to.

By Mr. Lockley: He didn't do it last Friday.

By Mr. McConnell: You are trying to confuse him.

By the Court: My notes said there were cash checks drawn to cash. He now explained what he means by
3563 it, but they were not payable to cash as such, all of them.

By Mr. Lockley:

Q. Will you check. I believe that you will find that there are 28 of those checks which are drawn to payroll or payroll cash.

A. I see quite a few and I assume 28 is right. I haven't checked either one.

Q. According to the information column upon your work sheet, you checked those to the payroll account, didn't you?

A. That is right.

Q. And you found that these checks for payroll were actually used to pay employees, didn't you?

A. That is right.

Q. And there is nothing sinister about drawing a check for that purpose?

A. There is nothing sinister about that.

By the Court: I think we will take our morning recess. We will suspend for ten minutes.

By the Marshal: Will the audience remain standing while the jury and Judge leave the court room.

3564 This honorable court will now recess for ten minutes.

(Whereupon a recess was taken.)

3565 By the Witness: Did you want these documents?

By Mr. Lockley: You can hang onto them. I will talk about petty cash checks next. There are eight of them. You take your time.

By the Witness: I would like a drink of water.

By Mr. Lockley: Go ahead.

By the Marshal: This Honorable Court will now resume its session.

By Mr. Lockley:

Q. Mr. Meyer, I have checked Exhibits 177 and 177-A and B and I find that there are eight checks to petty cash, is that correct?

A. I counted more than eight in the three pages.

Q. Yes.

A. I think there are more than—

Q. There are eight payable to cash. I believe you are correct. There are more actually charged to petty cash but only eight drawn to the order of petty cash?

A. I was looking in the charge to account.

Q. I think there are about 15 of them that are 3566 charged to petty cash.

A. That is right.

Q. Did you verify those charged to petty cash with the petty cash records?

A. Yes.

Q. Did you find that the records were in agreement with those checks?

A. We made—we checked them against the various petty cash vouchers and things and we agreed with it.

Q. So that you had a satisfactory explanation for those checks?

A. That is right.

Q. And the balance of the checks on Exhibit 177 and 177-A and B are all drawn to various natural persons, David Lubben, Roy Hankermeyer, H. E. Harmer, Mike Cohen—in fact, there are about 37, as I count them, that are drawn to either David Lubben or Roy Hankermyer or Mike Cohen or some other natural person, isn't that so?

A. That is right.

Q. They are not drawn to cash?

A. That is right.

Q. Now, at page 3452 of the transcript, did you 3567 testify last Friday at the second period 16 of those checks were questioned totaling $84,620.00?

A. That is right.

Q. Now, how many of those 16 checks were satisfactorily explained when you asked Mr. Lubben or Miss Feldman?

Mr. Meyer, did you work up a work paper recently showing those 16 checks which were questioned?

A. My work sheet was made up about a year ago,

the same as the other one, in the same fashion and I have the 16 checks totaling $84,620.90.

Q. From what information did you select those 16 checks a year ago?

A. Because they were the ones, to my recollection, we questioned and extended explanations that were necessary for the proper auditing of the books.

Q. And do you remember those—

A. For example on the one —take the first, 0742. There was a $26,000.00 item with David Lubben endorser and there was accounts payable—well, it says "Drop shipments, Shotwell" and there is a "J. E. 66" after that.

Q. And that indicates?

3568 A. And that "J. E. 66" indicates that that check was paid to David Lubben and charged to accounts payable. The endorsement was David Lubben and from this schedule, I would say it was charged to accounts payable against Shotwell for a drop shipment and the payment would be on July 3, 1946, and by referring to the journal entry, I would say—I would have to look at that journal entry. I haven't a reference. If I could look at the journal entry, I may be able to explain why a journal entry was made.

Q. Well, now, nonetheless, you were satisfied at the time you prepared this work sheet that that was an adequate and proper explanation for the $26,000.00 check, is that so?

A. That was an adequate explanation and it occasioned another journal entry with the journal entry 66.

Q. Is there anything wrong with making a journal entry?

A. Well, from the journal entry 66, the only thing I can actually say is—well, from this, there was an adjustment necessarily on the basis of the explanation.

3569 Q. So when you made a journal entry, you were satisfied, weren't you?

A. That is right. I had to make a journal entry to complete, possibly, this transaction.

Q. So that journal entry was eventually reflected in your certified accountant's statement?

A. That is right.

Q. Do you recall all 16 checks which were questioned or is there something on Exhibits 177-A and B which reflects which 16 checks you had in mind?

A. Well, I took off the checks and inquired about them and listed them. This was about a year ago—similar to that statement.

3570 Q. Well, what I am trying to find out is, is there something on Exhibit 177-A and B and Exhibit 177 which shows without your reference of a year ago which ones of these 131 checks were questioned?

A. No. There are no marks on here to indicate which ones were inquired about. I looked down and checked the ones to my recollection were inquired about.

Q. So you were able to remember 16 checks out 131?

A. That is right.

Q. Last year?

A. There may have been more, I don't know. Those were the ones that I looked at, that I looked into and questioned.

Q. Well, now, did you get a satisfactory explanation on those 16 checks which were questioned?

A. From the schedule, I would say we finally got, in that audit period, we got an explanation about those checks.

Q. And every check was explained to your satisfaction, is that correct?

A. At the time.

Q. You made journal entries whenever necessary?

3571 A. The schedule shows that, sir.

Q. And as a certified public accountant, you wouldn't make such a journal entry unless you were satisfied it reflected the correct information, would you?

A. That is right.

Q. And you wouldn't have issued a certified statement based upon those journal entries unless you were satisfied it was correct, would you?

A. That is right.

Q. Now I show you Government's Exhibit for identification 156 and 156-A, and I call your attention to journal entry No. 104 which is on Exhibit 177-B. Now does that check Exhibit 156,—or is that check the same check which is reflected on your work sheet for $7500.00?

A. I think that check, $7500.00, August 29th—let's see. It is on Exhibit 177-A and not B.

Q. All right, sir. Thank you. Is that check which you hold in your hand the same check which is reflected on Exhibit 175 or 177-A?

A. Yes, and it is $7500.00. Let me check the endorser. The endorser is David Lubben.

By the Court: Speak up, Mr. Meyer.

3572 By the Witness: The endorser is David Lubben. It is a check drawn to cash, $7500.00. The endorser is David Lubben. It was charged to accounts payable. It says "Part payment". I can't read that but then it says "Shotwell" after that.

By Mr. Lockley:

Q. "Part payment on merchandise from Shotwell included in our JE 104"?

A. Right.

Q. That JE 104 refers to Journal Entry No. 104, is that correct?

A. That is right.

Q. I also call your attention to an exhibit 157 and ask you if that is a cash authorization slip for $7500.00.

A. That is a cash authorization slip for $7500.00.

Q. And does that bear any relationship to Exhibit 156, the cash check for $7500.00?

A. That is right. That is the cash authorization slip involved.

Q. Do you recognize having seen that cash authorization slip before?

A. Yes, I saw this cash authorization slip before.

3573 Q. Did you see the check before?

A. I may have not seen it but one of the accountants under my supervision may have examined it in connection with the schedule drawn up because I notice this schedule is not in my handwriting.

Q. After having seen cash authoriaztion slip 156-A, were you satisfied that that $7500.00 on that check was used for purchases from Shotwell?

A. That is right.

Q. And you so treated it on the books of the company?

A. And so made it on the journal entry No. 104.

By Mr. O'Brien: What was the date?

By the Witness: August 29, 1946.

3574 By Mr. Lockley: At this time, your Honor, I offer Government's Exhibits 156 and 156-A.

By Mr. Lockley:

Q. So out of 131 checks which were questioned on this schedule of checks drawn to cash and others and out of the 16 checks which you required further explana-

tion on, you eventually received satisfactory explanations for all, is that correct?

A. For that audit period, yes.

Q. Will you please examine the work sheet for the next audit period, Exhibit 178 and 178-A.

By Mr. O'Brien: Mr. Lockley, I have some exhibits here.

By Mr. Lockley: I am sorry, Mr. O'Brien.

By Mr. O'Brien: I have no objection to the items themselves, your Honor. That is, I don't question the documents, but before responding to the offer, I would like to check these against the prior government's proof.

By the Court: Very well. I will defer my ruling.

By Mr. McConnell: I want to note my objection that I made to this offer.

3575 By the Court: Very well.

By Mr. Lockley: I am afraid, sir, I don't understand the scope of Mr. McConnell's objection.

By the Court: I don't either.

By Mr. McConnell: I object to all of these cash authorization slips as self-serving and not binding on Shotwell. I made that objection all the way through and I want to renew it.

By the Court: The objection is overruled.

By Mr. Lockley:

Q. Now, in the third period you have work papers number—or Exhibit 178 and 178-A, is that correct, Mr. Meyer?

A. That is right.

Q. And your work papers show the dates of each check, don't they?

A. That is right.

Q. So when you testified Friday that you didn't have a breakdown for the month of November and December it was just that you hadn't added up those months separately, isn't that so?

3676 A. That is right.

Q. Now, you testified Friday at page 3456 the third period covered from November 1st to February 28, 1947—51 checks drawn to the order of cash totaling $145,875.91. 29 of these checks were questioned, total $71,725.77, is that correct?

A. That is right.

Q. Now, this is a schedule of checks likewise drawn to cash for others, is it not?

A. That is right.

Q. And it actually shows that instead of there being 51 checks to cash, there are 22, doesn't it?

A. Well, we come back to the interpretation of an auditor's and a lawyer's ideas of cash.

Q. Well—

A. And your idea would not be mine. Your idea would be 22 and in my idea it would be the number mentioned.

Q. Well, let us look half way down the page. On December 2nd there are two checks No. 1866 and another one 1867 and another one 1868, all of which are drawn to the order of Michael Cohen and endorsed by Michael Cohen. Now, is Michael Cohen synonymous with cash in accounting language?

3577 By Mr. Kirby: He was in New York.

By the Witness:

A. As far as we were concerned, it was synonymous with cash at that time, because—

3578 Q. Did Mike Cohen have any ownership in the General Confections?

A. In General Confections—not that I know of. He didn't have ownership in General Confections although he may have had ownership in Reserve Trading Corporation which was a subsidiary. I don't—actually it was in the corporation that Mr. Lubben was in.

Q. And were a number of checks drawn to Saddle River Farms, endorsed by Saddle River Farms—is that synonymous with cash?

A. Saddle River Farms was owned by Mr. Lubben and it was synonymous with cash as far as our auditing program was concerned.

Q. But the checks weren't made out to cash. They were made out to Michael Cohen, weren't they?

A. That is right.

Q. And to Saddle River Farms?

A. That is right.

Q. So that when you testified that there were 51 checks drawn to cash, you were inaccurate, weren't you?

A. My idea of cash differs from yours.

By Mr. McConnell: I object, your Honor.

3579 I object to it as argumentative. He is arguing with the witness.

By the Court: You may answer.

By Mr. Lockley.

Q. Did you tell the Judge and the jury what your

interpretation of cash checks was, what your interpretation of checks drawn to cash was, last Friday?

A. Nobody asked me for my interpretation. I am giving it to you now and I am giving it to you from any auditor's viewpoint.

Q. In fact, there are nine checks to Mike Cohen, aren't there, and six checks to Saddle River Farms?

A. I see the Saddle River Farms. I didn't check the nine for Michael Cohen but will do so if you request.

Q. Will you do so? Will you also check the number of checks drawn to David Lubben?

A. I agree with the nine checks to Michael Cohen.

Q. And are there 12 checks to David Lubben?

A. I didn't count 12. I don't count 12 to David Lubben so far as payee is concerned.

Q. How many do you count, Mr. Meyer?

By Mr. McConnell: I think it isn't clear what the question is. It isn't clear whether he is asking whether
3580 Lubben got the money or—

By the Court: He is asking whether or not it is payable to David Lubben.

By Mr. McConnell: Meaning the payee of the check?

By the Court: Yes.

By the Witness:

A. The payee of the check. I count six to David Lubben.

By Mr. Lockley:

Q. I accept your correction, Mr. Meyer. I may have been wrong. Now, you testified that there were 29 checks questioned in this period totaling $71,725.77?

A. That is right.

Q. Is there anything on Exhibit 178 and 178-A which shows which checks you questioned at the time you prepared it?

A. No, there is nothing on there.

Q. So, you are relying upon your recollection of a year ago as to which checks you had questioned back in 1947, is that correct?

A. That is right, by the means of different handwriting in this case, possibly.

3581 Q. Did you get an explanation for any of those 29 checks?

A. Yes, we got an explanation and charged it according to our explanation.

Q. You got an explanation for all of them, didn't you?
A. That is right.
Q. And you were satisfied with that explanation, weren't you?
A. At the time, yes.
Q. And you prepared your audit report on the basis of that explanation and your satisfaction with it?
A. That is right.
Q. You made journal entries, I assume?
A. That is right.
Q. And you prepared an income tax return for General Confections?
A. That is right, we prepared an income tax for General Confections because on the basis of all these cash checks that Mr. Lubben gave us explanation about, we accepted what he gave. We couldn't verify who he gave the cash to after he received it but we had to accept it on the basis of the explanation.
3582 Q. Well, as a certified public accountant, would your firm have signed an income tax return if they had any doubt whatsoever as to the accuracy of the return?
A. We had no doubt as to the accuracy of the return, as far as General Confections was concerned. He received the money, possibly from the bank; other people got all this money from the bank. And General Confections—we certified to General Confections as a separate entity from Mr. Lubben, personally.
Q. And all these entries were in the General Confections books, is that right?
A. That is right.
Q. And you put them on there?
A. I did not put them on there.
Q. You put the journal entries there?
A. Well, journal entries were put on our work papers. The journal entries were given to Miss Feldman. In some cases she did not put them on as a journal entry but may have put them on in the book of original entry, as a cash disbursements book, as a purchase book, as something else, but we gave Miss Feldman these journal entries. I couldn't testify that we put them on. Our audit—
Q. But if you didn't put them on yourself you
3583 gave the information to Miss Feldman and she put them on?

A. That is right.

Well, let me correct you. Our statement is based upon our work papers and not on the books. We make separate work papers and prepare our audit from our work papers.

Q. But your work papers were based on the books, weren't they?

A. Our work papers were previously based on the books. Then we come along with adjustment, adjust our work papers, make our auditing statements and certified statements on the basis of our work papers, then make our tax return on the basis of our work papers.

Our last procedure is to give to the bookkeeper or accountant in charge of the specific audit in charge of the specific corporation, a usually typewritten copy of all the journal entries to bring the books in line with our audit and with the tax return.

Q. That was a perfectly proper way of proceeding?

A. I believe that is the usual procedure of accountants both in New York City and other states in the

3584 Union.

Q. Now, was there a single check in this third period shown on Exhibits 178 and 178-A as charged against Shotwell for purchases?

A. I havn't seen the name Shotwell in this list.

Q. So that when Mr. Lubben or Miss Feldman explained these various checks to cash were expended for, they didn't tell you it was Shotwell in every case, did they?

A. No.

Q. And not in any case, as a matter of fact?

A. Not in any case in this particular period.

3585 Q. Will you tell me what is the difference between a certified public accountant and a public accountant?

A. A certified public accountant is registered with the particular state as being capable of preparing an audit and he certifies to it that that audit has been in accordance with the laws of that state. And it gives a sort of authority, in the sense that certain audit procedures have been executed to the best of his knowledge and belief.

Q. And there is a high standard of ethics among certified public accountants, is there not?

A. There is a high standard of ethics among all certified public accountants.

Q. When a certified public accountant affixes his name

to a certified statement it, in effect, holds out to the public that that is a statement that is worthy of belief, isn't that so?

A. That's right.

Q. Now, if a certified public accountant in preparing an audit found that there were a great many checks to cash which are unexplained, wouldn't it be necessary for him to make some reference to this condition in his certified statement?

3586 A. It is necessary to make an explanation if the checks were not finally settled and charged. If there were checks at the end of the audit that didn't have proper explanation, then we would have to make a qualification in that connection.

Q. I show you Government's Exhibit 169 for identification and ask if you have seen that before.

A. Yes, this was Mr. Scholz's statement in connection with General Confections.

Q. Was that prepared on the basis of your work papers?

A. That's right.

Q. Did you have anything to do with the preparation of it?

A. I had all of the audit procedures. Mr. Scholz prepared—he was the certified public accountant. He prepared the actual statements, although I did check it against the work papers. I did not prepare the pencil copies for typing. Mr. Scholz did, and I checked it against my work papers.

Q. And do you recognize Mr. Scholz's signature?

A. I recognize Mr. Scholz's signature.

Q. And does that agree with your work papers?

A. That agrees with our work papers.

3587 Q. And it was prepared in the ordinary course of business as a public accountant?

A. As a certified public accountant.

By Mr. Lockley: Thank you. I offer Exhibit 169 in evidence.

By the Court: My notes show that it was received.

By Mr. Lockley: It was identified, your Honor, by Mr. Sproull.

By the Court: Yes.

By the Witness: That's right.

By Mr. Lockley: But I didn't offer it at that time, ar.

By the Court: Well, is there any objection to the exhibit?

By Mr. McConnell: My objection is the same as I made to the cash authorization, self-serving. I made it, I think, to all these documents.

By Mr. Kirby: Well, I have had no real adequate opportunity to understand what might be the importance of this, one way or another. I don't see that it tends to prove or not to prove any question in the case.

3588 It seems to me, so far as General Confections is concerned for the period ending February 28, 1947, as this witness pointed out, the money was paid out of General Confections. We don't question that Mr. Lubben was able to get the money out. But the question really is, what happened after he took it out.

I don't see that this at all bears upon that issue. It is certainly not to be considered binding upon any of the defendants.

And so, for those reasons, and without being able to give the Court further specific details, but I think that is an adequate objection to it, I object to this Exhibit 169.

By Mr. Lockley: Well, if your Honor please, the defense has attempted to attack the credibility of Mr. Lubben's and the General Confection's books and records. I intend to show through this certified statement prepared by the accountant that the accountant at least was satisfied that those books and records were accurate.

By the Court: I will receive it in evidence.

3589 By Mr. Kirby: Well, if the Court please, the real issue is what Lubben did with that money; and since that is the question and since he wants to put in these records, maybe the Government would now withdraw its objection to the income tax return which was prepared showing what Lubben got from General Confections for that period.

By the Court: Let's take one thing at a time. You can make your offer at the proper time.

(Said document was received in evidence by the Court and marked Government's Exhibit 169.)

By Mr. Lockley:

Q. Now, Mr. Meyer, this is identified as a Consolidated Financial Statement, General Confections, Inc., February 28, 1947. In accordance with a letter dated June 3, 1947. In accordance with a letter dated June 3, 1947, on the let-

terhead of Sproull, Scholz & Company to General Confections, Inc., it is stated in part:

"We have made an examination of the balance sheet of General Confections, Inc., as at February 28, 1947,
3590 and of the related profit and loss statement for the period March 1, 1946 to February 28, 1947.

"Our examination was made in accordance with generally accepted auditing standards applicable in the circumstances and included all procedures which we considered necessary. We examined or tested accounting records of the companies and obtained other supporting evidence by methods and to the extent we deemed appropriate, but we did not make a detailed audit of all transactions.

"The accompanying balance sheet and the related statements of the profit and loss and surplus, subject to the appended notes, which form an integral part of these statements, in our opinion, fairly present the financial condition of General Confections, Inc., and subsidiary company as at February 28, 1947, and the results of operations of General Confections, Inc., and its subsidiary, Reserve Trading Corporation, for the period covered by the profit and loss statements and surplus period."

3591 In other words, Sproull, Scholz, as certified public accountants, were certifying that the books and records of General Confections and Reserve Trading Corportion were true and correct, isn't that so?

A. As at that particular date, that's right.

Q. And any exception taken by Sproull, Scholz is, according to the letter of June 3rd, noted in the appended notes, is that so?

A. That's right.

Q. Will you please examine the profit and loss statement for General Confections and show me any note or any other exception taken by Sproull, Scholz to the method of handling checks to cash.

A. There was no note regarding cash in this exhibit.

Q. Will you look at the item of purchases on the profit and loss statement and tell us whether there is any qualification in this certified statement to the amount of purchases?

A. There is no qualification regarding purchases.

Q. In other words, you are certifying that the purchases as shown in that statement were the amounts actually expended for purchases in that period from
3592 March 1, 1946 to February 28, 1947, is that so?

A. We are certifying as to the amounts in that statement, but we don't certify that the amount was placed on the books. We gave the entries to place any adjustments on. I don't know whether the adjustments were made at the end of the period to coincide, or to make agreement with this. But we did give journal entries to bring the books in line. Whether or not the books agreed with that, I can't say, because I never saw the books after the statements were prepared.

Q. Isn't it true that the figures shown on that certified statement were eventually used by Sproull, Scholz in preparing the General Confections return for 1946?

A. That's right.

Q. And Sproull, Scholz signed that return?

A. Mr. Sproull—I don't know whether Mr. Sproull or Mr. Scholz signed the return. I didn't see the return. I had nothing to do actually with the filing of the tax return. Mr. Sproull and Mr. Scholz, I think, filed that and either one of the two would have signed it. But
3593 I did have some work to do with the preparation of this statement.

Q. I show you Exhibit 122-D and Exhibit 124-A and ask if you have seen those before.

A. I saw these cash authorization slips before.

Q. Can you tell me to what account those were posted on the books of General Confections?

A. I would have to refer to the schedules in order to do it.

Q. Isn't there something on the face of those cash authorization sheets which reflects that information?

A. It says, "Cash, Shotwell."

Q. Isn't there a posting notation on it?

A. There is a P-85. I assume that would be purchase 85.

Q. As an accountant don't you know that that indicates that that particular amount of money was posted to the purchase books at page 85.

A. I would say so, from the basis of this, that it was posted to page 85.

Q. And if they were posted to purchases there had to

be a corresponding entry in the accounts payable or the books wouldn't balance, isn't that so?

3594 A. That's right.

Q. Do you recall whether General Confections had an account called miscellaneous purchases?

A. Yes, I recall miscellaneous purchases on the General Confections account. I recall that we made an analysis of it which showed a debit balance in the accounts payable account.

Q. You testified that you remembered that there was only one overage payment posted to the Shotwell accounts payable ledger sheet in 1946. Do you recall whether those two purchases, Exhibits 122-D and 124-A, were posted to miscellaneous purchases account or to the Shotwell account?

A. The twelve two thirty-five, I recollect something on that. That to my mind was part of the $17,000.00 item I mentioned about. As I recollect the purchase was never set up. In other words, originally when you make an entry regarding purchases you should charge purchases and credit the people involved that sell you the material. And as I recollect it, that entry was not made at the time the purchase was made and we made an adjustment in connection with that purchase.

Q. I show you Government's Exhibit No. 122, a

3595 check for $12,235.00, and ask you if that is the check which is referred to in Government's Exhibit 122-D?

A. The amount agrees, but the dates do not agree. The cash authorization is dated October 7, 1946. The check is dated October 12, 1946. It appears in Miss Feldman's handwriting down here, "Date paid 10-7-46". But the check was actually October 12th.

3596 Q. So the cash authorization slip was issued and then the check was issued, is that correct?

By Mr. O'Brien: Please. Was the check October 12 or August 12?

By the Witness: October 12. The check was October 12. The cash authorization is October 7.

By Mr. Lockley:

Q. Now, will you look at Exhibit 177-B, please, the sixteenth entry. That is for the period July to October, 1946, Mr. Meyer, the schedule of checks drawn to cash and others; do you find it?

A. I find it.

Q. And that entry, apparently dated October 7, shows the payee, Shotwell, (check drawn to cash), $12,235.00, charge to accounts payable, with the information, "Purchases, warehouse shipments, journal entry 104."

Now, at the time you saw that check for $12,235.00 and drew up this work sheet, were you satisfied that that paticular check had been in payment of purchases, warehouse shipments?

A. We were satisfied that this check was in payment of warehouse shipments, but there was no entry made 3597 to set up that purchase. So our journal entry No. 104 was set up debiting purchases, warehouse shipments, or charging—when I say debit I mean charging purchases, warehouse shipments—and crediting accounts payable, Shotwell Manufacturing Company, and by explanation—inasmuch as General Confections picked up this purchase in their November recordings of purchases, the above journal entry was not recorded.

In other words, we made a journal entry to set up the purchase, but Miss Feldman did not record it as a journal entry, but put it in her purchase book in November.

Q. Were you satisfied that it was a purchase?

A. We were satisfied that it was a purchase, but we would have preferred it to go in the journal instead of the purchase book.

Q. Whichever way it went, the net result was the same, was it not?

A. Well, attention was called to the fact that the first part of this shipment should have been entered in the purchase book for August, not November. It actually wasn't handling it right, your calling it a purchase in November, when by journal entry you really place 3598 it on the books in the month of August, because you are making a journal entry to correct it properly. It wasn't properly corrected. It went in as a November purchase.

Q. When was the payment actually made, if you know?

A. The payment is October, but the actual—when the liability should have been set up was actually in August.

Q. But you were satisfied that the payment was made in October, although it was on an August shipment?

A. The payment was made in October. But the liability wasn't set up in October.

In other words, you paid for the material before you even bought it, according to Miss Feldman.

Q. Now, on Exhibit 56, defense exhibit, you testified Friday to an item of $35,536.00, which has the information, "Check made out to cash, endorsed by Lubben." There is another entry reflecting that $35,536.00 check, is there not, Mr. Meyer?

A. I would have to look at the—

Q. I believe you will find it on Government's Exhibit 177. I am sorry. I am afraid it's the earlier one. It's 176. It is the first schedule.

3599 A. 176, 175—

Q. Now, on that exhibit—

A. What number is that, please? I don't know if I have the one you want.

Q. It is 175. It is for the schedule of checks drawn to cash and others for the first period.

A. Right.

Q. You find an item, the twelfth item on the page, March 29, 1946, check No. 149, payable to David Lubben—

A. Right.

3600 Q. —for $35,536.00, endorsed by David Lubben, charged to accounts payable, with the information, "To apply on inventory payment owed to Eatsum".

Now, you testified that you also handled some of the inventory records when the Eatsum partnership broke up and General Confections bought the inventory, is that so?

A. That's right.

Q. And you testified that there was about $300,000 worth of that inventory, is that correct?

A. As I recollect, it was in the neighborhood of three hundred thousand.

Q. Now, this is a shipment which was sold to the Eatsum partnership, is that not right?

A. Well, I would say it was taken over by General Confections when the Eatsum partnership closed.

In other words, the partnership was selling all of the inventory assets to the new corporation, General Confections.

Q. So when General Confections bought the inventory from Eatsum partnership that set up on the books of General Confections an accounts payable to the Eatsum partnership?

A. That's right.

3601 Q. That's right, isn't it?

A. The schedule you have. I think that's offered as an exhibit, is it not?

Q. That's correct. So now when General Confections pays a premium of $35,000.00—

By Mr. O'Brien: Pays a what?

By Mr. Lockley:

Q. —a premium or an amount of $35,000.00 to retire a debt of Eatsum, it is proper for General Confections to show on its books that there is a debit to the Eatsum account, isn't that correct?

By Mr. Kirby: I object to that as an assumption completely unsupported by the testimony.

By the Court: Well, I don't remember just what the testimony was with reference to that $35,000.00 check. If you are correctly stating the testimony of the record in that regard, then, of course, it is proper.

By Mr. Lockley: The testimony in the record, your Honor, is to the effect that on these work papers the $35,000.00 item is shown to apply on the inventory payment owed to Eatsum.

3602 By Mr. O'Brien: That's right. But you don't mean, Mr. Lockley, that any witness here has testified that that $35,536.00 check was an overage that was paid out to settle an account, in the way you have included it in your question?

By Mr. Lockley: Mr. Lubben and Miss Feldman testified that that $35,000.00 went to The Shotwell Manufacturing Co.

By Mr. O'Brien: That is quite different than saying that it went to discharge an overage of somebody else.

By Mr. Lockley: And their testimony was that this was for overages.

Now, I want to show by this witness that when the General Confections paid an Eatsum liability to Shotwell—

By the Court: Well, the question is, is there testimony in the record that this was a liability of the Eatsum partnership?

By Mr. O'Brien: No.

By Mr. Lockley: There is testimony in the record that this was a premium due on shipments received during

3603 the period of the partnership. When Mr. Lubben took the partnership inventory over he also took over

with it the liability of those—

By Mr. O'Brien: No, he didn't. The agreement that is here is that he did not take over the liability.

By the Court: If Mr. Lockley correctly states the testimony that this was a payment to Shotwell from the Eatsum partnership, and it was paid by General Confections, then it will be proper credit against the inventory account.

By Mr. O'Brien: He does not correctly state, with all due respect—

By the Court: Sorry.

By Mr. O'Brien: That is not a correct statement of the testimony.

By the Court: I confess I don't remember.

By Mr. O'Brien: Indeed it is quite contrary. The written agreement was that Eatsum keep his own obligations and General Confections assumed none.

By Mr. Lockley: Mr. Lubben testified that he paid those premiums twice, once to the Eatsum partner-
3604 ship and once again to Shotwell in order to continue to obtain purchases.

3605 By the Court: You can refer to the testimony to clear that matter up. I confess that I don't remember.

By Mr. O'Brien: It merely means that in the absence of a showing on Mr. Lockley's part, we have to keep remembering these things and going back to them. There is no such foundation in the record.

By the Court: I think you will have to refer to the record so that we may obtain the correct understanding of the prior testimony.

By Mr. Lockley:

Q. In any event, Mr. Meyer, your work sheet doesn't show that that check to cash went to the Eatsum partnership, does it?

A. Yes, it does, on my schedule, that you have a photostat copy of. It has CD-4, on the analysis of the Eatsum account, and it has a debit, thirty five five thirty six.

Q. Which one is that, please?

A. Accounts payable, on the debit side. And there is an item there, as I recollect, it is CD-4, coming from the cash book, and it was charged against Eatsum
3606 Food Products Company. And I think it has the check number also inserted in the Eatsum account.

Q. 149?

A. That's right.

Q. That reflects that the check was made out to cash. It doesn't show it was paid out to Eatsum Food Products?

A. That's right. But the cash disbursements book, 4, charged that to Eatsum Food Products, and we examined that and we were satisfied that it was a charge against Eatsum Food Products.

Q. Precisely.

A. On the basis of our identification.

Q. And that was a proper entry to make, under the circumstances, wasn't it?

A. Thats' right, against Eatsum Food Products.

Q. And when General Confections was paying an Eatsum liability, it was proper to debit that account to General Confections—pardon me—Eatsum Food Products?

A. When General Confections was paying a liability, it was proper to debit the Eatsum Food Products account.

Q. That's exactly what I thought. Now, I want to 3607 call your attention further to Exhibit 56, defense exhibit, and to the entries dated April 30. They follow the $35,000.00 entry.

A. Exhibit what?

Q. 56. It is the defense exhibit. This one.

A. All right. I haven't got one of those.

Q. All right. You take this one, please.

A. Thank you.

Q. Now, will you please describe the entries under the date of April 30, the Journal 3?

A. April 30, J 3, seventy four twenty five, debit for Eatsum Food Products, seventy four twenty five—debit sales due—it looks like $75.00—credit C. W. Brown accounts receivable, $75.00. And there is a star on it.

Q. In other words, the effect of that entry is to debit the Eatsum Food Products, debit sales discount, and credit C. W. Brown. Does that mean that because the Eatsum Food Products account was debited that Eatsum Food Products got that check of $74.25?

By Mr. Kirby: What is in evidence about $74.25?

By Mr. Lockley: Exhibit No. 56.

By the Court: He is referring to a record that is 3608 in evidence.

By Mr. Kirby: Is that charged against us?

By the Court: He is referring to Exhibit 56. It is in evidence.

By Mr. Lockley:

Q. Well, Mr. Meyer, what that actually shows is that C. W. Brown got $75.00— or seventy four dollars and a quarter, doesn't it?

A. Wait a minute. Yes, Mr. Brown.

Q. But that Eatsum Food Products was debited?

A. That's right.

Q. So what General Confections did in that case was pay Mr. Brown, but they show it on their books that it was a reduction of the Eatsum Food Products accounts payable, isn't that so?

A. That's right.

Q. Precisely. And isn't that exactly the same thing that happened with the $35,000.00 check?

A. Not to my knowledge and belief. There is nothing that I can, from the explanation—there was an entirely different explanation on that journal entry from the explanation on our schedule of $35,536.00, entirely different.

3609 The explanation on this one is March 25, CD-4, check No. 149, $35,536.00, check made out to cash and endorsed by David Lubben.

Now, if the same circumstances applied, wouldn't it be natural for us to write who it would be credited to; wouldn't we write whatever name the credit is.

If that is the case, what we did on others, isn't it natural to assume that we would do the same on the $35,000.00 check?

Therefore, my contention is that that was charged to Eatsum Food Products Company.

Q. Take the entry up above, for April 12, that's CD-11, check No. 589, for $6,853.47, with the information, "Check made out to cash, endorsed by Lubben and Edward Urban."

Now, what is your explanation of that entry?

A. The same thing would apply.

Q. And what is the same thing?

A. The same as the $35,536.00.

Q. Will you explain it?

A. The explanation is that from CD-11 check number—it looks like 89, it is 19 or 89—the amount of
3610 $6,853.47, the check was made out to cash, it was endorsed by Lubben and Edward Urban, and as far as I can ascertain from the work papers and our records, it was charged against Eatsum Food Products.

If there was a credit to somebody else I think we would have listed the credit to somebody else on our work papers.

Q. Does that mean Eatsum Food Products got the money?

A. According to the work papers, it means Eatsum Food Products were charged with that money. Whether or not this cash was turned over to Eatsum, I didn't go to Eatsum Food Products to verify, but it was charged against Eatsum Food Products Company.

Q. Then you didn't go to Eatsum Food Products to find out whether they actually got the thirty-five thousand?

A. It was charged on the basis of their records. The General Confections posted that. We were auditing General Confections records, not Eatsum Food Products Company records.

Q. Didn't you verify with Eatsum Food Products records whether they got the $35,000.00?

A. I verified that this was properly charged against
3611 Eatsum Food Products Company.

Q. Do you know of your own knowledge whether Eatsum Food Products Company got the $35,000.00?

A. As far as the records go, it went to—

Q. Do you know of your own knowledge whether Eatsum Food Products got the $35,000.00?

By Mr. McConnell: I object. He is arguing.

By the Court: He may answer.

He asked whether or not you have any personal knowledge as to the Eatsum partnership receiving the money.

By the Witness:

A. Actually, I know it was charged against Eatsum Food Products, on the basis of our audit schedule.
3612 By Mr. Lockley:

Q. You still haven't answered my question. I asked you if you know what happened to the $35,000.00.

A. It was charged against Eatsum Food Products Company.

Q. Do you know if Eatsum Food Products Company got it?

A. I know that it was charged against Eatsum Food Products on the basis of the information—

Q. Do you know if Eatsum Food Products Company got it?

By Mr. Kirby: Why don't you ask him who told him Eatsum got it?

By Mr. Lockley: I will ask my own questions, Mr. Kirby, if you please.

By the Witness:

A. This check was made out to cash.

By the Court: I suppose the only knowledge you have is from—

By the Witness: That Lubben got the money.

By the Court: Wait. I suppose the only knowledge you have is from the books and records.

By the Witness: That's right.

3613 By the Court: You don't pretend to say whether or not the Eatsum Food Products partnership actually received the cash?

By the Witness: Could I explain it to you in my way, that actually we know that Mr. Lubben got the cash from the bank. He said that he paid it to Eatsum Food Products. On his say-so we had to charge—it was charged by his own bookkeeper, not by us, we didn't make any adjustments. It was charged by his own bookkeeper, whether Miss Feldman or an employee, against Eatsum Food Products.

By the Court: You are depending on the verity of the books?

By the Witness: That's right.

By the Court: We will take our recess now.

By the Marshal: Will the audience please remain standing while the jury, as well as the Judge, leave the court room.

This honorable court will recess till two o'clock this afternoon.

(Whereupon a recess was taken in the above-entitled cause to 2:00 o'clock p. m. of the same day, being Monday, October 5, 1953.)

3614

(Caption—No. 52 CR 143)

Chicago, Illinois,
Monday, October 5, 1953,
2:00 o'clock p. m.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:

By Mr. Lockley: Will you mark this Government's Exhibit No. 179 for identification.

3615 (Said document was marked Government's Exhibit 179 for identification.)

JOSEPH P. MEYER, a witness heretofore called herein on behalf of the defendants, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination (Ctd.) by Mr. Lockley.

Q. Mr. Meyer, I believe at the close of the morning session I inquired on Exhibit 56 for the defendants of check No. 589, dated April 12th, for $6,853.47, which you explained as a check made out to cash, endorsed by Lubben and Edward Urban. And did you say that that Exhibit 56 indicates that that check was charged on the books of General Confections to the Eatsum Food Products Company?

A. I did.

Q. Now, will you look at Government Exhibit 175, the first page, at the 35th line, do you find there an item dated April 15, 1946, check No. 589, to cash, $6,853.47, endorsed by David Lubben and Edward L. Urban; and now to

what account is that charged on that work sheet, 175?

3616 A. To accounts payable, Eatsum.

Q. And what is the explanation given for it?

A. This amount owed by Eatsum to Close, overage on Aunt Jennie—I can't read that last word.

Q. Jars.

A. Jars.

Q. So that whereas Exhibit 56 shows that that was charged to the Eatsum account on General Confections' books, Exhibit 175 shows that that was charged to Eatsum but was in payment of an amount owed by Eatsum to Close, isn't that correct?

A. That's perfectly right.

Q. And is that a proper way of handling such an account?

By Mr. O'Brien: That is objected to, your Honor.

By the Court: Sorry.

By Mr. O'Brien: The question as to whether that is a proper way. If he means accounting-wise, I suppose, yes. But as to whether it is proper here wouldn't depend on the facts.

By the Court: I suppose he means accounting-wise.

By Mr. Lockley: Accounting-wise.

3617 By the Witness:

A. Accounting-wise it can be done and it could be considered proper.

By Mr. Lockley:

Q. Then accounting-wise the $35,000.00 check which was shown on the Eatsum accounts payable was likewise properly handled?

A. Accounting-wise it was likewise properly handled, but it does not show any substantiation in a similar fashion on the cash report.

Q. I see. Now I show you Defendants' Exhibit 6-A and B, which is a two-page letter from Shotwell Manufacturing Company to David G. Lubben. That is a letter which you obtained in the course of your audit, is it not?

A. That's right.

3618 Q. And that tends to show that the accounts receivable on the Shotwell books from General Confections agreed with the accounts payable on the General Confections book to Shotwell, is that correct?

A. That's right.

Q. It shows that they were in balance. Now, that letter refers to the balances as of what dates?

A. The balance shown by Shotwell was as of April 21, 1947.

Q. And there is another balance, too, is there not, another date?

A. Well, the final figure says, "Balance, April 21, 1947, $28,986.25."

Q. Doesn't it also refer to the balance due on December 31, 1947—'46? I am sorry.

A. It gives the balance, December 31, 1946, that's right, at the beginning—half way between the letter is the figure you mention.

Q. That's right. Now, Mr. Lubben and Miss Feldman testified that all the premium payments to Shotwell had been completed as of December 20, 1946, and this sheet shows no shipments after that date, does it? Exhibit 60, that is.

A. Well, there is an invoice down at the bottom of
3619 the page.

Q. What date is that?

A. It doesn't give a date. It says, "Your invoice 26613."

Q. That's General Confections invoice.

A. That's right.

Q. I am speaking of shipments from Shotwell to General Confections. Were there any made from Shotwell to General Confections after December—

A. I don't see any after December 31.

Q. So all of the premium payments, having been made before December 20, the only thing left on the books of Shotwell, and on the books of General, would be the amount of the invoice, isn't that so?

By Mr. McConnuell: I object to that, a summary of statements of other witnesses and putting them in a question.

By the Court: Well, I assume you must make some further hypothetical reference to testimony before you propound a question of that kind.

By Mr. Lockley:

Q. Well, assuming that all of the premium payments were paid by the 20th of December, the only remaining
3620 accounts owed would be for the invoice amounts, is that correct?

A. Under your assumption that would be right.

Q. And they would naturally be in balance, between the two companies, isn't that so?

A. Assuming that the facts as you state them are such, the accounts should be in balance.

Q. And the accounts were in balance, according to that payment?

A. The accounts were in balance after we made adjustments of the account. And the adjustment was JE No. 240.

Q. And what is that JE 240?

A. That happened to be January and February commissions. And Journal entry 240 placed those commissions on the books of General Confections.

Q. In other words, those were commissions due to Mr. Lubben as a broker?

A. They were commissions due to General Confections as broker. Mr. Lubben may have been president, but they were due to General Confections, the way we interpreted it, and we so made our journal entry, to place these amounts on the books as of February 28, 1947.

3621 Q. And does that show then that the commissioners were never actually paid by Shotwell to General Confections but were just credited on their account?

A. The commissions, on the basis of our journal entry, were then credited. The General Confections did not pick them up in the normal course of their business, and it was our duty, as auditors, to rectify their records to include that amount as income to them in order to get the proper statement that we produced, as well as to get the proper income for the preparation of the Federal tax return.

Q. And to show that the account due to Shotwell had been reduced by that amount, isn't that so?

A. That's right. And if—going one step further, taking the balance as of April 24, and eliminating the March entry, and the various invoices, we arrived at a balance of $31,824.55.

Our records on our work sheets showed that after we made a credit of the two commissions we agreed on our accounts payable for the amount of $31,824.55.

By Mr. Lockley: All right. Thank you very much. That is all.

3622 *Redirect Examination by Mr. Kirby.*

Q. Mr. Meyer, these entries that finally found their way on to the books, represent explanations given you at that time?

A. Explanations that were given at that time by either Mr. Lubben, Miss Feldman or possibly some employee who was involved in the transaction.

Q. Did you ask for explanations?

A. Yes.

Q. Did you ask for what had happened to the money?

By the Court: Well, that is too indefinite. What do you mean?

By Mr. Kirby:

Q. During these cash items, they were items treated—

A. Yes. I asked during the course of the audit, on the date as specified, as I gave in my testimony.

Q. Now, to get directly to the question of the proof here, I showed you when you testified here before, a number of so-called recap sheets. Do you recall those?

A. Can I look at them again, please?

3623 Yes, I recollect that I have seen these on Friday.

Q. Well, they represent the proof in the absence of the books that was produced and what I want to know from you now is, were those items that you have in your lap on these books shown as payments out to Shotwell?

A. I never saw these. As I testified on Friday I never saw these and as far as I know, there were no records in our work sheets regarding these amounts.

By Mr. Lockley: I didn't understand the question to be whether you saw them. The question is whether or not they were on the books.

By the Witness: As far as I know, they were not on the books.

By Mr. Kirby:

Q. Now where is that audit, that Sproull, Scholz audit?

You were asked a number of questions, Mr. Meyer, about whether you made the audit up which is 16—your company, that is—to the best of your knowledge.

3624 A. That is right.

Q. And when you made it up, did they produce for you these recap or summary sheets before you made it up?

A. I never saw these at all during the course of the until or after the audit, as far as I can recollect, or as audit as I can trace in my working papers.

Q. So that when you did make a certification, you were not certifying those recap sheets and the payments shown on them that have been introduced in evidence here, were you?

A. That is right.

Q. Now the last one that Mr. Lockley asked you about, it would be a little out of order here, but so that it may be a little fresher in our mind, he asked you about an item of $35,536.00 which is shown on your work sheet which is Exhibit 175. Do you recall that?

A. Right.

Q. And you talked to Mr. Lubben about that, you say?

A. Wait a minute. I have Exhibit 56. What exhibit number is that, 175?

3625 Q. 175.

A. 175 you have reference to. Will you repeat the question now, please?

(Question read.)

By Mr. Kirby:

Q. Did you?

A. Yes.

Q. And the entry which you made on your work sheet, is that what he told you?

A. The entry in connection with that $35,536.00 was made by General Confections on their books because the C.D. 4 indicates on Exhibit 56—Exhibit 56 shows C.D. 4 check No. 149 which is the same check and indicates that it came from cash disbursements 4. The entry was made by a bookkeeper or some employee of General Confections and charged into accounts payable, Eatsum Food Products.

Q. It was never changed?

A. It was never changed by us.

Q. I show you Exhibits which set up the Eatsum account on your work papers, 56, 57.

A. I have them.

Q. 58 and 59 and that $35,536.00 is again there charged against Eatsum, isn't it?

A. That is right.

3626 Q. Mr. Lockley made a point in connection with that check of going down on your Exhibit 175 a few more lines to where he got a check which is $6,853.47 that was charged against Eatsum in connection with Urban. Do you remember that?

A. Yes. I have that item, $6,853.47.

Q. You were told specifically when you inquired about that item that it dealt with overages to Close & Company, weren't you?

By Mr. Lockley: Mr. Kirby, I hope we won't have the same trouble today that we had the other day. This is your witness on redirect examination. I must object, your Honor, to Mr. Kirby's constant testimony in this case and the leading nature of his questions.

By the Court: Yes. The objection is sustained.

By Mr. Kirby:

Q. Let me ask it this way. That $35,536.00, who told you what entry to make with respect to that?

A. The entry was—we did not make an entry on $35,536.00.

3627 Q. But so far as your notes are concerned, who gave you that information?

A. That information came from Mr. Lubben or Miss Feldman.

Q. Well, when you inquired did they say it was for overages?

A. When I inquired the explanation under the heading of "information" was inserted to apply on inventory payment owing to Eatsum.

Q. Now let us get down to the one that Mr. Lockley sought to draw an analogy with. Do you have an entry of what they told you when you asked them about that?

A. Yes.

Q. And what did they tell you?

A. This amount owed—

By Mr. Lockley: What do you mean, Mr. Meyer? Who do you mean, what did they tell you?

By the Witness:

A. Mr. Lubben or Miss Feldman told me.

By Mr. Lockley: Do you know who told you?

By the Witness: I don't know whether it was Mr. Lubben or Miss Feldman. That I can't recall but I

3628 know it was one or the other and they stated just what is written in my handwriting: "This amount

owing by Eatsum to Close, overage on account Jennie Jars".

By Mr. Kirby:

Q. Close & Company were a supplier, were they?

A. Yes, Close & Company were suppliers.

Q. Eddie Urban ran that company?

A. I don't know that. That I can't state because I am not familiar with Close & Company officers, but I do recollect examining Close & Company invoices for the General Confections audit.

Q. But at least now on the $35,536.00—am I correct that there is no mention of overages?

A. There is no mention of overages on the $35,536.00, as far as the Exhibit 175 is concerned or No. 756.

Q. But on this one with respect to Close & Company, they told you specifically it was—

A. Exactly as the writing indictates on the exhibit.

Q. No such statement in connection with that bigger check that is now charged against it?

A. There is no such statement about overages on the $35,536.00.

3629 Q. They had an opportunity to tell you that, isn't that right?

A. That is right.

Q. And they had told you that in one case but not in the other?

A. If they had told me that, I would have inserted it in that case.

Q. My question is they told it to you on one case but not on the other?

A. That is right.

Q. When you drew up this audit, that $35,536.00 was not charged against Shotwell, was it?

A. No, sir. According to the papers and records it was charged against Eatsum.

3630 Q. To repeat the line of questioning that Mr. Lockley used, as an accountant and as an auditor, in making up this financial statement, then you were satisfied it should have been charged to Shotwell, isn't that right?

A. That is right.

Q. And when you made up the income tax as to which he asked you, you didn't charge it against Shotwell, did you?

A. It was charged against Eatsum in connection with the income tax as well as the certified audit.

Q. And not against Shotwell?

A. And not against Shotwell.

Q. One of things that Mr. Lockley I thought pressed you on rather hard was whether you could remember when you did some work last August, which of these checks were checks as to which you required additional information. Do you remember he asked you that in each case?

A. Yes, sir.

Q. Now, take a look at Exhibits 175 and 176.

A. Right.

Q. Now, Exhibits 176 you made up when?

A. 176 was made up after we had asked questions
3631 about Exhibit 175 and 175-A.

Q. Exhibit 176 was made up back then in 1946?

A. That is right.

Q. And it represents the checks as to which you were questioning the amounts, as to 175 and 175-A; you still didn't have adequate information so you made the list of the ones on 176 that you were short information on, is that right?

By Mr. Lockley: Is that your answer, Mr. Meyer?

By Mr. Kirby: He already did testify.

By the Witness: I testified to this and it is just repetition.

By Mr. Kirby:

Q. But he was challenging you to whether it was just from memory that you knew the questioned checks. As a matter of fact the questioned checks were all listed on 176?

A. Well, we listed all the checks and questioned them originally. After we had questioned them, there were still some further explanations needed and that was the purpose of the next statement, the following statement, and that is Exhibit 176.

Q. Which Mr. Lockley had when he was asking
3632 you how you knew which ones were added questions?

A. Yes, that is right.

Q. Now, another list—oh, and by the way, this $27,000.00 check that he asked you about, that was on the super question list, wasn't it, Exhibit 176?

A. What is that check number on that? Yes, I think you are referring to check No. 906?

Q. Yes.

A. Right.

Q. Now, in the next period Mr. Lockley was asking you about the number of checks as to which you had inadequate information and you gave a number in your testimony—wait a minute. I will get that testimony. He read you this answer from page 3452:

"In the second period 16 of those checks were questioned"

and he wanted to know if you only knew from memory which ones were the 16.. Do you remember that series of questions by Mr. Lockley?

A. Yes.

Q. Now, on Exhibit 177 which he had in his hand, are there a number of journal entries entered to the right of those sheets?

A. That is right.

3633 Q. What does the journal entry mean—that there was a correction with respect to that check or a change?

A. There was additional information necessary to be placed upon the books in connection with that transaction.

Q. And how many such entries appear right on the sheet that Mr. Lockley had in his hand?

A. I counted 14 journal entries.

Q. Those would indicate to your mind checks as to which there was a question, I suppose?

By Mr. Lockley: I object to the form of the question again. Mr. Kirby, I am sorry. I am going to have to continue doing it as long as you persist.

By the Court: The objection is sustained.

By Mr. Kirby: I will withdraw it. Or, I don't have to withdraw it because the Judge sustained the objection, but I am going to make a dangerous step now and disagree with an accountant on adding.

By Mr. Kirby:

Q. Aren't there 16 journal entries marked?

A. 16. I can't readily read this copy too well.

3634 It isn't very readable on a photostatic copy. I might find them a little bit easier on an original exhibit because I think they were marked in red, if I recollect properly.

Q. Well, I will hand you the original.
A. Because it shows up a little better.
Q. And how are they marked on there?
A. They are marked in red.
Q. And the ones marked in red total how much?
A. 16 is right.
Q. And are those the 16 you mentioned in your answers on page 3452 as to which Mr. Lockley asked you extensively?
A. I would have to check that.
Q. The fact is that in the second period 16 of those were checked?
A. I would have to check whether the amounts jibed again, but at least there were 16 that were questioned so far as my records were concerned.
Q. Now, another period in which Mr. Lockley asked you whether you were just doing this from memory as to which checks were questioned was the third period and he read your testimony at page 3456, that 29 of these 3635 checks were questioned. Now, I call your attention to Exhibit 178 and 178-A which Mr. Lockley had in his hand when he was asking you about that 29 and how you knew it was 29 and I will ask you if there are check marks alongside of certain checks?
A. There are check marks alongside certain checks.
Q. Will you just count the number of the checks that are so specially marked out to the right?
A. 29.
Q. That is the same number you testified about Friday, isn't it?
A. That is right.
3636 By Mr. Kirby: 92 and 93. If you try and find those, Mr. Krane, I will move along.
By Mr. Kirby:
Q. Mr. Meyer, a number of questions were asked of you as to whether there was anything improper about the president of the company charging checks to himself. Do you remember that?
A. Right.
Q. And actually when you worked on the books there were a lot of them charged to Lubben?
A. That's right.
Q. Now, do you know anything about the question of whether Lubben is now charging those checks that were

charged against himself against Shotwell; do you know what the proof is, I mean?

A. Will you repeat that question? I am trying to understand what you are trying to ask me. I can't seem to—

Q. You didn't hear the testimony of Mr. Lubben?

A. No, I did not hear the testimony of Mr. Lubben.

Q. You did not hear the testimony of Miss Feldman?

A. I did not hear the testimony of Miss Feldman.

Q. So do you know or don't you know whether 3637 amounts charged on the books when you worked on them, to Lubben are now being charged against Shotwell; do you know?

A. No, I don't.

Q. So that when you were answering the question about that it is all right for the president to charge it against himself, you were going that far and no further, I assume?

A. That's right.

By Mr. Kirby: I am looking for 153-A. Do you know where that is?

By Mr. Krane: It should be there. Mr. Lockley didn't use it.

By Mr. Kirby: Yes, he did.

By the Witness: Maybe it is here. There are exhibits here.

By Mr. Kirby: It may be. It is a cash authorization slip.

By the Witness: There are no cash authorizations there.

By Mr. Kirby: You used 153-A this morning. Do you have it?

By Mr. Krane: No. It is there.

3638 By Mr. Kirby: It is a cash authorization slip.

(Document handed to counsel.)

By Mr. Kirby:

Q. I have these two checks for twenty-three hundred here. Do you recall that Mr. Lockley asked you whether you could find five checks for twenty-three hundred, and you did.

A. That's right.

Q. Well, I only want to ask you about the two checks which the Government put in evidence, 92 and 93. The first one is a check, No. 396. Do you have a record of 396?

A. Yes, I have a record of 396 on my schedule, Exhibit 175.

Q. Now, do you have a record of check 474?

A. I have a record of 474 on Exhibit 175.

Q. Now, those two checks, the Government witnesses on oath said they went to Shotwell and they keyed them specifically to Government Exhibit 13. I will now inquire as to those two checks, what the records show those two checks were spent for.

A. Those checks, according to our record, were spent for 25 drums of liquid syrup, in each case.

Q. Were they charged for candy, as was testi-
3639 fied by the Government witnesses?

A. They were charged on the books of General Confections as 25 drums of liquid syrup, as indicated by our record.

3640 Q. And your record also shows that they were endorsed by this Eddie Urban?

A. That's right.

Q. A supplier of, among other things, liquid syrup; do you know that?

A. That's right.

By Mr. Krane: That is not clear.

By Mr. Lockley: There is no evidence that Mr. Urban is a supplier of liquid syrup, aside from Mr. Kirby's testimony, your Honor. Unless this witness has some knowledge to that effect I ask that the answer be stricken.

By the Court: If he knows it, from what source?

By the Witness: I only know from the way it is endorsed that Mr. Urban is the supplier. Whether he supplies liquid syrup—I know he supplies things, put it that way.

By Mr. Lockley: I move the answer be stricken.

By Mr. Kirby: It is on the books.

3641 By the Court: You mean you learned that from what, the records?

By the Witness: From when we audited, and all the records of the company.

By the Court: Does it appear here on the records?

By the Witness: It doesn't appear here that he is a supplier in this case, no.

By the Court: Well, I suppose you can only testify from the records that are in evidence. The answer may be stricken.

By Mr. Kirby: Not to prolong it, but the lines on which the syrup and the name appear are right together. It would appear to be the purchase of syrup from Urban right on that sheet.

By Mr. Kirby:

Q. Isn't that what it shows?

A. Let me read it to you.

By Mr. Lockley: Please. Just a moment, Mr. Meyer. The question asked of this witness, your Honor, was whether he knew that Mr. Urban was a supplier of liquid syrup. If he knows, he can answer. If he doesn't
3642 know, it is already in the record what this work sheet shows.

By Mr. Kirby: I will concede that he doesn't know any more than the records show on what they told him.

By the Court: If he wants to read that, he may.

By Mr. Kirby:

Q. Yes. Read what it says.

A. All right. It says 2300, and gives the endorsers, William Heitmann, Edward Urban, "accounts payable, 25 drums liquid syrup," in each check as the explanation and the detail.

Q. All right: Now, Mr. Meyer, Mr. Lockley was critical, I thought, of your including checks other than merely to cash in your schedule of the things that you did question. But is it true, sir, that on the day you testified you actually handed forward the sheets that listed every check that you were talking about?

A. That's right.

Q. I mean—

A. I handed the schedule—the schedules are here. They are self-explanatory, as far as title. What I
3643 consider cash may be a different interpretation of cash, as far as Mr. Lockley is concerned.

Q. What I mean is, you gave Mr. Lockley these sheets?

A. I gave him the sheets that day.

3644 Q. It is all written out that day?

A. That's right.

Q. You weren't trying to lie to him?

A. I wasn't trying to lie to anybody.

Q. One of the ones he called your attention to, particularly, on Exhibit 178—

A. 175-A is that?

Q. 178 and 178-A.

A. Right.

Q. —are some checks made payable to Saddle River Farms, Inc. Did you ask Mr. Lubben who was Saddle River Farms?

A. We were familiar with Saddle River Farms during the course of our audit. We analyzed the Saddle River Farms account on the books of General Confections. We knew it was a farm that belonged to Mr. Lubben.

Q. Did they supply any goods?

A. As far as I know, Saddle River Farms never supplied any goods to General Confections.

Q. But I notice here that you are charging those checks against accounts payable, is that true?

A. There must have been an accounts payable subsidiary in the accounts payable called Saddle River
3645 Farms.

Q. So you charged the Saddle River Farms against an accounts payable ledger, is that right?

A. That's right.

Q. That incidentally is the same way as they told you to charge that check, 906, which they seek to tie to Shotwell; they said to charge that to accounts payable too?

By Mr. Lockley: Mr. Kirby, are you asking a question or asking a statement?

By Mr. Kirby: Well, it is all written out now. I don't know how coy I have to be with the fellow when it is all written right here.

By the Witness: Wait till I get—

By Mr. Kirby: It is Exhibit 176, sir.

By the Witness: Will you repeat your question now, I have everything here. I lost the trend of what the question was.

(Question read.)

By Mr. Kirby:

Q. Exhibit 176 is this.

A. The twenty-seven thousand—

Q. And how is that charged?

A. That is charged to accounts payable, David
3646 Lubben.

Q. The twenty-seven thousand dollar check?

A. It was originally charged on the books to accounts payable, David Lubben.

Q. And then it was taken off and laid against Shotwell?

A. Then it was taken off and a journal entry—the total of that summary column, $40,901.60— and the journal entry was set up making purchases in connection with all of those items.

Q. Well, let me get back to a fairly simple question now, Mr. Meyer. The account of a supplier of goods would be in an accounts payable book?

A. Yes.

Q. Now, the Saddle River Farms checks, they went to what kind of a book?

A. They went to an accounts payable, Saddle River Farms also.

Q. But they didn't supply—

A. They didn't supply anything, but there was an account set up, the way the General Confections had it. Otherwise it wouldn't be listed on this schedule.

Q. But that doesn't involve the purchase of any 3647 goods or any goods being supplied?

A. Not that I know of, Mr. Kirby.

Q. All right. Now, in his examination Mr. Lockley was asking you about charging various checks to cash and I think you said you charged them in the manner that you were told they should be charged, is that right?

A. That's right.

Q. Then he wanted to know if that was adequate for the purposes of General Confections books and I think that you said that is the best you had?

A. That's right.

Q. Then he got into the question of income tax returns of General Confections and you started to point out at one time but didn't get very far with it, that the checks to cash were more connected with the Lubben income tax question than General Confections. Explain what you meant at the point you were talking about then, will you?

By Mr. Lockley: I must object to the form of the question, your Honor. There is no testimony of any sort in the record, that I recall, that reflects—

3648 By the Court: That they might be more material to the Lubben income tax than the General Confections.

By Mr. Kirby:

Q. And I want to know what you mean by that.

A. When we audited General Confections we examined the books and records and made inquiries regarding cash checks, as far as General Confections was concerned. And we charged on the instructions of Mr. Lubben When he gave us information regarding these checks, we made the necessary entries, as far as General Confections were concerned. And that's as far as we went, because we only did the General Confections audit. We were not auditing Mr. Lubben personally. I can't explain what he did with the money when he got it. As president he possibly—

By Mr. Lockley: I object to what he possibly did.

By the Court: Well, you possibly have answered the question now.

By the Witness: Now.

By Mr. Kirby:

Q. It was out of General Confection's hands?

A. It was out of General Confections hands 3649 after we got the charge on the books. As far as we were concerned, we were auditing the General Confections books.

Q. And charges that were made against Lubben personally by you, that would be a question for him to take up on his own income tax?

A. That's right.

Q. Now, your firm did make up an income tax return for David Lubben, covering the partnership period, '45 and ending early in '46, and for all of 1946, General Confections, didn't you?

A. Are you talking about Mr. Lubben, personally?

Q. Yes.

A. Mr. Sproull took care of certain things for Mr. Lubben, but it was not under my jurisdiction, so I think you will have to refer to the testimony of Mr. Sproull in connection with that. I am not familiar with what he said in his testimony.

Q. I show you a document, which is marked in the 19 and 20 series, and ask you whether you had anything to

do with the preparation of that income tax return of Mr. Lubben?

By Mr. Lockley: I object, your Honor. He has al-
3650 ready stated he had nothing to do with it. And your Honor already ruled that that is not admissible evidence.

By the Court: He may answer the question.

By the Witness:

A. Well, actually that is my handwriting. I did not recollect making this out, but it is my handwriting. I can only state that.

By Mr. Kirby:

Q. And was it made out on the basis of information given you by—

A. Mr. Sproull.

Q. —Mr. Sproull?

A. In other words, I did not audit, or do anything in connection with the details. Mr. Sproull may have given this to me and said to compile a tax return on the basis of his work papers. But, as I recollect, the working papers for this tax return were not prepared by me. I did put in the details, as far as the figures and the name are concerned, but it was Mr. Sproull who made all details and all adjusting entries. And I think he has the working papers in connection with Mr. Lubben's personal tax return.

Q. Well, you know, for instance, from Exhibit
3651 176, that on that exhibit there was charged, after you questioned him, against Mr. Lubben, how much personally in cash checks on that one exhibit?

A. Seventy-four thousand.

Q. And the handwriting on the face of that income tax return of Lubben's is yours, isn't it?

A. That's right.

Q. You can tell from that the amount that you put in for his income from General Confections, can you, from the face there?

3652 By Mr. Lockley: I object, your Honor. It has no relationship to the issues in this case, whatever Mr. Lubben's income tax return may have shown.

By the Court: Yes, I will sustain the objection.

By Mr. Kirby: If the Court please, Mr. Lockley made quite a point that it is all right to charge this to Lubben,

it is all right to charge it against the president of the company. Well, if he would stand there and hold it, and admit that he kept it—

By the Court: I will sustain the objection.

By Mr. Kirby: I want to make a little bit—the immediate question is a simple one, Judge. And that is whether from the part that is in his handwriting—I don't want him to read the amount—just to make some formal proof at the moment—

By the Court: All he did was to act in a clerical capacity, in the first instance. He had nothing to do
3653 with the making up of the income tax report. He merely took the figures given to him by Mr. Sproull.

By the Witness: That's right.

By Mr. Kirby: I want to call to the Court's attention that in his handwriting—I am not going to read any figures—there is a special entry with respect to General Confections, you see, and I just want to ask him—complete the record on that, that that part is in his handwriting.

By the Court: Do you want to ask him if that item is in his handwriting?

By Mr. Kirby: Yes.

By the Court: Very well.

By the Witness: What item is that?

By Mr. Kirby:

Q. I am showing you the face of the income tax return and calling your attention to the item numbered 2, with reference to General Confections; is that in your handwriting?

A. Yes.

Q. And does that purport to show—I am not going to read a figure—the income he got from General Confections in '46?

3654 A. That's right.

By Mr. Kirby: I want to hand up to the Court, so that the Court may examine it, Exhibit 178, and I call your attention to this column here, about which Mr. Lockley questioned him most extensively.

(Document handed to the Court.

By the Court: Has the income tax for 1946 been marked as an exhibit.

By Mr. Kirby: Yes, sir.

By the Court: Didn't I rule on that once?

By Mr. Lockley: Yes, your Honor.
By Mr. Kirby: Yes.
By the Court: What exhibit number is it?
By Mr. Kirby: It is in the 19 and 20 series.
But I conceive that by going into the question as Mr. Lockley so elaborately did about the propriety of a president of a company charging it against himself, I would like to go into the question of whether the entries stood
that way or whether they were changed before the in-
3655 come tax return was filed.
By Mr. Lockley: If your Honor please, my questions were directed entirely to the propriety of such action from an accounting procedure. What Mr. Lubben may have done with the checks which were in his name and cashed by him and which were charged to him on the books of the company is entirely beyond the scope of this lawsuit.
By the Court: Yes, I think so.
By Mr. Lockley: We do not know whether they may have been charged to him as loans and he may have paid them back. We don't know but that he may have used that money for the purchase of materials for the company, and it then had an adjusting entry on the company books to show that he had paid it out.
In other words, these figures standing by themselves have no relationship whatsoever to the net income that he may have received from General Confections.
By Mr. Kirby: Well, but I think it is important.
3656 By the Court: You are going to try an entirely collateral issue, and that would be whether or not Mr. Lubben's income tax for 1946 was correct. That isn't our job here.
By Mr. Kirby: Well, actually, it will go directly to the question of whether the books, as this fellow finished them up, charging them against Lubben, and Lubben's later position stayed the same.
By the Court: No, I will sustain the objection.
3657 By Mr. Kirby: In that event, would it be the Court's feeling that I could now make, as I do formally a motion to strike all of the questions and answers of Mr. Lockley to this witness about wasn't it perfectly proper for Mr. Lubben to charge the matter to himself?

By the Court: He merely asked if Mr. Meyer, as an auditor—whether or not those items satisfied him, when the explanation was given, as properly being reflected in the books. I don't think Mr. Meyer assumes to determine whether or not Mr. Lubben used that money for himself or used it for other purposes or what may have happened to it.

We are going into an entirely collateral issue, if we are going to try to thresh out Mr. Lubben's 1946 income tax.

I will deny his motion to strike.

By Mr. Kirby: I wanted the group of exhibits that relate to the twelve two thirty five.

3658 By the Court: If you could show that the income tax reflects that Lubben received this money for himself, that might be one thing.

By Mr. Kirby: Heaven forbid. He would never do that.

By the Court: But where you want to have us determine here in this lawsuit whether or not his income tax for the year is correct—

By Mr. Kirby: The testimony is that the man handled a million and a half in cash in the indictment years and I think it is material to show—

By the Court: And if you showed that he had a million and a half dollars income on his income tax, that might be of some probative value, that the money that he put in the name of David Lubben and the cash checks that he drew went into his own pocket. But your income tax doesn't show that and hence I say we would have to be threshing out an entirely collateral matter.

By Mr. Kirby: It goes to the man's motive and credibility and the less he puts on his return the more he

3659 wants to shove on somebody else.

By the Court: No, we can't try—

By Mr. Kirby: That's human nature.

By the Court: We have one lawsuit here and that is enough. We are not going to try another.

By Mr. Kirby: It is human nature. It goes to the motives of the man in wanting to load it on somebody else.

By the Court: No. I will sustain the objection.

By Mr. Kirby:

Q. Well, Mr. Meyer, one of the matters in Exhibit 178 about which you were questioned—well, now, I am mistaken about that, it wasn't 178, it was in the 177 series, and that is an item on the first page—177-B, and it relates to a check for $12,235.00. Do you remember that?

A. Yes, I remember the $12,235.00 item.

Q. And that is a check which is No. 122, Government's Exhibit, is it not?

A. That's right.

Q. Now, when you inquired about that check, was some explanation afforded you?

3660 A. The explanation is on the exhibit, Mr. Kirby.

Q. And what is that?

A. Purchases, warehouse shipment?

Q. And then there is a note?

A. Journal entry No. 104.

Q. Does that refer to a journal entry of yours, I mean?

A. That is a journal entry that I prepared.

Q. That you instructed them to prepare?

A. That I prepared.

Q. Where it says, "Purchases, warehouse shipments," what do you mean by that?

A. Of course, the warehouse shipment was a shipment either direct to a warehouse or via a warehouse.

Q. And you instructed that a journal entry be made to post that $12,235.00 as a purchase?

A. That's right.

Q. Had that purchase been recorded before that?

A. It was not recorded on the books until we made the entry.

Q. When would that have been?

A. That would have been in the second—in the July to October audit, in the second period, which would have been around November, the end of November or beginning of December.

3661 Q. And so it was posted as a theretofore unrecorded purchase on the books, is that right?

A. It was recorded in the November purchases book, General Confections, but we had given instructions as a journal entry to put that on the books as an August item.

Q. How can you tell that?

By Mr. Lockley: Mr. Meyer, are you testifying from something now which you have not shown the Government?

By the Witness: No. This was my actual—this is actually—

By Mr. Lockley: Do you know what is on that paper without referring to these (indicating)?

By the Witness: Yes.

By Mr. Kirby: I think, counsel, that—

By the Witness: That was my own explanation of how I traced some of these things.

By Mr. Kirby: (Continuing) —handle his own proof. If the Court please—

By Mr. Lockley: How was it prepared?

By the Witness: By examination of the work papers about a year ago.

3662 By Mr. Lockley: Then you are not testifying from the work sheets. You are testifying from this.

By the Witness: I look this up on the work papers when I have the sheet.

By Mr. Kirby:

Q. Well, can you tell us from the exhibit you have before you that it was charged to purchases?

A. The journal entry was made setting up the purchase when we made the journal entry but it actually should have been put on the General Confections books in August. I think your cash shows—

Q. Well—

A. That it was paid later but it actually was purchased at an early date, possibly, or your cash authorization shows October, as I understand it.

Q. Now I will show you what the Government said that $12,235.00 really related to. I show you an Exhibit 121-D and 121-E and you notice those are invoices from Shotwell?

A. That is right.

Q. And I show you an exhibit which is marked 122-A which Miss Feldman testified was a recap sheet. Now,

3663 do you notice that the first item on that recap sheet is the same as that first invoice?

A. It is the same, but I think the amounts differ.

Q. They do, but the shipment is the same, isn't it, the weight?

A. The weight is the same. It doesn't say anything about 125 bales on this sheet.

Q. Well, how about the next item then which is on that little recap sheet? Is that the same as the next invoice?

A. The poundage is the same. It does not give anything about the number of cases or anything, as far as I can see.

Q. The poundage is the same on both items?

A. That is right.

Q. Miss Feldman testified—let me ask you were those invoices posted directly to the books of General Confections?

A. I would have to check my records, but I assume that they are posted directly to the books as a purchase from Shotwell.

Q. Well, there is a posting stamp on there, isn't there, showing a charge to purchases?

A. It gives a page "Entered page 62, line 35."

"Entered page 62, line 34."

3664 Q. And is there any reference to any journal entry on that?

A. None on these sheets.

Q. So those two were not posted as a result of a journal entry, were they?

A. So far as I know they would not be posted to a journal entry.

Q. Now the testimony of the witness Feldman was that $12,235.00 check was paid in connection with this recap sheet 122-A, on these two invoices which are marked 121-D and E, but so far as the records that you have are concerned, that was a posting of a purchase that—

A. Separate and apart.

Q. Separate and apart from this.

A. From what you have.

Q. Is that right?

A. That is right.

Q. In other words, the entry that was made at the time by you with respect to this check of $12,235.00 is different from the explanation represented by this group of exhibits put in by Miss Feldman, is that right?

A. That is right.

3665 Q. As a matter of fact, do you notice—what is the total on her recap sheet?

A. $13,078.00.
Q. $13,078.00?
A. Right.
Q. Now this check for $12,235.00, how does she get to that? Can you tell from that?
A. Yes. She has less $843.00 and she brings down the figure of $12,235.00 on her sheet.
Q. The recap sheet doesn't agree with the check at all, does it?
A. The typewritten—
By Mr. Lockley: It is a leading question, Mr. Kirby.
By Mr. Kirby:
Q. Well, does the recap sheet agree with the check?
A. The typewritten figures do not agree with the check but the penciled figures are in agreement with the check.
Q. After she struck $843.00?
A. That is right.
3666 Q. Is there any apparent reason for striking the $843.00 that you can see?
A. I don't know.
Q. She testified she didn't know either, but that is a different transaction than the one you have on your sheet, isn't it?
A. According to my journal entries it is a different transaction from this one.
Q. And it was treated differently at that time?
A. That is right.
Q. This is another of those checks endorsed by Urban?
A. That is right.
Q. Would it be true that these invoices that I just asked you about as having been posted to the purchases book, that the effect of your journal entry, if the transactions are the same, would be to charge twice for the same shipment or is that a nonsensical question?
Sometimes I ask them, Mr. Lockley.
A. It would be a duplication if the sheet there applied to the amount in question and then I put on $12,235.00 again.
Q. Yes. I am just talking about the physical goods.
3667 If the physical goods were already charged as having been already received as against these two invoices.
A. Right.

Q. You said it charged the physical goods, the total of $12,235.00 in again?

A. That would be the duplication, if only one shipment was received.

Q. So the only explanation you can give here that the check for $12,235.00 didn't apply to this at all on this purchase, I mean, your journal entry—

A. It would have been in error then, if that is the case.

Q. —it would have been in error, but what you did was base it upon what they told you at the time?

A. That is right.

Q. When they told you how to post this check for $12,235.00 did Miss Feldman come around and hand you a slip like that and subtract $834.00 and tell you to charge it?

By the Court: "A slip like that" doesn't mean anything in the record, Mr. Kirby.

By Mr. Kirby:

Q. A slip like this, 122-A, and tell you to charge it?

3668 A. I never saw this exhibit. I saw only cash authorizations as testified in my audit—in my testimony, I mean.

Q. In connection with that letter confirming the accounts receivable of Shotwell and the accounts payable of Shotwell, Mr. Lockley made quite a thing of the fact that it all balanced out if you assumed that the overages had all been paid by December 20th. Do you remember that?

A. Yes, I remember.

Q. Well, if there had been no payments of overages at all at any time, you would get exactly the same results, wouldn't you?

A. That is right.

By Mr. Kirby: That is all.

By the Court: Will your recross be just a question or two, Mr. Lockley?

By Mr. Lockley: If your Honor please, I have noted that the witness has been examining certain documents in his possession and during the period of his testimony and the government has not had an opportunity to look at those. If you desire to take a recess now, I would

3669 like to examine them.

By the Court: You have a right to look at it, if he has been using it.

By the Witness: I referred only—

By Mr. Kirby: I think he referred to—let us see what he was talking about. He referred to—which one were you looking at? Was it this one?

By The Witness: Where the $12,235.00 goes into—where I made an examination. If you will show it to me, I will explain it. It was part of another item. This was what I referred to (Indicating).

By Mr. Kirby: Will you give that sheet to Mr. Lockley, please?

By Mr. Lockley: No. He has been referring to this throughout the testimony. I think we are entitled to all of it.

By the Court: I think Mr. Lockley has a right to see what he used in giving his testimony.

By Mr. O'Brien: We certainly don't want him to have all the sheets.

By the Court: I am sorry.

3670 By Mr. O'Brien: The man has referred to only one sheet and that was the time that was called to your Honor's attention.

By the Court: Mr. Lockley, he said he was referring to this document during the time he gave his testimony.

By Mr. McConnell: The witness is under oath and he said he only referred to one sheet.

By Mr. Lockley: Let Mr. Meyer testify, Mr. McConnell. I think he is in better position to tell than you.

By the Witness: May I look at the sheets. I will tell you exactly which ones.

Recross Examination by Mr. Lockley.

Q. Mr. Meyer, tell us how many sheets you referred to and will you tell me when it was prepared?

A. I referred to the first sheet.

Q. When was it prepared?

A. I will tell you in just a moment. Let me look at the sheets, please. I referred to sheets 3 and 4.

3671 By the Court: He asked you when it was prepared.

By the Witness:

A. And it was prepared March 27th, 1953.

By Mr. Lockley:

Q. And who helped you?

A. I prepared it alone.

Q. Without the assistance of the defendants' accountants?

A. Without the assistance of anybody.

Q. Did you use any documents other than those that have been introduced in evidence here?

A. I only used these sheets that have been introduced in evidence.

Q. Well, with respect to the journal entry which you referred to will you show me on Exhibit 178, I believe—no. Show me Exhibit 177-B if there was anything said about a journal entry for that $12,235.00 and how you are able to tell me what that journal entry is from an examination of your sheet?

A. Because I checked that journal entry into my journal entry that I had.

Q. In other words, you are not testifying from examination of Exhibit 177-B but you are testifying from
3672 some other books and records that are not in evidence, is that so?

A. I testified in connection with the journal entries.

3673 Q. Where did you get the journal entries?

A. From the actual journal entries made back in 1947, 1948.

Q. That is not in evidence, is it?

A. That is not in evidence.

Q. You are testifying from this document which you prepared back in March of this year, isn't that so?

A. Yes.

By Mr. McConnell: But only page 3 and 4.

By the Witness: But only pages 3 and 4.

By Mr. Lockley:

Q. Where are the journal entries?

A. They are in my work papers.

Q. Where are your working papers?

A. In the office of the defense counsellors.

By Mr. Kirby: Mr. Lockley, that journal entry 104 is referred to on Exhibit 177-B.

By Mr. Lockley: Your Honor, may we take our recess at this time.

By the Court: Yes. We will take our recess.

By the Marshal: Will the audience please remain
3674 standing while the Judge and the jury leave the court room?

This honorable court will recess for ten minutes.

(Whereupon a recess was taken.)

By the Marshal: This honorable court will now resume its session.

By Mr. Lockley:

Q. Mr. Meyer, in connection with these two sheets, No. 5 and 6 of the memoranda you had before you while you were testifying, did you state that you prepared those yourself?

A. That is right.

Q. And when was that?

A. March 27, 1953.

Q. Did you type them yourself?

A. That is right.

Q. Where was that?

By Mr. O'Brien: What difference does it make?

By Mr. Lockley: It makes a lot of difference to me.

By the Court: Where did he type them?

By Mr. Lockley: Yes, where did he type them.

By the Court: All right.

3675 By the Witness: In the office of Lynch & Company, the defendants' accountants.

By Mr. Lockley:

Q. Did you say you worked alone on them?

A. I worked alone on it.

Q. Who is John A. Lynch & Company?

A. The accountants for the defense.

Q. Mr. Lynch is over there at the counsel table?

A. That is right.

Q. This is his stationery, is it, bearing his name on the bottom?

A. That is right.

Q. And you didn't consult with them at the time you prepared it?

A. I prepared this from my working papers.

Q. From your working papers?

A. From my work papers and from all the audit work papers.

Q. Well, are all of the work papers that you referred to the work papers which are now in evidence?

A. No, they are not. The journal entry that I copied is not in evidence.

Q. Where is the journal entry?

A. With all the other papers in the office of
3676 Mr. O'Brien.

Q. Mr. O'Brien has the original journal entry?

A. The entries.

Q. Which you prepared?

A. All of our working papers were subpoenaed by The Shotwell Manufacturing Company.

Q. Did you use any portion of those in the preparation of this memoranda?

A. I used the cash sheets and also examination of certain purchase records we had.

Q. Which purchase records?

A. Of the audit record that were subpoenaed by The Shotwell Manufacturing Company.

Q. Are those purchase records in evidence?

A. Those purchase records are not in evidence.

Q. And the journal entries, are they in evidence?

A. The journal entries are not in evidence.

By Mr. Kirby: Excuse me. The one book, I am certain, in here is the journal entry book of General Confections because I looked at it this morning. That isn't the same thing as his work papers but the General Confections book of journal entries that they did make is here.

3677 By the Witness: If they made that entry, you would be able to find it in the General Confections journal entry, if you can refer to it, and possibly we can locate that same entry in the General Confections journal entry book.

By Mr. Lockley:

Q. Well, is it common practice for an accountant's journal entries to remain on its work papers without recording them on the books?

A. It is common practice to place our journal entries on our working papers and then have a typed copy of the journal entries given to the accountant and they make the journal entries in accordance with our audit.

Q. And that type of journal entry book is a part of the books of account, isn't that so?

A. Those typed journal entries are usually used as a means of placing those journal entries in the books.

In other words, they may be copied in. If they were clipped into the book, then they would become part of the journal entry book in most cases.

Q. Do you know what happened in this case?

A. I don't know what happened in this case. I
3678 know the journal entries were given to the General Confections for insertion in the original book of entry—the journal book of entry, rather, and they were supposed to be placed on the books of General Confections.

Q. What other records do you have that would throw any light on the General Confections book besides cash purchase work sheets you referred to and the journal entry work sheets?

A. In connection with that, all the rest of the schedules are right here.

Q. What do you have under your arm in that envelope?

A. This is my correspondence and my subpoena.

By Mr. Lockley: If your Honor please, I think the Government is entitled to see the work papers which were prepared by this accountant for the General Confections. They are work papers of the accountant and they belong either to him or to the General Confections Corporation and I think the Government is entitled to examine them. They are now in the possession of the defendants.

3679 By the Court: When you say the entries, do you mean the journal entries?

By Mr. Lockley: Whatever underlying data there is that were used in the preparation of this memoranda from which he testified and he has testified that the journal entries, the work papers relating to journal entries and the work papers relating to purchases were used in preparing these memoranda and they are not now in evidence.

By the Court: Well, what have counsel to say about it?

By Mr. McConnell: I understand he prepared this from the journal which is in evidence and it was introduced as a Government's Exhibit.

By Mr. Lockley:

Q. Did you testify that you prepared it from the journal or from the work sheets?

A. I prepared that from the purchase work sheets and from the journal entry work sheet.

Q. From the work sheets?

A. The purchase work sheets and the journal entry work sheet in Mr. Lynch's office.

Q. Are those records there now in possession of
3680 either Mr. Lynch or Mr. O'Brien? Is that so?

A. That is right.

By Mr. Lockley: Your Honor, I ask that the Government be permitted to examine those papers.

By Mr. O'Brien: Well, we can discuss that as the whole discussion should have been had, if the Court please, outside the presence of the jury.

By the Court: Well, that means you will have to hold Mr. Meyer here, I assume.

By Mr. Lockley: If it please your Honor—

By the Court: Do you mean we take a recess now?

By Mr. O'Brien: Whatever is agreeable to the Court.

By the Court: Have you any further questions of Mr. Meyer outside the matter you have now referred to?

By Mr. Lockley: Your Honor, I don't know what those work sheets show so I am at a loss to know whether I will have any further examination of Mr. Meyer. I would like to have him stay within the jurisdiction of this
3681 court so that he might be available for further cross examination after we have had an opportunity to examine those work papers and I would suggest in the meantime, if the defense desires to do so, they may call their next witness and we can take care of this after the session this evening.

By Mr. McConnell: I think that would be better and then we could move along with the case rather than interrupt for this. I think it is an excellent suggestion.

By The Court: We will defer further examination of Mr. Meyer until tomorrow morning and then I will give counsel an opportunity to be heard on this matter.

By Mr. McConnell: Can we have some expression whether he is through with this witness otherwise? Is he through with him except for this documentary matter?

By Mr. Lockley: I have other matters I would like to take up with him, your Honor.

By Mr. McConnell: Why doesn't he go ahead and proceed with that and then we can move ahead with the case?

3682 By Mr. Lockley: It is a little difficult for me to see how far I want to go until I see what those work sheets pertain to.

By the Court: Very well. You will be at recess now, Mr. Meyer, until tomorrow morning at ten o'clock.

(Witness withdrawn.)

DAVID DRUCKERMAN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination By Mr. Kirby.

Q. What is your name?
A. David Druckerman.
Q. Where do you live, Mr. Druckerman?
A. 451 Wrightwood Avenue.
Q. In Chicago, Illinois?
A. That is right.
Q. What is your business?
A. I am a sugar broker.
Q. How long have you been in that business?
A. Oh, roughly twenty years.
Q. In Chicago?
3683 A. In Chicago.
Q. And your business covers what territory, generally?
A. Principally Chicago.
Q. Did you know a David Lubben?
A. Yes, sir.
Q. Did you do business with him in 1944 and 1945 and 1946?
A. I believe I did.
Q. You did?
A. I did.
Q. Do you know The Shotwell Manufacturing Company?
A. Yes.
Q. Did you do any business with them at any time?
A. I did business with them once, I believe.
By the Court: A little louder, Mr. Druckerman.
By the Witness: I did business with them once.
By Mr. Kirby:
Q. And when was the once?
A. I do not remember when it was. See, 1945, 1946.

I don't remember, but I did business with him, one transaction.

3684 Q. Was that a transaction involving 535,000 pounds of turbinato sugar?

A. Yes, that is right.

Q. What is turbinato sugar?

A. An unrefined, not highly polished, not highly refined.

Q. A poorer grade of sugar?

A. That is right, a poorer grade.

Q. Lumpy?

A. No, not necessarily lumpy, but it is yellow instead of white.

Q. That is the only time you ever sold any sugar to Shotwell at all, was it?

A. I believe that is correct.

Q. You had sold sugar to Lubben before that?

A. I don't recall. I might have.

Q. What?

A. I might have. I don't remember.

Q. Well, you did business with Lubben?

A. I did business with Lubben.

Q. Yes. Now did Lubben introduce the Shotwell people to you?

A. I don't remember whether it was Lubben or somebody else. I don't recall exactly. It could have been

3685 Lubben or it could have been somebody else.

Q. What is your best present memory?

A. I wouldn't know. It could have been Lubben. It could have been somebody else. I could have called on him myself.

Q. Did you call on him yourself?

A. Yes, I did call a number of times myself.

Q. You mean some years ago?

A. Some years ago and lately.

Q. Since, after the war?

A. After the war and before the war.

Q. This turbinato sugar deal for 535,000 odd pounds, describe what that deal was, Mr. Druckerman. Describe it.

A. I don't understand what you mean, describe it.

By Mr. Lockley: If your Honor please, I think that is too general a question.

By Mr. Kirby: Well, all right.

By Mr. Kirby:

Q. In those days was sugar under rationing points?

A. That is correct.

3686 Q. When you shipped this sugar to Shotwell, did you get the rationing points in advance?

A. I did not get them at once but I got them later on.

By Mr. Lockley: If your Honor please, may we have a foundation as to place and time?

By the Court: I think it should be made somewhat more definite than the record now reflects.

By Mr. Kirby: All right. I will see if I can locate the specific invoices, Judge. We moved into this a little faster than I thought we were going to so I have to waste a little of your time.

Do you have the Druckerman invoices that were in the fall of 1946? Are the general books of account of Shotwell down here, Mr. Krane?

By Mr. Krane: Yes, they are on the fourth floor, whatever Mrs. Morrill brought.

By Mr. Kirby: The purchase book, that would show the purchase of this.

By Mr. Krane: From Shotwell.

3687 By Mr. Kirby: Shotwell bought it from Druckerman.

By Mr. Krane: I don't know if they are here.

By Mr. Kirby: Mrs. Morrill—everybody keeps pointing at me and saying they gave me the papers and I don't doubt that they did, but I don't seem to be able to find them.

Well, that is the trouble over here. This is particularly embarrassing, your Honor, because my mother is in the audience and she will bawl me out good tonight.

Would you mark these Exhibits 61, 62 and 63 for identification.

(Said documents were marked Defendants' Exhibits 61, 62 and 63 for identification.)

By Mr. Kirby:

Q. I show you, Mr. Druckerman, Defendants' Exhibits 61, 62 and 63 and ask you if those are the invoices of some turbinato sugar to Shotwell?

A. Yes.

3688 By Mr. Kirby: I ask that they be admitted in evidence.

By the Court: Is there any objection? The exhibits may be received.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 61, 62 and 63.)

By Mr. Kirby:

Q. Mr. Druckerman, the first exhibit is for 125,000 pounds of sugar and the second is 310,000 and the third is 100,000. That gives us 535,000 pounds, is that right?

A. I believe so.

Q. And I notice that the invoices are dated the 17th of December and the 18th of December, 1946. Does that help you remember when you invoiced those shipments?

A. They must have been invoiced on the 17th and 18th of the month.

Q. Now, Mr. Druckerman, do you know when you shipped that sugar?

A. I have no exact records of the same but it was shipped before that.

Q. It was shipped before it was invoiced?

3689 A. That is right.

Q. And when did you get the ration stamps, when it was shipped or when it was invoiced?

A. When it was invoiced, about the 15th of December, the 16th or 17th or 18th.

Q. So you had shipped the 535,000 pounds before you got your sugar rationing stamps. Do you recall, Mr. Druckerman, that you were paid for that in advance of the date of the invoice?

A. Advance money, not all of it. Advance on some money.

Q. They sent you—Shotwell, that is, sent you checks?

A. That is right.

Q. Before the invoices came to them?

A. That is right.

Q. Is that right?

A. That is right.

By the Court: Speak up, Mr. Druckerman.

By the Witness: Yes.

By Mr. Kirby:

Q. Now, you were paid for that sugar, were you?

A. Yes, I was paid for the sugar.

Q. The invoiced amount?

3690 A. The invoiced amount, yes, sir.

Q. Was there any other condition or agreement in connection with that sugar besides merely the payment of the invoice amount?

A. Shotwell sold me some candy which I bought and paid them for it.

By the Court: Shotwell sold you some candy?

By the Witness: Yes, sir, your Honor.

By Mr. Kirby:

Q. How much, do you know?

A. I believe 5,000 cases or whatever it was. There is a record of same. There was invoices and so forth.

Q. Now, how many bags of sugar are involved in that shipment of 535,000 pounds?

A. 535,000 pounds—5,350 bags, a bag having a hundred pounds.

Q. So you shipped them 5,350 bags of sugar and they shipped you 5,000 cases of candy?

A. I believe that to be correct.

Q. You sold them at ceiling?

A. Yes, sir.

Q. And they sold you at ceiling?

3691 A. Yes, sir.

Q. Is this what was called in those days a trade deal?

A. That is right.

Q. And what you received what was called Coronet mix, is that it?

A. Many of the candy—I believe that is correct.

Q. Do you know or don't you know that at the same time Coronet mix was sent to Lubben? Do you know?

A. No, sir, I do not know.

Q. You didn't participate personally—

A. No, sir, I didn't.

Q. —in that deal?

A. No, sir.

By Mr. Lockley: In what deal?

By Mr. Kirby: The Lubben side of the deal.

By Mr. Lockley: There has been no testimony, your Honor, that there was any such deal.

By the Court: I don't understand that there was any such testimony.

By Mr. Kirby: No. That is what I thought he just said he didn't participate in.

By the Court: The mere fact that he said he did
3692 not participate in it doesn't mean there was one.

By Mr. Kirby: Well, we will cover that one.

By Mr. Kirby:

Q. Now, to whom did you sell that Coronet mix?

A. I do not remember to whom. It was to several people.

By the Court: I don't hear Mr. Druckerman. Will you speak a little more slowly?

By the Witness:

A. I do not remember to whom I sold. There was quite a number of people.

By the Court: You say you do not remember?

By the Witness: I don't remember to whom I sold the candy.

By Mr. Kirby:

Q. Was one of the persons to whom you sold candy Confection Cabinet Company?

A. I believe so.

Q. Was another one to whom you sold this candy Lubben?

A. No, sir.

3693 Q. Do you know anybody else to whom you sold this candy besides Confection Cabinet?

A. I do not remember. I don't remember.

By Mr. Kirby: I think that is all.

I also would like to offer as exhibits the receiving tickets of Shotwell which are attached respectively to Exhibits 61, 62 and 63 and have been marked respectively in the alphabetical series. Is there any objection to that?

By Mr. Lockley: No objection, your Honor.

By the Court: They may be received.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 61-A through 61-I; 62-A through 62-M; and 63-A.)

3694 *Cross Examination by Mr. Lockley.*

Q. Mr. Druckerman, I understand you sold sugar to Shotwell Manufacturing Company and they paid you no premium?

A. No, sir.
Q. And they sold you candy?
A. Yes, sir.
Q. And you paid no premium?
A. No, sir.
Q. Did Mr. Lubben have anything whatsoever to do with that transaction?
A. No, sir.
Q. Did Mr. Lubben give you any money or any raw materials or anything else of value so that you would sell candy to Shotwell Manufacturing Company?
A. No, sir.
Q. Or sugar to Shotwell Manufacturing Company?
A. Positively not.
Q. Did Lubben get any of that candy?
A. No, sir. Lubben did not get that candy.
Q. Did you get a penny from anybody for that sugar other than what you got from The Shotwell Manufacturing Company?
A. No, sir.
3695 Q. All you got from Shotwell is what is shown on the invoices?
A. 5,000 cases of candy.
Q. 5,000 cases of candy and for the sugar for which you paid?
A. That is right.
By Mr. Lockley: If your Honor please, I move to strike his testimony. I see that it has no relevancy to the issues in this case.
By the Court: It doesn't have any relevancy. Possibly counsel intends to connect it up. Standing alone it has no relevancy.
By Mr. Kirby: It will be connected up, your Honor.
By Mr. Kirby: Let me ask this question:

Redirect Examination by Mr. Kirby.

Q. Mr. Druckerman, we have had a number of exhibits here which related to Mr. Lubben's companies. They show a substantial amount of cash to a fellow by the name of Druckerman.
By Mr. Lockley: I object, your Honor. It is going

beyond the scope of the direct examination. He is
3696 going into an entirely new matter.

By the Court: Go ahead.

By Mr. Kirby:

Q. My question is, over the years you have had quite a few cash dealings with Lubben, in 1945 and 1946?

A. I can't hear you very well.

Q. You have had quite a few cash dealings here between 1945 and 1946, you and Lubben?

A. A lot of transactions.

By Mr. Kirby: That's all.

By Mr. Lockley: That's all, Mr. Druckerman.

By the Court: I will take it under advisement and if it isn't connected up, I will strike the testimony because as yet, the relevancy doesn't appear.

(Witness excused.)

BERNARD BERCU, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

3697 Q. What is your name?

A. Bernard Bercu.

Q. And your profession?

A. Certified public accountant for the State of New York.

Q. Where do you live?

A. 25 West 81st Street, New York City.

By the Court: Will you raise your voice a little bit, Mr. Bercu.

By the Witness: Surely.

By the Court: Face the jury more than me.

By Mr. O'Brien:

Q. What is the name of your company?

A. Bernard Bercu & Company.

Q. And has that been—

By the Court: I can't hear you, Mr. Bercu. State it again.

By the Witness: Bernard Bercu & Company.

By Mr. O'Brien:

Q. And did you and your company do the auditing for Eatsum Food Products Company?

A. Yes, sir.

Q. Both the proprietorship and the partnership?

3698 A. The proprietorship up to the time that it became a partnership and the partnership from June 1, 1945 to January 31, 1946, as I recall the dates.

Q. Did you also do some auditing for General Confections?

A. Yes, sir.

Q. That was for a limited period of time?

A. That was for a period from March through June, 1946.

Q. Do you recall during the proprietorship era that there were some overage transactions in which Eatsum Food—which Eatsum Food Products had?

A. Yes, sir.

3699 Q. Did you instruct and direct Mr. Lubben and Miss Feldman as to the system to be employed in the recording of those transactions?

A. The system to be employed was discussed by the three of us it was agreed to use a certain method.

Q. That is what I wanted to get at, Mr. Bercu. Just tell the jury briefly what the method was.

A. When Mr. Lubben began business as a sole proprietorship in April, 1944, the method he used to carry on his purchases was that of accepting invoices from the vendors, people from whom he bought goods, at whatever prices they listed, and adding to the invoice the amount of overage which he had agreed to pay them, and then entering the total amount of the bill, the gross amount, in his purchase book.

When I say Mr. Lubben, of course, the bookkeeper would do that for him.

The payments would then consist of the amounts, one check drawn to the order of the company for the amount of the invoice, and a second check drawn to the order of cash, cashed by Mr. Lubben, but charged to the accounts payable account of the concern to whom he

3700 made the overage payments, according to the record.

Q. Will you pardon me at that point, Mr. Bercu. Was that simultaneous checks?

A. Not necessarily.

Q. What was stated at the time as to whether they would be simultaneous or not?

By the Witness: Will you please repeat that?

(Question read.)

By the Witness:

A. The transactions in many instances—

By Mr. O'Brien:

Q. I am just asking about the system now, not what was done to comply with it. What was it that was agreed upon?

By Mr. Lockley: Is this the conversation, as I understand it, in April of 1944?

By the Witness: Early in 1944.

By the Witness:

A. The system, of course, was to pay the total amount which Mr. Lubben had agreed to pay for the merchandise. The actual carrying out of the system depended upon circumstances. In the one instance—

3701 By Mr. O'Brien:

Q. I am not asking, if you please, at this point, Mr. Bercu, about how it was carried out. I am merely trying to determine the system as it was then stated.

A. If you please, I am trying to point out that the system agreed upon naturally would depend upon the circumstances in the individual cases.

If I may answer your question as to the theory, it was understood that the gross amount would be entered in the purchase book, that the total amount of the invoices would be paid to the vendors in this dual method, by a check to the vendor for the amount billed by the vendor and cash for the difference.

Q. That would be by means of a cash check?

A. Of a cash check. If I understood your question correctly as to system, obviously it was impossible to carry on that business as Mr. Lubben carried it on and pay cash invoice separately because in some instances he would receive scores of invoices for drop shipments at one time, where the vendor had actually shipped the goods for him. Mr. Lubben's bookkeeper would bill

3702 the individual customers of the Eatsum Food Products for those goods and then would enter the purchase bills from the vendor either individually or in total and then pay them in lump—in groups, rather than individually.

Q. Well, I must insist, I haven't interrupted you because I don't want to interfere too much—but is it not true that you are now talking about practice?

A. It is the practice with regard to the system installed.

Q. I am only trying to understand what the system was. Let me ask you—you gave your deposition in this case, did you not?

A. Yes, sir.

Q. And on the deposition you said that the checks would be drawn simultaneously. Do you recall that?

A. No, sir.

3703 Q. It was at page 282—

By Mr. Lockley: Is counsel now trying to impeach his own witness?

By Mr. O'Brien: No, I am not.

By the Court: I don't suppose you can examine a witness by referring to testimony that he gave in a deposition unless you claim surprise or want to impeach your own witness.

By Mr. O'Brien: If the witness now says that that was not the system, I certainly do claim surprise, because I have his written deposition, that is on file in the office of the clerk right here, which contains his precise answer as to the system. And that is all I am asking him about.

By the Court: Well, if you want to claim surprise and want the right to cross examine your own witness—is that it?

By Mr. O'Brien: On that point I should like to, Judge.

By the Court: Well, what have you to say about it, Mr. Lockley?

By Mr. Lockley: I don't know that it is particularly important, your Honor. If Mr. O'Brien wants to

3704 cross examine him on that point I won't object.

By the Court: All right.

By Mr. O'Brien:

Q. On your deposition, Mr. Bercu, at page 282, do you recall making this answer as to the question:

"There were purchases made by Lubben regularly in dual form. He would receive an invoice at a certain price—whether that was the ceiling price, I did not know, I know that he was billed at a certain price. Lubben would add to that billed price an amount—

when I say Mr. Lubben, Mr. Lubben or his office—that is, someone in his office staff would add to that invoice an additional amount. The invoice would then be entered as a total amount, as adjusted. It would be entered in accounts payable. One check would be drawn to the order of the vendor for the amount of the invoice and posted to the debit of the accounts payable, another check would be drawn simultaneously to cash for the balance of this invoice and it would also be posted to accounts payable."

3705 Do you remember answering that?

A. I do. And as to many of the transactions, that was the system and the method. As to some accounts, however, that were on a continuous basis, that was wholly impractical.

Q. Well, you will appreciate, I am sure, Mr. Bereu, that I haven't yet come to the matter of practice and, as I indicated two or three times, I was talking merely of the theory which you discussed as you sat around the table at the inception, right?

A. That's correct.

Q. Now, in actual practice, and still speaking of the proprietorship—

By the way—withdraw that—did you employ or seek to employ the same system during the partnership?

A. I tried to employ that same system.

Q. All right. And in the case of the proprietorship did you, as the accountant, give any supervision to the work to see whether the system was carried out?

By the Court: In the proprietorship?

By Mr. O'Brien: In the proprietorship.

By the Witness:

3706 A. Only in very general terms. I relied on my associates to check the details.

By Mr. O'Brien:

Q. When I say "you" I mean you or your firm.

A. Oh, yes, the firm.

Q. You are really the C.P.A. and proprietor of that firm, are you not?

A. I had partners at that time.

Q. You had a partner, Mr. Weinert?

A. Right.

Q. And you had others on the staff and in the field?

A. Other partners and staff members.

Q. Yes, sir. And in some way or other, through your company, is it true that you endeavored to see that the system so agreed upon was pursued?

A. I personally was not so much interested in the—

Q. It is not a question of the degree of your interest, but did you or your firm, follow the matter enough to see to what extent the system was pursued?

A. So far as I know at the present time, in the proprietorship, that system was maintained right to the end of the proprietorship, the theory was maintained.

3707 Q. I didn't ask you the outcome of your investigation, I merely want to learn whether you or your firm took steps to see to what extent the system was complied with.

A. I did, yes.

Q. All right. And did you do the same in your endeaver to follow the system through the partnership?

A. No, I did not.

Q. Did your firm?

A. In general, yes.

Q. And in the proprietorship did you follow the matter, or did your partner or associates follow it?

A. In the proprietorship I spent a great deal of time personally in following through to see that the purchases were fully recorded, either on the books or in our work sheets, every month.

Q. And by the full recordation of the purchases do you include a proper recordation of the payment for the acquisitions?

A. No.

Q. Then your inquiry in the matter did not carry you into the records on which the payments were to

3708 be recorded?

A. My personal inquiry did not. I am not speaking of my own personal work in the matter.

Q. To what extent then, if at all, are you able to tell us how closely the keeping of the records at the proprietorship conformed to the system which you have described?

A. Only from the monthly profit and loss statements which we prepared.

Q. You mean from the statements themselves?

A. From the statements themselves and the comparison of physical inventories taken at the end of every month with the book inventories of purchases—of opening inventory, plus purchases, less sales of that month.

Q. Is it true, Mr. Bercu, that your primary interest was in the inventories and in the inventory controls?

A. That is true.

Q. Now, what was the system which you set up to effect a merchandise control or an inventory control, whichever is the proper term?

A. The proprietorship had a stock record, looseleaf stock record, what the accountants call a perpetual
3709 inventory, listing the items purchased, and then from monthly analysis sheets deducting the sales of those purchased items, leaving a book balance of individual items to be accounted for.

The physical inventory was supposed to be in agreement with that book balance. If there were discrepancies I made it my personal duty to trace those discrepancies with Mr. Lubben every month.

Q. Yes, sir. Well, now, taking that, Mr. Bercu, during the course of your own personal attention to this phase of the auditing, you may state whether there were times at which you found such discrepancies in any substantial way?

A. Yes; every month I found very substantial discrepancies.

Q. Could you tell us briefly the nature of them, the problem which you encountered; not at length, but just briefly?

A. I would—

By Mr. Lockley: Well, if your Honor please, I think we ought to have a foundation as to which particular period of time, whether he is talking about '44 or '45, and some identification of the circumstances, or the time of
3710 each circumstance you refer to.

By Mr. O'Brien: I would be glad to do that, but this is just a preliminary question. When he tells me what they are, some of them I might be interested in, and we will put them in the period. I can ask now, if you prefer.

By Mr. O'Brien:

Q. Whether you found them during the year 1945?

A. The sole proprietorship ended, technically, as of May 31, 1945. Actually, as I recall, the partnership control began sometime before May 31. But technically the sole proprietorship ended May 31. Up to that time we maintained this perpetual stock record and very generally—of course, I have no—I don't have the records before me, and these things occurred eight and nine years ago—

Q. I am speaking only in general.

A. My recollection is that I would find that a fairly substantial item was sold, an invoice was recorded for the sale of an item, and there was no purchase recorded. I would sit down with Mr. Lubben and go over each of these items and ask him, "Where did this come from?

3711 You billed it. Obviously you bought it."

He would explain that he had bought one item from one company, and had them ship that item to a second party, who, in turn, gave him other goods that he had sold to third parties.

In other words, I would find a purchase, or a record of a purchase of an item with no matching sale and I would find a sale with no matching purchase.

He was able, in practically all instances, to explain these discrepancies by digging into his memory of transactions, of these trade transactions, where he had had three-way swaps.

3712 Q. And where you found trade transactions of that sort, Mr. Bercu, after you had checked it out in your discussions, did you find that they were trades at ceilings?

A. I knew nothing at all about the question of ceilings. As an accountant—

Q. I see. But would you describe a little further what you mean by a trade?

A. Mr. Lubben would buy one type of goods from one manufacturer. It might have been—I am trying to think after eight or nine years, the individual items—

By Mr. Lockley: If your Honor please, I feel that I must object unless Mr. Bercu can relate in some specific transaction.

By the Court: Well, I am not sure whether these are just general questions—and you will come to something more specific, is that it?

By Mr. O'Brien: Yes, of course, Judge.

By the Court: Well, generally, he may state what a trade transaction was, as he understood it.

By the Witness:

3713 A. A trade transaction, as carried on by Mr. Lubben and quite a number of other traders in those days, consisted of buying one lot of one type of goods from one concern, having that concern ship that lot of goods to a second concern, who, in turn, would ship either to Mr. Lubben, or Mr. Lubben's account, a third type—a second type of goods.

Mr. Lubben would have a record of having made a payment to the first party for goods, for which he didn't make any sale. On the other hand, he would have a record of a sale, of a specific item, for which there was no purchase.

I could match those items only by conferring with Mr. Lubben as to what had actually occurred. And then I would learn about the intermediate transactions which were not recorded in any way.

By Mr. O'Brien:

Q. Now, Mr. Bercu, until you got that reconciliation satisfactorily done, the effect, as far as the books are concerned, is that they would be out of balance, would they not?

A. Not at all.

Q. What would be the effect, until you ascer-

3714 tained the facts?

A. As far as the books are concerned, if we didn't attempt to reconcile those physical inventories, there would be a purchase of a certain amount in dollars and there would be a sale of a certain amount in dollars. The analysis of the merchandise transactions was wholly outside of the books of accounts.

Q. I see. And when you got the items reconciled would that be reflected by any sort of posting to the books?

A. So far as I can recall, we tried to adjust those transactions.

Q. I see. Now, during the partnership was there a cash box maintained that came to your attention—I mean the proprietorship?

A. So far as I can recall, th re was no cash box of the kind that became rather notor ous under the partner-

ship, until the new partners stepped in, some time in April of 1945. Prior to that time, to the best of my knowledge, there was no cash box.

Q. Well, that is your best recollection on time, Mr. Bercu?

A. That is my recollection now.

3715 Q. At any rate, you, as an auditor, did you have anything to do with the auditing of such a box?

A. I never audited any cash box.

3716 Q. Right.

A. At any time in the—in my connection with any of Lubben's enterprises.

Q. Are you able then to tell us whether the profit, if any, from such a cash box, was carried into the books of the company in any way?

A. Not as to the cash box. What I would get would be a summary from Mr. Lubben of cash transactions which he handled and, to the best of my recollection, we tried to—or we did enter in summary the net effect of those cash transactions.

Q. And where would you make those entries?

A. On the books of the proprietorship.

Q. And what book?

A. Journal entries.

Q. Journal entries. And in case of any profit from the transaction—do you remember the handling of any profit from those transactions?

A. I am referring to profits or losses. The net effect of the transactions.

Q. Well, to what would you charge them, what account?

A. Without seeing the records, if—I am trying to think back to some of those entries.

3717 Q. Well, do you presently remember what account?

A. My rather vague recollection is that profits were charged to—not profits so much as pending items were charged to David Lubben's personal account, until they could be cleared up.

Q. Mr. Bercu, I have a group of papers which I would like to exhibit to you, and in the interest of time have the Reporter afterwards mark. The first is a longhand sheet with a date—December, 1945—at the top.

Can you tell me, if you know, in whose handwriting that appears?

A. So far as I can judge now, this is in my handwriting.

Q. And a second such sheet, under the same heading December, 1945, is that in your handwriting, too?

By Mr. Lockley: I am sorry, Mr. O'Brien, I didn't get the date.

By Mr. O'Brien: December, '45, is the heading.

By Mr. Lockley: Are they both December, '45?

By Mr. O'Brien: Yes, they are continuous sheets.

3718 By the Witness:

A. That is apparently in my handwriting.

By Mr. O'Brien:

Q. I show you a sheet already marked Defendants' Exhibit 11 for identification and ask you to state if it bears your genuine signature and handwriting?

A. This was a balance sheet of Eatsum Food Products Company on our firm letterhead and signed by me as CPA, and also signed by Mr. Lubben.

By Mr. Lockley: Mr. O'Brien, might you ask him what the date is of that balance sheet, Exhibit 11?

By Mr. O'Brien: I have already identified it for you as Defendants' Exhibit 11 for identification.

By the Witness: April 30, 1945.

By Mr. O'Brien: But I am glad to give it to you. Yes, that is right.

By Mr. O'Brien:

Q. And I show you a typewritten sheet, with longhand figures, and ask you to state—indeed, there are three of them here. The one in your hand relates to December of 1944.

A. April 1 to December 31, 1945, Eatsum Food

3719 Products Company.

Q. Yes, sir.

By the Court: I am afraid that when you—I know that you have got to stand near the witness, but I am afraid the jury don't get much of the testimony, Mr. O'Brien.

By Mr. O'Brien: I appreciate it, your Honor, but it is a mere matter of identification. I will go into it later. I don't mean to keep it from them.

By Mr. O'Brien:

Q. Were these prepared by your firm, Mr. Bercu?

A. Yes, sir.

Q. And is the same true of the two sheets, headed Eatsum Food Products, 12-31-44, which I next hand you?

A. Yes, sir, these were prepared by my office. They are photostats of work sheets from our office. Those are '44, also.

3720 Q. Right. Now here is one, "Moneys disbursed by D. Lubben, cash disbursements, May, 1945," consisting of two sheets. Will you examine that and tell me if you have seen that before, or the original.

A. These sheets apparently are in my handwriting.

Q. And they are part of your work sheets in the matter of Eatsum Food Products Company for the period indicated?

A. I should judge so, although it is—

Q. And I show you four white sheets headed "Eatsum Food Products," the first, work sheet of 6-30-45, the next one of the same date, and the next a work sheet of journal adjustments of 6-30-45, and the final white sheet of this group headed "November, 1945 receipts", and ask you to state if they are in your handwriting.

A. Yes, sir; they are.

Pardon me. You appreciate, of course, that some of these are work sheets of the sole proprietorship and some of the partnership.

By Mr. O'Brien:

Q. Yes, of course.

By the Court: I think it is adjournment time, 3721 counsel.

By Mr. O'Brien: All right, sir.

By the Court: We will be in recess until toomrrow morning at ten o'clock.

I will hear counsel immediately after adjournment, regarding the question of the memorandum, if that is convenient to counsel.

By Mr. Lockley: Yes, your Honor.

By the Marshal: Will the audience please remain standing while the Judge and the jury leave the court room.

This honorable court will recess until ten o'clock tomorrow morning.

By Mr. O'Brien: Will you mark these Defendants' Exhibits 64-A to 64-H, inclusive, for identification.

(Said documents were marked Defendants' Exhibits 64-A to 64-H, inclusive, for identification.)

(And thereupon the following further proceedings were had herein outside the hearing and presence of the jury:)

By the Court: I will hear you now, Mr. O'Brien, on your objections to the use of the memorandum by
3722 Mr. Lockley.

By Mr. O'Brien: It isn't quite clear to me, Judge, and I didn't want to get into it even as much as was done before the jury, for obvious reasons. So I didn't inquire, but my present impression is that the witness—who, incidentally, was presented by and interrogated by Mr. Kirby—so that my recollections aren't as sharp as they otherwise would be, that the witness testified to various transactions, and he brought with him, as I understood it, the supporting papers on that, and on those items, down to the point at which he was discussing a journal entry of some $12,235.00, or whatever it was, and for the purpose he resorted to some sheets which he had with which to refresh his recollection. And it was then that Mr. Lockley inquired as to what those were. And at that recess those sheets to which the witness was thought to have referred were made available.

And then further questioning after the recess had to do with that journal entry.

Now, it is quite clear to me, in view of that, that there can't be the slightest objection on our part to bringing in the journal entry in question rather than that
3723 document.

And that much I think we can pass without further comment.

By the Court: When you use the term "journal entries", you Mr. Meyer's work sheets?

By Mr. O'Brien: Yes.

By the Court: Of journal entries.

By Mr. O'Brien: That is a fair refinement of it, because there does seem to be, I now recall, the two things, his work sheet journal entries and the book journal entries. I have never seen the books, but I am told that that book is here. From what was said on the stand, however, it

does not necessarily follow, because the witness didn't know whether their suggestions about journalizing those on the books were carried out or not.

3724 So that I do refer to his work sheet journal entry and that is what is included in my statement, that it surely would be proper to bring that. Now, where the doubt arises, I do not know what if anything else is involved.

By the Court: Well, I take it what is involved is the entire memorandum. He apparently utilized a memoranda to refresh his recollection about a portion of his testimony, at least. Now, then, Mr. Lockley then inquired when he made it whether or not anyone assisted him, what the underlying data may have been for the preparation of the memoranda and he answered those questions.

Now, then, Mr. Lockley takes the position, as I understand it, that he should not be confined to just a few lines of a page which the witness says he referred to but the memoranda as a complete document that the witness prepared at one time or at least this one document, and that he should have a right to examine the entire record that the witness—the entire memorandum that the witness had before him. Is that about it?

By Mr. Lockley: Yes, sir, your Honor.

By the Court: I want to clarify my own thinking and explain to Mr. O'Brien what I understand your posi-

3725 tion to be.

By Mr. O'Brien: Well, is that what we are talking about?

By Mr. Lockley: We are talking about—we are talking in part about this six page memorandum which the witness prepared. I think that since he has been testifying as to matters which are not on that memorandum, I have an opportunity or should have an opportunity to examine it for the purpose of impeachment to see whether or not this testimony on the stand is any different from what is contained in that memorandum.

I would also like to point out in United States vs. Ricardi, which is just footnoted in Title 18 of the Code under Rule 26:

> "Where it is sought to impeach memory of a witness by a writing, a trial judge should in the first instance satisfy himself as to whether the witness

testifies upon a record or from his own recollection so that if the witness is wholly dependent for the fact upon memorandum, proper steps may be taken to determine the accuracy of the memorandum and the judge may determine whether the device of refreshing
3726 his recollection is merely a subterfuge to properly suggest to the witness the testimony that is expected of him."

I don't know of the circumstances under which this particular memorandum was prepared. It may have been prepared under those circumstances. I think I am not only entitled to examine the memorandum as a whole, but I am also entitled to examine all of the work papers which are by no means privileged because they are not the work papers of the defendants. They belong, under accounting law, as I understand it, to the accountant who prepared it.

By the Court: Mr. O'Brien recognizes that the work papers which involve the suggested journal entries should be made available to you.

By Mr. Lockley: Your Honor, I think we are entitled to any and all work papers which are in the hands of the defense.

By Mr. O'Brien: Well, I think I understand now, if the Court please—

By the Court: I don't know.

By Mr. Lockley: If your Honor please, if this is evidence in the case—

3727 By the Court: All work papers of Meyers?

By Mr. Lockley: All work papers of Meyers. They are not privileged. They reflect only matters which relate to the General Confections Corporation and not to the Shotwell Manufacturing Company. Those belong to one of two people, either to the accountant who prepared them or to Mr. Lubben, or the General Confection Corporation who paid for their preparation. The defense has no right to those whatsoever any more than the government has. If they were in the hands of the government, the defense would certainly be permitted to see them by this time. As a matter of fact, I believe that the subpoena was issued for those work papers and they were turned to the defense and not to the government and this

is the first information that we have they were even in existence.

By the Court: You use the term "work papers" in a very general sense. I don't know that Mr. Meyer has testified to any work papers outside of those that he brought into the court room.

By Mr. O'Brien: He hasn't.

By the Court: Except the journal entries that constituted his work sheets.

By Mr. Lockley: Well, he also referred to purchase work papers, your Honor. He said he used those.

3728 By the Court: I have forgotten.

By Mr. Lockley: Yes.

By the Court: You mean—

By Mr. Lockley: Work papers presumably relating—

By the Court: Which were obtained from certain purchase records?

By Mr. Lockley: Yes, purchase records of the General Confections Corporation. I would assume them to be work papers. These are work papers taken off of the General Confections books, information placed on a work sheet which information originated on the books of General Confections. There is nothing in any way privileged about those documents.

By Mr. O'Brien: Well, we perhaps can progress if we take one thing at a time.

Now, there is a transcript of the proceedings. We have one on the morning session which was delivered to us at court and we have one on the afternoon session which we get along about 7:00 o'clock at night. I am quite sure—but it is subject to verification from the record—but I am quite sure the the witness in none of the interrogation, either on direct or on cross, referred to anything except the underlying fundamental work sheets, with this ex-

3729 ception, which arose today: That when he was interrogated about a specific item, he reached for this memoranda and the item was that $12,235.00.

Now, the journal entries pertaining to that item he did not have with him and that I am perfectly willing to supply. In short, I was unwilling to have the witness turn over more of his typewritten memoranda at the time because the fact is that that typewritten memoranda which he prepared, was prepared for the lawyers of the defense and at our request and working with us on the case and

it didn't seem to me—I didn't know what the other pages related to, but it didn't seem to me that simply because the witness was turning to one place to try to refresh his recollection on the question that was involved, that counsel had the right to any other part of that extensive memoranda.

3730 So at the time there was given to counsel the sheets which the witness himself said that he was referring to on that matter. I am perfectly willing to bring in the journal work sheets on the same subject.

By Mr. Lockley: Your Honor, I dislike to be in the position of having to disagree with Mr. O'Brien, but yesterday on his direct examination, I noted that the witness was at that time referring to a white document which I now believe to be this memoranda, and frankly, I must admit it didn't occur to me at the time that that was what was going on.

By Mr. O'Brien: Mr. Lockley, if that is so, then two other things are so. First, you didn't say it, so it didn't come to my attention.

By Mr. Lockley: I said I did not think of it, Mr. O'Brien.

By Mr. O'Brien: Second, you didn't ask the witness that today, or if you did, he insisted he had not referred to any part but that.

By Mr. Lockley: I asked him for everything that he had used yesterday, Mr. O'Brien.

By Mr. O'Brien: Well, I will certainly say that the

3731 transcript itself will correctly, more correctly reflect what did occur.

By the Court: The transcript may not describe what took place in so far as the use of a memorandum is concerned.

By Mr. Lockley: Well, perhaps, your Honor, we might settle it by having Mr. O'Brien submit the memoranda to you so that you can examine it and determine—

By Mr. O'Brien: I don't think that would settle it.

By Mr. Lockley: That is placing a burden on the Court.

By Mr. O'Brien: I don't think that would settle it. I think the only way you could settle it would be through the combined use of the transcript and the witness.

By the Court: I don't know exactly how to answer it. You are attempting to take off two sheets of this

memoranda and say this is all the witness used. Well, maybe that is all that this witness used to refresh his recollection but you have a memoranda prepared. The balance of the memoranda may throw some light on the
authenticity of the two sheets that the witness util-
3732 ized. It may have some bearing on the time when
the data was prepared. It would be just as if you had a written statement of a witness—as if he made a long written statement and he had it in his pocket and he took it out to refresh his recollection and he would say "I only read the first line of that statement." Then your position would be that the other side would only have the right to read that one line. Obviously, that just is not sound.

By Mr. O'Brien: I would agree with that.

By the Court: Counsel have a right to see that entire document in so far as it purports to be the memoranda he referred to, which he utilized to refresh his recollection.

By Mr. O'Brien: Judge, what you say and what counsel says about memoranda in general and those used to refresh recollection, are those on which the testimony depends, it is quite true, but here the witness's testimony by and large is not related to any memoranda. The only instance where there is anything that can help him about the memoranda is when he merely reads from it. But
his testimony does not depend on the memoranda. It
3733 depends on the underlying sheets. Those, I say, I
will bring.

By the Court: That is not entirely accurate because he takes out of those sheets—he said he took these 28 checks and there are 81 checks drawn to cash as to which we have acquired an explanation. There were 28 of those checks as to some of which we didn't receive satisfactory explanation. Now—

By Mr. O'Brien: I brought sheets which showed the checks on them.

By the Court: Yes, but my recollection is that the sheets reflect the 81 checks that were subject to question. The sheet doesn't determine as to which chcks he received satisfactory explanation on and as to which checks he did not receive satisfactory explanation.

By Mr. O'Brien: But Judge, he did have two sheets. One was the total in question and then those that remained,—

By the Court: He has resorted to his memory. I am not criticizing it but I am saying it. He has resorted to his memory as to which checks he concludes satisfactory explanation has not been given.

3734 By Mr. Kirby: Excuse me, your Honor. If you will indulge me for a second: In that first period there were two separate exhibits. One had all 81 set out on it.

By the Court: That is right.

By Mr. Kirby: And the other had 28 set out. It wasn't a question of memory at all. The 28 were set out and that is in evidence.

By the Court: Then he says after those 28 "On some of those we didn't receive satisfactory explanations". He has resorted to his memory with reference to that. Right?

By Mr. Kirby: The explanation for all 28 is right on that sheet.

By Mr. Lockley: He didn't so testify, Mr. Kirby, while I was examining him, because I asked him about each one of those work sheets and on each occasion he said that there was nothing on the sheet which would help him tell that, which one of those checks were questioned; that he was relying upon his recollection at the time he went over them last fall, when he was preparing for the testimony in this trial.

By the Court: That is my recollection.

3735 By Mr. Kirby: There is a separate sheet which is in evidence on those 28.

By Mr. Lockley: That isn't what he testified to, so you got him back on redirect.

By Mr. Kirby: It is true, Mr. Lockley, there was such a separate list.

By the Court: I think counsel has the right to receive the entire memoranda.

By Mr. Kirby: That memoranda was made for me personally.

By the Court: The journal work sheets that he has in his possession should also be turned over to Government's counsel.

3736 By Mr. O'Brien: The witness was talking about journal entry 104 on the $12,235.00.

By the Court: I am sorry.

By Mr. O'Brien: The witness was talking about journal entry 104 on the $12,235.00 check. That is the only

thing on which he didn't have the original underlying data with him.

By the Court: Well, you contend there is something privileged in this sheet that constitutes this memoranda?

By Mr. O'Brien: Something privileged. I think any papers that come to counsel for defense in a criminal case are privileged, certainly.

By the Court: Counsel didn't prepare it. He prepared it. He said he had no help from anybody. How do you contend there is anything privileged about it?

By Mr. O'Brien: He prepared them for us. He prepared them at our request as part of the defense of the case.

By the Court: The fact that he prepared them for you doesn't make it privileged. I don't know.

By Mr. O'Brien: I think it is. Under the cases, it would be a serious error to take any other position, if
3737 the Court please, at this late stage of the case.

By the Court: Well, I will so rule.

By Mr. Lockley: Did I understand your Honor's rule that we are entitled to examine the work sheets relating to the journals and the work sheets relating to the purchases?

By Mr. O'Brien: All the Court is talking about is the memoranda that the man has.

By Mr. Lockley: I want to go further than that, Mr. O'Brien.

By the Court: Well, you want the memoranda and you want the work sheets which reflect the setup of the suggested journal entries, right?

By Mr. Lockley: Yes.

By the Court: What else do you want?

By Mr. Lockley: And he also testified he had some work sheets relating to purchases.

By the Court: Well, how does that bear upon his testimony?

By Mr. O'Brien: Not a bit.

By Mr. Lockley: He testified, your Honor, that he was able—I don't recall the exact testimony, except I do recall he said he had relied on those work sheets in part in preparing his memoranda; that he had not pre-
3738 pared it entirely from the work sheets in evidence, but in preparing his memoranda, he had also used the work sheets on the journal entries and the work sheets

on the purchases. To what extent he used them I am unable to say because I don't know what is in them.

By Mr. O'Brien: Judge, if I may suggest, granted that there was a right with which I do not agree—granted there is a right to look at the entire memoranda which the witness was using, then surely that could only be for the purpose of seeing whether the things that he had testified about were completely comprehended. By that I mean if I am looking at the memoranda and it were seen that only pages 3 and 4, for example, had to do with the business at hand and the remaining pages lent no assistance to the testimony that he had given, then I do not think it follows that they should reach out and go into all the remaining pages.

By the Court: Are you contending the government would not have the right to use any of the remainder of the memoranda as any offer of substantive evidence?

By Mr. O'Brien: That is right. It would be a mere matter of checking the accuracy.

By the Court: I am inclined to think Mr. O'Brien's
3739 position is well taken in so far as the use of the memoranda is concerned; that you have a right to inquire regarding any entries on the memoranda which the witness may have resorted to in giving his testimony and you have a right to examine the memoranda in so far as it may bear on the authenticity of the entries therein as to which he testified and the time that he prepared the memoranda and whether or not he prepared it himself or whether it was prepared by someone else in his behalf.

I don't know that I encompass all of it. I don't know that I have encompassed the entire scope of your cross, but it would seem to me that there may be entries on there that may be entirely foreign to his direct testimony and as to that, he wouldn't have a right to inquire.

By Mr. Lockley: I quite agree, your Honor.

By the Court: Now, then, I am not too clear. You say that in addition to the work sheets which set forth the suggested journal entries that there are certain purchase sheets or that there are notes made up from the purchase sheet, is that it?

By Mr. Lockley: I understand that these are work sheets which he prepared back in 1946 or 1947 relat-

ing to the purchase book of the General Confections
3740 Company.

By the Court: What objection, Mr. O'Brien, have you to the turning over of those work sheets which have relation to the purchase entries?

By Mr. Lockley: I think that we have an immediate subpoena for those documents right now, your Honor.

By Mr. O'Brien: If you think you will serve the subpoena—

By the Court: They may have them in their possession.

By Mr. O'Brien: You serve the subpoena.

By the Court: On someone subject to subpoena.

By Mr. O'Brien: I don't mind telling you if you do serve the subpoena we hope to quash it under Mr. Wigmore's rule. He says neither such a subpoena nor an order in a criminal case will lie.

By the Court: I am sorry. I did not hear you.

By Mr. O'Brien: Let me read it.

By Mr. Lockley: You mean, Mr. O'Brien, that the defendant has a right to suppress evidence in a criminal case?

By Mr. O'Brien: I will read you what the man says. You talk about my getting orders for documents that you have. That is true. I am entitled to them under the rules but it doesn't follow the other way
3741 around that the government is entitled to subpoena from the defendants.

By Mr. Lockley: But these are third party documents.

3742 By the Court: After ruling, I qualified my statement by saying—

By Mr. O'Brien: I was talking to him, your Honor.

By the Court: You have a right to serve your subpoena on a person who is subject to a subpoena.

Mr. O'Brien: I appreciate that.

By the Court: Well, whatever Mr. Lockley may say in that regard, you will take it up with him. There is no use arguing before me. I don't care to hear it now.

By Mr. O'Brien: Do I correctly understand, Judge, at this time, that—

By Mr. McConnell: I will suggest this: I don't think it is proper to have an argument of this kind before the jury in the morning. I think it is very prejudicial to

argue these questions before the jury. If he has anything to say, Mr. Lockley, he should say it now.

By Mr. Lockley: The jury is not here now.

By Mr. McConnell: But you are deferring the argument to tomorrow morning, from your attitude.

By the Court: I don't think he is deferring any-
3743 thing to tomorrow morning. I have asked you and I don't think you have responded, what objection do you have to the production of Mr. Meyer's memoranda reflecting the so-called data on the purchase record.

By Mr. O'Brien: The only thing that I recall without reference to the transcript is the journal entry on a check of $12,235.00 and from what I do recall, I am satisfied that I should produce that journal. Either that or the man's testimony on the subject should be stricken, but on the purchase record, just because he said there was a purchase record or that there were such work sheets, does not mean I am to produce them where he has no testimony, no specific item that was in any way related to it.

By the Court: I must confess I don't have any recollection of Mr. Meyer referring to a so-called purchase record in his testimony.

By Mr. O'Brien: I don't either.

By Mr. Lockley: Right after recess, your Honor.

By the Court: How is that?

By Mr. Lockley: Right after recess, your Honor.

By Mr. O'Brien: Mr. Lockley is right, to this ex-
3744 tent, Mr. Lockley asked him if he had any other work sheets which he didn't have with him and he said he had some purchase record work sheets. That is true. What I am trying to say is that there is no part of his testimony in which he testified to anything of that sort. It was merely the fact of the existence of it.

Now, it is different with the journal item. He was asked about that by both sides, journal entry 104, and when he didn't have it with him and he started to reach for this other memoranda, Mr. Lockley says, "If it wasn't on your sheet, what are you looking at there?" And he came to the memoranda. We had no objection. If we ever foresaw the thing, we would have had the sheet in the first place, and we are perfectly willing to bring it now but the purchase thing is something else.

By Mr. Lockley: You will recall, your Honor, the

witness gave certain testimony to the effect that on one of the shipments it should have been entered in the purchase book for August and it was entered in October instead.

By Mr. O'Brien: That is correct. That is the $12,235.00 item that I am talking about.

3745 By Mr. Lockley: Well, this item is for $19,735.00.

By the Court: Well, you mean that the notes on the purchase books should be made available to you in so far as that item is concerned?

By Mr. Lockley: Well, at least that far, your Honor. I don't think there is anything privileged with reference to those records in any way whatsoever.

By the Court: Well, you must distinguish it, I take it.

By Mr. O'Brien: It is a journal entry.

By the Court: On the question of privilege and the question of what I should order in connection with this testimony, I suppose he can serve a subpoena on Meyer and call for any records he may have. I haven't any control over that now. I am merely trying to clarify the situation in so far as his testimony is concerned and what documents he did have by reason of his testimony which he has given here.

3746 By Mr. O'Brien: Mr. Lynch, the auditor, tells me, Judge, that the item Mr. Lockley just spoke of, the one that should be—the one that the auditor on the stand said should have been in August, is the same one I am talking about and it is shown by journal entry 104. But, he didn't have it with him, though I am perfectly willing to bring it in.

Incidentally, Judge, the whole journal entry we are talking about—not the original of it, but a copy of it, is in the sheets of the memoranda we have already given but I will bring in the original work sheets for Mr. Lockley.

By Mr. Lockley: Well, your Honor, rather than introduce any possible error in the case, I am going to return to Mr. O'Brien now the two pages of the memoranda which the witness has previously given to me.

By the Court: Well, what do you mean by that gesture?

By Mr. Lockley: I am not going to cross examine the witness with respect to those memoranda and I am not

going to examine him any further or have any further use for him.

By the Court: All right. Then there is nothing more for the Court to rule on.

3747 By Mr. Lockley: Yes, your Honor. That is correct.

By Mr. O'Brien: Thank you very much.

By the Marshal: This Honorable Court will recess until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken in the above-entitled cause to Tuesday, October 6, 1953, at the hour of 10:00 o'clock A. M.)

3748

* * (Caption—No. 52 Ch 143) * *

Chicago, Illinois,
Tuesday, October 6, 1953,
10:00 o'clock A. M.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:

By the Clerk: United States of America vs. The Shotwell Manufacturing Company, et al. Case on trial.

3749 (Said documents were marked Defendants' Exhibits 64-I to 64-Z and 64-AA to 64-DD, both inclusive, for identification.)

(Said documents were marked Defendants' Exhibits 65-A to 65-X, both inclusive, for identification.)

(Said documents were marked Defendants' Exhibits 66-A to 66-Y, both inclusive, for identification.)

By the Court: Well, we were delayed a few minutes this morning, members of the Jury, because they were

marking exhibits and we thought we could expedite matters if the exhibits could be marked before we came into the proceedings this morning.

By Mr. O'Brien: Bernard Bercu.

By Mr. Lockley: If your Honor please, may I state at this time that I had asked permission to interrogate Mr. Meyer further this morning and I now wish to withdraw that permission—

By the Court: All right. Very well.

By Mr. Lockley: Or that request.

By Mr. McConnell: May I ask if Mr. Meyer is released now? Is he free to go back to New York?

By Mr. Lockley: In so far as we are concerned,
3750 your Honor, yes.

BERNARD BERCU, a witness heretofore called herein on behalf of the Defendants, having been heretofore first duly sworn, resumed the stand and was examined and testified further as follows:

Direct Examination (Ctd.) by Mr. O'Brien.

Q. Mr. Bercu, I show you a sheet which has already been marked Defendants' Exhibit F for identification.

By the Court: F?

By Mr. O'Brien: Yes, sir. No. I am sorry. That is a 7, Judge. It looks like F.

By Mr. O'Brien:

Q. I will ask you to state if it is a photostatic copy of one of your work sheets or reports during the partnership period?

A. Yes, sir.

Q. I show you an instrument marked at a prior hearing Defendants' Exhibit 43 for identification and ask you to state if you are familiar with the handwriting on that document?

A. No, sir.

3751 Q. I show you instruments marked this morning Defendants' Exhibits 64-J and 64-K, and ask you if the first of those is in your handwriting.

A. Yes, sir.

Q. And if it is one of the work sheets which you made for the period covered for Eatsum Food Products Company?

A. Yes, sir.

Q. Will you look at Defendants' Exhibit K and—

By the Court: K?

By Mr. O'Brien: Yes, sir, K.

By the Court: You mean 64-K?

By Mr. O'Brien: I am sorry. I do. It is 64-K.

By Mr. O'Brien:

Q. And tell me if that is a work sheet of Eatsum or a balance sheet as of December 31, 1945, made by your firm.

A. Yes, sir. In the first instance, it was a work sheet of the sole proprietorship as modified by partnership transactions in April and May of 1945 and in the second instance, it was all partnership.

Q. I now show you documents heretofore marked,
3752 that is, at a prior hearing, Defendants' Exhibit 64-L for identification and ask you to state if those are work papers from your files or copies of work papers from your files on Eatsum Food Products for the period mentioned in those papers.

A. I identified these yesterday.

By the Court: A little louder, Mr. Bercu.

By the Witness: I believe I identified these yesterday and so testified that they were in my handwriting.

By Mr. O'Brien:

Q. Well, that is true, is it not? Your answer to my question is yes?

A. Surely.

Q. Sometimes we may get them mixed up, Mr. Bercu. I am sorry. I now show you Defendants' Exhibit 64-M for identification and ask you to state if that is one of your work sheets for October, 1945, the partnership?

A. Yes, sir.

Q. And Exhibit 64-N, is that also one of your work sheets for November, 1945, in the partnership?

A. Yes, sir.

By Mr. O'Brien: Incidentally, Judge, that Exhibit
3753 64-L that the witness identified consists of two sheets. The second sheet is not marked.

By Mr. O'Brien:

Q. I now show you Defendants' Exhibit 64-T, T as in Tom, for identification, and ask you to state if the top

sheet is a balance sheet prepared by your firm for the partnership as at October 31, 1945?

A. Yes, sir.

Q. And the attached sheets, Mr. Bercu—

A. Are—

Q. —are how many in number?

A. There are three attached sheets.

Q. Are they a part of the same—

A. They are all—they are photostatic copies of a report, of a monthly report which we rendered to the partnership.

Q. All right.

A. All on our firm stationery.

By Mr. O'Brien: The three attached sheets are not separately marked, Judge, so the exhibit consists of four sheets.

By Mr. O'Brien:

3754 Q. I show you also Defendants' Exhibit 64-U for identification, and ask you if that is a copy of a balance sheet prepared by your firm for the partnership as of November 30, 1945. I was referring to the top sheet, Mr. Bercu.

A. Oh, I am sorry. Yes, it is a photostatic copy of a report prepared by our office.

Q. And would you be kind enough to tell us what the attached three sheets are?

A. They are parts of the same report.

Q. That again is a monthly report?

A. A monthly report of the recorded transactions of Eatsum Food Products Company, the partnership.

Q. I show you Defendants' Exhibit 64-V for identification and ask you to state if that is a balance sheet prepared as of January 31, 1946.

A. It is a balance sheet as of January 31, 1946, without inventory.

Q. I see. And is the Exhibit 64-W a statement of profit and loss for the period June 1, 1945 to January 31, 1946, also of the partnership?

A. Yes. This is a statement of income, profit and loss of the partnership from June 1, 1945 to January 31, 1946 without any closing inventory.

3755 Q. And the document attached?

A. Are expense schedules analyzed.

3756 Q. Of which there is one document attached to this exhibit and it does not bear the separate exhibit number.

By Mr. Lockley: Mr. Bercu, were 64-U and 64-W prepared by you?

By the Witness: May I see them again?

By Mr. O'Brien: U?

By Mr. Lockley: V.

By Mr. O'Brien: Did I say anything about W? I guess I did.

By Mr. Lockley: 64-V and 64-W.

By Mr. O'Brien: Yes.

By the Witness: It is difficult for me to say who prepared it because I find that this is not on the—on our stationery, printed stationery.

By Mr. Lockley: Which is that? Is that 64-V?

By the Witness: This is 64-V and it is prepared in the form that we used at that time. Assuming that—well, without seeing the original work sheet, I couldn't say whether it was actually prepared by our office.

3757 By Mr. Lockley: Is the same thing true also of all the other documents Mr. O'Brien has been showing you?

By the Witness: No. The other documents were photostats of reports submitted by our office on our printed stationery.

By Mr. Lockley: That one right there you cannot identify?

By the Witness: This one I cannot identify without seeing the original work sheet.

By Mr. Lockley: Do you know where the original work sheets are?

By the Witness: Everything that was in my files was turned over.

By Mr. O'Brien:

Q. I think that is—

By the Witness: I think some thousands of sheets of work sheets were turned over to the government for photostating and I understood, it seems obvious that you had access—that you got these. Let me think. Just a moment. This is on the partnership.

By Mr. O'Brien: I think we have already been into that, Judge, about the partnership.

3758 By the Witness: No. There is a question there.

By Mr. O'Brien: Well, I object to the question there, if the Court please.

By the Court: If it pertains to whether or not—

By Mr. O'Brien: It is the partnership.

By the Court: —it constitutes his work papers, I suppose he may state what the question was.

By Mr. O'Brien: What was that last question? The reason I object, Judge, that is a matter which we took up in advance of the trial.

By Mr. Lockley: I am afraid not, Mr. O'Brien. I don't think this discussion should be carried on in the presence of the jury, your Honor.

By Mr. O'Brien: Well, that is all I mean. I understood it had been, Mr. Lockley.

By Mr. Lockley: Well, then, I am afraid we had a different understanding, Mr. O'Brien. We will have to thresh it out later.

3759 By Mr. O'Brien: I am not taking it up. You are the one that is taking it up.

By the Witness: There is a question about these partnership balance sheets prepared which I identified as having recognized, as having been prepared by our office, because of the—because of our firm name.

By Mr. O'Brien:

Q. Yes, sir.

A. Imprinted on each of the sheets. It now comes to my mind that when I was asked about the work sheets of the partnership, I recall that I did not turn over work sheets of the partnership to the government.

Q. There is no question pending, Mr. Bercu.

By Mr. O'Brien: I would ask the Court to so instruct the witness.

By the Court: Well, I thought he was going to give some explanation of 64-V.

By Mr. O'Brien: No, I don't think so.

By the Witness: If your Honor please, that is exactly what I intended to do.

By Mr. O'Brien:

3760 Q. All right, then, go ahead.

A. I recall now that I did not turn over any work

sheets of the partnership in response to your subpoena a year ago because those work sheets had been destroyed, the original work sheets had been destroyed in my office under conditions that were—that I tried to make clear in the deposition.

Q. Yes.

A. However, before those work sheets and copies of our reports were destroyed, I had those particular reports photostated so that these photostats I assume are the photostats which I turned over to the government some years ago in connection with another case involving the partnership. They are not part of the papers so far as I know which were turned over in response to your subp of a year ago.

Q. That was on the deposition?

A. That is right.

By the Court: Proceed with your examination.

By Mr. Lockley: Have you identified those? Pardon me, your Honor. I didn't mean to interrupt you.

By the Court: I said to Mr. O'Brien, you may
3761 proceed with your examination.

By Mr. O'Brien: That is what I am trying to do,

By Mr. Lockley: I want to find out from Mr. Bercu if those photostats are the photostatic copies that he prepared.

By Mr. O'Brien: I am about to ask him that, Mr. Lockley.

By Mr. Lockley: All right. Thank you, Mr. O'Brien.
3762 By Mr. O'Brien:

Q. Now, the exhibits, 64-V and W, speaking of those again, Mr. Bercu, although they do not bear either your handwriting, since they are typewritten, or the printed name of your firm, would you say that those are copies, do you recognize them as copies of reports or statements prepared by your office at the time?

A. I recognize them as being in the form of the statements, but I say in the absence of the original work sheets, in the absence of the use of our printed stationery, I can't identify them positively as having been prepared either by me or by my office.

Q. Is there anything in the content of them which in any way would further your recollection?

A. I can only say that this report appears to be in

the form in which prior reports had been prepared, and I assume that it was prepared by our office. But I understand that I am not supposed to make assumptions, in the absence of original documents or other papers that would show—that would refresh my recollection definitely.

Q. Now, I show you a series of positive prints, photostatic prints, respectively numbered 64-X, Y, Z, AA, BB, CC and DD, and ask you to state if these are copies of purchase analyses made by your firm for November, 1945?

3763

A. I don't recognize the handwriting. We used—at that time we used work sheets which had our firm imprint on them and none of these have our firm imprint on them and so far as I can judge these are summaries or, rather, accumulations of purchase invoices in the month of November, 1945, which was the partnership period, but there is nothing on these sheets to indicate that they were part of our work sheets, nor is there any notation that I can see in my handwriting anywhere to indicate that I used these work sheets in any way.

3764 Q. They are not in your handwritng?

A. There isn't—I don't recognize—not only not in my handwriting, but I don't even recognize one of my scrawly check marks to indicate that I had worked on them.

Q. You had other people working on the records, too, did you not?

A. Probably eight or ten different people working on them. But the reason that I express doubt about these papers is because the work sheets themselves don't bear our firm imprint.

Q. You said that, Mr. Bercu, but now I woud like to ask you whether you recognize the writing as being that of any of your associates or partners?

A. I studied it carefully for that reason.

By the Court: I didn't hear that.

By the Witness:

A. I studied the writing quite carefully to see whether I could recall this writing as that of any of my associates, or even assistants of that period, and I don't recognize the handwriting.

By Mr. O'Brien: If the Court please, passing that last

group of exhibits for the moment, and passing, also,
3765 64-V and W, I offer in evidence the documents identified yesterday by the witness as 64-A, B, D—really C and D—D, consisting of two sheets, E, F—

By the Court: Have you a D?

By Mr. O'Brien: 64-E.

By the Court: Have you D?

By Mr. O'Brien: Yes, sir; D consisted of two sheets, Judge.

Now, we have 64-E, F, G, and H in that series.

I also offer a document marked at a prior hearing Defendants' Exhibit 11, and further verified by the witness yesterday.

And I offer all of the documents identified by the witness this morning, with the exceptions that I noted a moment ago. The additional ones that I am offering are 64-U, consisting of four sheets; 64-T—T as in Tom—consisting of four sheets; 64-N, 64-M—M as in Mary—64-L, consisting of two sheets; 64-K—better make it
J and K; and an exhibit marked Defendants' Exhibit
3766 7 for identification at a prior hearing and identified today by this witness.

By Mr. Kirby: Mr. O'Brien, here is another one that is on his work sheet. It is 21-A. Maybe he could identify that.

By Mr. O'Brien: I will wait till Mr. Lockley looks at those.

By Mr. Lockley: Go ahead, if you want, and we will look over these.

By Mr. O'Brien:

Q. I show you, Mr. Bereu, an instrument marked 21-A, and ask you to state if that is in your handwriting?

A. It is not in my handwriting. However, it is on our firm stationery. The stamp in the upper lefthand corner indicates that it was prepared by one of our assistants, giving his initials and the date that he prepared this schedule.

Q. That has to do with the loans and exchanges account as at November 30, 1945?

A. Of the Eatsum Food Products partnership.

Q. Right.

A. I believe that was one of the loan and exchange
3767 accounts on the books.

By Mr. O'Brien: Right.

I shall offer that, too, your Honor, Defendants' 21-A.

3768 By Mr. Lockley: May I have your indulgence a moment, your Honor? We have not seen these papers before and did not have an opportunity to make our objections as the defendants had an opportunity to see ours.

Initially, your Honor, I object to 64-C because it relates to the period April 1 to December 31, 1944; also that it is a photostat and that there has been no proper foundation laid for the absence of the original.

By the Court: Which exhibit is that, please?

By Mr. Lockley: No. 64-C.

By the Court: T as in Tom?

By Mr. Lockley: No, sir; C as in Charles.

By Mr. O'Brien: Well, Mr. Lockley, if I may respond to that, so we don't get mixed up, the originals of Mr. Bercu's work sheets during the proprietorship period are on file in the case here as part of his deposition.

By Mr. Lockley: That would satisfy me as to that objection then. But I object to it on the ground that

3769 it relates to the year 1944.

By Mr. O'Brien: Well, on that part, if the Court please, there is already testimony at the prior hearings as to the inception of these companies and the condition of the companies from time to time. Some of those exhibits are already in. Some remain for further identification.

I should like, while the witness is here, and not to have him come again, to have the exhibit at least received subject to the objection and the Court's ultimate ruling.

In other words, the bare fact that it is a month outside of the indictment period, that fact alone does not preclude it as evidence.

By the Court: Does it throw any light, however, on the situation in 1945?

By Mr. O'Brien: I think so. It shows—indeed I know so—a part of the end history of the proprietorship.

By the Court: What is 64-C? I haven't been told.

3770 By Mr. O'Brien: I am sorry, Judge. It is a statement of income, profit and loss, for the period April 1 to December 31, 1944.

I may say, if it will be any aid to the Court, we are

having a list of our exhibits made, with the descriptive matter.

By the Court: Well, Mr. Lockley, you are merely objecting to the exhibit because you contend it is immaterial?

By Mr. Lockley: Yes, sir.

By the Court: You are not objecting to the foundation?

By Mr. Lockley: No, your Hoonr. I understand that these are in Mr. Bercu's handwriting, they are on Mr. Bercu's stationery, and he has identified them.

Is that correct, Mr. Bercu?

By the Witness: I am afraid I would have to look at them.

3771 By Mr. Lockley: This is 64-C.

By the Witness: That's correct. When they are on the stationery, there is no question about them.

By Mr. Lockley: But I do object on the grounds that it is immaterial.

I object to No. 64-D on the same ground, that it relates to the period from April 10, 1944, to December 31, 1944.

Will you tell me what this is, Mr. Bercu?

By the Witness: These are—

By Mr. Lockley: Speak up, please.

By the Witness: These are work sheets of the sole proprietorship of David Lubben from the inception of his own concern on April 10, 1944, to the close of business, December 31, 1944.

By the Court: That is 64-D?

By Mr. O'Brien: 64-D.

By the Court: D as in Donald?

By Mr. O'Brien: Yes, sir.

By Mr. Lockley: Mr. Bercu, are 64-A and B in your handwriting?

3772 By the Witness: I have so identified them. So far as I can judge, they are in my handwriting.

By Mr. Lockley: Thank you.

Mr. Bercu, did you identify No. 64-N as being in your handwriting? That's N as in Nancy.

By the Witness: Yes, sir.

By Mr. Lockley: All right, sir.

3773 By Mr. Lockley: Will you tell me if No. 64-L is in your handwriting?

By the Witness: It appeared to be and I so identified it.

By Mr. Lockley: All right, thank you. If your Honor please, I object to the admission of these documents on the ground that no proper foundation has been laid for the absence of the originals. They are documents or work papers of the partnership period which are not at this time in the custody of the clerk of the court.

As I understand, those documents are solely in the proprietorship period. There has been no foundation laid for the absence of the originals of these particular documents which are Exhibits Nos. 64-L, No. 64-J, No. 64-K, No. 64-N, 64-M, 64-U, 64-H.

By the Court: H?

By Mr. Lockley: H, yes, your Honor. 21-A, 64-E, 64-F. 64-G, 64-T, 11, 7 and 64-A and B.

By Mr. O'Brien: They are papers, if the Court please, from the partnership era as to which it is my recol-
3774 lection that we have an agreement and statement made at the beginning of the trial as to secondary evidence.

By Mr. Lockley: I don't think that we should discuss it in front of the jury, your Honor, but I believe we ought to be—

By Mr. O'Brien: I will be glad to do it outside the presence of the jury. That will be fine.

By Mr. Lockley: I think we should examine the record and I believe you will find that that had to do solely with the testimony of one particular individual and the books and records of the Eatsum partnership. There was no stipulation entered into relating in any way to any accountants' work papers.

By Mr. O'Brien: Well, if you want to take that up, then I suggest we should do it while the witness is here and on that point, your Honor, since it touches so intimately on the other point, it seems to me that is a collateral matter on which we might take his testimony briefly.

By the Court: Well, where are the originals of
3775 these papers?

By Mr. O'Brien: Well, that is what I want to take up collaterally with this witness.

By the Court: Well, take it up now.

By Mr. O'Brien: I don't think that should be done and

I think that is the purport of what has been said by Mr. Lockley. It is all on the same subject, on the matter on which there was an agreement about secondary evidence. I mean, I am perfectly willing to go into it, Judge, but I think it should be taken up with you.

By the Court: Do you want to take a short recess at this time? Is that your suggestion?

By Mr. O'Brien: Yes, and we can take up this collateral matter with the witness. It will be very brief. We can take the recess at this time and do that and then we can reconvene.

By the Court: Well, I don't know. What suggestions have you, Mr. Lockley, on this point?

By Mr. Lockley: I agree that a recess would be preferable at this time and perhaps we can proceed
3776 without the jury to determine whether or not there is a foundation which can be laid for the absence of the originals.

By the Court: Well, the jury may be excused then, subject to call by the marshal.

By the Marshal: This honorable court will recess.

(Whereupon the following proceedings were had and taken outside the presence and hearing of the jury, in open court:)

By Mr. O'Brien: Shall I proceed, your Honor?

By Mr. O'Brien:

Q. Mr. Bercu, you gave your deposition.

3777 By the Court: I think the defendants should be in the court room during this proceeding. This is obviously a part of the trial.

All right.

By Mr. O'Brien:

Q. Mr. Bercu, do you have the originals of the partnership accounting work papers which you have identified on the stand here?

A. I do not.

Q. It is true, is it not, that I took your deposition in this case last year?

A. Yes, sir.

Q. In New York City?

A. Yes, sir.

Q. And at the conclusion of the hearing, of the first

hearing, I requested you and Mr. Cohen to make a search for your original work sheets on all three entities, the proprietorship, the partnership and General Confections, is that true?

A. Yes, sir.

Q. Did you make that search?

A. I did.

Q. Did you afterwards produce in evidence on that
3778 deposition the original work sheets of the proprietorship and those which you had of General Confections?

A. I did.

Q. You were unable to produce the work sheets of the partnership?

A. I was unable to produce the complete set of work sheets of the partnership.

By the Court: The what?

By the Witness: The complete set of work sheets, of the work sheets.

By Mr. O'Brien:

Q. Did you produce any?

A. I am sure the impression that some merchandise analyses were available and had been produced.

Q. And aside from those?

A. But as to the major work papers covering the monthly audit, such as trial balances, schedules of expenses, schedules of accounts and so on, practically all of those papers, I believe, had been destroyed in my office.

Q. Now, at the time of the deposition you told me that all of your partnership work sheets and all of the partnership books and records were taken by or turned over to William Giglio?

3779 A. I don't remember ever having made any such statement that I had any partnership books and records to be turned over. I did—

Q. Maybe I am in error on the books and records. You were talking about—

A. All work sheets.

Q. Only of your work sheets and reports?

A. Of the work sheets and reports in our office.

By the Court: What about them?

By Mr. O'Brien:

Q. And then those, you testified—

Well, you ask him, Judge.

By the Court: I think he finished his answer. You say the work sheets in your office—what did you do with them?

By the Witness: Those were destroyed.

By the Court: Are you now speaking of the partnership?

By the Witness: The partnership records from the period from June 1, 1945, to January 31, 1946.

By Mr. Lockley: What do you mean, records?

By the Witness: No, no. I mean only our work papers.

3780 By Mr. Lockley: That is what you said.

By Mr. O'Brien: No, he didn't.

By the Witness: No records of the partnership were in our office. If I recall correctly, we were never permitted to remove a record of any kind from the office of the partnership.

By Mr. O'Brien:

Q. So there is no misunderstanding about it, you are talking about your work sheets and your reports?

A. As I understand it, I believe there is a very serious misunderstanding about that.

3781 Q. Do you mean misunderstanding in the sense that my first question included the records?

A. Exactly.

Q. I withdraw the statement of the records, as I have already done, stating that I was evidently mistaken in my recollection. Now with that removed, is there any misunderstanding which remains?

A. I don't think so, counsellor.

By Mr. O'Brien: Your Honor, I renew the offer.

By Mr. Lockley: May I ask a question or two, your Honor?

By the Court: Yes.

Cross Examination By Mr. Lockley.

Q. Mr. Berch, you told me, or you told Mr. O'Brien that all of the partnership work sheets were destroyed, is that correct?

A. Well, when I said all, it appears that some of them escaped destruction. I did not make a complete inventory of the many thousands of papers which I turned over in answer to the subpoena.

Q. And did you see any of those destroyed?

A. I have seen—I beg your pardon?

3782 Q. Did you see them destroyed in your office?

A. They were destroyed in a separate room under the supervision of one of my associates while I was in my private office with Mr. Giglio.

Q. Do you know whether they were destroyed or moved from your office?

A. It would seem that—my associate didn't do a very good job because so many of them have turned up now in photostat form in court here.

Q. And to whom were they turned over in your office for either destruction or removal?

A. To Mr. Louis Roth, the accountant, Mr. Giglio's accountant.

Q. And who was present at that time?

A. Mr. Roth, my then associate, Mr. Weinert were in one room. I believe that Mr. Roth had an assistant of his to handle the physical part of the tearing up of the papers and I think that we had an assistant also.

Q. Did you see some of the papers after they had been torn?

A. No. I saw bags being removed from the office because I think there must have been several files full of those papers.

3783 Q. So far as you know, it was possible for the papers to have been removed from your office without destruction?

A. It not only seems possible but apparently probable and some of the papers, I think, I can say frankly, inadvertently, because the agreement had been made that all of the original work papers would be destroyed, but some of the merchandise analyses apparently have not been destroyed because it is my recollection now that a year ago in our search to honor Mr. O'Brien's subpoena, we located those papers and turned them over to the Government for purposes of this trial.

Q. Well, are the documents which we have referred to this morning any of those documents which you subsequently located and turned over to the Government?

A. I don't recall. None of the photostats shown me here seem to include any of those papers.

Q. So far as you know, those photostats were photostats of papers which were turned over to Mr. Roth for destruction or removal, is that correct?

A. With this exception—

3784 By the Court: With what?

By the Witness: With this exception, your Honor.

A. I had not made it clear in my deposition a year ago that I honored the agreement technically to turn over to Mr. Giglio or his associates all of our work sheets with regard to the partnership.

However, before turning them over, I had had photostated the papers which I regarded as most important not only for the proceedings and I say advisedly that I had in mind the probability that there would be a Government investigation of the partnership transactions—so I had had photostated the—so far as I can recall now—the trial balance papers for a number of months, copies of our audit reports which apparently are now in court. I had photostated copies of our work sheets concerning loan and exchange accounts and it was my—it is my impression now that I had photostated our audit notes concerning the explanations by Mr. Lubben as to the disposition of the cash checks that were charged to the loan and exchange account.

However, I haven't seen any photostats of those audit notes.

3785 By Mr. Lockley:

Q. Well, the photostats which you have been shown this morning, are they the photostats which you had taken of your work papers before they were destroyed?

A. I have no way of judging that.

Q. You don't know whether these were the photostats you had taken or whether they are subsequent photostats of those same papers?

A. It seems to me those are photostats I had turned over to the government, it seems to me, about three or four years ago, probably nearer to four years ago in connection with the—with another case against the—concerning the partnership, and—

By Mr. Lockley: Well, your Honor—

By the Court: Well, did you turn over any photostats to the defendants by way of subpoena?

By the Witness: No, I did not because I did not have any of them. They had all been turned over to the government several years earlier.

By the Court: Then you didn't turn any papers over to the defense?

3786 By the Witness: No photostats. No, your Honor.

By Mr. Lockley: If your Honor please, the defendants have seen the photostats which were in the possession of the government and they do not include the photostats which have been identified here this morning.

By Mr. O'Brien: What has that to do with it?

By Mr. Lockley: It has this to do with it: You didn't get it from the government.

By Mr. O'Brien: If the Court please, he says the papers were turned over to Giglio.

By Mr. Lockley: He said Roth.

By Mr. O'Brien: Well, Roth was working for Giglio. He turned them over to him. I told you at the outset that we had an understanding in this record as to secondary evidence relating to partnership papers which Giglio refused to produce. Now, here is a man and I would like to ask him a few more questions.

By the Court: All right.

3787 *Direct Examination (Ctd.) by Mr. O'Brien.*

Q. Didn't you testify, Mr. Bercu, on your deposition that Lubben pleaded with you to destroy your work sheets as part of the dissolution agreement of the partnership which he was trying to make with Giglio?

A. I don't want to be technical but—may I answer that in substance that you have stated it correctly, but it was not part of the dissolution agreement. It was a prerequisite.

Q. A condition preceding?

A. A condition preceding to the dissolution.

Q. And did you not—

A. Pardon me. Again, it is not a question of dissolution. The practice, the actual dissolution had taken place as of March 8th, I think, or 9th of 1946. Mr. Lubben, despite the reports, the monthly reports which I had given the partnership—Mr. Lubben got one copy and Mr. Giglio got another copy of these reports which—some of which have been presented in evidence. Those reports, especially the one of January, 1936—January 31, 1946, in-

dicated a very, very large operating profit for the
3788 partnership.

Q. I am not interested in what they indicated. I am just trying to find out about these physical papers. Now, I asked you on the deposition what had happened to them and you said that Lubben pleaded with you to permit their destruction, did you not?

A. I am trying to give you—

Q. Well, didn't you say that? That's all I want to know.

A. So far as I recall, I did say that.

Q. All right. And you were under oath at the time were you not?

A. Surely.

Q. All right. Now, Mr. Lubben on his deposition said that if you said those papers were destroyed you were a liar. Do you recall that?

A. Papers or records?

By Mr. Lockley: I don't believe he said that, Mr. O'Brien. He said that anyone who said he pleaded with him to have them destroyed is a liar. I think you are making a play on words.

3789 By Mr. O'Brien: I did not mean to make any play on words. I will read your Honor the deposition in that respect and we will be precise.

By Mr. Lockley: I don't see what materiality that has.

By the Court: Well, what is the materiality?

By Mr. O'Brien: I think it is material on this collateral hearing.

By Mr. O'Brien:

Q. Then I asked you, did I not:

"Q. Is that true also of the audit reports for the the partnership that were in your possession?"

and your answer:

"A. Every scrap of paper is in our file concerning the partnership transactions."

Did you make that answer?

A. If you have it—if you are reading from the deposition, I made that answer.

3790 Q. You said on your deposition at page 302 that the papers were destroyed in your office in the presence of one of your assistants, I believe Mr. Weinert. Weinert was your partner, wasn't he?

A. Did I say assistant or associate?

Q. You said assistant. And "some assistant from the staff who brought the records in from the files and saw Mr. Roth go over them and tear them up and send them out in bundles, in waste baskets to the elevator." Do you remember that?

A. I don't remember it, but,—

Q. You don't even remember that?

A. I don't remember the exact wording.

Q. I don't mean the exact words, Mr. Witness. I mean the thought and the substance.

A. I certainly recall having testified with regard to that transaction.

Q. And did you not say that to your recollection you did not retain any copy of those documents?

A. I don't recall it.

Q. You don't recall it?

A. No, sir. If I so stated, I was completely in error.

By Mr. O'Brien: Well, if the Court please, if he
3791 so stated he was completely in error—it is entirely collateral, what I am doing now, but if that testimony is persisted in, I want to take up the deposition in which I pursued this for pages about copies. I implored him and beseeched him to tell me about any copies, that surely he must have made some copies and all up and down the line, and he denied that he made any copies. That is a collateral matter. I should like to have those two pieces of testimony inquired into at a proper time.

By Mr. O'Brien:

Q. But now, in substance, that is what you said in your deposition, that the work sheets were not available to you, that you destroyed them, and you now say you cannot remember whether you made the answer that to your recollection you did not retain any copies, is that right?

A. My recollection at that time.

Q. That was your then recollection?

A. That was my then recollection, that I had not retained any copies.

3792 Q. But you are sure that you did not retain the originals?

A. I so stated.

Q. All right. Yes or no?

A. Yes.

Q. And you are sure that the papers which you identified here are copies of those work papers, or some of them?

A. There is no question as to those which are on our firm's stationery.

By Mr. O'Brien: Well, I submit, if the Court please, on the witness's own statement, and quite aside from the other things that I am interested in about it, that the originals—

By Mr. O'Brien:

Q. By the way, one other question. Do you remember, Mr. Bercu, that on my subpoena on the deposition I asked you to bring all the books and records of the partnership, do you recall that? The books and records, now.

A. Yes, sir.

Q. And also of the other two entities, do you remember?

3793 A. Yes, sir.

Q. And you did not have those and then I asked you about the work sheets and you said that the work sheets were not the property of the partnership, did you not?

A. That's correct.

Q. And you said that under numerous rulings those belonged to you?

A. That's correct.

Q. And did I not ask you, and Mr. Cohen, your lawyer, nevertheless, to get them and bring them in, is that right, and you did bring in the stack that is on file in the office of the Clerk of this Court?

A. Yes, sir.

By Mr. O'Brien: Now, your Honor—

By the Court: Bring in what?

By Mr. O'Brien: Such work sheets as he had.

By the Court: Oh.

By Mr. O'Brien: He claimed that the work sheets belonged to the auditing firm and were not part of the books and records of the partnership and that, there-

3794 fore, he had not produced them on the subpoena.

I asked him, nevertheless, and Mr. Cohen, his lawyer, agreed to go get them, and he did. And at a subse-

quent hearing he brought in everything he had, and they returned here. But they do not include the original work sheets for the partnership which Mr. Bercu says were destroyed.

By the Court: You don't consider that there is any duty on you to show when and how you obtained those photostats which you now are offering in evidence?

The only thing I had in mind was this, if you obtained photostats of some documents, which would indicate that they haven't been destroyed, that is one thing; if you obtained the photostats before they were allegedly destroyed, that is another situation.

By Mr. O'Brien: Well, if the Court please, I haven't the slightest objection to making that showing. The photostats which I had, I assert to your Honor, and will put on proof, if you wish—the photostats which I
3795 have I obtained from Mr. Giglio, in August and September of 1952, after this period that the witness is talking about.

3796 By the Court: Well, then, your statement would indicate that these work sheets were not destroyed.

By Mr. O'Brien: That's right, and are in the possession of Giglio.

By the Court: And this statement of Mr. Bercu that they went out to the inner office and tore them up, whatever was torn up, apparently didn't include the originals of those photostats, right?

By Mr. O'Brien: They seem to be relatively few.

I take it that the work sheets for the partnership period must have been a very substantial heap, just as those of the proprietorship, and I think in that respect that Mr. Bercu is probably correct, that there were, and must necessarily have been, some which were not physically destroyed.

By the Witness: Your Honor, may I point out the possibility of the reconciliation of this apparent discrepancy?

By the Court: Well, if you have anything, of
3797 your own knowledge, that will throw any light on the matter that we are now considering, you may state it.

By the Witness: I have already testified that I furnished copies of these reports to both Mr. Giglio and

to Mr. Lubben, and I assume that Mr. Giglio had retained those copies of our monthly reports.

As to those papers, there seems to be no mystery, as to how they came into Mr. O'Brien's possession.

By the Court: You mean that Mr. Giglio may have turned over to Mr. O'Brien photostats of the copies of your work papers which you delivered to him from time to time during the course of your audit, is that right?

By the Witness: Exactly.

By Mr. O'Brien: I may say, if you remember, Judge, I subpoenaed—that both I and the government subpoenaed Giglio here. It was not merely their subpoena involved. I wanted his papers. Mr. Stryker would not, in view of the proceedings down there at that time,
3798 let us have the papers.

By the Court: Was the subpoena served on Giglio broad enough to include these work papers?

By Mr. O'Brien: Yes, sir.

By the Court: Do you recognize that, Mr. Lockley?

By Mr. Lockley: I believe that is so, your Honor. I don't know what the defendants' subpoena was. I haven't seen any of their subpoenas.

By the Court: I mean the government subpoena.

By Mr. Lockley: I believe the government subpoena would have been broad enough to include it.

By Mr O'Brien: Sure.

By the Court: Would he have a right to stand on his constitutional rights, in so far as these working papers are concerned?

By Mr. Lockley: You mean Giglio?

By the Court: Yes.

By Mr. Lockley: They are not Mr. Giglio's work papers. As I understand it—

3799 By the Court: It doesn't make any difference whether they are his work papers or whether they belonged to the auditor. They might incriminate him, notwithstanding.

By Mr. O'Brien: Why, sure. I will read you Mr. Wigmore. That takes the precise position your Honor states.

Cross Examination by Mr. Lockley.

Q. Well, Mr. Bercu, did you turn those papers over to Mr. Giglio, or did you turn them over to Mr. Roth?

A. I thought I had turned them over to Mr. Weinert at my office, to go over them with Mr. Roth and see that they were physically destroyed.

Q. So that the last you knew of them they were in Roth's hands, is that correct?

A. Right.

3800 Q. How about the copies that you made, where you made two copies, one to Lubben and one to Giglio, who did you give the extra copy to?

A. I have personally delivered them and handed them, one to Mr. Lubben and one to Mr. Giglio, each month, each successive month.

By Mr. Lockley: Well, your Honor, it appears clear that if these were Mr. Giglio's papers there would be no further foundation necessary. But if they were Mr. Roth's, I believe Mr. Roth would be the appropriate person to testify as to the absence of the originals, because they were last in his possession. All that Mr. Bercu can testify, with respect to those papers which he didn't make copies of and give to Mr. Giglio, is that when he last saw them they were in Roth's possession. Mr. Roth has no privilege against self-incrimination.

By Mr. O'Brien: I have him under subpoena, too. He is indicted in the same proceedings as Mr. Giglio.

By the Court: Have you taken his deposition?

3801 By Mr. O'Brien: No. Of course, neither Stryker, nor Roth's attorney, will let them testify, with an indictment pending down there, and in the Court of Appeals, where Judge Goddard's order may be reversed and the matter sent back for trial. I made a special trip to New York, and he would not permit—

By the Court: Was Roth involved in that New York trial?

By Mr. O'Brien: Yes, Roth, too.

By the Court: He is one of the defendants with Giglio?

By Mr. O'Brien: Indeed he is, as the government knows.

By Mr. Kane: Yes, that is so.

By the Court: Supposing they are in Roth's possession. Wouldn't he be able to take the same position as Giglio, so far as the production of the documents is concerned?

By Mr. Lockley: Your Honor, it appears to me that Mr. Giglio—or Roth here are claiming the immunity as far as the government is concerned, but waives
3802 it in so far as the defense is concerned. I don't know why the government should waive its right to have the original production of these documents. And if Roth and Giglio are willing to turn them over to the defense it seems to me they have waived whatever privilege they had and should now come and testify as to the authenticity of them.

By Mr: O'Brien: I don't think that you could persuade Judge Nordbye that what a defendant does at another time and place, whether before the Grand Jury, or on a deposition, or anything else, precludes the privilege.

By the Court: I don't think he waives the right to claim the privilege thereafter. If he wants to, I suppose he can at one time talk, or at one time deliver documents and then the next time claim his constitutional privilege.

By Mr. O'Brien: I want to say to your Honor, in all seriousness and sincerity, that I have made an extreme—and I don't know when I have ever worked so hard
3803 as I have trying to get all the papers in this case from every particular avenue. In August of 1952, in New York, we got these copies from Giglio before there was any indictment, before there was any indictment at all. And whether he gave me all he had, I do not know. I never felt entirely assured that he did. Whether he had any more to give me, I don't know, in view of what Mr. Bercu said later on the deposition and what he says now. All I know is that I have followed the proprietorship papers, and got those and the work sheets; I followed the partnership everywhere I could go and came up with just these few things; I followed the General Confections to the receiver, and everywhere else, and I submit that we have made, whether you view it one way or the other, as Giglio or Mr. Bercu—I have made far more than the ordinary showing on the unavailability of the originals of these papers and that they should be received.

3804 By Mr. Lockley: I might correct Mr. O'Brien on one matter, although technically he is right, that the indictment wasn't returned until later, there was an information which had been filed and had been pend-

ing against Giglio for over a year at the time he turned over those papers.

By Mr. O'Brien: That is true. And I do not think that either Giglio or Roth, or Lawn, who were all defendants, and with whom I pursued the matter of the papers, I do not think that Giglio had any concern with the matter of the information, but that once the indictment was returned—and the information had to do with a relatively minor thing, and I think even a misdemeanor—but when that indictment was returned, we got nothing from Mr. Giglio, or anybody else, and Mr. Stryker and Mr. Wolfam, his partner, who were here at least three times—and Mr. Rosenblum, Samuel Rosenblum, who used to be in the District Attorney's office, and who was a partner of Mr. Rogers, represented
3805 Roth, and both of them refused to let those men testify. I have served Roth, paid him the money, served Giglio and paid him the money, and we cannot get their testimony.

By the Court: Well, Mr. Lockley, I understand your objection is only to the foundation.

By Mr. Lockley: Well, sir, I would like to add to that also the question as to the relevancy of them. What the Eatsum work papers show apparently is not going to have too great a relevancy upon whether David Lubben paid any money over to the General Confections—I mean to Shotwell, rather.

By the Court: I am not able to pass on that now very well. That may be a rather long procedure.

By Mr. Lockley: And as to the 1944 papers, I object to those on the grounds that they are also beyond the period of the indictment, Mr. O'Brien.

By the Court: I think I will reserve my ruling on the 1944 papers. I will receive the other exhibits in evidence.

If it should appear that they are not relevant or
3806 material I will entertain a motion to strike. That's as far as I can go now.

I think that there is sufficient showing to justify the Court in saying that a foundation has been laid for them.

By Mr. O'Brien: Just to be coherent, your Honor—or in the interests of coherence, I would like to say, for the record here as to the objection to those papers which are late in 1944, and therefore outside of the

indictment period, technically, I wish to remind your Honor that Mr. Lockley put in evidence of late '44 and there were what he called carry-over transactions which were not paid for, he said, until early in '45. Obviously there are places in the case where the Court or the jury will not be bound by the bare boundaries of the indictment period. There is a certain overlapping and it was on that basis that your Honor let his evidence in. And it is for the same reason that we put this late period in, included amongst the papers offered.

3807 By the Court: Well, let's see now, what exhibits have you offered, and let's have it clear which exhibits I am receiving.

By Mr. O'Brien: Shall I read them, Judge, or do you prefer to?

By the Court: Let me read them.

By Mr. O'Brien: Yes, sir.

By the Court: Defendants' Exhibit 64-J. There was no objection to that, as I understand it, right?

By Mr. Lockley: It was offered. I made objection to all of those, your Honor, but—

By the Court: Well, I will receive 64-J, 64-K, 64-L, 64-M, 64-N, 64-T, 64-U, 64—Well, V and W, as I understand it, this witness has said that he cannot identify them.

By Mr. O'Brien: That's right.

By the Court: Therefore, I don't understand that they have been offered.

By Mr. O'Brien: I didn't offer them, Judge.

By the Court: No. All right. Then 64-X, have you offered that?

By Mr. O'Brien: Yes, sir.

By the Court: Y?

3808 By Mr. O'Brien: Yes, sir.

By Mr. Lockley: If your Honor please, if 64-X is offered I object on the grounds that the witness was unable to identify it.

By the Court: Yes, that's true. I don't think you offered X, Y, Z, AA—

By Mr. O'Brien: That's true.

By the Court: All right. That takes us to 64-A, 64-B, 64-C, 64-D. I don't know what 64-E is.

By Mr. O'Brien: E, F—

By the Court: You haven't identified them in the record and I don't know what they are.

By Mr. O'Brien: All right, Judge.

By the Court: You had the witness identify them yesterday, but the difficulty was that you didn't refer to them by exhibit numbers.

By Mr. O'Brien: Let's see, we have A, B—

By the Court: A, B, C, D—

By Mr. O'Brien: Does your Honor have 7 and 11?

By the Court: I will come to that.

By Mr. O'Brien: All right. T you have covered. Here is H, 64-H.

3809 By the Court: Tell me briefly what 64-H is.

By Mr. O'Brien: I will, Judge. I think there are three sheets here. 64-F, G and H are sheets in the witness's handwriting.

By the Court: Work sheets.

By Mr. O'Brien: Yes, sir.

Now, what is that? Is that F?

By Mr. Lockley: That is H. H relates to November.

By Mr. O'Brien: November, '45.

3810 By Mr. Lockley: '45 receipts. F relates to work sheet, June 30, '45.

By the Court: F relates to what?

By Mr. Lockley: It is the work sheet for June 30, '45.

By the Court: Yes.

By Mr. Lockley: And G is a work sheet for—it has two dates, June 30 and July 31. That's 64-G.

By the Court: What is 64-E?

By Mr. O'Brien: I haven't come to it yet, Judge.

64-E is a work sheet for June 30, '45.

By the Court: All right. Now, then, the other exhibits are 21-A, which is a loan and exchange account of the Eatsum partnership.

By Mr. O'Brien: Of November 30, '45.

By the Court: I will receive it in evidence. And Exhibit 7 is Eatsum profit and loss of June, '45, right?

By Mr. O'Brien: Right.

By the Court: I will receive it.

3811 By Mr. O'Brien: That's June 1 to December 31, '45.

By the Court: And Exhibit 11 is a photostat of Eatsum balance sheet of April 30, '45?

By Mr. O'Brien: Correct.

By the Court: I understand that all of these have been identified by Mr. Bercu.

By Mr. O'Brien: Yes, sir.

By the Court: I will receive it in evidence.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 7, 11, 21-A, 64-A, 64-B, 64-C, 64-D, 64-E, 64-F, 64-G, 64-H, 64-J, 64-K, 64-L, 64-M, 64-N, 64-T and 64-U.)

By the Court: We will take a ten minute recess and then you can call in the jury.

By the Marshall: This Honorable Court will recess for ten minutes.

(Recess taken.)

3812 (And thereupon the following further proceedings were had herein, in the hearing and presence of the jury:)

By the Court: You may proceed.

By Mr. O'Brien: You may cross examine.

Cross Examination by Mr. Lockley.

Q. Mr. Bercu, you stated that you began working for Mr. Lubben in early 1944, is that correct?

A. Yes, sir.

Q. Had you done any work for him before that?

A. I had never met or heard of Mr. Lubben until March or April of 1944.

By Mr. O'Brien: May I interrupt just a moment, Mr. Lockley, to state that the exhibits which were offered are received.

By the Court: Yes.

By Mr. O'Brien: Except those that the witness could not identify.

By the Court: The record so reflects my ruling.

By Mr. O'Brien: Yes, sir.

By Mr. Lockley:

3813 Q. Was the Eatsum sole proprietorship in existence at the time you met him?

A. It is a difficult question to answer, technically. I set up a set of books for the Eatsum sole proprietorship as of April 10, 1944, as the exhibit indicates. However, he had been operating as the Eatsum Food Products Com-

pany, theoretically a sole proprietorship, in the early months of '44. Actually, he was working on a basis of 10 per cent of the net profits and was paying 90 per cent of the net profits up to April, '44, as a financing charge.

Q. To Burry Biscuit Company.

A. To Burry Biscuit Company.

3814 Q. So you set up the books in April, at which time he took over 100 per cent of the business, is that correct?

A. Unfortunately even that, technically, is not altogether true, because in April, and I believe in the month of May, he thought he was running again a sole proprietorship, technically, but that he was going to give half the profits—not 90 per cent, but half the profits, this time not to Burry Biscuit Company, but to Mrs. Burry—by June 1st, if I recall correctly, all complications had been cleared and he had become both technically and practically a sole proprietor.

Q. And were any of the profits ever turned over, to your knowledge, to Mrs. Burry?

A. Nothing was ever turned over to Mrs. Burry, to my knowledge.

Q. Now, when you set up this set of books, did you at that time also set up the system for handling cash checks?

A. To make it brief, I did. Actually, it was the result of quite a number of conferences between Mr. Lubben and myself.

Q. And this system of having cash authorization
3815 slips signed before a check was issued, was that your suggestion?

A. Again it was the result of discussions, and if—I don't know whether I can honestly say this is recollection, or whether it is merely I believe I would have told him at the time—that he would be better off to have something in writing, even though it is only his own paper, what you attorneys call a self-serving paper. I was concerned—in setting up that system I was very much concerned with the question of his being able to prove to the Revenue Department, in the case of an examination, that he had actually paid out these amounts and hadn't merely pocketed them. That was my sole concern in asking him to prepare these authorizations.

Q. And did you find that Mr. Lubben was familiar with bookkeeping systems?

A. Far from it. If I recall correctly, back in the early months, I think—it seems to me he made the outright statement that he had never seen a financial statement before I gave him our first monthly statement.

3816 Q. Now, you made up these—you set up the system of handling checks to cash. Was there also any arrangement made for handling cash receipts on the books?

A. I tried to point out to him at the time that in view of the fact that he was handling all of these cash disbursements that he ought to be certain that every transaction which he entered into was recorded on the books, and so far as I can recall, in the first year of operations he accounted—well, I would, to put it rather personally—he accounted to me personally for every transaction and as far as he could recall it and as I explained or started to explain yesterday afternoon, the reason for that accounting was that from the very first day he started his sole proprietorship, when we opened the books, I tried to match up every individual purchase and sale of merchandise and reconcile those transactions against the closing physical inventory.

Necessarily, in making those matchings, he had to account for all of these three-way transactions and for any cash sales that he might have made, because if a cash

3817 sale were made, the merchandise would be short.

Q. Did you find that Mr. Lubben objected to your suggestion that all of his cash receipts be included in his books?

A. He not only didn't object but he cooperated with me in every way in that—again I say, in that first year.

Q. Did he tell you that he wanted to have a correct set of books?

A. He made that very emphatic. His idea of correctness was to account to the Government for every dollar that he took in and every dollar that he paid out.

Q. Did he so tell you?

A. He not only told me, but all on his own volition, without any request on my part. He maintained, or rather, prepared a detailed accounting of every dime that he spent for traveling and for entertainment every week.

Q. So that he was able to satisfy you that all of the receipts and all of the expenditures shown on his books were actually received or spent?

A. Exactly.

Q. Now, do you know Miss Feldman?

3818 A. I do.

Q. Did you have anything to do with hiring her?

A. I did.

Q. And what was that?

A. I engaged her as bookkeeper, I believe, within three months after Mr. Lubben started on his own.

Q. Did Mr. Lubben have anything to do with her selection?

A. Only to the extent of approving my selection.

Q. In other words, he left it entirely up to you?

A. He had left it entirely to me to hire the bookkeeper.

Q. Did you prepare Mr. Lubben's 1945 return, his individual return?

A. As I recall it, I did.

Q. If Mr. Sproull testified that he prepared the 1945 return, would he be wrong?

A. Presumably, since two of us couldn't have prepared the same return and my recollection is that I prepared it since I was his accountant in March, 1946, in opening General Confections.

Q. Do you know when Mr. Sproull became his accountant?

A. After I left in July, 1946.

3819 Q. And when was Mr. Lubben's 1945 return filed?

A. To the best of my recollection, some time before March 15, 1946.

By Mr. O'Brien: If the Court please, I doubt very much that it is any part of the direct.

By the Court: I think you are exceeding the scope of the direct examination of this witness:

3820 By Mr. Lockley:

Q. Now, the partnership became effective you said, June 1st, but that the partners were in for some time prior to that. What did you mean by that?

A. The books of the sole proprietorship were closed as of May 31, 1946, but the new partners had taken effective control of the operations on the transactions sometime in April of 1945.

Q. It was after that time, you say, that a cash box came into existence, to your knowledge?

A. So far as I can recall, these cash transactions mushroomed to very substantial proportions after these people came in.

By Mr. O'Brien: I object to the answer, your Honor. He asked him about the time and now he is telling us about the extent.

By the Court: I think he testified on the very same phase of his testimony.

By Mr. O'Brien: Oh, I have no objection to the subject. It is merely the—

By the Court: What is it you object to?

By Mr. O'Brien: He is asking about the time when
3821 the cash box first came into existence and—

By the Court: Well, the answer may stand.

By Mr. Lockley:

Q. Now, you also stated that you kept some records on the valuation of the inventory, is that correct?

A. Complete—records as complete as we could possibly make them and—

Q. And did you find that there was any relationship between the purchases and sales during the period of the sole proprietorship, percentagewise?

A. I did.

Q. And what was that?

A. In our analysis of merchandise, we treated the gross amount, gross cost of an item—by that I mean—

By Mr. O'Brien: If the Court please, I don't mind any account of the method but if the results of the analysis during the proprietorship is involved, I think the books and records which are available would be the best evidence.

By the Court: Yes, I think that is true.

By Mr. Lockley:

Q. Well, Mr. Bercu, you are a certified public
3822 accountant, aren't you?

A. Yes, sir.

Q. You are an expert in your field. How long have you been a certified public accountant?

A. Since 1924.

Q. Are you familiar with the books and records of the Eatsum Food Products Company?

A. I was with the books and records and I believe all transactions of the Eatsum Food Products up to the time of the partnership.

Q. And did you find that there was any relationship then between the purchases and sales during that period?

A. I did.

Q. What was the relationship?

A. I found that the—

By Mr. O'Brien: I think, your Honor, that that is beyond the scope of the direct. If he wants him as his witness, I think he is subpoenaed as a government witness, and why, that would be proper, but he certainly couldn't get into such a subject. I interrogated him about the
3823 system. I interrogated him about the cash box and the rest had to do with the exhibits which he identified.

By the Court: Well, I think you did ask him about the question of the inventory.

By Mr. O'Brien: Yes, I did. That is true, about the inventory, whether he kept one.

By the Court: Well, he may answer the question.
3824 By the Witness: In connection with our merchandise analysis work which in a sense is a step beyond the usual books and records of a concern, as I had explained yesterday or started to, we had occasion to—when I say "we" in this instance, I, personally, would check with Mr. Lubben as to the actual cost of every item, every individual purchase, regardless of what the bill showed, and I would also check the selling price of that individual item and I found that Mr. Lubben's express desire to earn 20 per cent gross profit over all in his transactions was well carried out, as shown by the results of the analysis, monthly analysis of his purchases and sales as affected by his inventories, and that included all overages which he paid in cash.

By Mr. Lockley:

Q. And all overages which he received?

A. Which he might have received in cash.

By Mr. McConnell: I object to the overages paid in cash. He wasn't there. He doesn't know what Mr. Lubben did.

By Mr. Lockley:

Q. Will you tell us from your knowledge of the
3825 books and records, Mr. Bercu?

By the Court: Of course, if you are going into the books and records, I think that would constitute the best evidence in that regard.

By Mr. McConnell: I move to strike the witness's statement about overages.

By the Court: I am sorry.

By Mr. McConnell: I move to strike, your Honor, the witness's statement about overages that were paid.

By the Court: I think he testified about overages when Mr. O'Brien examined him. That isn't anything he injected into the case now. Mr. O'Brien asked him about overages and how overages were noted on the books.

By Mr. McConnell: Well, he went further than that. He wasn't testifying about a bookkeeping statement. He testified he had seen overages paid. That is what I am objecting to. He couldn't possibly have seen it.

By the Court: If you are speaking of overages, I think the only knowledge you have of overages is in so far
3826 as they were reflected on the books and records?

By the Witness: That is correct.

By the Court: All right.

By Mr. Lockley:

Q. Now you referred likewise to the cash box and you stated that you would get a summary of the cash transactions from Mr. Lubben. What was the nature of this summary that he gave you?

A. Am I—I hate to presume on the Court's time to be so technical, but when you speak of cash box,—while Mr. Lubben was a sole proprietor I never saw any cash box—I don't know whether—other than petty cash. Of course under the partnership I had reason to know or suspect that there were actual cash boxes with large sums in them.

Mr. Lubben handled cash transactions. He tried to account for those to me in connection with our analysis of merchandise, but I never knew of the existence of any cash box in the sense that apparently is being used here now until, I suppose, in April or May of 1945. The amounts involved were so large that they must have been using, literally, a cash box, in the transactions.

Q. That was after the partners came in?

3827 A. After the new people took control.

Q. Did I understand that this summary you received would show the amount of cash received from a customer and the amount of cash paid out to the supplier and the difference?

A. My recollection of Lubben's transactions in the years, in 1944 and early in 1945, was that he very rarely made a sale for cash, or let me put it this way: He rarely made a sale which was not recorded. Whether he received currency or not, he would record the amount of the sale and put through a bill for it. Sometimes they would be marked "cash sale", without the name of the customer, but he would deposit the cash in the regular course of business and I am speaking from recollection of matters going back eight or nine years now, but in those early months, I recall distinctly our discussions with Mr. Lubben about that and his statement that he didn't have to worry about receiving cash or it was just because his ceiling was just about what he chose to make it. He was a newcomer in business and he could always justify any price that he charged a customer.

By Mr. O'Brien: I object to that.

3828 By the Court: I don't think the answer is—

By Mr. O'Brien: I object to the dissertation.

By the Court: —in response to your question. You asked him about cash and the way that was handled in the partnership.

By the Witness: In the partnership. I beg your pardon.

By Mr. Lockley:

Q. Did you get a summary of cash transactions from Mr. Lubben either in the sole proprietorship after the partners came in in April or somewhere in there, or in the partnership?

A. I did.

Q. What was the nature of that summary?

By the Court: Well, during which period, now?

3829 By Mr. Lockley:

Q. Well, did you get different types of summaries in the two different periods?

A. Well, they would be different in this respect, that this—

Q. Speak first of the one in that period at the close of the sole proprietorship but while the partners were still in control.

A. At the close of the sole proprietorship, I received —it would seem now from the photostat which was presented to me that I must have received some sheet listing the transactions because they were fairly numerous and that I made a transcript of that sheet in my own handwriting.

Q. And that sheet would list the amounts which were paid out in cash, would it?

A. Amounts paid out in cash and amounts received in cash.

Q. And the difference?

A. The difference would be a cash balance on hand.

Q. What did you do with the cash balance on hand, accountingwise, I mean?

A. I honestly couldn't say now what I had actually done. My recollection is that I had either given
3830 orders or had made—

By Mr. O'Brien: Judge, I think the record will speak for itself on the partnership and proprietorship. That would be the best evidence of that. We don't like to have the rest of his recollection except where he is speaking in general terms.

By Mr. Lockley:

Q. Well, let me ask you this question, Mr. Bercu: Was the difference between the cash paid out and the cash received, if it resulted in a profit to Mr. Lubben, was that entered in the income of his business in any way?

A. Again I am speaking from recollection that what he did on a number of occasions—

By Mr. McConnell: I object to the recollection when we have got the books and the work sheets here.

By the Court: Have you got the books here to show the transactions?

By Mr. Lockley:

Q. Well, but this is the partnership. You are speaking of the partnership?

A. I am not speaking of the partnership. I am
3831 speaking of the—I understood your question was with reference to the sole proprietorship.

By the Court: Let us have the question read.

(Question read.)

By Mr. Lockley:

Q. Well, will you just give me the answer as it reflected the partnership books?

A. The partnership books?

Q. Yes.

A. Nothing at all was done about it.

Q. You don't know what happened in there?

A. I do not.

Q. Now, do you know what happened in the proprietorship books?

A. Yes. As I recall—

By Mr. McConnell: We have the proprietorship books here, Judge, and I object to this.

By the Court: Yes, I think that the books would be the best evidence.

By Mr. Lockley: All right. That's all, then, your Honor. Thank you, Mr. Bercu.

By Mr. McConnell: I want to ask one question.

3832 By the Court: All right.

Redirect Examination by Mr. McConnell.

Q. You referred to these cash authorization slips which you suggested that Mr. Lubben prepare. Do you recall in your cross examination you stated that?

A. Yes, sir.

Q. And you had nothing more than his word on the cash authorization slips, did you?

A. His word plus these merchandise analysis which indicated that there was a gross profit margin which he tried to realize on his merchandising transactions.

3833 Q. Well, you had no receipt for anybody for the money, did you?

A. Absolutely none.

Q. All you had was his word that he paid the money, is that right?

A. That is right.

Q. And it is true you said it was self-serving didn't you?

A. Yes. I pointed it out to him when we first set up the system.

Q. It was self-serving and it was Mr. Lubben's self-serving statement?

A. No question about that.

By Mr. McConnell: That's all.
By Mr. O'Brien: That's all.
By Mr. Lockley: Thank you, Mr. Bercu.

(Witness excused.)

By Mr. O'Brien: I think we have time, Judge, for that witness Starr who I spoke to you about. He would like to get away. He is rather short.

By the Court: All right.

By Mr. O'Brien: Mr. Starr.

3834 SAMUEL STARR, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your full name, Mr. Starr?
A. Samuel Starr, S-t-a-r-r.
Q. You live in New York City?
A. Yes, sir.
Q. And you are an accountant?
A. Yes, sir.
Q. What is your certificate in New York State?
A. Public accountant.

By the Court. A little louder, Mr. Starr.

By the Witness:

A. Public accountant.

By Mr. O'Brien:

Q. Talk to the jury. I know what you are going to say, but—
A. Yes. Public accountant.
Q. In the year 1945, did you do any work on the books and records of Eatsum Food Products Company?
A. I did.
Q. When did you commence, about?
3835 A. It was some time during the month of June or July of 1945 that I started.
Q. How long did you stay?
A. At that time I only worked about three or four months for Eatsum Food Products.
Q. You say at that time. Did you later come back?
A. I came back later, yes.
Q. When did you come back?

A. Well, I came back when it was under a different ownership. David Lubben wasn't connected with Eatsum Food Products when I came back.

Q. I see. Well, during Mr. Lubben's connection with the company you worked for a period of months, as you have just described?

A. That is right.

Q. For whom did you work?

A. Louis J. Roth.

Q. And Mr. Roth was one of the auditors separate from Mr. Bercu who just testified here?

A. That is right.

Q. And in the course of your work on the books of the partnership, did you have occasion personally to prepare certain work sheets?

A. I don't think so, not at that time, no.

3836 Q. Did you later?

A. I did, yes.

Q. From the partnership books and records?

A. Yes.

Q. Do you have the original work sheets which you prepared?

A. I haven't any work sheets.

Q. What did you do with them?

A. As soon as I prepared any work sheets, I turned them over to Mr. Roth.

By Mr. Lockley: May I ask when these were prepared? You have found out it was later, but we don't know when.

By Mr. O'Brien: Well, all right.

By Mr. O'Brien:

Q. Did you prepare work sheets on your first engagement?

A. No, I didn't.

Q. Then when was it that you prepared them?

A. It must have been about a year later. I prepared the work sheets for closings to prepare for the tax return, and the tax return was filed about six to nine months late.

3837 Q. Did you prepare some work sheets in the month of September of 1945?

A. Well, it all depends on what you call the work sheet. I mean, what type of work sheet are you referring to?

Q. Well, any type, any kind.

A. Well, I might have made out some work sheet analyses on purchases or something like that.

Q. Yes, but by work sheet I didn't mean to be technical, Mr. Starr. By work sheet I simply mean the working papers of an accountant pertaining to whatever it is he is doing with a set of books or some part of them.

A. Well, a work sheet is usually prepared by an accountant for preparation—to prepare a tax return or statements. A work sheet—an analyzing account would not be called a work sheet.

Q. What?

A. That is what I—

Q. All right, that is fine. Then on definition I mean any paper that you had occasion to prepare from the books and records, I am referring to as a work sheet.

A. I see.

Q. Understand?

3838 A. Then I might have prepared some work sheets from the very beginning, during the first part of my engagement.

3839 Q. Now, when you turned the papers over to Mr. Roth did you retain copies yourself?

A. Never prepared any copies.

Q. You gave—

A. The originals.

Q. —the originals to him. Now, will you look at the documents which I now show you, marked Defendants' Exhibits 65-A through 65—excuse me.

By Mr. Lockley: Will you enumerate them again, Mr. O'Brien?

By Mr. O'Brien: I will. They are 65-A through 65-X, inclusive, and also 66-W.

By Mr. O'Brien:

Q. Will you look at those sheets and tell us whether they are in your handwriting and whether they pertain to work which you did on the books of the partnership?

A. This is not mine.

By the Court: A little louder.

By the Witness:

A. This is not mine.

By Mr. Lockley: Which one is it?

By the Witness:

A. This is not mine.

By Mr. O'Brien:

3840 Q. Is the handwriting in the lefthand column yours?

A. I don't think so.

By Mr. O'Brien: I am speaking of A now, Mr. Lockley.

By Mr. Lockley: Exhibit 64-I.

By Mr. O'Brien: Where did you get the I so fast?

By Mr. O'Brien:

Q. It is I. Is it in your handwriting?

A. I don't think so, no.

By the Court: Speak up, Mr. Starr. I can't hear you.

By the Witness:

A. I am sorry, your Honor. I don't think it is. I don't recognize it. Unless I copied it.

By Mr. O'Brien:

Q. Well, I was calling your attention to the writing in the lefthand column. Let's pass it a minute and I will come back to it.

Now, look at these sheets which are identified as 65-A to 65-X, inclusive. Tell me whether those are in your handwriting.

A. This is mine. 65-A is mine.

Q. Well, look them over and tell us if there is

3841 any one that is not in your writing?

By Mr. Lockley: Well, I prefer, Mr. O'Brien, that he go through them one at a time and tell which ones are in his handwriting so we will know which he is looking at.

3842 By the Witness:

A. 65-A and B is mine. 65-C is mine. 65-D doesn't look like mine. 65-E is mine. 65-F is mine. 65-G is not mine.

By Mr. Lockley: That is G as in George?

By the Witness:

A. G. 65-H is not mine. 65-I is not mine. 65-J is mine. 65-K is mine. 65-L is mine. 65-M is not mine. 65-O is mine. 65-N is mine. 65-P is mine. 65-Q is mine. 65-R is mine. 65-S is mine. 65-T is mine. 65-U is mine. 65-V is mine. 65-W is mine. 65-X is mine.

By Mr. O'Brien:

Q. Now, going back to 65-D, Mr. Starr, is that not the second page of the schedule started on 65-C, which you have identified as yours?

A. It is, yes. 65-D is mine, too.

Q. I call your attention to 65-M. Do you know whose handwriting it is in?

A. Well, it is not in my handwriting.

Q. You said that.

A. It could either be one of two people.

Q. Who?

A. Either Mr. Roth or Mr. Hausman.

3843 Q. Are you familiar with Mr. Roth's handwriting?

A. Well, I was. I don't know if I can recall it now.

By Mr. O'Brien: Give me one of the Hausman sheets, will you?

(Document handed to counsel.)

By Mr. Lockley: Well, I object to this, your Honor. This witness is not an expert on handwriting and I think that this is an improper way of refreshing his recollection. If he doesn't know the handwriting, he doesn't know it.

By the Court: Well, I don't know what counsel is going to show him.

By Mr. Lockley: I have a fair idea.

By the Court: If it isn't in evidence, I don't suppose you have a right to state it is Roth's handwriting.

By Mr. Lockley: I don't even know if that is in Hausman's handwriting.

By Mr. O'Brien: Will you mark this Defendant's Exhibit B for identification, as of today.

(Said document was marked Defendants' Exhibit B for identification.)

3844 By Mr. O'Brien:

Q. Have you seen Mr. Hausman's handwriting before?

A. Yes, I have.

Q. And you are familiar with his handwriting?

A. Well, I was. I mean, this is going back eight years.

Q. Will you look at the instrument marked B for identification and tell me in whose handwriting it appears to be?

By Mr. Lockley: If your Honor please, I object on the ground that this is not a known exemplar of Mr. Hausman's handwriting, it hasn't been identified in any

way by Hausman, or anyone else, and this is an improper way of trying to refresh this witness's recollection as to what Mr. Hausman's handwriting looks like, and he is not an expert witness on handwriting matters.

By Mr. O'Brien: I submit there is nothing improper about it, Counsel.

By the Court: I think he has a right to state whether or not, in his opinion, the handwriting is one known to him.

3845 By Mr. O'Brien: That is all I am asking him, Judge.

By the Witness:

A. Well, I don't remember the handwriting, but I do remember Mr. Hausman made up statemtnts of this sort, he drew his lines without a ruler. I always use a ruler. I think that would be Hausman's handwriting.

By Mr. O'Brien:

Q. Speaking of B. How about Exhibit 65-M, are you able to state whether that is in the handwriting of Mr. Roth? I mean Louie Roth, the man you worked for?

A. Yes. It is hard for me to say. I don't think so, personally.

By the Court: We will take our recess now until 2:00 o'clock.

By the Marshal: Will the audience please remain standing while the jury and the Judge leave the court room.

This Honorable Court will recess until 2:00 o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p. m. of the same day, Tuesday, October 6, 1953.)

3846

• • (Caption—No. 52 CR 143) • •

Chicago, Illinois
Tuesday, October 6, 1953,
2:00 o'clock p. m.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:

By the Marshal: This honorable court will now resume its session.

3847 SAMUEL STARR, a witness heretofore called herein on behalf of the Defendants, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Ctd.) by Mr. O'Brien.

Q. Will you look at Defendants' Exhibit 66-W and tell me if that is in your handwriting?

A. It is.

Q. Is this a sheet on which you made entry from the partnership books?

A. When you say partnership, are you referring to the partnership when Lubben was in?

Q. Yes.

A. May I see that a minute?

By the Court: I don't hear you.

By Mr. Lockley: I am sorry. I did not hear you.

By the Witness: I just asked to see the paper. May I hear that question again, please.

By Mr. Lockley: I am sorry. I don't hear you.

By Mr. O'Brien: Will you please read the ques-
3848 tion.

By the Witness: Just read the question.

(Question read.)

By the Witness:

A. Well; this sheet was made after David Lubben was out.

By Mr. O'Brien:

Q. And when?

A. I couldn't give you the exact date because—

Q. What was the period of your employment after Lubben went out?

A. Well, I still worked for Mr. Roth on the same basis. I think Mr. Hausman at that time was no longer connected with Mr. Roth and I had to take over and prepare work sheets and these were some of the exceptions that I had listed on the paper.

Q. And for how long did you stay?

A. Well, I worked with Mr. Roth until 1948, 1949.

Q. In the same partnership?

A. Well, if they were still in existence by then, yes.

Q. Well, I am asking you about the partnership, Mr. Starr.

A. But this notation was done afterwards. I
3849 mean, Mr. Lubben was not connected any longer with them.

Q. Well, regardless of who was connected with them, was it taken from the Eatsum Food Products partnership books?

A. Yes.

Q. And do you know to what period your comments relating to it were applied?

A. I couldn't honestly tell you. I don't remember.

By Mr. O'Brien: Excuse me just a moment, Jack, do you have the loans and exchanges account?

By Mr. O'Brien:

Q. Will you look at Defendants' Exhibit 65-I for identification and tell us if you know the handwriting.

A. No, I don't.

Q. Look at Defendants' Exhibit 65-G and H and M, M as in Mary, and tell me—you have seen these before. You have seen these before today, Mr. Starr, but tell me whether you do or do not recognize the handwriting.

A. On 65-G and H I do not know the handwriting. On 65-M, I can't identify the handwriting.

3850 Q. Are you familiar with Mr. Roth's handwriting?

A. Well, I have seen his handwriting. He signed checks for me.

Q. Can you state whether or not 65-M is in Mr. Roth's handwriting?

A. I couldn't definitely state that.

By the Court: I don't hear you.

By the Witness: I couldn't definitely state that.

By Mr. O'Brien:

Q. 65-I, you saw that before, this morning. Will you look at it again and tell me whether you recognize any of the handwriting?

A. No, I don't.

Q. Will you look at Defendants' Exhiibt 64-O, P, Q, R and S, and tell me whether that is the loan, the same loans and exchange account as the notes on 66-M referred to?

By Mr. Lockley: Mr. O'Brien, will you correct me if I am wrong, but my records show Exhibit 64-O, P, Q, R and S are not in evidence. Is that what you have handed to the witness?

By Mr. O'Brien: Well, I was under the impression 3851 that they are in evidence, as I recall it. Of course, I do not have the transcript before me, but as I recall it, the Court admitted Defendants' Exhibit 64-A, B, C, D, E, F and so on.

By Mr. Lockley: G, H.

By Mr. O'Brien: Right all the way to V and W.

By Mr. Lockley: No. No, sir, Mr. O'Brien.

By the Court: You didn't identify P, Q, R and S, according to my notes.

By Mr. O'Brien: I am sorry, Judge, but nevertheless I will show—

By the Court: All right.

By Mr. O'Brien: —the witness the document so marked for identification rather than being in evidence and ask him to state if the loans and exchange accounts referred to in those sheets is the same account as he was commenting upon in 66-W for identification.

By Mr. Lockley: If your Honor please, I object on the grounds that none of those exhibts are in evidence and none of them have been identified including—

3852 By the Court: I assume he is trying to lay a foundation.

By the Witness: Shall I answer?

By the Court: You may answer.

By the Witness:

A. The figure that I have there of $113,000.00 was not taken from any of these sheets.

By Mr. O'Brien:

Q. I thought perhaps it was.

A. Those sheets, if your Honor please, were made out by Bernard Bercu and never—I never worked for him and I never used his paper.

By Mr. O'Brien: Well, if I haven't offered these, Judge—

By the Court: I don't think they have been identified by anybody, so far as any records show.

By Mr. O'Brien: Oh, I think they are identified by Mr.—

By the Court: Well, they may be, but if you don't refer to exhibits I can't make any note of it. If you just show the witness a paper, I have no notation of it being even identified.

3853 By Mr. Lockley: If your Honor please, my records show Mr. O'Brien skipped from 64-N to 64-T, leaving out O, P, Q, R and S.

By the Court: That is right.

By Mr. O'Brien: Well, I will not take the time now. I will check the record on that, Judge, and see what 3854 the fact is. For the purpose of cross examination of this witness, if the Court please, I offer—

By the Court: What do you mean, for the purpose of cross examination?

By Mr. O'Brien: For the purpose of any cross examination that counsel may desire—

By the Court: Oh.

By Mr. O'Brien: —I offer into evidence at this time, so that they will be available to him, the documents marked 65-A and B, which are an accounts payable schedule for September of 1945; 65-C and D, accounts payable schedules for October of '45; 65-E and F, accounts payable schedule for November of 1945, 65-J, covering notes on purchases for May 31, 1945; 65-K, working papers, May 31, 1946, covering June 1, 1945, to May 21, 1946; 65-L, a continuation—well, I don't know whether it is a continuation or not, but they are working papers, May 31, 1946; 65-O, May 31, 1945, notes of purchases; 65-N, the same notation, purchases, May 31, 1945; 65-P, the same; 65-Q, the same; 65-R, more of the same; 65-S, 3855 more of the same; also 65-T, and 65-U and V— Uand V, those are purchases, May, 1945; 65-W are notes on purchases, July, 1945; and 65-X, notes on purchases, June, 1945.

And you may cross examine.

By Mr. Lockley: At the outset, I object to those documents on the ground that there has been no proper foundation laid for the absence of the originals; that there has been no foundation laid that they were prepared in the ordinary course of business, or the circumstances under which they were prepared; that there has been no foundation as to their accuracy or as to the accuracy of the books and records from which they were prepared.

By the Court: Yes, I will sustain the objection.

By Mr. O'Brien: If the Court please, I may ask some further questions of this witness, although I will have other connecting testimony.

By Mr. O'Brien:

3856 Q. But these items which I have shown you, Mr. Starr, and which you have identified, were they made in the course of your employment by Mr. Roth from the records of the Eatsum Food Products partnership?

A. Yes.

Q. And Mr. Roth was one of the accountants having the accounting work at that firm?

A. That's true.

3857 Q. Do you recall that these schedules and sheets and notes which I have shown you are true and correct, according to what you learned from the books and records, at the time you made them?

A. That's right.

Q. And when you finished, as I understand it, you delivered the original sheets to Mr. Roth?

A. Either to Mr. Roth or to Mr. Hausman.

Q. To one or the other?

A. That's right.

Q. And you did not retain copies?

A. No, sir.

Q. And you do not now have either the originals or a copy?

A. No, sir.

Q. Of any one or either of these sheets?

A. No, sir.

By Mr. O'Brien: I think that is as far as I can go with this witness, Judge.

By the Court: Well, I will make the same ruling.

By Mr. O'Brien: I am only trying to—

By the Court: I understand.

By Mr. O'Brien: I am not disputing the ruling in
3858 any way, your Honor, but I am trying to say that I have gone as far as I can with this witness in that part of my proof. The rest of my proof I will adduce through other witnesses.

By the Court: Very well.

By Mr. O'Brien: But if there be any questions which counsel desires to ask on these exhibits I am tendering the witness. Otherwise I am through with him.

By Mr. Lockley: Did you re-offer them, Mr. O'Brien?

By Mr. O'Brien: Yes, I will re-offer them on the basis—but the Court says its ruling would be the same.

By Mr. Lockley: Well, no cross examination then, your Honor.

By Mr. O'Brien: I am correct in that, am I not?

By the Court: Yes.

By Mr. O'Brien: That your ruling is the same as of this time?

By the Court: Yes.

But you understand, Mr. Lockley, that counsel
3859 intends to lay additional foundation and then to re-offer. You understand, he hasn't abandoned the exhibits.

By Mr. Lockley: Then I would like to ask a couple questions.

Cross Examination by Mr. Lockley.

Q. Mr. Starr, you said you worked at Eatsum Food Products Company partnership for about four months from June or July of 1945, is that correct?

A. Four or five months; yes, sir.

Q. That would take you until about September?

A. A little later than that. About October or November.

Q. And did you ever work on the books and records themselves, making any entries in the original books and records?

A. You mean writing in the books?

Q. Yes.

A. Or do you mean check marks?

Q. I meant writing in them.

A. No, sir.

3860 Q. You made check marks in them in the process of preparing these work sheets, I presume?

A. That's right.

Q. You went over them?

A. Right.

Q. Who instructed you to prepare these work sheets?

A. Mr. Roth.

Q. And when was that?

A. Well—

By the Court: Speak up, Mr. Starr.

By the Witness:

A. When he sent me out on my assignment, he told me what he wanted done. It might have been the day before I got there, it might have been a week before. I mean, he just told me what he needed or what he wanted.

By Mr. Lockley:

Q. Was this after Mr. Lubben left the partnership?

A. No, those records were before. Some of them were, anyway.

Q. Will you show me which of these records were prepared by you after Mr. Lubben left the partnership and will you please call off the exhibit numbers on those particular records?

3861 A. Well, I don't recall the exact day that he left.

Q. Well, you said that you worked there for two periods, one during the summer of 1945, and then you came back, as I understand it, in 1947, after Mr. Hausman had left, is that correct?

By Mr. O'Brien: No, no.

By Mr. Lockley:

Q. Was it '46?

A. '46.

Q. After Mr. Hausman left?

A. Actually I never had left. What I meant was, I didn't exactly work on the Eatsum partnership. I was still working for Roth.

Q. You were working for Roth?

A. That's right.

Q. But on some other account that Mr. Roth also serviced at that time?

A. Yes.

Q. So you didn't have any connection with the Eatsum Food Products books from the time you left about September, '45, until what time in 1946?

A. Well, I might have been called in for a day or two in between. I don't recall. I mean, I might
3862 have been.

Q. Were any of those books prepared during that period of time?

By Mr. O'Brien: You mean the sheets.

By Mr. Lockley:

Q. Any of those sheets—sorry—yes.

A. Well, I still would have to know the time Lubben actually left, so I can tell you the exact date, whether I made it out before or after.

Q. Were they prepared after March 8th, 1946, any of those records, any of those work sheets?

A. Exhibit 65-K, which is a work sheet, was prepared after Mr. Lubben had left.

By the Court: A?

By Mr. Lockley: K, I believe it is.

By the Witness: K.

By Mr. Lockley:

Q. And this is dated May 31, 1946.

A. And 65-L as in Leonard, which is a continuation.

3863 Those two are the only exhibits that were prepared later on.

By Mr. Lockley:

Q. And the balance of them were prepared during your four-month stay in 1945?

A. Right.

Q. Now, from what basic books and records were the 1945 work sheets prepared?

A. Well, I was working on the purchase book and accounts payable.

Q. Just the purchase book and the accounts payable book?

A. Right.

Q. Did you ever work on the cash disbursements book?

A. I may have helped out Mr. Hausman one or two times.

Q. Do any of these work sheets relate to the cash disbursements book?

A. No. He prepared the work sheets on those books.

Q. These are just on the amount of purchases on the accounts payable?

A. Right.

Q. You were working entirely under the direction
3864 of Mr. Roth at that time, is that so?

A. That is right.

Q. And did Mr. Roth tell you or give you instructions in the preparation of these work sheets?

A. No, sir.

Q. Who gave you instructions?

A. I didn't need any instructions. He just gave me instructions on what kind of work sheets he wanted.

Q. Oh, I see. Did he tell you what they were for?

A. No.

Q. What was Mr. Roth's policy with reference to telling you what he was doing or what you were supposed to do?

A. Well, any time I asked any questions of Mr. Roth he told me to mind my own business, he knew what he was doing.

Q. Do you know whether the books and records from which these work sheets were prepared were true and correct?

A. The part that I had—

Q. Of your own knowledge?

A. The part that I checked, I believe was true and correct. I mean, as far as the accounting procedure.

3865 By Mr. McConnell: There is no showing this witness kept any books and record at all. How could he testify to that?

By the Court: I don't know. He can state whether or not he knows.

By the Witness: I mean, the part of the books that I checked was just from the bills into the purchase book itself and furthermore into the accounts payable ledger.

By Mr. Lockley:

Q. Do you know whether the Eatsum partnership books and records were ever closed?

A. No. I mean by that they were never closed, so far as I know.

By Mr. Lockley: All right. That is all.

By Mr. O'Brien: Just a couple of questions.

By the Witness: All right.

Redirect Examination by Mr. O'Brien.

Q. Those Exhibits K and L, 65-K and L, although they were made after Lubben left, they covered the period from June 1, 1945 to May 31, 1946; did they not?

3866 A. Yes.

By Mr. O'Brien: I think that's all.

Recross Examination by Mr. Lockley.

Q. Pardon me, Mr. Starr. Just one question. Do you know Exhibits 65-H and L also contain some material which relates to the period after March 8th or 9th of 1946 when Mr. Lubben was no longer there; isn't that so?

A. That is right.

By Mr. Kirby: Do you have that partnership—

By Mr. Lockley:

Q. When the books were completely under the control of Mr. Roth and Mr. Giglio?

A. Right.

By Mr. Kirby: Do you have that partnership—

By Mr. O'Brien: And Miss Feldman.

By Mr. Kirby: Do you know where that Eatsum general ledger is, the one with the paper cover? It isn't in this:

I want to ask Mr. Starr about something which he has said is in his handwriting and he said he couldn't fix

3867 the period.

Direct Examination by Mr. Kirby.

Q. That is 66-W, isn't it, Mr. Starr?

A. That is right.

Q. And I show you a sheet which has already been marked Exhibit 36 for identification, and that appears to be the loans and exchange account of Eatsum, doesn't it?

A. That is right.

3868 By Mr. Kirby:

Q. Now, Mr. Starr, could you take a look at that loans and exchanges ledger that you have in your hand there and see whether you can find the date with the amount of the balance is the same as the amount of the balance on that sheet that I handed you which is 66-W?

A. April 30, 1946.

Q. Now, Mr. Starr, now that you have taken a look at that and taken a look again at your own handwriting on Exhibit 66-W, does that fix in your mind about when that was made?

A. Well, it was made—well, it would appear to have been made sometime in May of 1946.

Q. In 1946?

A. In 1946.

Q. There is no question but what it is your handwriting, Mr. Starr?

A. On the sheet?

Q. Yes.

A. That is right.

Q. And you made it in accordance with your work that you were doing there at the time?

A. Well, that is a question, now. Now this nota-
3869tion—I usually make a notation like this when I am closing the books and it might have been made May, 1946, and then again it might have been made much later. I couldn't tell you exactly.

Q. Yes, but the question was it was made in connection with your work on the books?

A. Yes.

Q. Oh, yes, and it ties into the account that you hold in your hand in that bound book?

A. That is right.

Q. All right, fine. And in it you were asking questions about how to allocate certain items, is that the fact?

A. I was asking a question on how to allocate the total.

Q. Yes, all right.

By Mr. Kirby: And now, if the Court please, the witness has keyed this particular exhibit to one of the books, the time and everything like that. Now, the only question remaining would be that it is a photostat rather than an original and it is within the partnership period.

By Mr. Lockley: If your Honor please, I object
3870 to it.

By the Court: Any questions he may ask do not constitute admissible evidence any way.

By Mr. Kirby: Well, it becomes quite an important question and if I was—

By the Court: That may be, but still it isn't admissible into evidence.

By Mr. Kirby: The work papers, I mean, on this account.

By the Court: I assume that there are some questions that the auditor has.

By Mr. Kirby: It relates to a specific transaction which is of importance, your Honor.

By the Court: Are you offering it into evidence?

By Mr. Kirby: Yes, sir.

By the Court: Well, I will sustain the objection. What is that exhibit number again, please.

By Mr. Kirby: 66-W, your Honor, and it relates to exceptions on the audit with respect to loans and ex-
3871 changes. That's all.

By the Court: I think he stated 66-W is in whose handwriting?

By Mr. Kirby: It is in his own handwriting, Judge, and he made it in connection with that book.

By the Court: Yes. I will sustain the objection.

By Mr. Lockley: That's all, Mr. Starr.

(Witness excused.)

ARTHUR M. ROBINSON, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. Arthur M. Robinson.

Q. Where do you live, Mr. Robinson?

A. Keokuk, Iowa.

Q. What is your business?

A. I am the vice president in charge of sales for the Hubbinger Company who manufactures corn syrup
3872 and starches.

By the Court: Robinson or Robertson?

By the Witness: Robinson.

By Mr. Kirby:

Q. And how long have you been with the Hubbinger Company?

A. Since December 1, 1939.

3873 Q. In what capacities?

A. I went there as assistant sales manager. The

sales manager had an accident, I believe, in about 1942 and in about 1944 I was made acting sales manager and about a year later, sales manager, and in about 1947, vice president in charge of sales.

Q. Now during the years 1945 and 1946, you were in sales then?

A. That is right.

Q. And was one of the company's accounts in those days The Shotwell Manufacturing Company?

A. It was.

Q. You knew the company?

A. Yes.

Q. Now Mr. Robinson, how many corn refiners are there in the United States?

A. Well, there are practically eight major ones. There are some that process other grains that are sometimes considered in the class, but actually there are eight.

Q. Well, which are the eight that process most of the corn in this country?

A. Corn Products Refining Company, A. E. Staley, 3874 in Decatur, the Clinton Company, at Clinton, Iowa, American Maize Products Company in New York, the Hubinger Company at Keokuk, Anheuser Busch in St. Louis, Union Starch Refining Company at Granite City. Their general office is at Columbus, Indiana. National Starch, New York.

Q. During the war, Mr. Robinson, were there some restrictions on the grinding of corn by refiners, generally?

A. Yes, there were Government restrictions on our grind.

Q. I don't really want to go into all the details of it, but just describe, will you, the corn syrup supply situation during the war years and on up into and including 1946, will you please?

A. Well, starting in about 1942, the industry had a very unusual demand for corn syrup because of the shortage of sugar primarily, and there were a lot of—

Q. Is corn syrup usable in place of sugar?

A. It can be used as a sugar replacement, although it is not as sweet as sugar.

It is generally considered to be about sixty per cent as

sweet as sugar. There were a lot of manufacturers
3875 who previous to the war had no use for corn syrup or who didn't use it who wanted to use some kind of sweetener when they were short of sugar. They were primarily bottlers and some of the bakery trade and the ice cream manufacturers who before the war had not used corn syrup. When the sugar became short, they began to use it to the point where our production went up to full capacity as soon as we could get it up there and of course everybody, both in the industry we had been serving and all these new industries had been after us for corn syrup right from the beginning of 1942, through and beyond the end of the war, beyond the end of the actual war.

Q. Now sugar, of course, was rationed?

A. That is right.

Q. But was corn syrup rationed?

A. No, it was not rationed.

Q. You had to get rationing points to get sweetening in the form of sugar, did you?

A. That is right.

Q. Now to get sweetening in the form of corn syrup did you have to get rationing points?

A. No.

Q. That was just a question of supply and demand?

3876 A. Yes, it was. And the manufacturer set his own allotments to his trade.

Q. And is corn syrup used in the confectionery industry?

A. Yes. If I am not mistaken, it is the largest single customer of the corn refining industry, the candy manufacturing trade.

Q. Well, go ahead then. These other people started to come on. The other people that hadn't used it came in, and then what happened?

A. Well, it got to the point where we, as manufacturers of corn syrup, had to arrive at some kind of allocation basis for our customers, and we made an attempt to guarantee all of the customers with whom we had done business before the war that we would give them an amount of syrup equaling to what they had in the year 1941 and if our production increased, we made an attempt to give them part of the increase of our production.

Q. Is there some Federal restriction upon the amount of corn you could grind?

A. There was at one time, but it was late in the war and I don't remember exactly the year, but if I
3877 am not mistaken, it was about in 1945.

Up until that time we had been able to buy all the corn that we could process in our plant and then the black market developed in corn to the point where we weren't able to buy all that we needed to keep our production going and if I am not mistaken, it must have been about late 1945 or early 1946 that the Government set a restriction. I believe it was based on 80 per cent of the previous year's grind. In other words, we were not allowed to grind more than 80 per cent of corn than the amount we had ground in the previous year.

3878 Q. What was the shortage in corn or availability, at least?

A. Well, I didn't have anything to do with the buying of corn myself. It is a separate department in our company, but I did know something about our acquiring corn and we bought, unlike most of the others—

By Mr. Lockley: I object, your Honor, unless he is testifying of his own knowledge.

By Mr. Kirby: Well, he knows it.

By Mr. Lockley: He just said he didn't know anything about it.

By the Court: Well, he can tell what he knew about it.

By the Witness:

A. We, differently than other manufacturers in our industry, we bought most of our corn out at country elevators rather than at terminal markets like Chicago, and we were dealing with country elevators and it developed that the price of corn—that corn was more valuable to the farmer, actually, for feeding the hogs than it was for selling as regular corn. In other words if corn was
3879 selling at $1.22 it was entirely possible that that same corn fed to a hog would be worth $3.00 a bushel. That made it very difficult to get corn, in addition to the fact that when the farmers decided to feed more of their corn to hogs and animals, it shortened up the supply further so that we couldn't buy the quantity we were allowed under government allotment of 80 per cent, to use.

By Mr. Kirby:

Q. And then what developed in the market?

A. Well, actually there were sales being made of corn out in the country on the basis of a seller—from the elevator operators out there and the farmers—

By Mr. Lockley: Just a moment, please, I would like to have the time and the place and the circumstances, if you please.

By the Court: I don't believe that this generalizing is going to be helpful. It must be limited to certain specific instances concerning the defendants that we are dealing with.

By Mr. Kirby: Well, we are initially concerned with the conditions that existed in the market.

3880 By the Court: Yes, generally.

By Mr. Kirby: I don't mean to have Mr. Robinson go into detail.

By the Court: But what other people may have done and what they may have primarily engineered is not a part of this lawsuit.

By Mr. Kirby:

Q. Now, this difficulty in getting corn, that affected your company?

A. Yes, it caused us to reduce production considerably and it made it impossible for us to take care of any of the regular customers that we had been selling for years and then we were approached by some of our customers who told us they could get corn if we were—

By Mr. Lockley: I object again to the general nature of the testimony, your Honor.

The Court: Yes.

By Mr. Kirby:

Q. Let me go to something else. Do you have any records with respect to Shotwell for any of this period?

3881 A. Yes. Back through 1946 we have records of shipments of corn made in the name of Shotwell to the Hubbinger Company and we have sales records and invoices for 1946 but no invoices prior to that time because the company had a habit, a practice of destroying invoices and other records that were more than five years old.

Q. But do you have the invoices for 1946 from your company to Shotwell?

A. Yes.

Q. We subpoenaed them. May I see them, please?

(Witness hands documents to counsel.)

Q. Have you handed me all of the 1946 invoices from your company to Shotwell?

A. I am sure they are all there.

By Mr. Kirby: I will get all of these marked in a series as Exhibit No. 67, with the sub letters beneath it and ask that they be admitted in evidence. I do want to question the witness with respect to some writing that is upon them, your Honor. These are retained invoices, their invoices to Shotwell for 1946.

9 (Said documents were marked Defendants' Exhibit 67 with sub letters for identification.)

3882 By Mr. Lockley: Your indulgence for just a moment, your Honor, while we are comparing them. May I ask Mr. Robinson a question about these?

By Mr. Kirby: Surely.

Cross Examination by Mr. Lockley.

Q. Mr. Robinson, do you know when these were prepared?

A. When those invoices were prepared?

Q. Yes, sir.

A. Our general procedure is to prepare them immediately after shipment, which is probably the day following shipment.

Q. Will you tell me what High Sweet is?

A. It is a special grade of corn syrup. There are three different types.

Q. And what is "O. K. thin boiling starch"?

A. It is a thin boiling starch used in the manufacture of certain candies.

Q. Is it also a sweetening?

A. No, it is not.

By Mr. Lockley: I have no objection to those. Let 3883 me see. I don't see what starch has to do with it.

3884 By Mr. Kirby: I will ask him.

Direct Examination (Ctd.) by Mr. Kirby.

Q. Mr. Robinson, starch is a product of corn?

A. Yes, it is.

Q. And was there the same difficulty with respect to the supply of starch as there was with respect to the supply of anything else made from corn?

A. Yes, because they both come from corn, the same process.

By Mr. Lockley: No objection, your Honor.

By the Court: They may be received.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 67-A to 67-W, inclusive.)

By Mr. Kirby:

Q. On Exhibit 67-B, I notice this entry, "Our records only. Charge against corn purchases." Did you note that on that exhibit?

A. Yes.

Q. Will you explain that?

A. It was done in our office to keep track of the shipments we had made against corn received from customers.

We had many customers who were not sending corn
3885 to us and we were trying to ship them regularly.

We had other customers who shipped corn to us and we got this notation on the invoice to identify cars of syrup and starch that had been sent to customers who had furnished corn to us to keep our plant operating.

Q. Well, now, on Shotwell—I notice as I go through these invoices that that same entry appears repeatedly on these carloads of corn syrup. You notice that yourself.

A. Yes.

Q. Well, now, tell us, please, what is this "corn purchased by Shotwell" that you refer to there; explain that, will you please?

A. Well, at the time we were unable to get corn in the market as we normally did through the regular course of going out on the market to buy it. Some of our customers offered to furnish corn to us, if we would process it.

By Mr. Lockley: Again, your Honor, I object to the general nature of the testimony.

By the Court: We are talking about Shotwell.

3886 By Mr. Lockley: —unless he has some definite information relating to the Shotwell Manufacturing Company.

By the Witness:

A. Shotwell offered to furnish corn to us if we would process it and return part of our production from that corn in the form of corn syrup or starch. And that we agreed to do. And these notations on these invoices were put on here to show that this corn syrup, or the starch that was shipped on some of those other invoices, was shipped against the corn that Shotwell had furnished to us.

By Mr. Kirby:

Q. And when Shotwell furnished the corn to you, at what price was it furnished?

A. We bought the corn at the regular ceiling price.

Q. At OPA—

A. OPA ceiling prices.

Q. The corn that Shotwell made available to you?

A. That's right.

Q. Why didn't you buy that corn yourself in the open market at OPA prices?

A. Because, as I mentioned before, we couldn't
3887 buy it in the open market. With the OPA ceiling price of corn, it was much more valuable to the farmers as feed for cattle and hogs.

In addition to that it was being sold in the black market to other people who needed corn for one purpose or another.

Q. At that time there was no corn moving into your plant at all from the regular market, was there?

A. I wouldn't say no corn. Very little.

Q. And, Mr. Robinson, was there a man at your office, now dead, who kept some little memoranda with respect to these corn deals?

A. Yes, L. G. Evers, our corn—grain buyer at the time.

3888 Q. As I understand it, he is dead?

A. That's right.

Q. Have you got the sheet from his memo book that relates to Shotwell?

A. Yes.

Q. For a part of the period at least?

A. That's right here.

Q. Now, what kind of a document are you referring to?

A. Well, this is a day book showing purchases of corn by this grain buyer, and it has—

By Mr. Lockley: Well, I object, your Honor, until such time as the book has been properly identified.

By the Court: Generally he may state what it purports to be, but without going into any contents.

By Mr. Kirby:

Q. What do you say it purports to be?

A. Well, it is a record of the amount of corn that we bought on each day, and the price we paid for it, and from whom it was bought, the shipper and all.

By Mr. Kirby: Would you mark that Defendants'
3889 Exhibit No. 68 for identification.

(Said document was marked Defendants' Exhibit 68 for identification.)

By Mr. Kirby:

Q. Besides this book, which has been marked Defendants' Exhibit No. 68 for identification, was there some other memorandum of corn deals?

A. Yes, we have a sheet which was kept in the sales department. That was a purchasing—grain purchasing department record there.

Q. You mean Exhibit 68?

A. Yes.

Q. All right. What was kept in the sales department?

A. We also kept in the sales department a figure that we got from the grain buying department, showing th number of bushels of corn that was shipped to us by any customer, and then showing the dates and the amounts of shipments of corn syrup or starch against those corn shipments.

Q. And you have some records of that type that relate to Shotwell?

A. I have such a record here for Shotwell, yes.

3890 Q. And is that the record which I have marked Defendants' Exhibit 69?

A. Yes, that's it.

Q. And in whose handwriting is that?

A. It is in the handwriting of Mr. John Fanning, who at the time was an assistant in the sales department.

Q. Assistant to you?

A. Yes.

Q. Now, I notice that there are some references on it to A. M. R. Who is A. M. R.?

A. That refers to me.

Q. And you are the one that gave the orders with respect to those kind of things?

A. That's right.

Q. Now, was that a memoranda which was kept in the regular course of the business of your company?

A. After it was once begun, it was kept regularly and daily.

Q. Well, after you did get started with it, it was so kept?

A. That's right.

Q. And what does it purport to cover for the period involved in it?

3891 A. Well, the purpose of our keeping it was to know how many bushels of corn we had received from Shotwell, and showing a total number of bushels received, and the amount of corn syrup that was due Shotwell, based on so many bushels, and on the bottom of their sheet it shows the shipments of corn syrup and starch against the corn that was received.

Q. And does that accurately reflect the period which it purports to cover, so far as the records of the company are concerned?

A. It does.

Q. Relating to Shotwell?

A. Yes.

Q. Now, have you shown me all the records that you have with respect to any corn purchase deals with Shotwell, Mr. Robinson?

A. Yes, I have.

3892 By Mr. Kirby: I now offer in evidence the red book, which is 68, and the memo, which is 69.

By the Court: Well, I think counsel should see them.

(Documents handed to counsel.)

Cross Examination by Mr. Lockley.

Q. Is this Exhibit 68, Mr. Robinson, in your handwriting?

A. No, it is not.

Q. Or any part of it?

A. No, that was in the handwriting of Mr. Evers, who was our corn buyer at the time.

Q. Did you have any part to do in keeping that?

A. No, I did not.

Q. Do you know whether the entries in it are true and correct?

A. Only that I believe that all the records of the company are true and correct. And that is just another one of the many that we have.

Q. Where did you obtain the record?

A. It has been kept in the offices as a record of our corn purchases during that period. It came
3893 out of our general office, and as an officer of the company I believe I have access to it.

Q. Has it been your practice to keep this sort of a record?

A. It is still being kept.

Q. Just like this?

A. I wouldn't say just like that, no. Although it is very similar.

Q. Were any of the entries contained in this book ever transcribed to any of the other records of the company?

A. That other exhibit is the one record where figures were transferred. That happens to be the record of corn that we received for the individual company, for Shotwell in this case, and our shipments of corn syrup and starch against the corn received. The corn on that second exhibit came out of that red book.

Q. You mean on Exhibit No. 69, that is a transcription of the Shotwell entries on Exhibit 68?

A. That's right.

Q. Is that correct?

A. That's right.

Q. Where is the original book from which Ex-
3894 hibit 69 was taken?

A. It is at Keokuk. It has no other information on Shotwell in it.

Q. It has information as to other customers, is that it?

A. That's right.

Q. And was this made under your supervision and direction, this particular record?

A. It was.

By Mr. Lockley: We have no objection, your Honor.
By the Court: They may be received.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 68 and 69.)

Direct Examination (Ctd.) by Mr. Kirby.

Q. Mr. Robinson, would you read the entries with respect to corn supplied by Shotwell that appear in that book, 68.

A. Under date of Wednesday, February 6, 1946, "Cargill at Cedar Rapids, 15 cars of No. 2,"—meaning
3895 No. 2 yellow corn— "ceiling plus 27,"— ceiling plus two and a half, it is—"2-½ merchandising, and ½ brokerage", I believe.

And another entry is the name of Shotwell Candy Company. There is a pencil notation showing 23123, which was probably our corn purchase number.

Q. Now, that's 15 carloads of corn that that talks about?

A. That's right.

Q. Keyed to Shotwell Company?

A. That's right.

Q. And what does that mean, 15 carloads of corn keyed to Shotwell, what does that mean?

A. It means that Shotwell had arranged to have those cars of corn shipped to us from Cargill Grain at Cedar Rapids, Iowa. They were bought on February 6, 1946 and sent to our plant. And we were to process them and give Shotwell a portion of the production of syrup and starch from that corn.

3896 Q. Now, how many pounds would you get of product out of the bushel?

A. 38 pounds—35 pounds of corn syrup and approximately 38 pounds of starch, because of the difference in dry substance.

Q. 37 pounds of corn—

A. 35 corn syrup, 38 starch.

Q. Now, looking at Exhibit 69—did I give that back to you?

A. No.

By the Court: What do you mean, out of one bushel of corn?

By the Witness: Yes, sir. You don't get both amounts. You get one or the other. You don't get both syrup and starch out of the same bushel. You get either 35 pounds of corn syrup or 38 pounds of starch. You don't get both.

By Mr. Kirby: No.

By Mr. Kirby:

Q. Looking at Exhibit 69, Mr. Robinson, can you tell how many pounds of corn syrup were to be sent to Shotwell out of the 35 pounds you would get per bushel?

3897 A. 15 pounds.

Q. Who kept the other 20 pounds?

A. It was used by us to service our other trade.

Q. So that from any bushel of corn that Shotwell bought in the black market and sent to you they would have the right—

By Mr. Lockley: I object to the form of the question. There has been no evidence that Shotwell bought any corn in the black market.

By the Court: There is no evidence that they bought in the black market.

By Mr. Kirby:

Do you know where they bought the corn?

A. From these, it shows that 15 cars came from Cargill.

By Mr. Lockley: Was Cargill in the black market?

By the Witness: I can't say that.

By Mr. Kirby: Cargill was simply a broker.

By the Court: We don't know that. You have to prove that. You are assuming things that are not in evidence.

By Mr. Kirby:

Q. Well, Mr. Robinson, your company tried to buy

3898 corn at ceiling?

A. That's right.

Q. Were you able to?

A. No.

Q. Now, this 15 cars of corn that you speak of would entitle Shotwell to get, at ceiling, a certain amount of corn syrup from your company, is that right?

A. That's right.

Q. And that was on the ratio of 15 pounds of corn

syrup out of each 35 pounds of corn syrup, or out of each bushel of corn they supplied?

A. That's right.

Q. Now, would you look on the next day and see whether again there was some corn shipped by Shotwell.

A. Yes, on Thursday, February 7, 1946, one car from Cargill, Incorporated, Cedar Rapids. It is marked Area A, 2 Y,—which means two yellow— ceiling, plus two and a half merchandising, plus one half brokerage, Shotwell Candy Company.

Q. And then that was on a Thursday, and on the following Saturday, February 9, did you get some more corn supplied through Shotwell?

3899 A. Yes, on Saturday, February 9 there is an entry, Daniel F. Rice & Company, Chicago, one car of 2 Yellow, at a dollar and twelve and three-eighths, Minneapolis, plus two and a half cents merchandising, Keokuk weights and grades, Shotwell Candy.

3900 Q. Then the following Monday did you get some more corn supplied by Shotwell?

A. Yes, on Monday, February 11, there was an entry, Cargill, Incorporated, Cedar Rapids, 14 cars No. 2 Yellow, Area A, ceiling, as soon as possible, plus two and a half cents merchandising, plus one half brokerage, Shotwell Candy Company.

Q. Now, in answer to one of Mr. Lockley's questions you said that the material from that red book—

By the way, have I covered with you as many entries as exist in that book with respect to Shotwell?

A. Yes, I believe you have.

Q. Now, in answer to one of Mr. Lockley's questions about the red book there you said that the material from the red book was carried forward into this little memorandum, which is Exhibit 69, is that right?

A. That's right.

Q. Now, does that show—Exhibit 69,—how many bushels were involved in the shipments in that five-day period?

A. Yes, it does.

Q. How many bushels did Shotwell make available

3901 in that five-day period?

A. 48,754.

Q. Now, for that 48,754—is that the corn purchase deals which are referred to on the invoices, Mr. obinson?

A. It is.

Q. And was corn syrup shipped under that corn purchase deal?

A. Yes, it was.

Q. And how much corn syrup was shipped in connection with the purchase by Shotwell of that corn in that five-day period?

A. In that five-day period?

Q. Yes.

A. You mean shipments in that five-day period?

Q. Yes.

A. I can't tell you that. I have to refer to the invoices.

Q. I don't mean how much corn syrup you shipped in the five days, but you have told us about these 48,000 some bushels of corn that Shotwell made available.

A. Yes.

Q. Now, then, can you tell me from Exhibit 69
3902 how much corn syrup was shipped in connection with that corn that was supplied?

A. 816,000 pounds.

By the Court: Eight hundred what?

By the Witness: 816,000 pounds.

3903 By the Court: All syrup?

By the Witness: No, there was one car of sixty thousand pounds of starch.

By the Court: Sixty thousand?

By the Witness: Sixty thousand pounds of starch, and the rest of syrup.

By the Court: Isn't it sixteen thousand pounds of syrup?

By the Witness: No. The sixty thousand pounds of starch is to be deducted from that figure.

By Mr. Kirby:

Q. It is 816,000 pounds of product, of which all but 60,000 was syrup, is that right?

A. That's right.

Q. Now, Mr. Robinson, I show you these exhibits again, in the 67 series, and ask you whether you will give the dates which are charged to the corn deal, reading the dates from these exhibits in that series.

A. The dates on these shipments?

Q. That are tied to the corn deal.

A. They are all out of order here now.

Q. I am sorry.

3904 A. I will start with this top one. It is January 29, 1946; February 9, 1946; February 15, 1946; March 5, 1946. There were 2100 pounds of starch which were not included in that figure, I see here, on March 4th. A tank car on March 8th.

Q. By the way, is that tank car on March 8th the first one that is picked up as the special charges on memo 69?

A. No, all those that I have read been on there, but some of them have been scratched off.

Q. And charged to some kind of an earlier—

A. Yes, apparently.

Q. All right.

A. The ones that are not scratched off of this memo are the only ones charged to this 1946 corn deal and these earlier shipments were not charged to that corn deal, probably because they had reference to some other—

Q. Let's stop right there. How much on Exhibit 69 is scratched off?

A. Well, there is 569,000 pounds.

Q. Of product?

A. Yes, that's right. About 570,000 pounds.

3905 Q. And that 570,000 pounds, that represents product shipped to Shotwell over and above the 816,000 pounds?

A. That's right.

By Mr. Kirby: Your Honor, that is an added shipment.

By Mr. Kirby:

Q. That is shipment of product tied to a corn deal?

A. That's right.

Q. But that is some earlier corn deal.

By Mr. Lockley: Mr. Kirby, are you testifying? I just wondered.

By Mr. Kirby: All right.

By Mr. Kirby:

Q. What is that related to, Mr. Robinson?

A. Well, since it was not charged to this 1946 corn deal, it apparently—this record, Exhibit 69—

By Mr. Lockley: I object, unless the witness knows.

By the Court: He is asking for your own knowledge, Mr. Robinson.

By Mr. Kirby:

Q. Mr. Robinson, does it indicate on whose instructions that was crossed off?

3906 A. It was crossed off on my own.

Q. That indicates that right on the piece of paper?

A. That's right.

Q. Now, explain what that was, Mr. Robinson; give us your best memory on it, at least.

A. My best memory is that it was taken off the 1946 record because it had no reference to shipments made—corn shipments made in 1946, and for that reason was not chargeable to that corn in '46. But all the other cars that—cars of syrup and starch shipped were chargeable to '46 corn.

If my memory is correct, those ones scratched off came from a previous transaction.

Q. Do you have any record on that or is that the '45 material you said didn't exist?

A. That's right. Those records we don't have. However, we do show our sales, our total sales to Shotwell in that particular year, 1945.

By Mr. Kirby: Yes.

By the Court: I think we will take our recess. We will take a ten-minute recess now.

3907 By the Marshal: Will the audience kindly remain standing while the jury and the Judge leave the court room.

This honorable court will recess for ten minutes.

3908 By the Marshal: This honorable court will resume its session.

By Mr. Kirby:

Q. Mr. Robinson, is the shipment of March 8th of '1947, which is Exhibit 67-G the first car of syrup charged against that four houndred and some thousand bushels?

A. Yes, the car of March 8th, 1946.

Q. And then is the next one the shipment on the 12th of April, 1946?

A. That is right. That apparently was a car of starch.

Q. I will tell you what. Why don't you just do this, Mr. Robinson. Why don't you just start with that shipment of March 8, 1946, and read off to the jury what you did ship Shotwell against that corn deal?

A. On March 8th of 1946 a tank car of corn syrup.

Q. How much did that weigh?

A. That car weighed 94,680 pounds. On the invoice is a car of starch which is charged to that corn— is that here? There is an invoice short, a shipment of a 60,000 pound shipment of corn starch on April 12th, which is not in here. The next car—

3909 Q. You mean it is mixed up or it isn't there at all?

A. I don't see it here at all. Here it is down here (indicating).

Q. And how much starch was shipped?

A. That was a sixty thousand pound shipment of corn starch on April 12th, and then a tank car of corn syrup on April 28th.

Q. How much did that weigh?

A. That car weighed 94,900 pounds.

There was another car shipped on May 7th weighing 94,000 pounds even. There was a car shipped on May 27th weighing 94,360 pounds and there was a carload of barrels of corn syrup weighing 47,915 pounds shipped on June 8th, and another carload of barrels, 69 barrels, weighing 47,158 pounds on June 12th, and a tank car of corn syrup on July 26th weighing 94,780 pounds.

There was a car on June 24th, a tank car of syrup weighing 94,300 pounds and a tank car on July 21st weighing 94,080 pounds. That's all.

Q. Now the invoices after July 26, 1946, they show that the corn was shipped—I mean that the corn syrup was shipped without corn deals, is that right?

3910 A. Yes.

Q. Do you know when the OPA went off on corn?

A. I don't know the date. It was in the middle of 1946.

Q. Does June 30, 1946—

A. That was probably it.

By Mr. Lockley: Well, I object, your Honor, unless the witness knows what the date was. There is better evidence that can be obtained than his guess.

By the Court: Well, it may stand.

By Mr. Kirby:

Q. Mr. Robinson, was the deal which was made with Shotwell to supply corn for corn syrup in any way unusual or different than deals made with other candy companies at the same time?

A. No, it was not different.

Q. And how widespread was the practice among you—I mean, between you and the customers in the candy business?

A. Well, it went on generally, I would say.

Q. Generally?

A. Not only with us but with other manufacturers in our business.

3911 By Mr. Kirby: That's all. Thank you.

By Mr. McConnell: Wait a minute.

By Mr. Kirby:

Q. There were books in 1945 but those are destroyed under the normal record destruction program of your company?

A. That is right.

Q. The only things you have been able to produce here are the 1946 records?

A. The 1946 records, that's right.

By Mr. Kirby: That's all.

Cross Examination by Mr. Lockley.

Q. Mr. Robinson, you mentioned that Shotwell offered to buy corn for Hubinger. When was that conversation? When did that conversation take place?

A. I don't know the exact date, but it was in 1945.

Q. Were you present?

A. I was the one that handled it on the telephone.

Q. And to whom did you talk?

A. Mr. Huebner.

Q. Mr. Frank Huebner?

A. That is right.

3912 Q. That was sometime in 1945?

A. That is right.

Q. Shotwell had a quota for corn syrup, did it not, with the Hubbinger Company?

A. It had an allocation. We set up an allocation system for dividing our production among all of our regular customers.

Q. And exclusive of this period of time when the government restricted you to 80 per cent of your normal grind, your quota was based on 100 per cent of the grinds you had had back in the base period of 1941, wasn't it?

A. That is right.

Q. So that under normal circumstances, exclusive of this short period of shortages, you were able to supply your customers with the same quantity of corn syrup that you had supplied them back in 1941?

A. Yes, but Shotwell was not a customer of our company in 1941.

Q. So they hadn't—they didn't have any quota with you in 1941?

A. They didn't. We set one up for them upon the base period figuring we would try to build up good will with a good base customer that would do busi-
3913 ness with us when we were a free seller of syrup and starch.

Q. When did you set up the quota?

A. We set up that quota for Shotwell in 1942. However, we set it up for all other customers as we went along, based on their 1941 purchases.

Q. Do you recall how much of an allocation Shotwell Manufacturing Company had on the basis of that quota?

A. It was originally set up on the basis of a limit of two tank cars a month, depending on what our ability was to ship.

Q. Two tank cars a month, and a tank car runs about 94,000 pounds or 96,000 pounds?

A. That is right, 93,000 or 94,000 is about it.

Q. Now, with reference to this period when there was a shortage of corn, can you give us the dates?

A. No, I can't. My memory doesn't go back that far, but we had corn shipped to us by one customer as far back as 1943, but my own recollection—that is according to the recollection of one of the other members of our organization—my own recollection only goes back to 1945 and I can't remember dates in 1945.

Q. But it was for a period of several months?

3914 A. Yes, it was.

Q. And the date extended over to 1946?

A. Yes, it did.

Q. Now, you said there were arrangements made whereby Shotwell sold you corn. Is that completely accurate? Did you ever buy any corn from Shotwell?

A. No, we didn't. Shotwell arranged to have corn sent to us by a dealer in grains, a normal grain dealer.

Q. You bought the corn from Cargill and from Rice?
A. That is right.
Q. Did you pay any premium for it?
A. We paid the ceiling price.
Q. And when you sold the portion of the corn syrup which went to Shotwell, did they pay you any premium for it?
A. They paid the ceiling price.
Q. Now, do you know of your own knowledge whether Shotwell paid one dollar to either Rice or Cargill for the purpose of purchasing that corn or arranging the sale of it to Hubbinger?
A. I have no way of knowing that.
Q. Do you know of your own knowledge whether Shotwell paid one dollar to anybody in connection
3915 with the sale of corn syrup by Hubbinger to the Shotwell Manufacturing Company?
A. No.
Q. So, as far as you know, Shotwell was not required to pay any premium or anything above the ceiling price for the corn syrup?
A. I don't know that they did.
Q. You don't know that they paid any premium or other inducement to the grain dealer to get him to sell the corn to Hubbinger?
A. I don't know that. My memory—
Q. But it could have been done?
A. Yes, it could have been done and it was generally done.
Q. Do you have any knowledge of it being done in this case?
A. Not in this case, no.
Q. Now, you say there were 31 cars of corn bought from the Cargill and Daniel F. Rice Company in 1946. During that same year you sold 30 cars of corn—21 cars of corn syrup to Shotwell?
A. That is right.
Q. And eight of those cars then were on the corn deal?
3916 A. That is right.
Q. And the balance of them, the remaining 13 were without any consideration whatsoever other than the payment of the invoice amount?
A. Well, now—

Q. Just on the basis of the allocation?

A. I might explain that from Exhibit 69 here. This exhibit shows—it does not show all the shipments in the year 1946. It only shows shipments to July 26th of 1946 and the exhibit also shows that only 816,000 bushels of these shipments were chargeable to the corn deal.

By the Court: Pounds?

By the Witness: Pardon me, pounds, that is right, 816,000 pounds.

By the Court: You said bushels.

By the Witness: Oh, I am sorry.

3917 By Mr. Lockley:

Q. Do you have any records—

A. And you will notice—

By Mr. O'Brien: Well, let him finish his answer, please.

By the Witness:

A. —on the top of that exhibit there is a memorandum put there by the same Mr. Fanning, per A.M.R. in 1946, showing one free and one charge a month.

By Mr. Lockley:

Q. What is one free and one charge? What does that mean?

A. That means we were to charge one car of the syrup that we shipped to Shotwell against the car and we were to give a second car without a charge against the corn that they had shipped in to us.

Q. In other words, they would get one car a month on their quota?

A. That is right.

Q. And one car a month on the basis of the corn which they arranged for Hubbinger to buy?

A. That is right, but the shipments didn't go out on that basis because we cleaned up the entire corn

3918 deal as fast as we could and charged every car as it was shipped against the corn deal with the intention of shipping the free cars later.

Q. So—

A. The ones bought July 26th are the ones that they got on the free basis.

Q. So they were entitled, according to that, to about 24 cars in the year?

A. That is right.

Q. And they actually got 21 so the balance of them were all free, that is, against their regular quota?

A. Well, now. We weren't operating on a regular quota at that time because we did not have enough corn to keep up with the quotas. We couldn't maintain our allocations when we were short of corn.

Q. I see. That is why there were—

By Mr. McConnell: Let him finish that answer. Just let the man finish the answer. He is going to give a good explanation.

By Mr. Lockley: I am perfectly willing to have any explanation he has to offer. I am quite interested in this thing. Go ahead.

3919 By the Witness:

A. Well, we had many customers who were trying to get corn syrup and many of them who couldn't ship corn to us. Of course, they were in danger of shutting down their plants without corn.

By Mr. Lockley:

Q. Are you talking about Shotwell now?

A. It has reference to the same thing, since we couldn't possibly take care of Shotwell up to two tank cars a month and I say the same thing applied to all of the others.

Q. In any event, you don't know what if anything Shotwell did in connection with Hubbinger's purchase of those 31 cars of corn in February of 1946?

A. No, I don't.

Q. And you don't know whether they ever paid a dollar premium to anybody in order to get it?

A. No, I don't.

Q. Either to a farmer?

A. No.

Q. To a grain elevator?

A. I don't know.

Q. To a grain salesman?

A. I don't know.

3920 Q. Anybody in your organization?

A. I don't know.

By Mr. Lockley: All right. That's all.

Redirect Examination by Mr. Kirby.

Q. When Mr. Lockley was talking about your knowledge —you gave one answer talking about this market in those days and whether Shotwell did or didn't pay premium and you said you knew of what was generally being done. What did you mean by that answer?

A. Well, we had some experience right in our own office where as you probably know some of these people who were getting into the market to buy grain—

By Mr. Lockley: Well, now, I object to some of these people, and what they did, unless you relate it to your transactions in the Shotwell case.

By the Court: Yes. I will sustain the objection.

By Mr. Kirby: He is trying to—

By Mr. O'Brien: If the Court please, I think it is
3921 material and relevant to show the condition of the market.

By Mr. Lockley: I don't think so.

By Mr. O'Brien: It isn't merely the market that comes into play in this proof.

By the Court: He is going to refer him to some other incident. That isn't the market.

By Mr. O'Brien: I don't mean an incident, but the man in the trade who is carrying on with the commodity has a chance and he is the only one who has the chance to know what the market is and what is being done and that is beyond hearsay exception and for that purpose, he has a right to testify.

3922 By Mr. Lockley: I don't think what somebody else did has any relationship to whether David Lubben paid any premiums to The Shotwell Manufacturing Company. You are getting too far afield.

By Mr. O'Brien: It has a great deal to do with the question.

By the Court: I think he has a right to state, as he has already, that there was a shortage of corn and that the farmers were using it to feed the hogs rather than selling the corn. That, I take it, is from his knowledge which comes to him from the corn refiners, but you are relating to incidents that are totally unrelated to Shotwell dealings. I don't think that constitutes the market and that is the reason I sustained the objection.

By Mr. Kirby: All right. Let us go to this then, your Honor: He said he knows about the shortage in the corn market, the inability to procure it, the OPA price, that the farmers found it much more profitable to feed the hogs than to sell and now let us ask what he knows
3923 of how corn was procured in that market.

By Mr. Kirby:

Q. What do you know of that?

By Mr. Lockley: Well, I object again unless he relates it to something—

By the Court: Yes. I will sustain the objection.

By Mr. Kirby: I would like to ask a couple of questions that I forgot to ask on direct.

By the Court: All right.

By Mr. Kirby:

Q. You know a David Lubben?

A. Yes.

Q. Did your company have some corn deals with Lubben in 1945 and 1946?

A. Yes.

By Mr. Lockley: I object, your Honor. What his company did with David Lubben is entirely immaterial to what the company did with The Shotwell Manufacturing Company. It is irrelevant and immaterial.

By the Court: It may stand.

3924 By Mr. Kirby:

Q. Did your company ship to Lubben in the fall of 1946 any corn syrup?

A. Yes.

By Mr. Lockley: I object to any further questioning along that line on the grounds—

By the Court: It may be preliminary. The answer may stand.

By Mr. Lockley: I did not object to that answer. I am just objecting to the general line of questioning.

By Mr. Kirby:

Q. And at what price—

By Mr. Lockley: I object to that on the ground that it is entirely immaterial and irrelevant.

By the Court: Yes. I will sustain the objection.

By Mr. Kirby: If the Court please, you will have in mind that one of the issues in the case is whether Mr. Lubben paid us 13 cents a pound in the fall of 1946 for corn syrup, and therefore I would like to go into the question of the availability of corn syrup to Mr. Lub-

3925 ben at that time at a price which this witness will indicate, which bears upon the question of whether it is conceivable to believe the occurrence Mr. Lubben described did take place.

By Mr. Lockley: What Mr. Lubben may have paid—

By Mr. Kirby: Mr. Lubben, incidentally, in his own cross examination with respect to that—Mr. Lubben ad-

mitted that he had some 500,000 pounds of corn syrup and he described it as coming from Hubinger at the ceiling, so I think that bears directly into the questions we have at issue.

By the Court: Well, when was the shipment made that we are dealing with, from Lubben to Shotwell, with reference to this syrup?

By Mr. Kirby: In October of 1946.

By the Court: And you now want to show that Lubben was able to buy corn syrup on the market at what time?

By Mr. Kirby: In the fall of 1946.

By the Court: Well, what time in the fall? Well, let us find out.

By Mr. Kirby: Let us find out.

3926 By Mr. Kirby:

Q. When did you ship Lubben syrup in the fall of 1946, Mr. Robinson?

A. I am not sure that I have all the invoices here but I have an invoice for July 8th, June 2nd, June 18th, May 21st, for shipment of tank cars of corn syrup to General Confections Company in the Bronx, which was being operated at the time by Mr. Lubben. I am sure there are some invoices missing there because I have a copy of our sales record kept in the office in Keokuk, Iowa, and the total sales—

By Mr. Lockley: Never mind the total sales.

By the Witness: For the year—

By Mr. Lockley: Just give use the dates you have.

By the Witness: I don't have the dates. I have the total sales for the years of 1945, 1946 and 1947 to Lubben's companies General Confections and Eatsum Food Products Company. I don't have dates on them.

In other words, the invoices are not available.

3927 By Mr. Kirby:

Q. Were there some shipments other than the ones you have referred to that you can identify or is that the only material you have with you on Lubben?

A. It is the only invoices I have. There were other shipments shown on our total shipments to his companies.

Q. You mean later in the year or both later and earlier, which?

A. Yes.

Q. Both later and earlier?

A. That is right.

Q. And at ceiling prices?
A. At ceiling prices.
By Mr. Kirby: Thank you.
By the Court: Well, is that a corn deal?
By the Witness: Lubben's was a corn deal, yes.
By the Court: Well, then, Lubben went out and bought corn some place and arranged for you to obtain the corn and you allocated to him a certain percentage of the syrup just like you did the Shotwell Company?
By the Witness: That is right, yes.

3928 *Direct Examination by Mr. O'Brien.*

Q. Mr. Robinson, Mr. Lockley asked you whether the corn shortage period extended into 1946, do you recall?
A. Well, now, are you talking about the corn shortage or are you talking about corn or corn syrup?
Q. I am talking corn now.
A. Yes, the corn shortage did extend into 1946.
Q. Do you recall it just went over the line or how far into 1946 did it extend?
A. Well, I am not positive about that. I think that it expired before the OPA ceiling went off.
By Mr. O'Brien: That is all.

Direct Examination by Mr. McConnell.

Q. Just a minute. You have a record there, don't you, of the price of corn in June, June 30th of 1946?
A. In this book here?
Q. Yes.
A. Yes.
Q. Will you turn to that and see what the price of
3929 corn was immediately after June 30th?
A. Well, here is July 5th, Friday, July 5th, 1946, three cars—this happened to come from another grain dealer on the basis of $1.44 a bushel.
Q. What was the price prior to June 30th?
A. Well, it's—it is apparent that we were paying right around $1.37 to $1.43 in June and it was in—I can't remember—
Q. Well, can't you tell—
A. —definitely whether that was a government ceiling on corn or not.
Q. You testified you paid the ceiling price, as I understood your testimony?

A. That is right. And if—

Q. Can you tell from examining that record when the ceiling went off? Can you tell when the price of corn went up?

A. No, I can't. I am not too familiar with this grain record. However, it apparently did go off just about that time because of the fact that the price of corn on Tuesday, July 25th was $1.40 a bushel and on August 8th it was $1.85 a bushel which was a jump of 45 cents a bushel in a very short period of time.

By Mr. McConnell: That is all.

3930 By Mr. O'Brien: That is all.

By the Court: Any further questions?

By Mr. Lockley: About two, your Honor.

Recross Examination by Mr. Lockley.

Q. The shortage of corn syrup was related not only to the shortage of corn, was it, Mr. Robinson—it was related also to the shortage of sugar, cane sugar?

A. That is right.

Q. So that as long as cane sugar remained rationed, corn syrup was short because it was in greater demand, isn't that so?

By Mr. McConnell: I object to that. It is argumentative.

By Mr. Lockley: I am asking him a question on cross examination. I see nothing argumentative about it.

By the Court: Go ahead.

By the Witness: Will you ask the question again, please?

By Mr. Lockley:

Q. Yes. I said, as long as cane sugar was under

3931 rationing and was therefore short, there would be a greater demand for corn syrup, isn't that so?

A. That is right.

Q. Mr. Lubben had to sue the Hubbinger Company to get his corn syrup, didn't he?

A. Yes, he did. Can I explain that?

Q. No, you needn't.

By Mr. McConnell: What was the explanation? Why did Mr. Lubben sue you?

By the Witness: Mr. Lubben agreed that he would not deal with the black market on our corn syrup because we

were worried about the effect it would have on our other customers and when we had this arrangement with him to ship him so much corn syrup, I had a customer come in from Pittsburgh who said, "We can buy your corn syrup on the black market but we can't buy it directly from you." At the time, our price was $3.09. This customer said he bought it at $3.09. And I asked the customer if he could give some identifying—

By Mr. O'Brien: What was the price of that?

3932 I didn't hear what you said about the price.

By the Witness: The price was $3.09 a hundredweight and this customer said he paid twelve for it and he gave me the barrel numbers and I called Keokuk immediately and we diverted the car in transit and found out it was going to some organization that was under Lubben's control and he had guaranteed he wouldn't sell any of it on the black market, so for that reason I told him that since we found this syrup on the black market, we are going to refuse to fill the rest of the contract regardless of how much corn syrup he shipped us.

I said, "You agreed it wouldn't get on the black market and here is one of our own customers—"

By Mr. O'Brien: Was it corn syrup?

By the Witness: He sent us in corn and we processed it.

By Mr. O'Brien: And you said regardless of how much Mr. Lubben shipped you—

3933 Will the Reporter please read that answer?

(Answer read.)

By the Witness: I said corn and not corn syrup.

3934 By Mr. Lockley:

Q. How much was Mr. Lubben selling it for, do you know?

A. The cost to us was twelve cents a pound.

Q. Do you know when it was?

A. I don't know the dates from memory, but I can tell at the time from our records where we stopped making shipments to Lubben.

Q. Will you do that?

A. Yes. I have a record here showing shipment of corn syrup to David Lubben and Eatsum Food Products in New York against corn which Lubben had sent in to our plant, and there is a memorandum in this record showing that on March 25, 1946, we shipped a carload of bar-

rels amounting to 41,182 pounds to—I don't have the name of the consignee, but it was directed to Lubben. It is charged to his corn deal and when this customer called and told us about it, gave us the barrel numbers, our traffic department diverted the car in transit to our own warehouse in New York.

Q. That was in March, 1946?

A. Yes.

Q. He wasn't able to buy the corn syrup from
3935 you after that date?

A. He was.

Q. Oh, he did buy it?

A. What happened, he came to Keokuk at that time and we had a balance due him of some—right close to about twelve cars and he again—he came to Keokuk and talked to our management and said he would positively guarantee again there was no danger of our syrup getting into the black market, that he needed it for his candy business, both General Confections and Eatsum Food Products and that there were other people involved in this with him and he stood to lose a lot of money.

At the time we said, "All right. Now, if that is the end of it, we will ship, but we will ship only half of what you have coming."

He said, "That is agreed. That will help me out that much."

Q. So you shipped the six tank cars?

A. So we shipped the six tank cars.

Q. All right.

A. And then he came back to us again. Apparently none of the syrup got into the black market and we didn't
find any of it in the black market and he wanted some
3936 more and we shipped him another tank car and a
barrel car. He had a balance of six tank cars which we did not ship to him.

By Mr. Lockley: All right. Thank you very much.

By Mr. McConnell: I have one more question.

Redirect Examination by Mr. McConnell.

Q. After the ceiling went off on corn in 1946, there was no point to that corn deal, was there? You didn't need corn shipped to you after that, did you?

A. No, that is right.

Q. You could buy it on the open market?
A. That is right.
Q. So that any corn balance you are referring to so far as Mr. Lubben was concerned, would mean nothing in the amount of corn syrup available, would it?
A. No.
Q. Now Mr. Lockley referred to cane sugar. Did you require your clients or your customers to furnish or
3937 supply cane sugar to you in order to furnish corn syrup?
A. No, we didn't.
Q. It was only corn, wasn't it?
A. That is right.
By Mr. Lockley: I didn't insinuate they did.
By Mr. McConnell: That's all.
By Mr. O'Brien: That's all.

(Witness excused.

By Mr. Lockley: Mr. Robinson, don't walk off with the exhibits.
By Mr. O'Brien: Thank you, counsel.
By Mr. Kirby: You can lay those down on the table.

JOHN B. KELLY, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name, John Kelly?
A. John B. Kelly, yes, sir.
Q. Where do you live, Mr. Kelly?
3938 A. I live in St. Petersburg, Florida.
Q. And you used to work for Shotwell?
A. Yes, sir.
Q. When?
By the Court: Keep your voice up, Mr. Kelly.
By the Witness:
A. In the years 1943, 1944, 1945 and until August of 1946.
By Mr. Kirby:
Q. Did you have something to do with some negotiations of army contracts for food being produced at Shotwell?
A. Yes. I negotiated the contracts for pudding powder and also the Hi-Mac candy bar.

Q. And the pudding power went to whom in the army?
A. Well, it was delivered to the United States Quartermaster Depot and redistributed. It went out for the soldiers. It was food for the soldiers.
By Mr. Kirby: Will you please mark these Exhibits 70 and 71, Defendants' Exhibits 70 and 71 for identification.

(Said document was marked Defendants' Exhibits 70 and 71 for identification.)

3939 By Mr. Kirby:
Q. I hand you two documents which are marked Defendants' Exhibits 70 and 71 and ask you if you have ever seen them before.
A. Yes. This No. 70 is a copy of a letter that I wrote May 31, 1945.
Q. To the army?
A. It was written to the army service forces.
Q. What is Exhibit 70?
A. That also is a letter to the army service forces, June 27, 1945.
Q. Did you write those in connection with some contracts that were then in existence between the army and Shotwell?
A. Yes, I did.
3940 Q. Did you send the original of that letter?
A. Yes, I did.
Q. That is, Shotwell's retained copy?
A. That is right.
By Mr. Kirby: I ask that that be admitted in evidence and I will show them to counsel.

(Handing documents to counsel.)

By Mr. McConnell: Mr. Lockley—if I may interrupt counsel, counsel for Hubbinger wants to know if we can agree to have photostatic copies substituted for those Hubbinger exhibits. He wants to take the original records home.
By Mr. Lockley: I have no objection to your reference to the invoices.
By Mr. Robinson: The corn book, principally.
By Mr. Lockley: I think we ought to retain the original red book for the time being, your Honor. I have no objection to the invoices being photostated.

By Mr. Robinson: I don't want to go to the expense of photostating an entire red book.

3941 By Mr. Kirby: I will take it up with you. I appreciate your situation. We will talk to counsel about it.

By the Court: Is there any objection?

By Mr. Lockley: No, your Honor.

By the Court: It may be received.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 70 and 71.)

By Mr. Kirby:

Q. Mr. Kelly, now both of those letters refer to the contract for pudding, is that right?

A. Yes, sir.

Q. And they—well, read the two letters, will you, please?

A. Yes. This No. 70 is written to Army Service Forces, Chicago Quartermaster Depot, Chicago, Illinois. Attention: Warrant Officer Reese.

Q. What is the date?

A. May 31, 1946. I don't recall the man, but the letter says this:

"Gentlemen:

"We are enclosing herewith copies of our order No.

3942 4592 and No. 4647 which we have been unable to place with the American Maize Products Co. and A. E. Staley Mfg. Co.

"On order No. 4592 calling for 200,000 pounds of 7⅓% Redried Starch, the Staley Mfg. Co. have accepted only 80,000 pounds.

"We would appreciate very much your assistance in getting these two orders placed as we are going to be badly in need of these raw materials in order to complete Contract No. W-11-009 QM-48398 within the specified time."

That was letter No. 70. And 71—

Q. Let me ask you there, the pudding used a corn product, is that it?

A. Yes.

Q. And you couldn't get the corn product?

A. That is right.

Q. And you needed it for the Army contract?

A. Yes. The Army was pressing us for delivery of

this pudding powder. It seemed to be in dire need of it.

3943 Q. Were you able in May, 1945, to get the corn product that you needed to fill that Army order?

A. Oh, no. This letter indicates that we couldn't get it. The American Maize wouldn't accept the order. They wouldn't make delivery to us.

Q. Did they explain to you why they wouldn't make delivery to you?

A. They said they didn't have it, if I recall.

Q. All right. What is the next letter you wrote the Army about getting those corn products? When was that?

A. That was June 7th, 1945.

Q. Read that.

A. That is Attention of A. W. Nygren, who was the procurement officer. It says:

"Gentlemen:

"With reference to Contract No. W11-009-qm-48398 covering Starch Dessert Powder.

"Owing to the fact that it is necessary for us to substitute 100,000 pounds beet sugar in place of corn sugar in order to complete above contract, we will require additional sugar certificates covering 100,000

3944 pounds sugar.

"Would appreciate it if you would forward these ration points to us at once."

Q. Now, that was another problem in connection with the same contract, securing of corn products, is that right?

A. Yes, it was.

Q. Did you talk to Nygren of the Army about whether the Army could give you any assistance in corn products?

A. Oh, yes. I think that Nygren suggested that I write this letter to the Warrant Officer Reese, but I am not positive, though.

Q. But did the Army produce anything for you?

A. They gave us sugar points but they didn't get us the sugar, if you know what I mean.

Q. How about the corn products, the starch? Did they do anything for you on that?

A. I don't recall whether they did or not.

3945 Q. Did you report to any of your superiors in Shotwell about the difficulty in May and June of being able to get corn products?

A. Oh, yes.

Q. And did you personally thereafter go out to buy any corn, or did you personally have anything to do with how they got the corn?

A. No, sir.

Q. All you know about it is that at that time you were having the difficulty set out in the letter?

A. That's right.

Q. And what about the existence or the absence of an existence of a black market in corn, was that discussed with the army quartermaster people?

A. Well, yes, I think it was. I think it was common knowledge then that in the industry—

By Mr. Lockley: I object, your Honor, unless we have a time and place, the people who were present—

By the Court: You have answered the question.

By Mr. Lockley: —there is no foundation.

3946 By Mr. Kirby:

Q. And you discussed that with the army people?

A. Yes, sir.

Q. And did they tell you, Mr. Kelly, that it was up to Shotwell to procure the materials to complete the contracts?

A. Yes, sir. They said they wanted deliveries.

By Mr. Lockley: I object—

By Mr. Kirby:

Q. Wanted what?

A. Deliveries.

By Mr. Lockley: —to the nature of your questions.

By the Court: You are getting into bad habits again now.

By Mr. Kirby: All right.

By Mr. Kirby:

Q. What did they tell you; what did the army tell you?

A. That they were not concerned how we got the sugar, they just wanted deliveries on time of these contracts.

By Mr. Kirby: Thank you. That is all.

3947 *Cross Examination by Mr. Lockley.*

Q. Mr. Kelly, on Government contracts didn't The Shotwell Manufacturing Company get sugar ration points ex-quota from the Government?

A. Yes, sir.

Q. It wasn't a part of the ordinary sugar quota that was used by The Shotwell Manufacturing Company in the manufacture of its regular products for commercial use?

A. No, sir.

Q. This sugar quota was entirely separate and apart and in addition to the ordinary quota?

A. That's right.

Q. Now, in March, 1945, didn't the Government cancel a contract or contracts with the Shotwell Manufacturing Company for which they had advanced about 500,000 sugar ration points?

A. I don't recall.

Q. 500,000 pounds.

A. I don't recall that incident, no, sir.

Q. Isn't it a fact that Shotwell Manufacturing Company never returned those 500,000 pounds of sugar ration points to the army?

3948 By Mr. O'Brien: I object.

By the Witness:

A. I don't know.

By Mr. O'Brien: There is no evidence on that. It is an assumption.

By the Court: It is cross examination. He can ask if he knows.

By Mr. O'Brien: He asks him if it isn't a fact and then he states facts which are not in the record.

By Mr. Lockley: I am learning that very quickly, Mr. O'Brien.

By Mr. O'Brien: That is what the Judge referred to as a bad habit.

By the Court: It is different on cross examination than on direct. I take it on cross examination he can ask leading questions or suggestive questions.

By Mr. McConnell: But he can't lay a basis—

By Mr. O'Brien: Such as the question to Mr. Ericson.

By the Court: One at a time, please. I am sorry.

3949 By Mr. O'Brien: Such as the questions to Mr. Ericson on direct.

By Mr. Lockley:

Q. Didn't you handle the Government contract with The Shotwell Manufacturing Company, Mr. Ericson?

A. My name is Kelly.

3950 Q. Pardon me, Mr. Kelly. I am sorry. I am confused.

A. I negotiated and secured the contracts, but I had nothing to do with the sugar points, or anything of that kind. That was taken care of all by our purchasing department.

Q. Well, are you familiar with the cancellation of that contract?

A. I don't recall the cancellation; no, sir.

Q. Were you familiar with the price that the government was paying for this pudding which is referred to in Exhibit 70 or 71?

A. I can't recall offhand what the price was; no, sir.

Q. Now, these are dated May and June, 1945. You say that there was a shortage in the corn market in corn products at that time of the year, in May and June of 1945?

A. There must have been. When I wrote that letter there was a decided shortage, because we couldn't get it.

Q. So that it wasn't just a shortage after October of 1945?

A. Oh, I don't recall when the shortage started.

3951 That's a long time ago, sir.

Q. But you knew there was a shortage in May and June?

A. At the time I wrote those letters, yes, sir, there was a shortage.

By Mr. Lockley: In 1945.

That is all. Thank you very much, Mr. Kelly.

Redirect Examination by Mr. Kirby.

Q. Mr. Kelly, I got talking about sugar, when I meant to be talking largely about starch. The first letter talks about 200,000 pounds of 7½ per cent redried starch, and then another order that doesn't mention the amount. Now, so far as starch was concerned, there were no ration points for that, were there?

A. No.

Q. And the government didn't supply any ration points for that?

A. No, only for sugar.

Q. The sugar. And the sugar, that is what is mentioned in the second letter?

3952 A. Yes. In the manufacture of that pudding product there was only starch and sugar and flavor.

Q. Yes. And the second letter says that you need to substitute beet sugar in place of corn sugar; isn't that what it says?

A. That's right.

Q. So ration points or no, the problem was getting the corn product?

A. That's right, sir.

Q. And what you wanted to do was to use a sugar not made from corn rather than one made from corn?

A. Yes.

By Mr. Kirby: All right. The letters are more accurate, indeed, than I am.

Recross Examination by Mr. Lockley.

Q. You mean that you had enough sugar to sell Lubben, but you didn't have enough sugar to sell to the Army, is that it?

A. No, I don't mean that.

By Mr. Lockley: That is all.

By Mr. McConnell: I don't know that there are any sugar purchases in that period of time in the evi-

3953 dence. I move to strike that as improper cross examination.

By the Court: Yes, I will sustain the objection.

By Mr. Lockley: I might put it this way:

By Mr. Lockley:

Q. You had enough sugar to manufacture candy to sell to Mr. Lubben—and corn syrup—but you didn't have enough to manufacture things to sell to the Army?

A. I don't know. All I know is that we didn't have enough sugar to manufacture the pudding product.

Q. Was it a separate division that handled Mr. Lubben's transactions for Shotwell?

A. Yes, I had no business dealings with Mr. Lubben.

By Mr. Lockley: All right. Thank you.

By the Court: Apparently that is all, Mr. Kelly.

(Witness excused.)

3954 ARTHUR HAUSMAN, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?
A. Arthur Hausman.
Q. Where do you live?
A. 151-41 27th Avenue, Flushing, New York.
Q. And what is your business?
A. I am a certified public accountant.
Q. Did you ever do any work in connection with the Eatsum Food Products Company?
A. Will you please identify the company, because there were several entities that went under the name of Eatsum Food Products Company.
Q. Well, when did you first do any work for any of Lubben's companies?
A. I worked for Louie J. Roth, who was an accountant, as his assistant. At his direction I examined certain of the records of David Lubben.
Q. Starting when?
By Mr. O'Brien: Of David Lubben?
3955 By the Witness: Eatsum Food Products Company.
By Mr. Kirby:
Q. Starting when?
A. Approximately March or April of 1945.
Q. Was it a proprietorship then, a sole proprietorship or a partnership?
A. It was a sole proprietorship.
Q. So did you then do some work for the Eatsum Company which became a partnership later in that year?
A. Yes, sir.
Q. How long did you do any work in connection with the partnership?
A. Until the partnership was dissolved, I believe, March 9, 1946.
Q. And did you do any more work for any of Lubben's companies after that?
A. Well, actually I worked for Louie Roth until about the middle of May of 1946, and at that time I worked for David Lubben, who had organized General Confections, Inc.

Q. I have a number of sheets that I wish to show you. No one of them covers the General Confections pe-
3956 riod, they cover the period of the partnership. I believe there may be one or two that cover the proprietorship, but mostly the partnership. When I speak of work papers, I mean sheets that accountants make up in connection with their work. And what did you do with the work papers you made up during the period you have testified about?

A. Are you speaking of the work papers that you have there?

Q. Yes.

A. And may I understand your question correctly? You are asking me now what did I do physically with them?

Q. Yes.

A. May I see the work papers you have reference to?

Q. Well, I have a whole big long list of them and I don't know that we can get at them right now. I will ask you a general question, Mr. Hausman.

A. Yes, sir.

Q. Did you keep the work papers that you did in the partnership period yourself, or did you leave them with Mr. Roth, or just what did you do with them?

3957 A. I gave them to Mr. Roth. Of course, he was my boss.

Q. To Louie Roth?

A. That is correct.

Q. And was Louie Roth an accountant that had been retained by Mr. Lubben and then later by the partnership?

A. I think at the beginning Mr. Roth's interest was as an accountant retained by the Giglio interests to examine the books and records of David Lubben, doing business as Eatsum Food Products Company, with a view to determining whether the purchase of a fifty per cent interest of that business would be practical and money making, would be worth while, in that sense.

3958 Q. All right. Then in the period after Giglio did become a partner was Roth an accountant more or less working for the Giglio interests?

A. I believe so.

Q. And these papers that I generally described—now, I don't mean to pin you to the individual ones, because I will show you each one, Mr. Hausman.

A. All right.

Q. But generally the papers that you had, that you had called work papers, you left with Roth?

A. That's correct.

Q. And do you know where they are now; that is, the originals?

A. The originals of these?

Q. Yes.

A. Well, that is a very general question. I wouldn't know offhand, unless—if you are asking me specifically where the originals of specific papers that I see here, I may be able to answer the question better.

By the Court: All right. We probably better take that up tomorrow.

By Mr. Kirby: Yes.

By the Court: We will be in recess until 10:00 3959 o'clock tomorrow morning.

By the Marshal: Will the audience remain standing until the jury and the Court leave the court room, please.

This Honorable Court will recess until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10:00 o'clock A. M., Wednesday, October 7, 1953.)

3960

* * (Caption—No. 52 CR 143) * *

Chicago, Illinois,
Wednesday, October 7, 1953,
10:00 o'clock A. M.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the jury:

By the Clerk: No. 52 CR 143, United States vs. Shotwell Manufacturing Company, et al. Case on trial.

3961 ARTHUR HAUSMAN, a witness heretofore called herein on behalf of the Defendants, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Ctd.) by Mr. Kirby.

Q. Mr. Hausman, is the document which is marked 37 for identification in your handwriting?

A. Yes, sir.

Q. And could you give us a short name for that document, just so we can identify it is all?

A. This appears to be a work sheet indicating an analysis or description of merchandise inventories on hand at Eatsum Food Products Company, May 31, 1945.

Q. The next document is No. 22 and is that in your handwriting?

A. Yes, sir.

Q. And does that relate to the currency income for April and May, 1945, generally?

A. It appears to relate to currency account disbursements—excuse me—currency account income.

Q. Income, yes.

A. Yes.

3962 Q. In April and May, 1945?

A. Well, it is difficult to say, because the first entry is marked March 31 and then there are a number of entries that are undated and the next date is May 17th.

Q. Well, they are in the year 1945, aren't they?

A. 1945, I would assume, although there is no—yes, there is a date. May, 1945.

Q. Is the next document which you have, No. 31, a duplicate of 23 and is it also in your handwriting?

A. It is in my handwriting. It is a duplicate, yes, of Exhibit No. 31.

By Mr. Kirby: 23 and 31 have already been marked, your Honor. They appear to be duplicates.

By Mr. Kirby:

Q. 66-B is the next document. And is that in your handwriting?

A. Yes, it is in my handwriting.

Q. And could we describe that generally as currency disbursements for April and May, 1945?

A. Yes.

Q. Is the next document, 66-D, in your handwriting?

A. It is in my handwriting, yes.

3963 Q. And could we describe it as currency disbursements, May, 1945?

By the Court: Currency or current?

By Mr. Kirby: Currency.

By the Witness:

A. It appears to be a summary of receipts and disbursements for May, 1945.

By Mr. Kirby:

Q. Is the next sheet, which is document 66-D—

By the Court: B?

By Mr. Kirby: D.

By Mr. Lockley: I thought the last one was D.

By the Witness: The last one was D.

By Mr. Kirby: All right. I am running one behind the field. I am sorry.

By Mr. Kirby:

Q. 66-E as in Evelyn.

A. You skipped 66-C. Is that intentional?

Q. Well, no, that is the one that you and I perhaps got confused on. What is 66-C?

A. 66-C is an analysis of currency transactions for the month of May, particularly relating to disbursements.

3964 Q. All right. That is in your handwriting?

A. Yes.

Q. And 66-D, that is—

A. We just discussed that.

Q. —a summary of currency transactions in May, 1945.

A. We just discussed that.

Q. Is 66-E in your handwriting?

A. Yes.

Q. And can that generally be described as showing the currency balance on May 1, 1945?

A. Yes.

Q. Is the next sheet, 66-F, can that be described as relating to currency receipts in May of 1945?

A. Yes.

Q. And is it in your handwriting?

A. Yes.

Q. 66-G, can that be described as currency receipts and disbursements in August and September of 1945?

A. Yes, sir.

Q. And is that in your handwriting?

A. Yes, sir.

Q. 66-H, is that currency received in August of 1945?

3965 A. It appears to be part of such a transaction.

Q. And is it in your handwriting?

A. Yes, sir.

Q. Do you have 66-I there?

A. Yes.

Q. Does that relate to currency receipts in June of 1945?

A. Yes.

Q. And is it in your handwriting?

A. Yes.

Q. 66-J, does that relate to currency receipts in July of 1945?

A. Yes.

Q. And it is in your handwriting?

A. Yes.

Q. 66-K, does that relate to payments to Her-Bert Company—spelled H-e-r hyphen B-e-r-t Company— in July, 1945?

A. Yes, sir.

Q. And is that in your handwriting?

A. Yes.

Q. 66-L, does that relate to currency receipts in January, 1946?

A. Yes.

3966 Q. And is that in your handwriting?

A. Yes.

Q. 66-M, is that also relating to currency receipts in January of 1946?

A. This appears to be merely a work sheet that was used for an analysis of the cash receipts book, general column, or sundries column, for the month of January;

1946. It would not be currency. It would be an analysis of the actual cash book column labeled sundries.

Q. And it is in your handwriting?

A. Yes.

Q. 66-N, does that relate to currency receipts in July of 1945?

A. Yes.

Q. 66-O, does that relate to currency receipts in August and September, 1945?

A. 66-O appears to relate to currency receipts for the month of August only. I believe your question was August and September.

Q. 66-P, that relates to currency receipts and disbursements for what period in '45?

A. It relates to cash received—currency receipts during the month of August, 1945, and cash paid out
3967 from August 3, 1945 through September 7, 1945.

Q. And it is in your handwriting?

A. Yes.

Q. 66-Q, does that relate to currency disbursements in August of '45?

A. Yes.

Q. And is the same thing true of 66-R?

A. Yes.

Q. They are both in your handwriting?

A. Yes.

Q. Exhibit 27, does that relate to currency received and disbursed in August and September of 1945?

By Mr. Lockley: Is this 27?

By Mr. Kirby: Yes, sir.

By the Witness:

A. This relates to cash received and paid out for the month of August through September 8, 1945.

3968 Q. And it is in your handwriting?

A. Yes.

Q. 66-S, is that a cash box No. 2 reconciliation on October 10, 1945?

A. Yes.

Q. And it is in your handwriting?

A. Yes.

Q. Exhibit 21-B. Well, I will tell you—

A. Yes, sir.

Q. Will you locate that?

A. Yes, I have it.

Q. Can that be described as relating to the loans and exchanges account for November of 1945?

A. It is an analysis of the loans and exchanges and it is marked November but there is no year. I would assume that it was 1945.

Q. 21-C, does that also relate to the loans and exchanges account and is it as of December 31, 1945?

A. Yes.

Q. 21-D, does that relate to the same account as of the same December 31, 1945, date?

A. Yes.

Q. 21-E, does that relate to the loans and exchanges account with respect to a date which is February 28th, 1946?

3969

A. Yes.

Q. 22, does that relate to the loans and exchanges account for a date which is March 9th, 1946?

A. I don't have 22.

Q. Do you have 66-U?

A. No.

Q. Those that you do have with respect to loans and exchanges then are 21-B?

A. Yes, sir.

Q. C, D and E?

A. Yes, sir.

Q. Are they all in your handwriitng?

A. Yes.

Q. I show you a document which has already been marked Defendants' Exhibit 36 and ask you if you have seen that before?

A. This appears to be the Eatsum—the general ledger of the Eatsum Food Products Company for the period beginning June 1, 1945.

Q. Mr. Hausman, I call your attention to that one particular page. The government had the book marked in its entirety, but I want you—

A. I wanted to identify the page in conjunction with the entire document that it is a part of.

3970

Q. Yes. That is a partnership book?

A. There is merely marked loans and exchanges account No. 15 with no other means of identification.

Q. The partnership.

A. If you want me to identify it as loans and exchanges account No. 15, I can identify it that way, if you wish.

By the Court: Is that Defendants' Exhibit 36?

By Mr. Kirby: Yes, Judge. The book as a whole is the only book of the partnership.

By the Court: I am only trying to get the exhibit straight. Is it Government's Exhibit 36?

By Mr. Kirby: Yes.

By the Court: You say the government had it marked?

By Mr. Kirby: Yes. The government had the book marked as Government's Exhibit 9-A.

By the Court: Oh.

By Mr. Kirby: And inside of Government's Ex-
3971 hibit 9-A is a particular page which is Defendants' Exhibit 36.

By the Court: All right.

By Mr. Kirby:

Q. And Mr. Hausman, this is a partnership period?

A. Yes, sir.

Q. And is some of the handwriting that appears on that exhibit 36 yours?

A. Yes, sir.

Q. Which? Is it all yours?

A. No.

3972 Q. Well, you see some pencil monthly sub totals there on that loans and exchanges account?

A. Yes.

Q. Are they in your handwriting?

A. Some of them are and some of them aren't.

Q. Well, read the dollar amount of the numbers which are in your handwriting, will you, please?

A. Yes, sir. Do you wish me to read just the balance in the account that is in my handwriting or all of the amounts that are in my handwriting?

Q. Well, I think, so we can be plain about it, there are some sub totals which are in your handwriting.

A. Yes.

Q. Will you first, Mr. Hausman, give the date and the amount of the sub total which is in your handwriting. I don't think it would be proper for you to read, or at least, I am not asking you to read what is in somebody else's handwriting. I have no objection to all of it going in.

A. That was not my intention. I just wanted to clarify those figures you wanted me to read.

Q. The sub totals in your handwriting, will you read them?

3973 A. February 28, 1946, debit total $429,529.07. March 9, 1946, debit sub total $437,876.85.

April 30th, debit sub total $502,676.65. April 30th debit sub total $502,678.01, and that is all on the debit side.

On the credit side they were: Sub total, $323,667.36. That is at March 9, 1946. April 30, credit sub total $389,527.84. Now, of the balances that are indicated as debit balances in the account—

Q. Yes. You mean the net of the debit?

A. The net of the debit, and they were totals as of these various dates. March 9, 1946, $114,209.49. April 30, $113,148.81. April 30, $113,150.17. That is all.

Q. Those were all in your handwriting?

A. Yes, those are in my handwriting.

Q. Made contemporaneously with the dates that you have given us?

A. Approximately, yes.

Q. In the regular course of the partnership business?

A. Yes, sir.

Q. There were a couple of long sheets that I
3974 didn't finish with.

A. Yes, sir.

Q. Would you be good enough to pick up 66-V?

A. Yes.

Q. And can you describe that as a sheet showing certain differences in the currency account or questions in the currency account in August of 1945?

A. Yes, sir.

Q. That is in your handwriting?

A. Yes.

Q. 66-X. Do you have that?

A. Yes.

Q. Does that—

By Mr. Lockley: Pardon me. Just a moment. Would you mind, Mr. Kirby—you lost me on 66-D. Was that the last one?

By Mr. Kirby: No, that was 66-V, as in verity. The next one is 66-X. And could we describe 66-X as relating to a journal entry, April 30, 1945, as to assets not recorded?

By the Witness:

A. Yes, sir.

3975 Q. That is in your handwriting?

A. Yes, sir.

Q. 66-Y, is that in your handwriting?

A. Yes.

Q. And is it describable as an inventory summary on July 31, 1945?

A. Yes.

By Mr. Kirby: George, I am not plain about Exhibits 22 and 66. Do you remember where those two are? I don't think I remember them, myself.

By Mr. Kirby:

Q. Now Mr. Hausman, in case I forgot to ask you about any of the exhibits that you have had in your hand there, they are all in your handwriting except that only a part of that ledger sheet is in your handwriting, is that right?

A. That is correct.

3976 Q. Otherwise, all the writing is yours?

A. (Witness nods in the affirmative.)

Q. You nodded your head yes?

A. Yes.

Q. Do you have the originals of the papers which I have shown you?

A. No, I don't.

Q. When you were on the stand yesterday I asked you some general questions subject to handing you the papers this morning?

A. Yes.

Q. And not to lead the witness, but summarizing it—am I correct in saying that you said the papers, the work papers that you had written up, you had left with Mr. Roth?

A. That is correct.

Q. Now, you have looked at these papers, you are certain of that, Mr. Hausman?

A. As nearly as I recall, that was my general procedure, to leave papers with Mr. Roth.

Q. Yes.

A. Let me make this one other clarification, though—

Q. Yes.

3977 A. So that we can get ourselves squared away on one thing. During the period that I worked for Mr. Roth, which was up to approximately the middle or the end of May, 1946, all papers, all work papers were his property, he being the gentleman in charge of all of these accounting matters.

After May 27, 1946, I went to work on a per diem basis with General Confections, Inc., and as such, I was more

or less on my own and those work papers would have been in my possession to whatever extent that it was necessary.

Q. I don't believe that any of those papers relate to the period after you went to work for General Confections.

A. That is correct, yes.

Q. They relate to the prior period.

A. That is right.

Q. When you turned them over to Roth, for whom you worked?

A. That is right.

By Mr. Kirby: I offer in evidence Defendants' Exhibits 37, 23, 66-B, 66-C, 66-D, 66-E, F, G, H, I, J, K, L, M, N, O, P, Q, R; Defendants' Exhibit 27, 66-S.

3978 By the Court: F, F or S?

By Mr. Kirby: S. Like in Sam. I offer Exhibit 21-B, C, D, and E, 66-V like in verity, X and Y and 36.

I do not offer 31 because it is, by this witness's testimony, a duplicate of 23. Nor do I offer 22, nor 66-U, which I do not seem to have, and call to the Court's attention that these are all photostats in the partnership period.

You may cross examine.

3979 By Mr. Lockley: If your Honor please, it might expedite matters if I were permitted to examine these papers and determine at the noon hour whethr I have any objection to them. I think perhaps some of them are photostats and documents which the government itself has made available to the defense. I don't know exactly what is in here and rather than take the Court's time at this time, might I reserve my cross examination until this afternoon and after I have had this opportunity?

By the Court: I assume there will be no objection to that arrangement.

By Mr. Kirby: No, I have none at all.

By the Court: Then we can excuse this witness until 2:00 o'clock.

By Mr. Kirby: It is perfectly all right with me, your Honor.

By the Court: Is that what you had in mind?

By Mr. Lockley: Yes, your Honor.

(Witness temporarily excused.)

3980 SIDNEY RUBINSON, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?
A. Sidney Rubinson.
Q. Where do you live?
A. 6 Twelfth Street in Fair Lawn, New Jersey.
By the Court: Where?
By the Witness: Fair Lawn, New Jersey.
By the Court: Speak up, Mr. Rubinson, please.
By Mr. O'Brien:
Q. What is your business?
A. My business right now is the power transmission business.
Q. In 1945 and 1946 what was your business?
A. I was selling candy at that time.
Q. What was the name of your company?
A. I did business in my own name.
Q. In New Jersey?
A. In New Jersey.
3981 Q. Where?
A. In Paterson.
Q. Did you have any dealings with Sidney Kurtz?
By the Court: With whom?
By Mr. O'Brien: Sidney Kurtz, K-u-r-t-z.
By the Witness:
A. No, I didn't have any direct dealings with Sidney Kurtz.
By Mr. O'Brien:
Q. Did you know Sidney Kurtz?
A. He was a very good friend of mine. I knew him very well.
Q. And with whom was he connected?
A. He was in business for himself.
Q. What was the nature of his business?
A. He was in the corn sugar business.
Q. Was he a broker?
A. I think that is what he was.
Q. And for what company, if you know?
A. One of the corn refineries. Which one it was, I don't know.

Q. Was it Corn Products Refining?
A. I think that may be the name.
Q. Did you meet David Lubben?
A. Yes, I met David Lubben.
3982 Q. When was the first time?
A. I couldn't recall the exact time, but—
Q. Approximately.
A. I would say around 1945.
Q. And through whom did you meet him?
A. I met him through Sidney Kurtz.
By the Court: Through whom?
By the Witness: Through Mr. Sidney Kurtz.
By the Court: How do you spell his last name?
By the Witness: K-u-r-t-z.
By Mr. O'Brien:
Q. Did you buy any Shotwell candies?
A. Yes.
Q. From Mr. Lubben?
A. Yes.
Q. Or his companies?
A. Yes, I did.
Q. Which company?
A. I wouldn't know the name of the company, exactly.
Q. When did you start to buy the candy?
A. I would say somewhere in 1945. To the best of my recollection, somewhere in 1945.
3983 Q. Refreshing your recollection, would you say that the company was Eatsum Food Products Company?
A. I don't—
Q. Mr. Lubben's company?
A. I don't know if the name of the company was mentioned to me.
Q. Were all of your purchases of Shotwell candy made in 1945?
A. I would say thereabouts, in that vicinity of 1945.
Q. Would you say that any were made in the year 1946?
A. It's a possibility. I just don't recall it. Possibly in the area of 1945 or 1946.
Q. Is it also possible that those purchases extended into March or April of 1946?
A. I think they could.

Q. Now, on the Shotwell candies which you so purchased, did you receive invoices of Lubben or his companies?

A. No, I didn't.

Q. Were the shipments made?

A. As I recall, the shipments were made to a warehouse and I received a warehouse slip for the candy.

3984 Q. Were you retailing candy at the time?

A. No, I would say I would be more of a wholesale business.

Q. Yes, sir. And did you pay for the candies so received?

A. Yes, I did.

3985 Q. Whom did you pay?

A. I paid either David Lubben or Ronald Stone.

Q. Were those payments by check or in currency?

By the Court: A little louder. I have to strain my ears to hear you.

By Mr. O'Brien: I am afraid that is so. I am afraid I am a little tired this morning.

By Mr. O'Brien:

Q. Were the payments by check or in currency?

A. The payments were in cash.

Q. Did you make the payments?

A. Yes, I made the payments.

Q. At some time to Stone and other times to Lubben?

A. Yes.

Q. Prior to your introduction to Lubben by Kurtz, had you ever done business with Lubben before?

A. Not that I recall.

By Mr. O'Brien: It may not make much sense to the jury, if the Court please, but we do have a Kurtz deposition which we shall have to read later, because Mr. Kurtz is incapacitated, and we have been sent a doctor's
3986 certificate, and this small part is connected with the subject-matter of that deposition.

You may cross examine.

By Mr. Lockley: I move to strike the testimony, your Honor, on the ground that it has no relevance to the issues at trial.

By the Court: Well, Mr. O'Brien informs me that there is a deposition to be read which may throw some

light on it. I am not in a position at this time to determine its relevancy.

By Mr. Lockley: No questions.

By the Court: That is all.

(Witness excused.)

MORRIS DUCORSKY, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?

A. Morris Ducorsky.

By the Court: What is your first name?

3987 By the Witness: Morris.

By Mr. O'Brien: M-o-r-r-i-s is his name.

By the Court: Morris Ducorsky?

By the Witness: Right.

By Mr. O'Brien:

Q. Where do you live, Mr. Ducorsky?

A. In New York.

By the Court: You will have to raise your voice, Mr. Ducorsky, if the jury is going to hear you.

By the Witness: O. K. New York.

By Mr. O'Brien:

Q. What was your business in the years 1945 and 1946?

A. I was a jobber, as a packer of candy.

Q. Did you have some companies?

A. Yes, my name of company was Sweet Tooth Product.

Q. Company?

A. Corporation.

Q. And you had another company, didn't you?

A. No.

Q. How about Princess Sweets?

A. Not mine.

Q. That was not a company?

3988 A. It was after that. We were partners with them.

Q. After what?

A. After resigning of Sweet Tooth.

Q. Did you have a Princess Sweets Company in the year 1945 or '46?

A. It was—I think it was in 1947.

By a Juror: We can't hear.

By the Witness:

A. And '47.

By Mr. O'Brien:

Q. I am a little confused by the answer.

A. It means it was—

Q. Wait a minute, now. Was Princess Sweets in existence in the year 1946?

A. That's right, it was. But I wasn't in partnership there yet.

3989 Q. You had no interest in it—

A. I had no interest in that business.

Q. —until 1947?

A. Until 1947, right.

Q. Who did run Princess Sweets?

A. Heller.

Q. Louis Heller?

A. Louis Heller and Klein.

Q. Are you interested in Concord Confections?

A. Now, yes.

Q. When did that company start doing business?

A. 1948, I think.

Q. In the year 1948 did you have occasion to buy some raw corn?

A. Yes, sir.

Q. Where did you buy it?

A. Up to Des Moines, Iowa.

Q. Des Moines, Iowa?

A. Right.

Q. And did you afterwards have a transaction with General Confections and Mr. Lubben concerning the corn?

A. The transaction, I was partners with Mr. Heller in buying the corn?

3990 Q. Yes, sir.

A. The transaction—

By the Court: Raise your voice a little bit, Mr. Ducorsky.

By the Witness: All right, I will, Judge.

By the Witness:

A. After a while—I don't much remember what happened that—I will say that, that when I bought the corn I bought it partners with Mr. Heller. After we had to take that corn to make some corn syrup out of it, and happened that it was too late already, that the companies of Penick & Ford, of the refinery people, they couldn't take it.

Q. You wanted Penick & Ford—

A. Anyone.

Q. Some refinery.

A. Any one of the refineries to grind the corn, but it was too late already, because on account of the price, so giving—so Mr. Heller introduced Mr.—made a deal with Mr.—what is his name—Dave Lubben—to get the corn in production, in producing of corn syrup.

3991 Q. And was it ground?

A. It was ground, yes.

Q. Through what refinery?

A. I think—I couldn't tell you to what refinery. I don't remember that.

Q. What did you get, dextrose or syrup from the corn?

A. We didn't get anything.

By Mr. Lockley: Pardon me. Just a moment, Mr. Ducorsky. I object on the ground that I fail to see any relevance to what Mr. Ducorsky's transactions with Mr. Lubben were to what transactions the Shotwell people may have had. I don't see any connection to it up to now. I think it is immaterial, irrelevant.

By the Court: I didn't understand, Mr. O'Brien, as to what connection he says Mr. Lubben did have with this transaction. Will you state what he said?

By Mr. O'Brien: It isn't too clear to me, to tell the truth, Judge.

By the Court: Let's clear that up.

By Mr. O'Brien: Let me go back.

3992 By Mr. O'Brien:

Q. You were introduced to Mr. Lubben by Heller?

A. I was introduced—no, I wasn't introduced, no. As a matter of fact,—

By the Marshal: The jury can't hear.

By Mr. O'Brien: You talk down there, Mr. Ducorsky, so the people at the end can hear you. You talk to them, where the Marshal is.

By the Witness:

A. I wasn't introduced to Mr. Lubben. I was given to—Mr. Heller took everything—whatever—and my partner did everything, whatever was to be done in the producing of the grinding of the corn.

By Mr. O'Brien:

Q. Did you receive the corn products from the corn?

By the Court: We haven't yet straightened out just what Mr. Lubben had to do with this deal, if anything.

By Mr. O'Brien: I see.

By Mr. O'Brien:

Q. What did Mr. Lubben have to do with the transaction, Mr. Ducorsky?

3993 A. I don't know much about that. One thing I know, that I got my profit, and that is all what I did.

Q. From whom did you get it?

A. From Dave Lubben.

By Mr. Lockley: Get what?

By the Court: Read it.

By the Witness: The profit, whatever was—

By the Court: Just keep quiet. Read it, Mr. Reporter.

(Record read.)

By Mr. O'Brien: I think that is all.

By Mr. Lockley: I move to strike the testimony, your Honor. I fail to see its relevance.

By the Court: It may be stricken as immaterial.

That is all.

(Witness excused.)

3994 DAVE KUPFER, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McConnell.

Q. Will you state your name, please?

A. Dave Kupfer.

Q. And where do you live, Mr. Kupfer?

A. 733 South Cornell Avenue, Villa Park, Illinois.

Q. And what is your business or occupation?
A. At this time?
Q. Yes, what is it now?
A. I am selling windows.
Q. What was your business or occupation in the year 1945?
A. I was with Walgreen Company as candy buyer.
Q. At that time, or during your employment there did you meet a Mr. David Lubben?
A. Yes.
Q. What was the occasion for meeting Mr. Lubben?
A. Well, I had met Mr. Lubben prior—somewhere in '45 at various places. I don't recall whether he came in to sell me anything or whether I just met him
3995 down at the hotels at conventions or something like that.
Q. Did you have some conversation with him on the subject matter of acquiring a candy company?
A. Yes.
Q. And when was that?
A. I believe that was in '45.
Q. And who was present; where did it take place?
A. In the Walgreen office building.
Q. And who was present?
A. I believe a Mr. Druckenmiller was with Dave Lubben. I am not certain, but I am pretty sure he was.
Q. Can you fix the time approximately?
A. The time of the day or the date?
Q. No, I mean the date, the approximate time of the year.
A. I couldn't tell you that. I don't remember.
Q. All right. Now, tell us what was said.
A. Well, he asked me if I knew of any place—any candy factory that might be for sale.
Q. And what did you tell him?
A. And I told him that I had heard of one. And he asked me what the name was. And I told him
3996 I wasn't at liberty to tell, because it was not for—it was handled on the quiet because the people didn't want it known that it was for sale.
Q. Is that all the conversation?
A. And I was asked to get some information on it, which I did.

Q. Who asked you to get the information on it?
A. Dave Lubben.
Q. And that was part of that conversation?
A. That's right.
Q Now, is that all the conversation at that time?
A. That's all.
Q. Now, what did you do, if anything, after having that conversation with Mr. Lubben?
A. I contacted the individual that had mentioned to me that that plant was available.
Q. And who was that?
A. Paul Hershey.
By the Court: Who?
By the Witness: Paul Hershey.
By the Court: Can't you speak a little louder?
By the Witness: Paul Hershey.
By the Court: H-e-r-s—
3997 By the Witness: —h-e-y.
By Mr. McConnell:
Q. And after contacing Mr. Hershey did you have some further conversation with Mr. Lubben?
A. Yes.
3998 A. I think that was just over the phone. I don't recall, but it was not in Walgreen's office. I don't remember just where it was.
Q. Well, you did have a conversation with Mr. Lubben?
A. I had a conversation with him, yes.
Q. Now, tell us what was said?
A. The price of the business was mentioned.
Q. Tell us as near as you can what was said. Don't try to summarize it. If you can't give us the exact words, give us the substance.
A. I can't tell you the exact words.
Q. Well, give us the substance.
A. Well, the sum and substance was, "What is the price on the business?" And "What are the quotas"
Q. Now, who said that?
A. Dave Lubben.
Q. He asked you that?
A. That is right.
Q. What did you tell him?
A. I told him, I says, "I still will have to find that out," and I found it out and I told him.

Q. Wait a minute. Let us finish with the conversation. Was that all the conversation at that time?

3999 A. Well, I would say that is about all.

Q. All right. Now, did you do anything after that conversation?

A. Yes.

Q. What did you do?

A. I made an appointment. Well, I told—Dave Lubben told me that if the quotas were going to be good, it would be worth something to my advantage.

Q. That was in that telephone conversation that he told you that, is that right?

A. It might have been the telephone conversation.

Q. All right. What did you do with reference to it?

A. Well, we settled on a commission arrangement.

Q. Now, was that some conversation you had with Lubben?

A. That is right.

Q. Where was that?

A. I don't recall exactly where that took place but I can tell you what was said.

Q. All right. Can you tell us what was said between you?

A. I told him that it would be—it would cost him quite a little money to get that business.

4000 I said, "The price is $35,000.00 and $10,000.00 for Paul Hershey and $10,000.00 for me", because he said it was well worth it.

Q. Who said it?

A. Dave Lubben.

Q. Did you tell him the name of the company?

A. No, not at that time.

Q. All right. What did you do after that conversation? Did you have any further conversation with Mr. Lubben about it?

A. Yes. The arrangements were made to see the plant and I was to pick him up at a certain place to take him out there.

Q. Did you do that?

A. I did that.

Q. Did you tell him at that time what the name of the company was?

A. On the way out I said, "Dave, we have a deal of

$10,000.00 for Paul Hershey and myself" and he said, "Yes."

And I said, "Are you sincere about it?"

He said, "Yes."

I said, "Would you sign an agreement to that?"

4001 And he said, "Yes." And he did, and then I took him out there.

Q. Did you tell him the name of the company?

A. After he had signed that agreement.

Q. And what was it that you told him?

A. Haberkorn Candy Company.

Q. All right. What did you do? Did you and Lubben go to the plant?

A. We went to the plant.

Q. And what occurred after that, of your knowledge?

A. Well, he conferred first with the principals and later on the deal was made and shortly after that I was contacted to come down and collect my $10,000.00.

Q. Who contacted you?

A. Dave Lubben.

Q. And where did you go?

A. The Close Candy Company.

Q. And what happened there?

A. Well, Paul Hershey and I were together and Dave Lubben offered to pay us in cash.

Q. Yes.

A. I refused the cash and so did Mr. Hershey. I told him, "I will take a check."

4002 Q. Did you get the check?

A. I got two checks, one for $5,000.00 from Dave Lubben and one from Ed Urban of the Close Candy Company.

Q. Did you cash the checks?

A. I took one of them—I don't know which one, to Merrill Lynch and deposited it to my stock account. The other one, I don't recall whether I took that to another broker or whether I—

Q. You got the cash?

A. Sir?

Q. You got the credit to your account?

A. Yes, that is right.

Q. Is that all you had to do with the transaction?

A. That's all.

By Mr. McConnell: You may cross examine.

By Mr. Lockley: If your Honor please, I move to strike on the ground that it has absolutely no relevancy to the issues in this case as to whether The Shotwell Manufacturing Company evaded these income taxes.

4003 By Mr. McConnell: Mr. Lockley, Mr. Lubben testified on his direct examination he had no interest in the Haberkorn Candy Company. This shows he was paying commissions on it and making a deal.

By Mr. Lockley: It doesn't show Mr. Lubben's interest, if your Honor please.

By the Court: I don't remember. My recollection is, however, that the Haberkorn Candy Company was in somebody's else's name. It wasn't in Lubben's name.

By Mr. McConnell: That is what he said. He said he had no interest in it. I am showing now he did have an interest in it, by this witness. It goes to the whole background, with the final wind-up of the Haberkorn Candy Company and whether he had it and whether he go it, and whether he paid the money.

By Mr. Lockley: If your Honor please, Mr. Lubben said on the stand he paid this man $10,000.00. He recited practically the identical details this man told us on the stand. It is in no sense impeachment of Mr. Lub-

4004 ben's testimony.

By the Court: It may stand.

By Mr. Lockley: No cross examination.

By the Court: That's all.

(Witness excused.)

WILBERT J. MILLER, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. Wilbert J. Miller.

Q. Where do you live, Mr. Miller?

A. Bronxville, New York.

Q. Now, Mr. Miller, will you talk in a loud voice so that it is possible for everybody to hear. The acoustics are not very good in this court room.

What is your present business, Mr. Miller?

A. I am a management consultant.
Q. With what company?
A. With George H. Elliot & Company.
Q. In New York?
A. In New York City.
4005 Q. Did you, at one time, work with the American Maize Company?
A. I did.
Q. Tell us about that. When were you with them and what post did you occupy?
A. I was with American Maize from October, 1941, until November, 1949. My position there was a sales manager and later manager of sales administration. And as—in that capacity, it was my duty to see that the company's policies were properly carried out. I had charge of allocations of merchandise because everything was on allocation. And in that way I got into handling any corn that had to be bought during the corn deal period.
4006 Q. And now the corn deal. What years are you referring to, Mr. Miller?
A. That was 1945, 1946, in that period.
Q. And in those periods, you say you were in charge for the company of their overall allocation and product?
A. I was.
Q. Is your company, or the company that you were with then, Mr. Miller, one of the largest producers of corn products in the United States?
A. We were the fourth in grind.
Q. The fourth largest?
A. The fourth largest.
Q. And one of their products was corn syrup?
A. It was.
Q. Was your company a large purchaser of corn?
A. Yes, sir.
Q. Well, will you describe briefly, Mr. Miller, in the war years the supply situation with respect to corn syrup?
A. Well, we started to allocate syrup on the basis—of course the demand was terrific, beyond our ability to supply them. Then we established quotas for each customer on the basis of their 1941 purchases in an
4007 attempt to be equitable to all of our customers.
Q. Did the government have some restrictions on

the amount of corn you could grind?

A. No, there was no restriction on the amount of corn we could grind but there was a restriction on ceiling prices on corn and then a period developed in 1945 where it became more profitable for farmers to feed corn to hogs than to sell it through the regular channels.

Our factory was located here in the Chicago area and all of the corn that we purchased, came through the Chicago Board of Trade. Even during the corn deals, everything came through the Board of Trade where it was graded and we paid ceiling prices for corn, but there was no corn coming into the free market at one time.

Q. What do you mean by that, there was no corn coming into the free market?

A. Well, the Board—this is a term of the market where the farmers—their corn and ceiling prices were set on the Chicago—on the basis of Chicago prices for No. 2 yellow and then it was graded down for whether it had more moisture in it—you made adjustments
4008 from the base ceiling price for the corn and that was all graded by the Board of Trade, so when there was a shortage of corn, our customers went out or made available corn to us to grind.

By Mr. Lockley: Well, I object, your Honor, unless we get down to the particularities.

By the Court: I don't understand, but I think we should not go into the general practices any further.

By Mr. Kirby:

Q. Was Shotwell a customer of American Maize?

A. It was, or they were, rather.

Q. And now in the period of the corn deals, as you know them, was it possible for your company to buy corn on the open market at ceiling?

A. It was not. There was none available for a long period of time.

Q. Well, during that period, could you live up and did you live up to your 1941 allotments?

A. We did not. We couldn't possibly.

Q. Well, how did you allocate the corn syrup then?

A. We allocated the corn syrup on a percentage basis of what we had available.

4009 In other words, we had to give a certain percentage of the grind to the customers that made the

corn available and what was left, we allocated to the balance of our quotas.

Q. And so that put the 1941 quota out the window during the corn deal period, is that right?

A. Well, it only served as a basis. We had to reduce it to sometimes 70 per cent of 1941 purchases. Sometimes we had to go even lower than that because we only had the excess over what we had to pay for the corn deals to allot to our regular trade.

4010 Q. Now in your company was somebody—let me put it this way: In your company, in the New York office, that is the head office, isn't it?

A. That is right.

Q. And that is where you were?

A. Yes.

Q. Did the bookkeepers of the company in New York keep records as part of the company records of these corn deals in New York?

A. We had to keep records to know who to ship our obligation to or to make corn available. We had to keep records, surely.

Q. What was the form of that?

A. Well, it was—all we did was we got a carload of corn in and it was assigned to us by a customer.

By Mr. Lockley: Well, I object, your Honor, again unless we get down to the situation.

By the Court: Well, I assume he is laying a foundation for some particular transaction.

By Mr. Lockley: All right.

By the Court: Go ahead.

By the Witness:

4011 A. (Continued) We had to keep a record of our obligation to the customer who made the corn available. Now, once that obligation was fulfilled, we had no further need for the record.

By Mr. Kirby:

Q. And what did you do with it?

A. Well, they kept them there as long as I was with the company. What was done with them since I left, I don't have any idea.

Q. They were just memoranda records?

A. They were just memoranda records, definitely.

Q. Was one of the people they supplied corn to on the corn deal Shotwell?

A. I cannot swear to that. I cannot testify that they did. However—

By Mr. Lockley: I object to any "howevers", your Honor.

By the Court: Well, you have answered the question.

By the Witness: I have not. Your Honor, I would like to explain something in that connection.

By the Court: Well, perhaps he can put another question.

4012 By the Witness: Yes.

By Mr. Kirby:

Q. What knowledge do you have about Shotwell securing the corn syrup?

A. Well, I know that they got shipments in corn in excess of their 1941 quota.

Q. They got shipments of corn or—

A. Corn syrup, in excess of their 1941 purchases and the only way that I can possibly conceivably consider it is they must have supplied corn. I do not have any specific records available.

Q. Well, how many years since you have been with the company?

A. Just about four years.

Q. Mr. Miller, was that requirement of the furnishing of corn applied just to Shotwell or to other companies?

A. It applied to practically all of our customers.

Q. Including—

A. That is, a great many of them, yes.

Q. In the confectionery field?

A. Confectionery, ice cream, bakery deals.

Q. And you were dealing with the principal companies in those fields in the United States?

4013 A. That is correct.

By Mr. Kirby: That's all.

Cross Examination by Mr. Lockley.

Q. Mr. Miller, you say that whatever records you may have had with reference to the purchase of corn by The Shotwell Manufacturing Company for grinding at American Maize Products have now been destroyed?

A. I did not say that.

Q. Well, you don't know where they are?

A. I do not know where they are because I am not with the company any longer.

Q. At least they are not available?

A. I haven't got them available because I am not with the company.

Q. Did you keep any such records?

A. I did not.

Q. Did you handle any transactions relating to the purchase of corn for use by the American Maize and grind it, from which corn syrup would then be sent to The Shotwell Manufacturing Company?

A. I had the complete authority to decide—

Q. Well, I asked you if you handled any such transactions.

A. Would you re-state the question, please?

4014 Q. Did you handle any transactions or arrangements with the Shotwell Manufacturing Company whereby American Maize Products received corn and in turn ground it, made corn syrup and sent that corn syrup to the Shotwell Manufacturing Company?

A. I authorized all corn—

By the Court: Just answer the question.

By Mr. Lockley:

Q. Did you make such arrangements in connection with the Shotwell Manufacturing Company?

A. I can't remember precisely each particular customer.

Q. Then you don't remember any such arrangement having been made?

A. Not specifically, no, because after all, we had an awful lot of customers and I couldn't possibly remember every customer.

Q. So that you are testifying entirely from what you believe might have happened?

A. I am quite sure—

Q. You have no present recollection that such an arrangement was ever made with the Shotwell Manufacturing Company?

A. I have every reason to believe—

4015 Q. I say, do you have any present recollection?

A. I can't say that I can specifically recall right now, no.

By Mr. Lockley: I move to strike his testimony, your

Honor. I think it is immaterial and irrelevant and it is hearsay.

By the Court: It may stand. Is that all the cross examination?

By Mr. Kirby: Yes, sir.

By Mr. Lockley: I might ask him another question while he is on there.

By Mr. Lockley:

Q. Do you know of your own knowledge whether the Shotwell Manufacturing Company paid one dollar premium to American Maize Products Company or any employee of American Maize Products Company for the purpose of getting syrup?

A. I am very confident that they did not.

Q. Do you know whether they paid one dollar to any grain broker for the purpose of getting corn for shipment to American Maize Products?

A. That was completely out of my jurisdiction.

Q. Do you know if they paid one dollar to anybody for either corn or corn syrup over and above the
4016 ceiling price?

A. Everything I know about that is purely hearsay.

By Mr. Lockley: All right, that's all.

By the Court: That is all?

Redirect Examination by Mr. Kirby.

Q. Mr. Miller, was your company able to buy corn at the ceiling price?

A. It was absolutely impossible to get any corn because it was just not available, so the corn had to come from someplace.

Q. Do you know of anybody in the whole country that was able to buy corn other than in the black market in that period?

By Mr. Lockley: I object, your Honor. The answer would obviously be hearsay.

By Mr. Kirby: Well, you asked him generally about his knowledge.

By Mr. Lockley: I asked him of his knowledge with respect to Shotwell and not his knowledge with respect to everybody else in the country.

4017 By the Court: He may answer.

By the Witness:

A. There was no corn available. All of the corn refiners—and I was closely connected with all of them and knew all their problems—there was no corn available except it was made available by customers. Obviously, it was in the black market because there was no regular market for corn, none whatsoever.

By Mr. Kirby: Thank you. That is all.

By the Court: We will take our recess now for ten minutes.

By Mr. Lockley: Don't go yet.

By the Marshal: Will the audience remain standing while the Judge and the jury leave the court room. This Honorable Court will recess for ten minutes.

(Recess taken.)

By Mr. Lockley: I just want to ask you one question.

Recross Examination by Mr. Lockley.

Q. Did the Shotwell Manufacturing Company
4018 have a quota with American Maize Products Company?

A. They did.

Q. For 1945 and 1946?

A. Yes.

By Mr. Lockley: All right. That is all.

By Mr. Kirby: Thank you, Mr. Miller.

(Witness excused.)

LEROY D. GODFREY, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. Leroy D. Godfrey, G-o-d-f-r-e-y.

Q. Where do you live, Mr. Godfrey?

A. My home address? Chicago. Do you want the street address?

Q. Yes.

A. 5008 North Mozart Street, Chicago 25.

Q. What has been your training in life, Mr. Godfrey?

4019 A. Well, since I left the regular Army 23 years old I have been in the grain business.

Q. In the grain business?
A. Yes.
Q. For some many years?
A. It will be 50 years in August.
4020 Q. Would you be good enough—you do have a voice that carries well, but the acoustics are poor in this room, Mr. Godfrey, so speak up clearly. Would you kindly do that?
A. Yes.
Q. Now in the fifty years—by the way, were you ever in the grain business in Minneapolis?
A. Yes, for twenty years.
Q. With what company?
A. Van Dusen Harrington Company.
Q. And did you come to Chicago?
A. No, I went to Winnipeg.
Q. And you were in the grain business there?
A. Yes, for thirteen years.
Q. When did you come to Chicago?
A. March, 1937.
Q. Did you then work on the Chicago Board of Trade?
A. Yes.
Q. In what capacities?
A. Manager of the grain department of the Corn Products Refining Company from March, 1937, until the first week in May, 1946.
Q. Is the Corn Products Refining Company the
4021 largest corn processor in the United States?
A. Yes.
Q. Well, probably in the whole world, I guess?
A. Oh, yes, certainly.
Q. And when you say you were manager of their grain department on the Board of Trade, what does that mean?
A. It means that you are responsible for the procuring of corn and for its distribution at the proper time.
Q. Did you have men that worked on the floor under you?
A. Yes, I had three assistants.
Q. And they were the ones that actually would be on the floor buying those?
A. In Chicago, yes.
Q. And in this crew that you had, Mr. Godfrey, were

they the largest of the buyers of corn in the Chicago market for processors?

A. Oh, yes.

Q. By far the largest, were they?

A. Yes. I don't know the exact ratio, but overwhelmingly so.

Q. Now, Mr. Godfrey, will you tell me, during
4022 the war years,—or let me strike that.

Mr. Godfrey, were you on a national committee that had to do with the corn and grain supply and price situation?

A. I was on several informal committees that were just for the time being, but I became chairman later on of a newly created committee known as The Corn Industry Advisory Committee to the OPA.

Q. There was an OPA?

A. Yes. The OPA started operating in corn in January, 1943.

Q. And when did OPA control on corn end?

A. It ended on midnight of the 30th of June, 1946.

Q. And did it ever go back on corn after June 30, 1946?

A. No.

Q. Describe just generally and briefly, Mr. Godfrey, the course of prices of corn in Chicago through the war years and then after OPA went off.

A. Well, the war years of course started in the latter—in December, 1941, but the controls, as I have just
said, didn't go on to corn until January, 1943. Dur-
4023 that interim, corn gradually worked up in price until
it reached a level of $1.02, Chicago, for the top price in about the middle of January, 19—that was all prior to controls.

Q. And under controls what price did OPA set in 1944, 1945, and 1946, roughly?

A. Well, in 1943 when they started out, it was $1.02 and that price was continued for—well, I don't recall just the dates until it was raised to $1.08, a six-cent advance, and then they raised it again to, I think, it was $1.16 and then it was raised to $1.24 or almost exactly that, and then some time late in May or after the 10th of May—

Q. Of what year?

A. In 1946, after I had left, they raised it 25 cents a bushel overnight, $1.44. I think the $1.44 was the ultimate. That would be—no, it was $1.19 instead of $1.24, and then they raised it to $1.44.

Q. And is $1.44 a bushel the highest corn was priced under the OPA?

A. $1.44 basis, Chicago, yes.

Q. What did the price go down to when OPA dropped?

A. It worked up to—if my memory serves me
4024 right, within a cent of it, anyway—to $2.25 a bushel.

Q. On the Chicago market?

A. That is right.

Q. Now in 1945, what happened to the availability of corn on the open market?

A. Well, it kept—during 1945, it kept increasingly difficult to buy corn and then the situation was aggravated in the fall of 1945 by several weeks of almost continuous rain so that it made corn very difficult to obtain.

4025 Q. What would that do? What effect would that have?

A. Well, of course, it would create a shortage, a scarcity, and of course it increases the anxiety of the processor or consumer to buy corn or secure corn.

Q. And that was late in 1945?

A. Yes, affecting the 1945 corn crop.

Q. Then how long did the shortage continue? Did it continue? I mean, did the shortage get worse or did it lighten? What was the course of it then?

A. Well, from what I could observe, I don't—I think it got so tight that there was no corn sold at the ceiling price or practically none after about the 1st of January, 1946, for the life of the OPA, the six months' life and I don't think any corn was sold at the ceiling price without some inducement that may have been given to somebody, yes.

Q. What do you mean inducement?

A. Well, I don't know myself but we were buying the corn. We bought at the ceiling price.

By Mr. Lockley: I object to any hearsay, if your Honor please, unless he knows what was done with respect to the sales.

4026 By the Court: He said he didn't know.

By the Witness: I said I don't know.

By Mr. Lockley: I move his answer be stricken.

By the Court: The answer may stand.

By Mr. Kirby:

Q. Mr. Godfrey, so far as Corn Products Refining Company is concerned, that company did not, on the Board of Trade, offer anything above the ceiling price, did it?

A. No, sir.

Q. Was Corn Products able to buy on the open market at ceiling prices?

A. There were purchases that were made almost daily.

Q. And did suppliers of Corn Products—I mean, did customers of Corn Products make that corn available to them at ceiling price?

A. No. When you say customers of Corn Products?

Q. That is, people—the corn deals. Did you handle the corn deals or was there another department that handled it?

A. Oh, the purchasing of corn?

Q. Yes.

4027 A. The purchasing of corn was done by my assistants on the floor. I wasn't there personally.

Q. If there was a corn deal made with Corn Products when the corn came out to the market, it was earmarked to go to Corn Products, was that the situation?

By Mr. Lockley: If you please, Mr. Kirby, will you ask the questions. I object, your Honor, to Mr. Kirby leading the witness and testifying.

By the Court: Yes.

4028 By Mr. Kirby:

Q. Did you have, personally, Mr. Godfrey, anything to do with the so-called corn deals?

A. No, sir.

Q. That was handled by some other department of Corn Products?

By Mr. Lockley: We haven't established that there were any yet, if your Honor please. I object to the nature of the question.

By the Court: Yes, sustained.

By Mr. Kirby: Well, we will have other witnesses from Corn Products, documentary material and all that sort of stuff.

By Mr. Lockley: Fine. Let's wait till we get that.

By Mr. Kirby: I wanted to cover with this gentleman that he personally did not.

By Mr. Kirby:

Q. You were trying to buy corn—you fellows were trying to buy corn on the open market?

A. We wouldn't buy it unless it was offered to us at ceiling price?

Q. The open market was practically devoid of 4029 corn at ceiling price; is that true?

By Mr. Lockley: I object again, if your Honor please, to Mr. Kirby's testimony and to his leading the witness.

By the Court: He may answer.

By the Witness:

A. There was no corn. So far as I know, there was no corn offered on the market, unless—except when the man came to my assistants, the salesman, to offer the corn, he would state that this is for the credit of some buyer, somebody outside of the grain business.

By Mr. Kirby:

Q. Strings to it?

A. Certainly, strings to it.

Q. All right. Now, are there any daily figures issued with respect to the volume of trading on the Chicago Board of Trade?

A. The Chicago Exchange Authority issues every forenoon a statement showing the volume of trade in grain futures, contracts, of the previous day, and the net result of what was left open, in the matter of open trades. That is published every day, following the 4030 trading day. That's on grain futures.

Q. And is there also a publication with relation to spot sales?

A. There is.

Q. And where is that?

A. It is a matter of record with the Chicago Board of Trade. It is kept—a daily record—it is reported to the reporters of the Chicago Board of Trade, and they make a complete record of it. And that is handed out to any publication that may wish to publish it. But the Wall Street Journal now and what was formerly the

Chicago Journal of Commerce, publish those figures in full each day.

Q. So that the daily figures which are published, with respect to the Board of Trade, in the Wall Street Journal, as it is now called, or the Journal of Commerce, they are the ones that come from the Board of Trade?

A. That's right.

Q. And are they accepted and relied on in the trade?

A. Certainly they are.

Q. In the regular course of the market?

4031 A. Yes, sir.

Q. And that is true both as to the spot figures and futures figures?

A. Well, the futures figures—

Q. They print them both, don't they?

A. Well, yes, but they can't print them the next morning, following the markets, not the futures figures.

Q. No. Does the Chicago Board of Trade put out an annual volume which accumulates some figures of business on the Board of Trade?

A. Yes.

Q. And do they in that volume accumulate the figures as to the futures trading?

A. Well, the futures trading is a matter of record with the Commodities Exchange Authority, and they publish every year, the record for the year. But the Board of Trade simply receives the report from the Commodities Exchange Authority and through their statistical department make it available to anyone who wants to pick up a copy.

Q. And they publish a book once a year?

A. Yes.

Q. And those figures are relied on in the market

4032 and in the industry?

A. Certainly, the year book is correct.

By Mr. Kirby: That is all, Mr. Godfrey. These gentlemen may have some questions.

4033 *Cross Examination by Mr. Lockley.*

Q. Mr. Godfrey, you state that you had nothing to do yourself with the actual purchase of corn on the Board of Trade, is that correct?

A. That's correct.

Q. You stated, however, that during this period that you were referring to, 1945 and 1946, the only way corn was sold by someone coming to one of your subordinates and offering to sell it for the account of somebody else, is that correct?

A. I would say that that was—is almost a hundred per cent correct for the period from January 1, 1946 on. Prior to that it wasn't always true.

Q. Did you ever handle any such deals yourself?

A. I have no recollection of ever handling such deals.

Q. So all you know about it is hearsay?

A. No, the reports were turned in to my office every day.

Q. You mean you were told by other people?

A. My reports.

Q. You didn't handle any of them yourself?

A. The reports were brought in to me every day
4034 from the floor.

Q. But you didn't handle them yourself?

A. I didn't handle the purchases, no.

Q. That's what I mean. Now, did you know, of your own knowledge, of any purchases made by the Shotwell Manufacturing Company in that manner?

A. I do not recall that name.

Q. Or for the account of Shotwell Manufacturing Company?

A. No, I do not recall that name.

By Mr. Lockley: That is all.

4035 *Redirect Examination by Mr. Kirby.*

Q. These fellows that did turn in these reports to you, they were your subordinates?

A. Yes.

Q. You had trained them?

A. Oh, yes.

Q. Trained them well?

A. I hope so.

By Mr. Kirby: Thank you.

By Mr. Lockley: Thank you very much, Mr. Godfrey.

(Witness excused.)

By Mr. Kirby: Mr. Lowney.

WILLIAM LOWNEY, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?
A. William Lowney.
By the Court: Again, please?
4036 By the Witness: Lowney, L-o-w-n-e-y.
By Mr. Kirby:
Q. Where do you live?
A. Pardon me?
Q. Where do you live, Mr. Lowney?
A. 3130 Lake Shore Drive, Chicago.
Q. And what is your business?
A. I am a researcher and writer for a firm of education and training consultants.
Q. And is that a statistical firm here in Chicago that does statistical research?
A. We do some statistical research, yes.
Q. And you have clients in industry generally?
A. Yes.
Q. Name some of the representative clients of your company.
A. Elgin National Watch Company, the Pure Oil Company, Sears Roebuck, Uarco, many others.
Q. National business concerns for whom your company does business?
A. That's correct.
Q. And you know my name is Kirby and I talked to you about some matters I wanted your company to research, is that true?
4037 A. That's true.
Q. And they relate to the corn market, the Chicago Board of Trade?
A. Yes, that's true.
Q. Specifically, did I ask you to do some work in connection with the volume of futures trading on the Chirago Board of Trade?
A. Yes, you did.
Q. And what source material did you refer to?
A. I used the Chicago Board of Trade year book for the futures.

Q. And does the Chicago Board of Trade year book contain figures on the volume of futures trading?

A. It does.

Q. And is that given by years and by months?

A. It is given by years and by months, yes.

Q. When you had the Chicago Board of Trade figures, from their book, what did you do with those figures, at my request?

A. Our company made up a chart, a visual chart, which visually represents these figures and shows exactly what the situation was for those years.

Q. Keep your voice up, and loud, Bill.

A. O. K.

4038 Q. And is the chart drawn to some scale?

A. Yes, it is drawn to an exact scale.

4039 Q. Just describe how you do a thing like that, to the Court and jury, will you.

A. The futures corn is given in, as I recall, thousands of bushels, so we would indicate in exact scale the thousands of bushels on the left hand side of the chart. And plotted against that at the bottom of the chart there would be the months of the years we wish to show.

Therefore, by looking at the lines on the chart you can tell exactly how much corn in thousands of bushels was sold on the Chicago Board of Trade for any months during the years plotted.

Q. Do you then get a visual picture of the volume of futures trading?

A. That is exactly what you get, yes.

Q. Now, is that visual picture distorted in any way?

A. In no possible way.

Q. And did you check the chart to make sure it was mathematically and graphically completely accurate?

A. We did.

Q. Is this a type of a chart which your company 4040 has made with respect to other types of things through the years?

A. It is.

Q. And is it a type of chart which is commonly used in business?

A. Yes.

By Mr. Kirby: Would the reporter mark this chart here Defendants' Exhibit No. 72 for identification.

(Said instrument was marked Defendants' Exhibit No. 72 for identification.)

By Mr. Kirby:

Q. Is this chart, which is marked Defendants' Exhibit No. 72, the chart to which you have just been referring?

A. Yes, it is.

Q. And just as you look at the chart, it represents what?

A. It represents—

By Mr. Lockley: Well, if your Honor please, I object to any further questioning on this line on the grounds that it is immaterial, it is irrelevant, it is incompetent, 4041 it is outside the issues of the case. It has no bearing whatsoever on whether the Shotwell Company evaded its income tax or whether David Lubben paid them any money. I fail to see that it has any relevance whatsoever.

By the Court: I take it counsel is attempting to lay a foundation now for the chart. You may proceed.

By Mr. Kirby: Yes, indeed, if we spent money—

By the Court: I am sorry.

By Mr. Kirby: Indeed, if we spent money to procure raw materials, that is a proper credit against any possible income tax.

By Mr. Lockley: The way to prove it is to bring in the people you spent the money with, not to bring in what was sold on the Chicago Board of Trade.

By Mr. Kirby: Well, I have the most fond regard for you, but I am not going to accept your instructions as to how to prove this.

By the Court: Go ahead.

By Mr. Kirby: They don't even believe we spent a dollar.

4042 By the Court: Go ahead.

By Mr. Kirby: Now, I move, if the Court please—so that we reach that issue at once—for the admission of Defendants' Exhibit 72. And do I understand that it may be received?

By Mr. Lockley: I object on the ground that it is immaterial, it is irrelevant, it is beyond the issues of the case.

By the Court: It may be received.

(Said instrument was received in evidence by the Court and marked Defendants' Exhibit No. 72.)

By Mr. Kirby:

Q. Mr. Lowney, will you come down here, please, and take a pencil and just explain to the Court and to the jury precisely what that shows.

A. This shows the total volume of futures trading in corn on the Chicago Board of Trade for the years 1945, 1946 and 1947.

On the far side of the chart, plotted upward, you have your numbers of bushels of corn that were sold on the Chicago Board of Trade on future trading in thou-
4043 sands of bushels. Therefore, you have a hundred thousand thousand bushels across this line, and so on up. And down here ten thousand thousand bushels.

4044 Down here you have your January, February, March, April, May, June, July, and your sales for your months of 1945, 1946 and 1947.

Therefore, you can tell at any particular month of the year exactly how much corn was sold that month on the Chicago Board of Trade.

Q. And have I informed you that OPA went off corn in the middle of—I mean the last day of July of 1946?

A. I'm sorry. I can't answer that.

Q. Well,—

A. I don't remember.

Q. Would you locate—in any event, the last witness just said it did—but would you locate on that chart July 1, 1946?

A. That would be right at this point, right here (Indicating).

Q. And after that point, describe the contour of the chart?

A. From July 1, 1946, it is easy to see that the contour of the chart climbs somewhat like a mountain till it reaches a point up here of 500,000 thousand bushels at approximately May of 1947.

Q. How many bushels is 500,000 thousand bushels?

4045 A. 500,000,000, I believe.

Q. Now, during the period just prior to the ex-

piration of the OPA, will you indicate that, please, on the chart?

A. That would be right at this month of June, right here (Indicating).

Q. And going backwards.

A. Going backwards, yes, into—June, May, April, March, February, January, right through there.

Q. Now, will you locate on that chart where October, 1945, is?

A. October, 1945, is this point, right here (Indicating).

Q. And you have indicated that the trading in futures after OPA reached 500,000 thousand bushels. What was the trading in futures from October, 1945, on through 1946?

A. Well, it dropped as low as 490,000 bushels. At October it was 20,871 thousand bushels.

Q. And so far as the visual record is concerned, so small that it almost went off the chart?

A. True.

Q. Now, Mr. Lowney, is there anything else on the chart that you would care to call our attention to?

4046 A. I don't believe so.

By Mr. Kirby: Will you take the stand again, please?

By Mr. Kirby:

Q. Mr. Lowney, in the course of your research were there any other figures as to the volume of trading in corn available?

A. There were. There were the spot sales of corn on the Chicago Board of Trade.

4047 Q. And where were they published?

A. They were published in the records of what was then the Chicago Journal of Commerce and what is now the Wall Street Edition—or the Chicago Edition of the Wall Street Journal.

Q. And what did you do in order to obtain those records?

A. I went to the files of the Chicago Journal of Commerce.

Q. At their office?

A. At their office, got those files out and took the figures from their back copies of their paper.

Q. The daily sales of spot corn on the Chicago Board of Trade?

A. That is correct. I took the daily sales and totaled them to monthly sales.

Q. And so that you then arrived at a cumulative total of spot sales per month?

A. That is correct.

Q. And what did you do with those figures, Mr. Lowney?

A. We again charted them in the same manner that we charted the other—the futures, except these are
4048 not in thonsands of bushels now, but I believe in carloads.

Q. How were they reported by the Board of Trade?

A. In carloads.

Q. In each case, in each chart you adopt the same system of reporting which the Board of Trade used?

A. Would you rephrase that question, please?

Q. Well, in connection with the futures you used the thonsand bushels?

A. That is correct. We used the same medium that the source document used.

Q. So you followed your source, whatever that was?

A. That is correct.

Q. And you didn't change that?

A. No.

Q. And spot sales are reported in carloads?

A. That is correct.

Q. But you cumulated those by months?

A. We did.

Q. Now, what type of a chart did you make to show the availability of corn on the spot or cash market?

A. The same type of chart, except that your left hand side—your vertical side, going up on the left, now
4049 shows your volume in carloads rather than in thousands of bushels.

Q. And was it plotted mathematically?

A. It was.

Q. Not as an artist, it isn't a freehand job?

A. No, it is not a freehand job. It was done mathematically.

Q. Visually, does it in any way distort the figures?

A. It does not.

Q. It represents them accurately?

A. It represents them accurately.

By Mr. Kirby: Will you mark this chart Defendants' Exhibit No. 73 for identification.

(Said instrument was marked Defendants' Exhibit 73 for identification.)

By Mr. Kirby:

Q. Is Defendants' Exhibit 73 the chart with respect to spot or cash corn?

A. It is.

Q. Now, what do the different parts of that chart represent, Mr. Lowney? Would you come down to the chart and show them, please.

By Mr. Lockley: Do you intend to offer it at this time?

4050 By Mr. Kirby: I am sorry. I truly should have made that offer, and I apologize. I do offer Defendants' Exhibit 73.

By Mr. Lockley: In that event I object on the ground that it is immaterial, it is irrelevant, it is beyond the issues of the case. It is not the best evidence.

The Court: It may be received.

(Said instrument was received in evidence by the Court and marked Defendants' Exhibit 73.)

By Mr. Kirby:

Q. Will you explain the chart, Mr. Lowney.

A. This is the total reported spot sales of corn on the Chicago Board of Trade, 1945, 1946, and 1947.

On the left hand side of the chart, over here, you have the number of carloads of corn that were sold on the Chicago Board of Trade.

Down here, as on the other chart, you have your months and your years.

Q. Now, on the carloads on the left, what scale is that?

A. This is 500 carloads, a thousand carloads, be-
4051 low that it works down till you have 25 carloads, 50, 75, 100 carloads.

Q. Now, your figures across the bottom, what do they represent?

A. These figures represent the number of carloads sold for any particular month.

Q. Explain now, by referring to the chart, how a per-

son could tell as to any month how much spot or cash corn was available on the open market.

A. You simply go to your month, which is June. You come up here and read across, which will show you how many carloads. Or you can just read this figure down here, which is the accurate figure for the month.

Q. All right. Now why don't you start over there at the left, and what is the first month you have in '45?

A. January of 1945.

Q. Now, read your chart as you come across it, Mr. Lowney, to indicate the total number of cars of corn sold on the open market.

A. Will you repeat that?

Q. Month by month.

A. The entire way across?

4052 Q. Start at the left.

A. All right.

Q. What is the first month you have?

A. We have January of 1945.

Q. How many cars sold on the spot market in January 1945?

A. 1,019.

Q. The next month?

A. The next month is February, 857.

Q. Why don't you point out visually what it is.

A. All right. Here is your 1,019. Here is your 857.

Q. Then go through now.

A. March is 718. April is 770. May is 587. June is 169. July is--

Q. Now wait a minute. In other words, in the month of June of 1945, there were only 169 cars sold on the Board of Trade on the spot market?

A. According to the Chicago Journal of Commerce records.

Q. That is an average of some five a day.

A. Yes.

Q. All right. Now, go ahead and give us the months after June.

4053 A. Well, we come at July to a case where the Government sold some corn and that is listed in white. To follow down as to what was sold in the regular manner on the Chicago Board of Trade, you have for August, 225. September, 95.

Q. In September now the average was down to about three cars a day being sold on the market?

A. That's correct. October it was 37.

Q. In October the average is a little better than one car a day available on the open market?

A. That's right. In November, 85. December, 60. Shall I go on?

Q. Yes.

A. January of 1946 there were 25. In February of 1946 there were four cars sold.

Q. Well, then, in those two months, January and February of 1946, the corn was practically off the market?

A. There were 29 carloads in those two months.

Q. 29 carloads in two months?

A. That's right.

4054 Q. On the whole Board of Trade?

A. Yes.

Q. All right. Will you go ahead.

A. March, 22. In April there was one. In May, 5. In June there was one. In July there were 221. That's July of 1946.

Q. All right. Now, July 1, 1946, the OPA went off. And show visually what happened after the OPA went off.

A. Again it went to 221 carloads, 267 carloads, 225 carloads, shot way up to 884 carloads, up to 1308 carloads, and eventually over here went clear up to—I believe 1,627 carloads is the top figure, in the middle of 1947.

Q. Now, the white section there in 1945, in the middle of '45, did the government enter the market then?

A. Those are 113 carloads sold by the C.C.C., 47 carloads sold by the C.C.C. I think that was Commodities Credit. I believe that's government selling.

Q. They were pouring some corn into the market then?

A. Yes.

4055 Q. But, as a matter of fact, the corn they put in was almost half as much as went in the market in those months?

By Mr. Lockley: I object to this testimony.

By Mr. Kirby: All right. It is visually there and I may be inaccurate about it. It may be a third.

By Mr. Kirby:

Q. Now, is there anything else, Mr. Lowney, with respect to that chart?

A. No, I believe that covers the chart completely.

Q. Now, the period that we have been particularly talking about here is from late '45 until June and July of 1946. And that is the period which I now cover by the sweep of my pencil?

A. That's true.

Q. Referring now to the earlier exhibit, which is Exhibit 72, the period we have been particularly talking about here is from the middle of '45 until July of '46. And is that the period which I am now covering by the sweep of my pencil?

A. Approximately, yes.

By Mr. Kirby: You may cross examine.

4056 *Cross Examination by Mr. Lockley.*

Q. Does your chart reflect purchases of corn from country elevators?

A. My chart reflects purchases of corn made on the Chicago Board of Trade.

Q. It doesn't reflect the purchases of corn made on the Omaha Board of Trade?

A. On the Chicago Board of Trade.

Q. Not on the Denver Board of Trade?

A. On the Chicago Board of Trade.

Q. Not on the St. Louis Board of Trade?

A. The same answer.

Q. Or Kansas City?

A. No.

Q. It doesn't reflect any purchases made at country elevators?

A. It refers to purchase made on the Chicago Board of Trade.

By Mr. Lockley: If your Honor please, at this time I move to strike the testimony on the ground that it has no relevance to the issues in this case. It is only testimony with respect to purchases on the Chicago Board of
4057 Trade. It is limited to the—Mr. Godfrey, of the Corn Products Refining Company, testified they exclusively bought on the Chicago Board of Trade, but other witnesses testified that they made purchases at other places. It has no relevancy to the issues.

By the Court: Your objection goes to the weight of it rather than to the relevancy. I will deny the motion.

By Mr. Kirby: Thank you, Mr. Lowney.

(Witness excused.)

By Mr. Kirby: That is the year book of the Board of Trade. I don't know whether Mr. Lockley wanted to look at that or not.

By Mr. Lockley: I certainly don't.

By Mr. Kirby: Well, you don't want to ignore things that happen out in the world, Mr. Lockley.

4058 ROBERT R. ADAM, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. Robert R. Adam.

Q. And where do you live?

A. 3260 Lake Shore Drive.

Q. In Chicago?

A. Yes, sir.

Q. Mr. Adam, we do have a little trouble with the acoustics in this room and if you could speak up it would help us all.

A. All right.

Q. I talk a little louder maybe than I need to, but it does help, I think.

Are you with the Corn Products Refining Company?

A. Yes, sir.

Q. And that is the company that Mr. Godfrey was with until his retirement after some fifty years in the grain business?

A. Yes, sir.

4059 Q. Now, what has been your work with Corn Products Refining Company?

A. I am the central division sales manager for the Corn Products Sales Company.

Q. And what type of products do you have charge of, Mr. Adam?

A. All the products that my company manufactures.

Q. And is your company a manufacturer of corn syrup?

A. Yes, sir.

Q. And of starch?
A. Yes, sir.
Q. And of corn sugar?
A. Yes, sir.
Q. And what trade name does your company use?
A. Globe brand corn syrup, unmixed. Cerolose brand dextrose sugar. And Buffalo brands and Globe brands of starch.
4060 Q. And is it Adam or Adams?
A. Adam.
Q. Mr. Adam. Well, Mr. Adam, is it true that your company is the largest refiner of corn syrup in the country?
A. It is reputed to be.
Q. And the territory in which you had charge is the middle west territory here?
A. That's correct.
Q. That included the Shotwell account?
A. Yes, sir.
Q. They were purchasers of corn syrup from your company?
A. Yes, sir.
Q. Now, Mr. Adam, in early 1945 did you have some difficulty in your company in the procuring of products for your customers?
A. In the procuring of products for our customers?
Q. In filling the demand?
A. Yes.
Q. What was the demand situation in '45?
A. Well, it was—the demand at that time was beyond our ability to produce.
Q. And was there any situation with respect to the
4061 ability to procure corn that you were aware of?
A. There was a shortage of corn, reputedly, at that time.
Q. Did you personally send some of your men out to try to buy corn?
A. Yes.
Q. What men were they—I don't mean by name, but what type of men did you send out?
A. They were our bulk salesmen, principally.
Q. People usually engaged in selling the product?
A. Selling the end product, that's right.

Q. What did you do with these men who normally sell the end product and when did you do it?

A. We did that—we started that in January, 1946.

Q. What did you try to do?

A. We tried to find corn for our company.

Q. And were they able to get it?

A. No.

Q. What did the company do with respect to the securing of corn?

A. Well, they appealed to anybody that might have had corn to send it to us, among them our regular customers.

Q. Was one of the customers that was asked to
4062 supply corn, if they could, Shotwell?

A. Yes.

Q. Now, do you know a man by the name of Alger?

A. Yes.

Q. And who is he?

A. He is the head of our accounting department in Chicago.

Q. And did he maintain some records about customers who supplied corn?

A. Yes.

Q. You don't have those personally?

A. No.

Q. That wasn't part of your job?

A. That's correct.

Q. That is that other fellow's?

A. Yes.

Q. Tell us now, apart from the records which Alger is the fellow that handles, what do you know about the corn deals, if any, that were made by your company with customers?

A. Well, my—

By Mr. Lockley: Well, if your Honor please—

By the Court: Yes.

4063 By Mr. Lockley: I must object to the form of the question as being too general in nature.

By the Court: I will sustain the objection.

By Mr. Kirby:

Q. Were there any corn deals made with Shotwell?

A. Yes.

Q. Now, did you handle those personally or did somebody else?

A. I handled them through my office.
Q. And what do you mean, your office?
A. Through my organization.
Q. You were head of the sales organization?
A. That's right.
Q. And do you remember what the deal was with Shotwell?

By Mr. Lockley: Let's have a foundation, as to time and place, please.
By Mr. Kirby:
Q. Do you know the time?
A. Well, it was sometime, as I recall, between the end of November and possibly the end of June of '46, the end of November, '45, and to June, '46.
4064 Q. And what was the deal?
By Mr. Lockley: Well, just a moment, please. Who was there, what was said?
By the Court: Yes.
By Mr. Kirby: Yes.
By Mr. Kirby:
Q. Who handled it, do you know; who made the arrangements?
A. Well, with respect to the purchase of the corn itself?
Q. No, that had to take place outside. Who made the arrangements between Shotwell and Corn Products for there to be a so-called corn deal?
A. Well, when this shortage of corn developed, my company sent out a general advice to the customers telling them that they might be able to procure for us and in return for that corn we gave them product—end product.
Q. What had happened to any quota system?
A. Well, we had established a quota prior to—the late—end of '45, based on 1941 sales to customers.
And that quota was set up because we didn't have
4065 ample corn to supply the demand that the customers—that was evident from the customers.
4066 Q. And were you able to maintain that quota when the corn shortage became acute?
A. No.
Q. What was it then?
A. Well, that varied, dependent on how much corn we had to grind.
Q. What was your source of corn to grind?

A. Mostly from that which customers procured for us.

Q. Now, to go to the Shotwell deal particularly, did you personally talk to anybody from Shotwell about their making corn available?

A. No.

Q. That was handled by somebody else in your department?

A. Yes.

Q. Now, Mr. Adam, would you describe how in your company any track at all was kept of a corn deal?

A. Well, when a customer—

By Mr. Lockley: I object, your Honor, unless there is some relationship to the Shotwell Manufacturing Company or unless he knows of the records himself. He has stated he didn't keep the records.

4067 By the Court: Let us first find out what he knows about the records.

By Mr. Kirby: I would like to show the pattern by which they kept track.

By the Court: Let us find out whether he had anything to do with the keeping of the records.

By Mr. Kirby:

Q. Do you know the system that was used to keep track of these corn deals?

A. I do.

Q. And did you have anything to do with it?

A. As I say, my office did, and I was in charge of that office.

Q. Fine and dandy. In a big organization, I don't expect you to do everything personally. Of course, it isn't up to me say that. I am not the president of the company. But, in any event, how was it done, Mr. Adam?

A. Well, when a customer advised either one of our salesmen or our branch office, whether it was in Chicago or any of our other branches, that they could make corn available, we were so advised in the sales depart-

4068 ment and we told the customer who might have corn available to contact their grain department in the Board of Trade and if they had corn available, the sale of that corn was negotiated through our grain department in the Board of Trade. The corn was purchased by our

It was then reported to me that the corn—when the corn grain bar at the then ceiling price.

arrived and had been purchased by our grain department, the grain department advised my office that the corn was then owned by my company and we set up a product credit for that corn. We kept those records until we completed our obligation on product, on end product.

Q. And after you had delivered the corn syrup, to which the corn had become entitled, the sales department didn't worry about that further?

A. We completed our obligation.

Q. Yes. Now, with respect to all of your customers, were they all treated the same way or were they especially singled out, one or the other?

By Mr. Lockley: In what way?

By Mr. Kirby: Well, with respect to—

By Mr. Lockley: I think it is too broad.

4069 By Mr. Kirby: With respect to furnishing corn syrup.

By the Witness: Our furnishing corn syrup?

By Mr. Kirby:

Q. Yes.

A. We endeavored at all times to confine the so-called corn deals to customers of record. We discouraged any negotiations or transactions with people with whom we had never before done business. I can't say definitely whether they were all customers of record but, by and large, we tried to confine those transactions to customers of record and obviously we treated everybody the same.

In other words, we didn't give anybody any more finished product for a car of corn than we did the other fellow.

Q. Did you give anybody a finished product in that critical period unless they did furnish the corn?

A. If they had a quota, yes.

Q. What had happened to the quota in the critical period?

A. It was dependent, as I say, on our corn supplies and we were obligated to give preference to those who supplied corn to us first.

4070 Q. Yes.

A. They got the preference. If there was anything left, we divided it equally, based upon customers of record in 1941 and on the quota that was established on the amount of corn that we still had available, or finished product.

Q. These customers then with whom these deals were made were your regular long-standing customers?

A. By and large, yes.

Q. In the fields that do require the use of corn syrup and starches?

A. I would say yes.

Q. And they included some of the biggest and finest companies in the United States?

A. I consider them such.

Q. And they were all treated in the same way?

A. Yes, sir.

Q. Including Shotwell?

A. Yes, sir.

By Mr. Kirby: Thank you.

4071 *Cross Examination by Mr. Lockley.*

Q. Mr. Adam, did the Corn Products Sales Company—I think that is your corporation, isn't it?

A. That is our selling corporation, yes, sir.

Q. That is a subsidiary of the Corn Products Refining Company?

A. That is right.

Q. Did the Corn Products Sales have a salesman, sort of a customers' man, who handled the Shotwell account?

A. Yes.

Q. One particular man who handled it all the time, is that correct?

A. Yes. Usually we assign our salesmen to customers and they confine themselves to the customers to whom they are assigned.

Q. Do you know who that was in 1945?

A. Yes.

Q. Who was it?

A. Arthur N. Anderson.

Q. Arthur Anderson. And how about in 1946?

A. Anderson, the same.

Q. Would anybody else have sold the Shotwell ac-
4072 count during that period of time?

A. I do not recall.

Q. Now you stated that when a customer arranged for the purchase of corn on one of these corn deals, he got a percentage of the grind or the end product, is that correct?

A. He got a certain number of pounds of end product for each car of corn that he obtained or procured for us, that is correct.

Q. As I understand it, it is 34 pounds to a bushel?
A. 56 pounds to a bushel.
Q. I am sorry. I mean 34 pounds of corn syrup is what you get out of a bushel, is that about right?
A. Well, that would vary a little bit. It is around that figure.
Q. And how much of that 34 pounds of corn syrup would go to the customer who helped find the corn?
A. May I put it another way?
Q. Yes, certainly.
A. It is generally acknowledged that a carload of 1500 bushels of corn will produce about 40,000 pounds of finished, refined product outside of the feed that is produced, which goes back to the farm.
4073 Now, based on tht availability of corn during that period, the amount of end product that we gave our customers varied. At times we gave 20,000 pounds of end product for a car of corn. At times we gave fifteen, as I recall, and when corn was in better supply, it went down to 10,000 pounds per car of corn of finished product.
Q. I am afraid you lost me somewhere on the figures. Will you start over again. How much does a car of corn weigh?
A. I said it weighed—I said a car of corn contained 1500 bushels.
Q. That is where you got me. And the 1500 bushels of corn—
A. That is right.
Q. It produced 4500—
By Mr. O'Brien: Forty thousand.
By the Witness:
A. It produced 40,000 pounds, approximately 40,000 pounds of finished product, refined product.
By Mr. Lockley:
Q. And did you get 40,000 pounds?
4074 A. 40,000 pounds.
Q. That is exclusive of the feed?
A. That is exclusive of the feed.
Q. That is 40,000 pounds that we have to distribute?
A. That is right.
Q. How much did you say—sometimes as low as 10,000 went to a customer?
A. For each car of corn.

Q. For each car of corn?

A. Sometimes fifteen; sometimes ten.

Q. Did it ever go as high as twenty?

A. I don't recall that it did.

Q. That means you had at times 30,000 pounds left over of the end product which was not allocated to the customer who found the corn?

A. That is true.

Q. What did you do with that?

A. We had an obligation to the consumers of this country. We also manufacture proprietary brands that are well known, Karo syrup, which is used for infant feeding. We had an obligation there to supply that demand. The consumer didn't supply corn for us to get the end product.

4075 We had packaged starches known as Argo brand, Linit, Mazola salad oils. We used part of that corn to keep our products in distribution in the retail channel so that the housewife could continue to buy.

Q. Well, did any part of the 30,000 or 20,000 balance get back into the wholesale market to such customers as Shotwell Manufacturing Company on your allocation basis?

A. Yes. I can't say definitely whether it did or how much, but I assume that it would, because they were customers of record in 1941 and were entitled to a percentage based on their purchases as of that period.

Q. So that accompanied with a quota, who also obtained your corn would benefit not only on the basis of the ten or twenty thousand pounds would also get a percentage of the balance of its regular quota, is that right?

A. That is right, if there was such amount available.

Q. Do you know—

By Mr. O'Brien: What was that? If there was such amount available?

4076 By the Witness: If there was such amount available.

By Mr. Lockley: If there was anything left over.

By Mr. O'Brien: Was there anything left over after you got through using it, is that what you meant?

By the Witness: After we had completed our obligations on corn buying on the amount of corn that the customer had provided.

By Mr. Lockley:

Q. Do you know what if anything The Shotwell Manufacturing Company did to effect the sale of corn to the

Corn Products Refining Company?

A. Will you ask that question again?

Q. Do you know what if anything The Shotwell Manufacturing Company did to arrange the sale of corn to the Corn Products Refining Company?

A. No.

Q. Do you know whether The Shotwell Manufacturing Company or any of its officers paid any money to any of the salesmen of Corn Products Refining Company for the purchase or the arrangement of the purchase of corn syrup?

4077 A. No.

Q. Do you know whether The Shotwell Manufacturing Company paid any money to anyone so as to arrange the purchase of corn by The Corn Products Refining Company?

A. No.

By Mr. Lockley: That's all. Thank you.

Redirect Examination by Mr. Kirby.

Q. Was your company able to buy corn outside the black market?

By Mr. Lockley: Well, if your Honor please—

By the Court: I don't think he bought—I don't think anyone contends that Corn Products bought corn on the black market. They contend they bought corn for the ceiling price.

By Mr. Kirby: I want to illustrate that it was impossible for Shotwell to get it any place except on the black market.

By the Court: Except as he has indicated, where they would buy it when the customer was able to procure corn, and then they would turn it over to a refiner in order

4078 to get a certain amount of the end product. Is that what you mean?

By Mr. Kirby: Yes.

By Mr. Kirby:

Q. Do you know where Shotwell went to get this corn?

A. No.

Q. You didn't have anything to do with that personally?

A. No.

Q. But you heard?

By Mr. Lockley: Well, if your Honor please—

By Mr. Kirby: I guess I shouldn't ask that question. I will withdraw it.

By the Court: We will be at recess until two o'clock.

By Mr. Kirby: That's all.

(Witness excused.)

By the Marshal: Will the audience remain standing until the Judge and the jury leave the court room.

This honorable court will recess until two o'clock this afternoon.

4079 (Whereupon an adjournment was taken in the above-entitled cause to 2:00 o'clock p. m. of the same day, being Wednesday, October 7, 1953.)

4080 • • (Caption—No. 52 CR 143) • •

Chicago, Illinois,
Wednesday, October 7, 1953,
2:00 o'clock, P. M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the jury:

By the Clerk: No. 52 CR 143, United States vs. The Shotwell Manufacturing Company, et al. Case on trial.

4081 ARTHUR HAUSMAN, a witness heretofore called herein on behalf of the Defendants, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination by Mr. Lockley.

Mr. Hausman, who was on direct examination this morning, is back on the stand for cross examination, but at the outset, your Honor, I wish to object to the admission in

evidence of the documents which have been offered by the defense, namely, Exhibits 37, 23, 66-B, C, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, V, X, Y; 27, 21-B, C, D and E.

I have no objection to Exhibit No. 36.

If I have overlooked any, I wish my objection to stand as to the balance of them, with the exception of Exhibit 36. And I object that there has been no proper foundation laid for the absence of the originals, that there has been no foundation laid that they were prepared in the ordinary course of business, or the circumstances under which
4082 they were prepared, that there has been no foundation laid as to their accuracy, or as to the accuracy of the books and records from which they were prepared, and that we don't know how many books and records may have been kept during the period of the partnership, that these books and records—or these particular work sheets were taken off by an employee of Mr. Roth, who was not the regular accountant of the Eatsum Food Products Company partnership, and that they were done at the behest of Mr. Giglio and not of Mr. Lubben.

By the Court: Well, I don't think there has been any showing made for the absence of the originals.

By Mr. Kirby: Well, the witness testified that he does not have the originals.

By the Court: That isn't sufficient foundation.

By Mr. Kirby: That he gave them to Roth. Now, your Honor will recall that these are partnership papers
4083 and we did discuss with your Honor the situation with respect to Mr. Roth and his papers. It is identically the same as the situation with respect to Mr. Giglio and his papers.

By the Court: Well, I don't know—Mr. Roth hasn't been called or hasn't explained the existence of the originals or any other disposition.

By Mr. Kirby: Well, if I may address myself to the question:

Redirect Examination by Mr. Kirby.

Q. At the time that you made these out, referring now to all of them, Mr. Hausman, you did them in the normal course of your auditing work?

By the Witness: May I see the documents that you have there, please?

(Documents handed to the witness.)

By the Court: In other words, Mr. Kirby, it doesn't appear that Mr. Giglio ever had possession of these papers, so they can't come within the scope of any stipulation.

By Mr. Kirby: That is true with respect to Giglio. But the situation with respect to Roth—

4084 By the Court: I don't know anything about that.

By Mr. Lockley: So far as we know, there has been no subpoena served on Roth. So we have no way of knowing how he would react to it.

By the Court: Well, go ahead.

4085 By Mr. Kirby: There is a question pending.

By the Witness: Are you ready for my answer?

By Mr. Kirby: Yes.

By the Witness:

A. Let me say this, in general I haven't examined these records specifically. I am going to just testify generally as to the records.

By Mr. Kirby: Well, the question is, did you make them in the course of your work as an auditor.

By the Witness: As an employe of Mr. Roth.

By Mr. Kirby: Yes. And as you wrote them down did they correctly transcribe, so far as you were informed, the transactions to which they relate?

By the Witness: As nearly as I can recall at this time, yes.

By Mr. Kirby: Yes. All right. I just wanted to make that bit of proof as to the regularity of them.

By Mr. O'Brien: I think, Judge, that it remains for us to make the connection with you indicated. The man is under subpoena. And in view of this we have to have 4086 him come in, that's all. But it takes the two together to justify the evidence.

By the Court: Sorry.

By Mr. O'Brien: It takes the two things together to justify the evidence and we have finished with this part of it.

By the Court: Well, we will return to that when you introduce further evidence.

I will sustain the objection at this time. Exhibit 36, however, may be received.

(Said document was received in evidence by the Court and marked Defendants' Exhibit 36.)

By Mr. O'Brien: And that is subject to our connecting it up.

By the Court: Yes, it is subject to a re-offer again in the event you have further foundation.

By Mr. O'Brien: Yes.

Cross Examination by Mr. Lockley.

Q. Now, Mr. Hausman, I call your attention to Defendants' Exhibit No. 36, which is a loans and exchanges account in the general ledger of the Eatsum partnership. Are 4087 you familiar with the entry on that ledger from the work papers which you previously have identified here?

A. I don't follow you, Mr. Lockley.

Q. Well, does your handwriting appear on that ledger sheet?

A. Yes, sir.

Q. And you did work on it?

A. Yes.

Q. Did you post any entries to that sheet from the books of original entry?

A. Yes, sir.

Q. And from the work papers which you prepared?

A. Well, I think that possibly the sequence would have been from the ledger to the work papers, rather than the other way around.

Q. I see. During the period of the Eatsum partnership, was it not the practice, accounting-wise, to charge the loans and exchanges account with checks which were issued to cash?

By Mr. Kirby: If the Court please, I want to object to that, because I asked this witness simply to identify his handwriting on that document. He did identify it. I did not question him at all with respect to how it was made 4088 up, or one thing or another.

Now, if the Government wants to call Mr. Hausman as their witness with respect to that, I have no objection. But it is completely beyond, if the Court will recall, what I asked this witness.

By the Court: Does it have any relation to the work papers which he has identified?

By Mr. Lockley: Not necessarily, your Honor, no. He can testify from that exhibit. And the exhibit is in evi-

dence. It was offered by the defendants themselves. All I am asking now is for him to explain—

By the Court: My query is whether or not your examination is within the scope of the direct.

By Mr. Lockley: It is within the scope of the direct examination in so far as it relates to the loans and exchanges account, which is one of the items of evidence which they have offered and which I have excepted from my objection.

By the Court: Did Mr. Hausman identify it this
4089 morning further?

By Mr. Lockley: He identified it as being partially in his handwriting.

By the Court: In so far as your query relates to that sheet, I think it is a proper question. I confess I am not too fully cognizant of just what all these exhibits indicate and it is a little difficult for me to know whether or not his question is within the direct.

4090 By Mr. Kirby: Well, my point is this, I asked this witness to identify the record and tell me what part of it he made up. And he made plain that he did not make it all up, but he made some part of it up.

Now, Mr. Lockley is inquiring as to the method, what the loans and exchanges is. He is going into the bookkeeping matters.

Now, if he wants Mr. Hausman as his witness for that purpose, that is completely agreeable. But he is beyond my scope on the direct. I did not use this witness for anything other than identification.

By the Court: Well, I rather think there is substance to Mr. Kirby's position.

By Mr. Lockley: Well, if your Honor please, he offered that particular item of evidence. And all I am trying to do now is have it explained.

Now, I don't know what possible purpose he can have in offering it, unless the person who has some knowl-
4091 edge concerning it is able to explain it.

Now, it may be that he intends to bring in an expert witness who will attempt to explain from his expert knowledge, in general, what this sort of an entry means. What I want to show through this witness is what those particular entries on that particular record means. And this is the best witness who can give us that information.

By the Court: Let's find out. Is Exhibit 36 the document that you are now inquiring about?

By Mr. Lockley: Yes, your Honor. And it is in evidence, offered by the defense and not objected to by me.

By the Court: And that sheet was partially identified by Mr. Hausman.

By Mr. Lockley: Yes, your Honor, bearing partially, or some of the notations he testified this morning are in his handwriting.

By Mr. O'Brien: Judge Nordbye, may I suggest that we have made a practice of offering exhibits, so iden-
4092 tified, so that there might be a cross examination on the foundation.

If we identify an exhibit and take it back to the table, as I sought to do, for the purpose of using it later, then your Honor has ruled that it may be used and we ought to put it in evidence so as to enable counsel to interrogate him about the foundation.

Now, that is why we did it. But as to the substance of what is in those documents, we have brought forward no proof. And it remains to do that with other people. And the testimony that Mr. Lockley wants would then be rebuttal or would be brought forward through Mr. Hausman directly.

By the Court: Well, I think, Mr. Lockley, your questions at least must be confined to the entries entered in there by Mr. Hausman.

4093 Q. Mr. Hausman, are any of the postings to the debit account in Exhibit No. 36 in your handwriting?

A. Yes, sir.

Q. Now from examination of those postings, can you tell us whether they reflect the issuance of checks to cash?

By Mr. Kirby: I object.

By the Court: He may answer.

By the Witness:

A. I can't tell from this record.

By Mr. Lockley:

Q. Do you have any recollection as to whether any of the postings contained on that account reflect checks to cash at the time you made them?

By Mr. McConnell: The books would be the best evidence of that.

By Mr. Lockley: He said he couldn't testify and we

don't have the books. Now, I am trying to search his recollection.

By the Court: He may answer.

By the Witness:

A. From my audit of these records and there was an audit made each month, the purpose of this particular account was to provide a means of clearing certain 4094 cash checks that were used for the purchase of merchandise.

By Mr. Lockley:

Q. That account is headed—

By Mr. Kirby: If the Court please, I object to that and ask that it be stricken. Now, you see, he seeks to go into matters in chief in rebuttal, perhaps through the use of the witness who was merely asked to identify certain documents. He is getting into questions about how they conducted their business generally, which, if he wants—

By the Court: He is inquiring about the sheet which the witness identified and which he partly made out.

By Mr. Kirby: Then he has got us in this position, Judge—

By the Court: I think it is a proper question.

By Mr. Kirby: Well, will you please bear with me a moment. The documents which, if we were to go forward to ask about the methods, are these which he has objected to. We can't read from them or do anything about it. 4095 Now, then, the history of it he is asking this gentleman. You see the situation we are in, Judge. He is going beyond the scope of the examination, as we see it, and I do ask that he be restricted.

By the Court: Well, I will overrule the objection. The answer may stand.

By Mr. Lockley:

Q. Now Mr. Hausman, according to that ledger sheet, there is a debit balance, is there not?

A. Yes, sir.

Q. What does that debit balance appear to reflect?

A. Are you referring to any specific date, Mr. Lockley?

Q. Let us just take the end balance as of the end of the accounting period shown on the sheet.

A. The last balance as of May 31, 1946—

By Mr. O'Brien: What sheet are we looking at now?
By the Court: Exhibit 36.
By Mr. Lockley: Exhibit 36.
By the Witness:

A. The last balance on May 31, 1946, indicates a 4096 debit balance of $113,750.17.

By Mr. Lockley:

Q. And a debit balance in a loans and exchanges account of that amount would normally mean that somebody owed the corporation or rather the partnership that much money, is that correct?

A. That is correct.

Q. Do you know whether that is the true situation, whether anybody owed the partnership that much money as shown on the loans and exchanges account?

By Mr. Kirby: I object to that question.
By the Court: He may answer.
By Mr. Kirby: Well, he is asking him—I should have made my objection a little plainer. He is asking him to go beyond that.

By the Court: Well, you partially identified the foundation for this exhibit through this witness. I don't think that I should limit the Government to just the very question you asked. The verity of the exhibit, its authenticity and what it purports to teach has been partially established by this witness, and I think counsel has a right
4097 to go into the various figures there as to what they mean through one who had the responsibility of making out the exhibit at the time it was made out.

By Mr. Kirby: The particular question I am objecting to is after the witness says this is what it normally means, now he is saying does it really mean something else and that is speculation.

By Mr. Lockley: Exactly, your Honor, and I am showing those records are not correct.

By the Court: That is a question for an accountant who should know from his familiarity with the sheet.

By Mr. Kirby: Did I understand that you want to show that the only book of the partnership that you have produced is incorrect?

By Mr. Lockley: I am not attempting to do anything of the sort. You have brought out this loans and exchanges acccount. I want to have it explained through this witness.

By the Court: Go ahead.

By the Witness:

A. I think we were at the point, Mr. Lockley,
4098 where you asked whether this—

By Mr. Lockley:

Q. Debit balance—

A. Let me have the question asked again.

By Mr. Lockley: Will you please read the question again.

(Question read.)

By the Witness:

A. This money, the $113,750.17 debit balance on the loans and exchanges account as of May 31, 1946, did not indicate that moneys were owing to the company by anyone but rather was a repository account and at the end of each month, it is my recollection that work sheet entries were made, accountants' work sheet entries were made distributing the balance at the end of each particular month and the cost of goods sold for purchases and possibly some other expenses that might have been paid in cash.

4099 By Mr. Lockley:

Q. In other words, that loans and exchanges account was merely temporary, it was merely a temporary clearing account, is that correct?

A. That is correct.

Q. And the checks that were charged to it were not actually loans, either made or received?

A. That is—

By Mr. Kirby: I object to that. You don't have the checks.

By the Court: He may answer.

By the Witness:

A. That is correct.

By Mr. Lockley:

Q. Do you know if the checks actually charged to that loans and exchanges account were used for either purchases or overages?

By Mr. Kirby: Now, I object to that.

By the Court: He may answer.

By Mr. O'Brien: I object to it also, your Honor. It is certainly beyond the scope of the direct and it is not proper evidence of the fact.

By the Court: It may have a bearing on the
4100 verity of the sheet which you introduced. I think it is proper.

By Mr. McConnell: I object to it as hearsay. He has no knowledge of what was done with these transactions and doesn't have any showing—

By the Court: If he doesn't have any knowledge, he should say so.

By Mr. McConnell: Well, I object.

By the Court: He was allocated—or rather, he was charged with the responsibility of making up all the subtotals for these partnerships. Go ahead.

By the Witness: May I have the question again, please?

By Mr. Lockley: Will you read the question back?

(Question read.)

By the Witness:

A. Yes. I do.

By the Court: I didn't hear you, Mr. Hausman.

By the Witness:

A. Yes, I do.

4101 By Mr. Lockley:

Q. All right.

By Mr. Kirby: May we impose on the Court to ask him what is the source of his knowledge? Is it hearsay? Please.

By the Court: Well, I suppose you may inquire further when you take the witness on redirect examination.

By Mr. Kirby: But I object to the question until a foundation for the witness's knowledge is laid.

By the Court: It may stand.

By Mr. Lockley:

Q. Mr. Hausman, will you explain your answer a little bit more fully? You said yes, but I don't quite understand what you meant.

A. Well, may I inquire of you, Mr. Lockley, whether it would be possible for me at this time to explain the background of some of this work so that you would have some idea of what the situation was?

Q. I certainly have no objection, Mr. Hausman. I don't know what the gentlemen at the other table will have to say about it.

By Mr. O'Brien: If he wants this witness to des-
4102 cribe the background and all of that, I suggest he make him his own witness.

By the Court: I think you better propound a question, Mr. Lockley. That will avoid any confusion.

By Mr. Lockley: All right.

By Mr. Lockley:

Q. Do you know at whose instructions the loans and exchange account was set up in this fashion?

A. Mr. Roth.

Q. And was Mr. Roth working for Mr. Lubben?

A. No.

Q. Or he was working for Mr. Giglio?

A. Well, there was—yes, in that—it's a very difficult question to answer because there was a peculiar relationship there. It was more than the mere fact that Mr. Roth was or wasn't working for Mr. Giglio. I would say he represented Mr. Giglio's interests, yes, but whether it was an employer-employee relationship that, I can't say.

Q. Well, do you know Mr. Bercu?

A. Yes.

Q. And he was the accountant who represented Mr. Lubben's interests, wasn't he?

4103 A. That is correct.

Q. Did he agree with the method of handling this loans and exchanges account as a clearing house?

A. Well, there were—

By Mr. McConnell: I object to this witness testifying as to what somebody else thought.

By the Court: It goes out of the scope of the direct. I will sustain the objection.

By Mr. Lockley: All right. That is all, Mr. Hausman.

Redirect Examination by Mr. McConnell.

Q. You said that one of these items had to do with overages and purchases. Did you see any transactions of that kind yourself?

A. Will you explain that a little bit further.

By Mr. Lockley: I object to the general nature of the question, your Honor.

By the Court: Well, the witness has asked him to explain it further.

By Mr. McConnell:

4104 Q. Are you testifying of your own knowledge or transactions of what you learned from the bookkeeping entries?

A. I still don't follow you.

Q. Well, are you testifying to anything other than just what you learned as bookkeeping entries?

A. Well, I am testifying as to the nature of the transactions that came to my attention from one source of documents or another. If you are asking me did I see Mr. Lubben or anyone else engage in transactions in cash, that I must answer no.

Q. You had no personal knowledge of that at all?

A. Of my own—

Q. Of your own knowledge?

A. No.

By Mr. McConnell: That is all.

By the Court: Anything further of this witness?

By Mr. Kirby: No.

Recross Examination by Mr. Lockley.

Q. You saw the bookkeeping evidence of those transactions, didn't you, Mr. Hausman?

4105 A. Yes, sir.

By Mr. O'Brien: That is objected to.

By Mr. Lockley:

Q. You saw bills of lading?

By Mr. O'Brien: That is objected to.

By Mr. Lockley: Why is it you object to it?

By the Court: I will overrule the objection.

By Mr. O'Brien: There is no showing of lack of documents on the matter, if your Honor please.

By the Court: I take it an accountant has a right to resort to the information he gets from books and records explaining certain documents. He merely purports to explain what he learned as an accountant and not from any other standpoint.

4106 By Mr. O'Brien: Even so, he should support it with the books and records he is talking about or with some competent substantive evidence for them and not his recollection.

By the Court: I will overrule the objection.

By Mr. McConnell: I will take a further point, that Mr. Lockley's question called for the contents of books and records. The best evidence would be the books and records.

By the Court: Is there any further examination of this witness?

By Mr. Lockley: No further examination, your Honor.

By the Court: That's all, Mr. Hausman, then.

By the Witness: Thank you.

(Witness excused.)

EARL J. PRATT was called as a witness on behalf of the Government, and having been first duly sworn, was examined and testified as follows:

4107 *Direct Examination by Mr. Kirby:*

Q. What is your name?

A. Earl J. Pratt, P-r-a-t-t-.

By the Court: You have a bigger voice than that, I am sure.

By Mr. Kirby:

Q. Where do you live, Mr. Pratt?

A. Bellwood, Illinois.

Q. What is your business?

A. I am a broker at the Chicago Board of Trade.

By Mr. Lockley: Mr. Pratt, you are going to have to speak louder than that. I can't hear you.

By the Witness: I am a broker at the Chicago Board of Trade.

By Mr. Kirby:

Q. How long have you been a broker?

A. Twenty years or more.

Q. Now during the war years, what did you do?

A. I was commodity price specialist for the Office of Price Administration in the Chicago Regional Office.

Q. You were with the OPA?

A. Right.

4108 Q. What commodity—in what commodity were you OPA specialist?

A. All grades, feeds and agricultural chemicals.

Q. For what territory?

A. Seven states, Illinois, Iowa, Wisconsin, Minnesota,

North and South Dakota, and Nebraska.

Q. Where were your offices?

A. Chicago, Illinois.

Q. Was corn one of the products involved?

A. Yes.

Q. Were you the chief specialist for the OPA on corn in this area?

A. Right.

Q. There were price controls, were there?

A. Yes.

Q. What do you know about the corn market in 1944, 1945, and 1946? What opportunity did you have to learn?

A. Well, my job was to find out what was going on in all these various commodities and report violations as they occurred and where they occurred to Washington and to the enforcement section for action.

4109 We had fifteen branch offices in the states and each one of the states had a counterpart of myself whose job was to go in his area and acquire information and I did a lot on my own. I traveled all around those places and visited the markets where grain was handled to find out what was going on.

Q. Did the fifteen—who did they report to?

A. Me.

Q. And you in turn reported to—

A. To Washington.

Q. So that the Government's machinery with respect to corn, that was in your hands in this territory?

A. Yes.

Q. And such information as came, it came through your hands?

A. That is right.

Q. Now will you describe the corn market in 1945 and 1946, Mr. Pratt?

A. Well, shortly after the corn was harvested in the fall of 1945, the loose corn disappeared from the market almost immediately and people interested in buying corn at any price, went out into the country and purchased it wherever they could, and there were—there was

4110 not only one interest, there were several varied interests out trying to acquire corn, the truckers buying it for feeders in deficit areas, corn processors, feed manufacturers.

By Mr. Lockley: I object, your Honor, to any recitation of hearsay on the part of this witness unless he has some particular personal knowledge of those transactions.

By the Court: Well, I assume, he is testifying from his personal knowledge.

By the Witness: Yes.

By Mr. Kirby:

Q. Go ahead with your description, Mr. Pratt.

By the Witness:

A. And as the season wore on and the country elevators were loaded with corn, it wouldn't keep too long, they sold that in the earlier days, back in late 1945, at small premiums over the future—over the ceiling price, but as the next year came on and that corn disappeared, the fellows that were lucky enough that had driers and had dry corn, they really held them up and charged all the way up—well, the corn sold during that period from five to forty or fifty cents over.

4111 Q. Did the OPA, during 1946, hold fast its price on corn?

A. I can't answer that offhand because there was a price increase either in 1945 or 1946.

Q. Do you recall in 1946 being advised by your Washington office about a corn purchase program that the Government was going to embark on?

A. Yes.

Q. Tell us about that.

By Mr. Lockley: Well, I object, your Honor. I fail to see what relevancy it has to any issues in the case.

By the Court: Yes. The objection is sustained.

By Mr. Kirby: Will you mark this Defendants' Exhibit 74 for identification.

(Said document was marked Defendants' Exhibit 74 for identification.)

By Mr. Kirby:

Q. I hand you a document marked Defendants' Exhibit 74 and ask you to please read it, not out loud, but just to yourself, and look at it.

Have you read it?

A. Yes, sir.

4112 Q. Now let me inquire whether there was a time in April of 1946 when you learned of a Government corn purchase program where the price was in excess

of the OPA ceiling. Did you learn of that?

A. Yes.

By Mr. Lockley: Well, if your Honor please, I have another objection to the relevancy of the inquiry.

By the Court: Yes. I will sustain the objection.

By Mr. Lockley: And also to Mr. Kirby's testimony.

By Mr. Kirby: I want to make an offer of a certified copy from the archives of the United States of a directive of the Office of Economic Stabilization with respect to that program. It is certified by the—

By the Court: A certified copy of what?

By Mr. Kirby: Oh, excuse me, Judge. It is a certified copy from the archives of the United States of a directive.

By Mr. Lockley: I have no objection to the foundation.

4113 By Mr. Kirby: Under the statute, it is a sufficient certification.

By the Court: Any manipulations of the Government in the corn market, if there were any, is wholly immaterial to this lawsuit.

By Mr. Lockley: I have no objection to the foundation of the document, your Honor, but I do object to its materiality.

By Mr. Kirby: Let the Judge read what it is the Government did.

(Handing document to the Court.)

By the Court: Well, I will sustain the objection.

By Mr. Kirby: Judge, let me point out that there is a price mentioned. Now, one of the elements in this case is what it was costing to get corn and that is material on that issue.

By the Court: Well, when that evidence comes, why, I will consider the re-offer, if you want to connect that re-offer with it.

By Mr. Kirby: But this was the man who was the head of the Government's—

By the Court: There is no objection to the foundation.

4114 By Mr. Kirby:

Q. Did the OPA, Mr. Pratt, as such, have anything to do with corn purchases on behalf of the Government?

A. No.

By Mr. Lockley: I object, your Honor, on the ground it is immaterial.

By the Court: Well, I think it is wholly immaterial.

4115 By Mr. Kirby:

Q. Well, on or about April of 1946, will you describe the market and the dealings in corn as you learned them personally in your work for the government?

A. Well, that was the time when corn really began to get scarce.

By Mr. Lockley: Well, if your Honor please, I object again on the ground that what the government did has no relevancy.

By the Court: If you are asking what the government did, I will sustain the objection. If you want to have Mr. Pratt amplify as to what he stated as to the shortage of corn—I allowed that to come in because it may have some bearing as to whether or not it is reasonable that over-ceiling prices may have been paid by a candy manufacturer, but that is the only materiality of it, and what the government did or whether the government by reason of certain emergencies took it upon itself to pay more than the ceiling price, is wholly

4116 immaterial in this lawsuit.

By Mr. Kirby: Well, in the law of supply and demand, if they take it away, it makes it worse.

By the Court: Well, we are going into all these ramifications of the corn market and if we do that, we will be trying too many collateral issues. I have given you a broad field to show that there was a shortage of corn in 1944, 1945 and 1946, that the refineries couldn't get the corn through the ordinary channels and that many concerns that needed the corn syrup would get a hold of corn in some way and take it to the refineries.

Now, we are not going to broaden the field and go into the purchases made by the government or whether the government by reason of certain emergencies paid over the ceiling price for corn.

By Mr. Kirby: Well, I don't want to broaden the field too far. If your Honor would open the door far enough to let me prove specifically what they did have—

4117 By the Court: I don't think I am going to open the door any more that I have.

By Mr. Kirby: In a tax case, if you will indulge me for just a second, the intent as to why people might handle these, if they did wilfully intend to defraud the government of income tax, they wouldn't make—

By the Court: Let us not get into an argument about it. I will sustain the objection and that is what I am going to do.

By Mr. Kirby:

Q. Having in mind, Mr. Pratt, I am not asking you what the government did in April, 1946, but I now want you to tell me what was the market like in 1946, April of 1946?

A. It was a market in which people who wanted supplies went out and paid over the ceiling price at any price that they could get.

Q. And did you report that to Washington?

A. Yes.

By Mr. Kirby: That is all.

By Mr. Kirby:

4118 Q. Oh, by the way, the OPA went off June 30, 1946?

A. Correct.

By Mr. Kirby: All right. Thank you.

Cross Examination by Mr. Lockley.

Q. Mr. Pratt, do you know whether the Shotwell Manufacturing Company paid over-ceiling prices for the purchase of corn?

A. No, I do not.

By Mr. Lockley: Your Honor, I move to strike his testimony on the ground it is immaterial and irrelevant and beyond the scope of the issues of this lawsuit.

By the Court: It is admitted for the purposes I have already indicated.

Cross Examination by Mr. O'Brien.

Q. Mr. Pratt, you spoke of 40 or 50 cents over the ceiling on the raw corn. Is that per bushel?

A. Per bushel.

Q. How many bushels in a car, if you know?

4119 By Mr. Lockley: Is this redirect examination, Mr. O'Brien?

By Mr. O'Brien: Who said it is redirect examination?

By Mr. Lockley: I just wondered how many cracks you got at him, your own witness.

By Mr. O'Brien: He is not my witness.

By Mr. Lockley: He certainly is your witness. He is not the government's witness.

By Mr. O'Brien: If you have any misapprehension as to my right to cross examine any witness that I don't put on, you might as well get rid of it.

By the Court: Hasn't that point been brought out by other witnesses?

By Mr. O'Brien: Sir?

By the Court: Hasn't that point been brought out by other witnesses?

By Mr. O'Brien: If so, I don't agree with what they said.

By Mr. O'Brien:

Q. How many bushels in a car?

A. Approximately 2,000.

By Mr. O'Brien: That is all.

By Mr. Lockley: No questions.

By the Court: That is all.

(Witness excused.)

4120 ROBERT J. ALGER, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. Robert J. Alger.

Q. And what is your address, Mr. Alger?

A. 834 Gardiner Road, Flossmoor, Illinois.

Q. And for whom do you work?

A. Corn Products Refining Company.

Q. How long have you worked for them?

A. Over a period of 15 years, including service in the armed forces.

Q. What do you do for them?

A. I am manager of the Chicago accounting department.

Q. Were you there in '45 and '46?

A. I returned from the service in March of '46.

Q. Are the records of '45 and '46 presently under your control?

A. That's right.

Q. And did we subpoena your company to pro-
4121 duce records with respect to some corn deals with Shotwell?

A. That's right.

Q. Now, were any kind of records of any type kept of corn deals by your company?

A. Well, the only records that we have are contracts with various commission houses which indicate names of companies that the corn was supplied through their influence.

Q. And what did those records look like?

A. I have them here in my possession. They are memoranda contracts with commission houses which stipulate the number of cars or bushels contracted for, price and delivery date, and in pencil are indicated on these particular contracts the name of Shotwell Candy Company.

Q. Do you know whether those records are complete for '45 and 46?

A. To the best of my knowledge, they are.

Q. And did you bring as many of them as you could find with Shotwell's name on them?

A. I have all of them that have Shotwell's name on them.

Q. Yes. Now, would you let me see those, please?

4122 (Documents handed to counsel.)

By Mr. Kirby: Now, mark these sheets in the 75 series, will you?

(Said documents were marked Defendants' Exhibits 75-A through 75-Z, inclusive, and 75-AA for identification.)

By Mr. Kirby: Instead of taking the time to number each one, I will refer to them as exhibits in the 75 series and I will ask the witness when he is referring to one of them to give the date on it and that will be enough indication, I am sure, for everybody.

By Mr. Kirby:

Q. Now, I hand you a document which is marked Defendants' Exhibit 75-A, and which bears the date of January 28, 1946, and is that one of the documents you are talking about?

A. That is correct.

Q. And from what department was the information secured to put Shotwell's name on that?

A. That was, to the best of my knowledge, either supplied by the sales department or our grain pur-
4123 chasing department. My records do not clearly indicate where this information came from.

Q. But it is on there in pencil, on these different sheets, is that right?

A. That's right.

Q. Were there some letters of authorization in connection with corn deals sent by the sales department to the grain department?

A. I have letters in my possession here, from the sales department to our department, which is the accounting department, listing contracts, number of cars, the commission house which the purchase was to be through, and to whom credit should be given as supplying it.

Q. Those relate to corn deals?

A. They relate to, to me, a notification that these contracts were supplied, that grain was supplied through the efforts of these particular people. Now, by corn deals, I do not know what you mean.

Q. Well, by corn deal I mean a deal where one of your customers make corn available to you and you, in exchange, make syrup available to them.

Now, is that what these documents purport to be tied into?

A. Yes.

4124 Q. Now, do you have any of such types of letters that relate to Shotwell?

A. I do.

By Mr. Kirby: May I have those?

(Documents handed to counsel.)

By Mr. Kirby: Will you mark these in the 76 series.

(Said documents were marked Defendants' Exhibits 76-A to 76-H, inclusive, for identification.)

By Mr. Kirby:

Q. Now, I show you this document which is marked 76-A and ask if that is the advice of customers making corn available to your company?

A. That's right.

Q. And what is the date of 76-A?

A. This particular letter is dated January 29, 1946.

Q. Now, 75-A is dated what date?

A. January 28, 1946.

Q. Is there any connection between the two?

A. The letter shows a purchase of five cars through Daniel F. Rice & Company. And this particular memorandum contract I have here is one of the five cars sup-
4125 plied through Daniel F. Rice & Company.

Q. 76-A, that tells you that you are going to get some corn through Shotwell's efforts, is that right?

A. That's correct.

Q. And then does 75-A represent a corn purchase by your company on which you have written Shotwell's name in pencil?

A. That is correct.

Q. Now, Mr. Alger, would that relation follow throughout between the letters in the 76 series and the corn purchase memos in the 75 series?

A. It does, to a certain extent. They don't absolutely match. Our record is not too accurate and they are hard to tie in. But, generally speaking, they do.

Q. Is it also true that your records for the corn purchases are not complete, that there is some missing material?

By Mr. Lockley: I object to Kirby's testimony, and the leading nature of the questions.

By the Court: Perhaps you better change the form
4126 of your question.

By Mr. Lockley: The witness has already testified that they were complete.

By Mr. Kirby:

Q. What about the completeness of your records on these corn deals?

A. Are you referring to the letters?

Q. Well, do you have anything else?

A. Well, the letters are not all numerically numbered, so it is not possible for me to say whether they are all there or not. To the best of my knowledge, they are there. I have no accurate check on them.

Q. When was the earliest of the corn purchase letters?

A. I would have to examine the files in order to answer that question. I do not have that information with me.

Q. It was some time in '45, wasn't it?

A. It was during that period.

By Mr. Kirby: I will offer in evidence all of these documents in the 75 series, being respectively 75-A through 75-Z, and 75-AA. Some of them, your Honor, have
4127 a number of sheets within them, but I offer all of those.

By Mr. Lockley: No objection, your Honor, to the exhibits in the 75 series.

4128 By the Court: They may be received.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 75-A through 75-Z and 75-AA.)

By Mr. Kirby: I will now offer Exhibits 76-A through 76-H, inclusive. And each one of them has quite a large number of pages attached.

(Documents handed to counsel.)

By Mr. Lockley: If your Honor please, I object to Exhibits 76-A to 76-H because they relate to a great many other transactions.

By the Court: They relate to what?

By Mr. Lockley: A great many other companies, and names, and transactions are apparently contained on them. I have no objection to the portion of each exhibit which relates only to the Shotwell Manufacturing Company, if a transcript of that could be taken off. I would have no objection to just that material being submitted, and the individual letters which relate to the Shotwell Manu-
4129 facturing Company.

By the Court: Well, are there letters that relate to other companies?

By Mr. Lockley: Yes, sir.

By the Court: I don't think that is a competent record on those.

By Mr. Lockley: On this there is only one that relates to Shotwell.

By Mr. Kirby: Let me make it plain, I didn't make that record. And it has got on one page Shotwell and a lot of others. I don't know how else to offer it.

By the Court: Well, let me see.

By Mr. Lockley: You could take the other letters off.

By Mr. Kirby: But this gentleman, they are his records. I don't know what to do. With one fellow you say—

In answer to his specific objection, your Honor, that is the form in which they were kept and therefore I think they are competent in that form.

By Mr. Lockley: I object to all portions of them that have any relation to anything but the Shotwell Manu-
4130 facturing Company. If the outside portions of the so-called company letter can be blocked off in some manner so that just the Shotwell Manufacturing Company entry appears thereon, that is satisfactory. Or if counsel wishes to have just a transcript made of those entries relating to the Shotwell Manufacturing Company—

By the Court: I think that could be done. A transcript can be made of the transactions which relate to Shotwell and that will eliminate reference to any other transactions which are not of any concern here.

By Mr. Kirby: Well, I don't seek to prove anything with respect to the other people, Judge, but this is the form in which they came. I could do this, your Honor—

By the Court: Well, it is just immaterial. The other transactions are immaterial. That is all.

By Mr. Kirby: But this is the original record.
4131 By the Court: Be that as it may, you may have original records that are not competent in this lawsuit, because they contain transactions that are irrelevant. And it is not an insurmountable job or task to make a transcript of the transactions that relate to Shotwell.

By the Kirby: Well, I offer them in the form in which the witness gave them to me, your Honor.

By the Court: Well, as to that, I will sustain the objection, with the right, of course, to—

By Mr. Kirby: I now offer, without prolonging the matter further, these letters with the names of everybody else blocked out, except Shotwell, which I will have to undertake to do by a photostating process. Would that be agreeable?

By the Court: Well, I am sure that any way of merely copying the transactions, without photostating, will be acceptable, if you think that is too burdensome.
4132 By Mr. Lockley: If your Honor please, I don't require him to photostat them. If he just wants to make another page and copy each individual line, giving the

appropriate information on it, that would be satisfactory to me, a summary.

By Mr. Kirby: Would the Court look at the specific language that is up there? That actually is part of the exhibit itself.

By the Court: Well, I think you have a right to have all of that—company letter, Chicago, dated—letter No. 50, Elmer Buss, "Our customers were issued a memorandum obtaining corn for us as follows:"

You simply eliminate those with which we are not concerned. We are only concerned with the Shotwell Company. And you have it signed by—or a facsimile or a photostat of the signature.

Here you have a letter that goes to a Mr. Schmidt. It hasn't anything to do with Shotwell. Here is another
4133 letter, Illinois Grain Company. Here is a letter from a man by the name of Adam. That is probably for you—not for you.

By Mr. Kirby: Adam was the sales manager.

By the Court: Boulevard Candy Company, John Hill Company. Obviously we are not concerned with those transactions.

By Mr. Kirby: Well, then, your Honor, there are attached in the later documents—wait till I ask the witness.

By the Court: All right.

By Mr. Kirby:

Q. These later documents, Mr. Alger, that follow the 76-A series, those represent receiving reports, as to when the grain was received?

A. Well, as I recall, without reading them, they are notifications to our sales department of the fulfillment of these contracts, which they were instrumental in obtaining for us. And they definitely state, contract number, and company involved. In this case, Shotwell Manufacturing Company.

Q. Now, you look through that 76-A there and see if any of those attachments relate to Shotwell, will
4134 you?

A. There is one here for three cars, contract 303 and 306, Daniel F. Rice.

Here is another letter for two cars, and contract No. 307, Daniel F. Rice, which I believe completes this. It does. Five cars.

By Mr. Kirby: So that there is more than just the one line in that document that does relate to Shotwell.

By the Court: That may be. I didn't mean to intimate that that was the only relevant portion of your exhibit. Anything that refers to Shotwell, whether it is a letter, or a listing, or any other record that indicates deals with Shotwell should be received.

By Mr. Lockley: I have no objection to the letters which are attached to this exhibit, in so far as they relate to Shotwell. My sole objection is to the letters which relate to other people and which are immaterial.

4135 By Mr. Kirby: I don't think they are immaterial. They show the nature of the transactions. They show the nature of the market. They show who is in it.

By Mr. Lockley: It's what somebody else did.

By Mr. Kirby: On the question of whether it was with malicious intent to violate the tax law.

By the Court: Nobody's intent is arrived at with reference to the corn purchases. I didn't understand that that question is at issue. The question of these corn purchases is the only thing we are interested in. Were they made? At least that is the first step.

By Mr. Kirby: Well, Mr. Alger—I shouldn't put that burden on you. We will attempt to sort these out.

And, as I understand it, your Honor, I should take the entire caption and the ending, leave everybody else's name off but ours, and then patch the things at the end—everybody else, leave them out, and just put ours on—and

4136 if I do that, should I re-offer them or does it go in without further discussion?

By Mr. Lockley: I would like to examine them. But I am sure if you do that I will have no objection.

By Mr. Kirby: All right.

By Mr. Kirby:

Q. Looking at this 76-A, who was Mr. Elmer Buss?

A. He was at the time in charge of our grain section.

Q. In what office?

A. Chicago.

Q. And then there is a Marion Normile, who is identified as secretary to Mr. Adam. Who is Mr. Adam?

A. Mr. Adam is the sales manager.

Q. The man who testified here earlier today?

A. That's correct.

Q. Then I notice that the copies of these letters in the 76 series are to be sent to Mr. E. W. Schmidt in New York. Who was that?

A. He is another sales man. What his connection is with those, I do not know.

4137 Q. He was vice president of the company in its New York office, wasn't he?

A. That's correct.

Q. In charge of sales?

A. That's right.

Q. Do you know whether the company, in Mr. Schmidt's office in New York, did maintain a file with respect to these corn transactions?

A. I do not know.

Q. Do you know whether they maintained a set of books with respect to the corn transactions?

A. In New York?

Q. Yes.

A. I do not know that, either.

Q. So you don't know anything about whether those records any longer exist?

A. That's right.

4138 By Mr. Lockley: What records, Mr. Kirby? There has been no testimony that there have been any records.

By Mr. Kirby: They had some in New York that had been destroyed.

By Mr. Lockley: There has been no testimony of any records in New York that were destroyed.

By the Court: He doesn't know anything about them.

By Mr. Kirby:

Q. We subpoenaed you for all the records you have?

A. That's right.

Q. And have you shown them to me?

A. With one exception.

Q. What is that?

A. A transcript of our accounts receivable ledger for the years of 1943 through 1947, inclusive, which was supplied to me by our New York office. I believe you have those—a copy of it in your possession now, though, however.

Q. Do they give the quantities of corn products sold to Shotwell in those years?

A. They didn't give the quantity of products. They

4139 gave the amount of money involved for each invoice.

Q. Could we tell from the documents what the poundage for the product was?

A. You could not.

By Mr. Kirby: Well, then, I don't think it is too material.

What we will do, your Honor, is to give a summary of the corn products purchases as shown by the Shotwell books in the case of each of these companies. We couldn't get that from the material he has.

By Mr. Kirby:

Q. Have you told me about all the other records that the company does have?

A. That's correct.

By Mr. Kirby: Thank you very much, Mr. Alger.

By Mr. O'Brien: If the Court please, relating to these exhibits 76-A, B, et cetera, which contain all of the names, which under the Court's ruling are to be excluded, other than Shotwell's, although I am aware of the Court's
4140 ruling, I wish to make an offer of record.

By the Court: I think he has.

By Mr. O'Brien: I mean on behalf of my client.

By the Court: Well, I assume when Mr. Kirby is the only counsel who examines the witness that you gentlemen have agreed that he should examine him for all of you.

By Mr. O'Brien: True. But in this forum I wish to state to the Court my position, that I regard these names as material, not on the question of intent, but on the question of the necessity for dealing in this way.

That is, when it is Shotwell alone, there might well be in the mind of the jury on the issue of—is there a tax or isn't there a tax?—a question as to whether there was need for such expenditures or such deals, or a question as to the degree of necessity.

4141 By Mr. Lockley: May I suggest, your Honor, that any further offer of proof or argument of this nature be conducted out of the presence of the jury.

By Mr. O'Brien: I have no more, except to say that in that view of it I regard it as material that we be permitted to show the scope of those transactions, as it would appear through these exhibits.

By the Court: I will adhere to the same ruling.

Cross Examination by Mr. Lockley.

Q. Mr. Alger, do you have any personal knowledge of any arrangements made by the Shotwell Manufacturing Company for the purchase of corn for the Corn Products Refining Company?

A. I do not.

Q. Only what you have indicated in these records which you have brought forward, is that so?

A. That's correct.

Q. You weren't there even until—when was it?

A. March of '46.

4142 Q. March of 1946. Do you know whether the Shotwell Manufacturing Company, or any of the officials connected with it, paid any premiums over and above the invoice price?

A. I do not know.

By the Court: Well, he says he doesn't know anything about that, Mr. Lockley. He just identified certain records, because they are under his control. That is the scope of his examination.

By Mr. Lockley:

Q. I think you said that the contracts—those are informal contracts, are they; what did you call them?

A. This particular piece of paper we have submitted here is our accounting record, which is a copy of the contract submitted to the seller, and we merely list on here our payments to that seller and see that the contract is fully complied with.

Q. And that was every contract that you know of in which the Shotwell Manufacturing Company was in any way involved during the years 1945 and '46?

A. That's correct.

Q. And you state that that is a complete list of
4143 all of the contracts in your office. Well, I mean relating to the Shotwell Manufacturing Company for 1945 and 1946.

A. That's correct.

By Mr. Lockley: That is all.

By the Court: That is all.

(Witness excused.)

By the Court: We will take our afternoon recess at this time.

By the Marshal: Will the audience please remain standing while the Judge and the jury leave the court room.

This Honorable Court will recess for ten minutes.

By Mr. Kirby: Mr. Reporter, will you reserve Exhibit No. 77 for the summary?

(Defendants' Exhibit No. 77 reserved as requested.)

(Recess taken.)

JOHN B. DUNLAP, a witness called herein on behalf of the Defendants' having been first duly sworn, was examined and testified as follows:

4144 *Direct Examination by Mr. O'Brien.*

Q. What is your name?
A. John B. Dunlap.
Q. And where do you reside, Mr. Dunlap?
A. Dallas, Texas.
By the Court: I am sorry. Where?
By the Witness: Dallas, Texas.
By Mr. O'Brien:
Q. You were formerly Commissioner of Internal Revenue, were you not?
A. Yes, sir.
Q. Of the United States of America?
A. Yes, sir.
By Mr. O'Brien: If the Court please, I am putting Mr. Dunlap on rather abruptly, without some prior or preceding evidence that I intended to adduce, because of his engagements and because of my mis-timing the precise hour at which he would be needed. I think it better to do that and let him get away. But it comes apropos of nothing at this moment and is on a different subject.
4145 By Mr. O'Brien:
Q. Would you state briefly for the jury, Mr. Dunlap, your experience in the Treasury Department?
A. From the beginning?
Q. Well, you state it as you will.
A. I entered the Internal Revenue service in 1933 as a deputy collector, served as Chief of the Field Division, Assistant Collector, Collector of Internal Revenue, for the north half of Texas, Internal Revenue Agent in Charge for the State of Texas, was in charge of the establishment of the nationwide racket drive and then became Commissioner of Internal Revenue.
Q. Was that about 1951?
A. August 1, 1951; yes, sir.
Q. Now, during your experience in the Treasury Department, Mr. Dunlap, did you become and are you familiar with the policy of the Treasury in respect of disclosure?
A. Yes, sir.

Q. Can you tell the jury your best recollection as to when that policy first had its existence within the Treasury?

A. My first knowledge of it, of course, came after I went to work for the government, but my research
4146 on the subject revealed that it really came into effect in about 1919. And it was slowly developed over the years until it became rather concrete and intensified right after the war.

And that policy remained in effect—we called it the voluntary disclosure policy— until we abandoned it in January of '52.

Q. From 1919 down to 1947, or so, was that policy in any way promulgated or published to the public?

A. I don't know that it was. It was understood, and whether it was actually in writing I just don't know, sir. There had been many discussions on the subject, I know, but whether it was in writing I just don't recollect.

Q. But within the Treasury Department itself, that is, intra-Treasury and bureaus, it was known?

A. Yes. Oh, yes.

Q. And is it true that publicity was given to that policy somewhere, as you say, after the war?

A. I believe that widespread knowledge of it began in about 1945. I believe that is the year that the Treasury and its people began to publicize and hold out the voluntary disclosure policy pretty widely.

Q. In 1952 the policy was abandoned as to future
4147 matters, as I understand you. I don't think you said as to future matters, Mr. Dunlap, but you did say that it was abandoned in '52?

A. Yes, the—

By Mr. Lockley: I object, your Honor. As I understand it, Mr. Dunlap was the Commissioner of Internal Revenue—

Were you Commissioner of Internal Revenue at that time, Mr. Dunlap?

By the Witness: I was.

By Mr. Lockley: All right. Sorry, sir.

By the Witness:

A. We promulgated that decision, as I remember, about January 10th of '52.

4148 It was not retroactive. It was prospective of course.

By Mr. O'Brien:

Q. And by prospective, you mean, I take it, that it did

not—that it would no longer apply to future matters?

A. Yes. In other words, any cases that had already come in out of the old policy, we would handle under the old policy and any cases that came in from then on—

In other words, it was to be no voluntary disclosure policy on new cases after that.

Q. Can you state briefly of your own knowledge the reason for the abandonment of the policy?

By Mr. Lockley: I object, your Honor. I think that is immaterial.

By the Court: Yes. I will sustain the objection.

By Mr. O'Brien:

Q. Will you tell us, Mr. Dunlap, what the disclosure policy was?

By Mr. Lockley: I object to that, your Honor, on the ground that what the voluntary disclosure policy was has no relevance to the issues of this lawsuit. It is imma-
4149 terial. What the defendants may have done with respect to voluntary disclosures is one thing but what the voluntary disclosure policy was in the minds of the government officials who were at that time enforcing it or administering it is entirely something else.

Furthermore, I believe Mr. Dunlap is incompetent to testify to that because he was not the Commissioner of Internal Revenue until 1951 and the policy which would have applied in this case was the policy that was applicable at such time as an attempted voluntary disclosure, if any, was made.

By Mr. O'Brien: Mr. Lockley, just taking the last part—

By the Court: I think if you have any documents which you want to offer, it is for the Court to determine what the voluntary disclosure policy was so far as it may be relevant in this lawsuit. I don't know that it is within the scope of expert testimony or kindred testimony, I should say.

4150 By Mr. O'Brien: Now, Judge, I have three or four objections interposed and maybe I should address myself to them separately.

First, it makes no difference legally that the witness was not Commissioner throughout the entire period because there is nothing in the—

By the Court: Let me make myself clear.

By Mr. O'Brien: Yes.

By the Court: If the so-called voluntary disclosure policy in the lawsuit—if the so-called voluntary disclosure policy is in the lawsuit, it is in here only on the question of intent. We are not going to determine in this lawsuit now whether or not there was a voluntary disclosure. I have already made that effective.

4151 By Mr. O'Brien: I think that I understand what the Court is saying, but nevertheless, I submit that on the issue of intent in order that that factor of the evidence have intelligent consideration, it will be necessary that the jury know first, what the policy was and second, how it was defined and construed, and third, how it was administered, because, except for that background, well, it is not possible for anyone, either Court or jury, to give intelligent consideration to that.

By the Court: It can be assumed sufficiently practical to submit the question to me, or documents, and I know of no other way it can be handled except by such regulations or promulgations or statements that may have been made from time to time in Congress or elsewhere that the policy can be set forth or determined, rather.

By Mr. O'Brien: Well, I will approach it in that way, for a moment.

Will you mark this book Defendants' Exhibit 78 for identification.

4152 (Said document was marked Defendants' Exhibit 78 for identification.)

By the Court: Have you a No. 77?

By Mr. Kirby: Your Honor, I asked the reporter to save 77 for my summary, for the rejected No. 76.

By the Court: Oh, all right.

By Mr. O'Brien:

Q. Mr. Dunlap, I show you Defendants' Exhibit 78 for identification and call your attention to the Wenchel statement commencing on page 144 and will ask you to state if you are familiar with the contents of that speech. I first ask you that.

A. Yes, sir.

Q. Was that made at about the date that is indicated at the head of the article?

A. According to my memory, yes, sir.

Q. You are otherwise familiar with Mr. Wenchel's statement as made at that time, are you not?

A. Yes, sir.

Q. Does that copy of Mr. Wenchel's address have to do with the disclosure policy?

A. Yes, sir.

Q. Was there ever a time, to your knowledge, Mr.
4153 Dunlap, that the Treasury Department—oh, withdraw that.

Now, I call your attention also to the mimeograph starting at the top of page 142 of Defendants' Exhibit 78 for identification signed by Mr. Halvering, Commissioner, and approved June 27, 1934, by Mr. Morgenthau, the Secretary of the Treasury, and ask you to state if that mimeograph also has to do with the disclosure policy to which you have referred.

A. It does, yes, sir.

Q. Now, is that the policy as embodied in that mimeograph which was in effect within the Treasury from 1934 and down until the time when the publicity was given, to which you have referred?

A. Yes, sir.

Q. Can you state of your own knowledge as to whether the mimeograph itself as shown at page 142 was ever published or made public in this form?

A. May I see it again, sir?

Q. Yes, sir.

A. Not to the public; just to the Bureau of employees.

4154 Q. Except for the mimeograph, so called, so labeled, year of 1934, was there, to your knowledge, any definitive statement of the disclosure policy within the Treasury of evidenced by any written document?

A. To my knowledge, the only thing that I personally ever had as a field officer in charge—and mind you, I am speaking only of the years from 1940 up until 1945 because I was in the army during that period and I naturally don't know what happened—the only thing else I have seen published was Mr. Wenchel's talk to which you referred a minute ago.

That was published and distributed to all Internal Revenue employees to whom it was of interest and of course, was released in public.

Q. Would you mind telling the jury who Mr. Wenchel was?

A. Mr. Wenchel was the general counsel for the Treasury Department of the United States.

Q. And his speech, the article which I first showed you—

A. Just a second. I am thinking back. I am wrong. I believe Mr. Wenchel was chief counsel for the
4155 Bureau of Internal Revenue at the time.

Q. Yes, sir.

A. I got mixed up.

Q. And Mr. Wenchel's statement was made before an annual dinner of the Tax Executives Institute at the Waldorf Astoria Hotel in New York, was it not?

A. I understand it was.

Q. I mean, it was a speech by which some publicity to the policy was given, is that correct?

A. Yes, sir.

Q. But Mr. Wenchel's statement was not a document within the Treasury itself, was it?

A. No, sir. It was a speech to a group of business men.

Q. I therefore repeat, Mr. Dunlap, my question as to whether to your knowledge there was within the Treasury itself any formal document on the subject other than this mimeograph of Mr. Halvering's which I show you at page 142?

A. There could well have been and I not have been familiar with them because—

Q. If there was anything additional, did you know about it?

4156 A. I didn't know about it because you see, before the reorganization, there were three segments of the Bureau and some received one set of instructions that others did not receive.

Q. Now during your experience, have you had occasion to observe or have there come to your attention cases which involved the voluntary disclosure policy?

A. Yes, sir.

Q. Was there, during the year 1948, any definitive article or mimeograph as to the terms on which a disclosure might be made other than this item at page 142?

By Mr. Lockley: Well, your Honor, I object on the

ground that it calls for a conclusion and opinion of this witness.

By the Court: Well, if he knows, he may state.

By the Witness:

A. I recall no explicit instructions in regard to it.

By Mr. O'Brien:

Q. Did the Treasury, to your knowledge, make any attempt to define in writing and to publicize the
4157 factors which it would take into consideration in deciding whether or not a voluntary disclosure had been made?

A. It made several efforts. We never came out with a publication.

Q. Aside from the fact that you did not come out with a publication, did the Treasury ever succeed in reaching such a definitive item or set of procedures?

A. My own personal knowledge of it only comes from the committee upon which I sat while I was agent in charge and worked on that question and a set of rules was drawn up and submitted to all of us for approval, but we couldn't get together and it never was published.

Q. What experience did you have, if any, Mr. Dunlap, as to the differences of administration of the policy in different parts of the country? By that I mean, was—

By the Court: I will sustain the objection.

By Mr. Lockley: Object.

By Mr. O'Brien:

Q. In that situation, Mr. Dunlap, was the policy,
4158 to your knowledge, administered according to the discretion and views of the particular agent or officer in charge?

By Mr. Lockley: I object, your Honor. It is immaterial.

By the Court: As I have indicated, we are not going to try that issue out in this lawsuit. It is not on a material matter.

By Mr. O'Brien: Let me say I thoroughly agree with your ruling on it. I don't even intend to try it out in this lawsuit.

By the Court: Well, the way it may have been interpreted by various officials who had the authority is a matter that can have no bearing upon the limited issue that that phase of this lawsuit will encompass.

By Mr. O'Brien: I think even for a reason which I can state, I think that within your Honor's ruling there is an area of materiality because I shall have shown what was done on the issue which you mention.

By the Court: Well, I will sustain the objection.

By Mr. O'Brien: Well, then, Judge, I think for 4159 the record. I shall make an offer of proof.

By the Court: Yes, very good.

By Mr. O'Brien: Would you mind, Mr. Dunlap, just stepping aside to the chair down there, the next chair there?

By the Court: Yes.

(Whereupon the following proceedings were had and taken in open court before the bench, beyond the hearing of the jury:)

By Mr. O'Brien: I offer to prove, if the Court please, through this witness—let me say it this way—I make the following offer of proof through this witness: That if he were asked on the stand to state whether there was any definite and absolute set of rules as to what constituted a disclosure, he would say there was none, as he has to some degree already; that if asked, he would say that in that situation, and for lack of the codified rule, each region of the country, in the actual administration of that policy, made up his own rules, not officially, but 4160 according to the policy and motion of the man charged with the administration.

If he was further asked on the stand whether any of such rules, administrative rules so devised for practical purposes, were ever communicated to the public, his answer would be that they were not, and that the public was unaware of any of the conditions which were given weight in the Bureau beyond those which appear in the items by which the policy was publicized, such as the Wenchel speech:

That any other or further conditions were not publicized to or known by the public.

By the Court: You contend that has some bearing on the question of intent on the part of Mr. Cain and the other defendants?

By Mr. O'Brien: I will tell you. To make it a little clearer with one more statement, while the subject matter

is proper under the issue of intent, I think there is a further purpose and it is this, and I should make this part of my offer of proof:

4161 If this witness were asked whether during his experience in the Treasury when matters were recommended for prosecution and where there had been a disclosure, whether it is not true that the Department of Justice would, as a matter of practice, refuse to prosecute those cases on the ground that the facts of disclosure in addition to manifesting an intent, also raised an issue as to the good faith of the Government, which the jury is entitled to inquire into and on any system in the Department of Justice of determining or screening cases on the basis of cases on which they could prevail or cases on which they couldn't prevail—that the matter of disclosure, from that standpoint had a very important bearing. So much for the offer of proof. The reason behind that is it was felt at all times by the Department of Justice when it did have a screening policy that the fact of disclosure and the Government's repudiation of the disclosure, where the taxpayer had met the published conditions is a factor to be taken into consideration by

4162 the jury.

Now, I am rambling a little at that point on the more substantive point—

By the Court: Is this all your offer of proof, or are you arguing? It is hard for me to tell.

By Mr. O'Brien: I said back there that that was the end of the offer, Judge, and I was arguing this.

By Mr. Lockley: If your Honor please, in the first place, Mr. Dunlap is incompetent to testify as to any policies which the Department of Justice may have had. He was in the Bureau of Internal Revenue. He doesn't know what policies may have existed in the Department of Justice. He would be required to have the Attorney General testify to that. There was a screening process in the Department of Justice as to tax cases. There was never any voluntary disclosure policy in the Department of Justice. The case which went from the Treasury Department to the Department of Justice was assumed to have failed to comply with the Treasury's

4163 voluntary disclosure policy or they would never have sent it over, so that that portion, at least, of Mr.

O'Brien's statement is, I think, in error.

By the Court: Well, I am not clear. When I asked you as to whether or not you were contending when you made the offer it has some bearing on the question of intent, Mr. Cain's intent, then you digressed and talked about the good faith of the Government. We haven't that issue in this lawsuit, have we?

By Mr. O'Brien: Well, I think with the jury you have. I think so.

By the Court: I don't know.

By Mr. O'Brien: Here is the point I am making—

By the Court: Well, the first offer of proof, you had in mind to—

By Mr. O'Brien: I won't argue that one with you, Judge.

By the Court: You had in mind to have the witness disclose that there was no established policy throughout the country with reference to what constituted a
4164 disclosure and each division sort of decided for themselves as to whether or not that particular case came with the purview of the policy as they understood it, is that right.

4165 By Mr. O'Brien: By means of conditions which would not contain—

By the Court: How is that?

By Mr. O'Brien: By means of conditions, by the method of adding conditions which were not contained in the public policy.

By the Court: How does that have any bearing on Mr. Cain's intent when he made his disclosure? We are now concerned with intent in so far as it is an element to evade the United States tax laws. I don't know. I haven't given the matter a great deal of thought, I confess.

Now, I assume that any reference to Mr. Cain's disclosure going into the department would be material only in so far as it might bear on his good faith and his intent to not evade any taxes but merely by reason of a fear to disclose his records, if he failed to make a tax return in that it was inaccurate in that he didn't disclose all premiums and all payments he made for raw materials and he contended he did not owe any taxes—
4166 he came to the government and said "I don't owe any taxes". If he said, "Whatever the situation is, I

want to make a disclosure on the situation," that may have a bearing on intent. Isn't that about all?

By Mr. O'Brien: Unfortunately, Judge, you can see we have been on this corn subject, the refineries and all and I rather thought that tomorrow we would get into this material and I haven't had the time to think about that either.

By the Court: I haven't either, but Mr. Dunlap has been put on now.

By Mr. O'Brien: Oh, yes. I have to do that. I suppose I have this only question, as to whether there were any—

By the Court: The amount of the policy or any policy that was uniformly followed throughout the United States?

By Mr. O'Brien: Yes.

By the Court: Go ahead on that.

By Mr. O'Brien: All right.

(Whereupon the following proceedings were had in open court in the presence and hearing of the jury:)

4167 By the Court: All right. Now, Mr. Dunlap, you may take the stand again, if you will, please.

Well, members of the jury, you understand that when counsel comes up to the bench, that we have some rather close questions of law and questions of evidence and they arise rather suddenly and I have to hear counsel and while I dislike to interrupt the trial, it is quite necessary at times to hear counsel privately in regard to those matters.

Go ahead.

By Mr. O'Brien: What was the question, Miss Reporter?

By the Court: Why don't you reframe it. She would have to go back too far.

By Mr. O'Brien: She has it.

(Question read.)

By Mr. Lockley: Your Honor, I think I objected to the form of the question. It doesn't come within the scope of your Honor's ruling before the bench.

By Mr. O'Brien: I recognize it may not.

4168 By the Court: Frame another question, if you will.

By Mr. O'Brien: I will.

By the Court: I sustain the objection to that one, so the record will be clear.

By Mr. O'Brien: My offer of proof stands as to that one, but I will ask just this remaining question.

By Mr. O'Brien:

Q. Was the disclosure policy, to your knowledge, Mr. Dunlap, administered uniformly, that is in a uniform fashion throughout the country by the different agents or agencies?

A. No, I don't think so.

Q. You may state whether you mean that on the same state of facts there might be in the absence of these definitive provisions and codifications, there might be one ruling in one section and a different ruling in another.

A. May I put it this way? There are no two cases that arise under the Internal Revenue laws that are exactly similar or have been. There are no two agents or special agents in charge of collectors that ever saw eye to eye on anything and as a net result, the inter-
4169 pretations placed on the so-called policy by certain people in certain areas varied from that placed on it,—and if I may say—the modus operandi of accepting the voluntary disclosure in other areas. That was very thoroughly dicussed in this committee I was talking about. We were trying to draw up the ground rules.

Q. There was no manual of codification of absolute instructions as to how they should proceed?

A. That is exactly the thing we never could agree on, we could never draw up.

By Mr. O'Brien: That is all the questions I have.

By Mr. Lockley: Are you going to ask him any questions, Mr. Kirby?

By Mr. Kirby: No.

By Mr. Lockley: No cross examination, your Honor.

By the Court: I believe that is all.

By Mr. O'Brien: Thank you very much, Mr. Dunlap.

By the Witness: May I say that I am glad to have met you, Judge.

By the Court: All right. Thank you.

(Witness excused.)

4170 BERT ROCK, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McConnell.

Q. Will you state your name, please?
A. Bert Rock.
Q. Where do you live, Mr. Rock?
A. 4121 42nd Street, Long Island City.
Q. What is your occupation or business?
A. At the present moment?
Q. Yes.
A. I am working for a steel importer on a broker's basis.

By Mr. Lockley: Will you speak up, Mr. Rock?

By the Witness:

A. Steel importer, brokers.

By Mr. McConnell:

Q. What was your business in 1945?
A. I was working for a whiskey outfit at the time and I also had a food brokerage business.

4171 By the Court: I am sorry, Mr. Rock. You dropped your voice. You had a whiskey—

By the Witness: No. I was working for a whiskey company.

By the Court: For a whiskey company and a food brokerage?

By the Witness: That is right, sir.

By Mr. McConnell:

Q. What was the nature of the food brokerage business that you referred to?
A. Well, purchasing rations, almonds, fondant coating, anything in the food business.
Q. Did you know of a company known as the Eatsum Food Products Company, a co-partnership?
A. Yes, sir.

I know of the Eatsum Food Products Company, or corporation, or whatever it was.

Q. Well, did you have some transactions with the Eatsum Food Products Company in July of 1945?
A. I did, sir.
Q. Well, will you tell the Court and jury what those transactions were.

A. The Eatsum people called me in—

By Mr. Lockley: Just a minute, please.

4172 I object, your Honor, unless we get names, dates, places and events.

By Mr. McConnell:

Q. All right. Who called you in, where was it, who was there, tell us what was said as near as you can remember.

A. Mr. Giglio, Mr. Loperfido and I don't remember offhand—I mean, there was two or three other ones there and they called me in and they told me—

Q. Did you know a Mr. David Lubben that was connected with that company?

A. Yes, sir.

Q. All right. Now tell us what was said.

A. They told me—

By the Court: Are we sure who was there now?

By Mr. McConnell: Well, he said—he identified Mr. Gigio and Mr. Loperfido and two or three others.

By Mr. McConnell:

Q. Now, do you know who the two or three others were?

A. Offhand, I can't remember but there were two or three others. I think that Mr. Lubben was there.

4173 I really don't remember, sir.

Q. All right. Now tell us what was said and who said it, if you can remember.

A. Well, he told me that they were going into—

Q. Who told you?

A. Well, in the group. Individually, I don't remember who told me, but it come up in the conversation that they were going to purchase some corn, to produce and manufacture syrup or get corn syrup. At that time corn syrup was a scarcity and a commodity which we could sell so he told me that he would have to have moneys for it and that if they would give me—if I give them an invoice, they would give me—they would give me a check and I would secure the cash and retain it for the purpose of securing the corn to make the syrup with.

Q. I show you a document which has been marked for identification Defendants' Exhibit 66-Y and ask you—

By the Court: 66 what?

By Mr. O'Brien: It looks like Y, your Honor.

By Mr. McConnell: That is the way it reads to
4174 me.

By Mr. McConnell:

Q. Which refers to certain invoices and I ask you to examine that document and will you state whether or not you sent those invoices or sent invoices to the Eatsum Food Products Company?

By Mr. Lockley: Well, if your Honor please, I would like to know whether the witness has ever seen this document before, whether he prepared it, whether it means anything to him, whether it would refresh his recollection if he did see it.

By the Court: I think counsel has a right to show him the document.

By Mr. Lockley: Well, he isn't laying a foundation then as to whether or not this document means anything to the witness.

By Mr. McConnell: How can I lay a foundation without showing him the document?

By the Court: Frame your question again, please.

By Mr. McConnell: Let us forget the document. Put it down, will you, please, counsel. I am afraid it might
4175 get away from us.

By Mr. McConnell:

Q. Did you send any invoices to Eatsum Food Products after you had that conversation?

A. Yes, sir, I did.

Q. How many invoices did you send, do you remember?

A. I think about two but I also sold them merchandise at the same time.

Q. Well, now, these invoices that you speak of, do they cover any actual goods or the delivery of any actual goods to Eatsum Food Products Company?

A. I don't think so.

Q. Well, you know so, don't you?

By Mr. Lockley: Well, now, which invoices are you speaking of?

By Mr. McConnell: The two invoices he said.

By Mr. Lockley: Are those the two invoices you are referring to?

By Mr. McConnell: Yes, that I am referring to.

By the Witness: Yes, but in the interim, I also sold them some material for which they paid.

4176 By Mr. McConnell:

Q. I am not talking about the materials you sold

them and got paid for. I am talking about two invoices which you sent them which covered no goods. Do you remember that transaction?

A. Yes.

Q. For those two invoices which covered no goods, did you receive any money?

A. The moneys that was taken off was for the charge—

Q. Did you receive any money, first?

A. That was the charge for cashing the checks at a check cashier's so I did not receive any funds for it.

Q. Well, you received some checks, didn't you?

A. Yes, sir.

Q. And you cashed the checks?

A. Yes, sir.

Q. Who did you give the money to?

A. I brought it up—I think Mr. Loperfido would come to see me or I would give it to him.

Q. Now let us see if we have this transaction now. You sent the two invoices which covered no goods for which you received checks which purported to cover
4177 the payment for those invoices, is that right?

A. Yes, sir.

4178 Q. You went with those checks to the bank and had them cashed?

A. Well, I wasn't to the bank, sir; to the check casher's.

Q. All right. To the check cashier. But you had them cashed?

A. That is right.

Q. But you didn't keep the money but turned it back to Mr. Frank Loperfido of the Eatsum Food Products Company, is that right?

A. That is right, sir.

Q. Did you get a commission for that?

A. If the two per cent I used for cashing the check could be called a commission, that is what I got.

Q. You got two per cent for cashing the check?

A. Which was the cost of cashing the check at the check casher's.

Q. And that transaction was about when?

A. I think in July of 1945.

4179 Q. And how much was the transaction in dollars?

A. Well, I think one was for $17,000.00 and one was for $8,000.00, something like that. I don't remember the different amounts.

Q. Was the one for $17,300.00 and the other for $5,445.00?

A. It might be possible, sir.

Q. Do you remember what those invoices were supposed to cover, what kind of goods?

A. I don't remember, sir.

By Mr. McConnell: You may cross examine.

Cross Examination by Mr. Lockley.

Q. Mr. Rock, you stated that you also sold some merchandise to the Eatsum Food Products Company?

A. Yes, sir.

Q. Did you give them an invoice, a bill for that merchandise?

A. I am quite sure I did, sir.

Q. And were you paid by cash or by check?

A. I don't recall. I think it was by check, sir.

Q. By check. All right. Now, you stated that you took these two checks which you referred to to the check
4180 cashing agency, and paid them a two per cent commission to cash the check, and then you returned the money to Mr. Loperfido, is that right?

A. That's right.

Q. How long had you known Mr. Loperfido ?

A. Not too long, but I did know Mr. Giglio since 1933.

Q. You have known Mr. Giglio since 1933?

A. Yes, sir.

Q. Did you meet Mr. Loperfido through Mr. Giglio?

A. I did, sir.

Q. And was that in connection with the Eatsum Food Products or had you met him prior to that time?

A. No, I think in connection with the Eatsum Food Products.

Q. And did you know Mr. Frank Livorsi?

A. No, sir.

Q. Did you meet him through Mr. Giglio?

A. (No response.)

Q. You didn't know he was connected with Eatsum Food Products?

A. I don't think so.

4181 By Mr. McConnell: I don't think the court reporter is getting those shakes of the head.

By Mr. Lockley:

Q. Well, when did you meet Mr. Lubben?

A. Prior to—well, you see, it is very, very strange, but I don't know what was going on. The partnership—prior to the partnership I met him, probably a month or two before that.

Q. A month or two before this transaction in July, 1945?

A. Yes, sir.

Q. That is the first time you had met him?

A. It might be two or three months before that. I just can't recollect the exact month or day.

Q. So it was Mr. Giglio who was your friend in the Eatsum Food Products Company?

A. Yes, sir.

Q. And do you recall whether it was Mr. Giglio who suggested to you that you give him invoices without the delivery of any materials and he would give you checks in exchange for those which could be cashed?

4182 A. The reason for that, sir, is because they asked —they told me they would give me corn syrup when it comes through.

Q. And did you get the corn syrup?

A. Well, not as much as I did want. I mean, not in sufficient quantities.

Q. Who told you that they would give you corn syrup?

A. At the time they called me in, that was Mr. Giglio, Mr. Loperfido and Mr. Lubben, the group that was there,

Q. Whoever else was present?

A. That's right.

Q. Did you get corn syrup?

A. I did.

Q. And were those two checks advances in any way?

A. No, sir.

Q. Now, where did you have a bank account, Mr. Rock, in 1946—1945? I beg your pardon.

A. On Seventh Avenue and 32nd Street. I think it was the Corn Exchange Bank.

Q. The Corn Exchange Bank. Now, you said there was one check in the amount of approximately $5,445.00, on a little prompting by Mr. McConnell, that might have been one of the checks involved.

4183 A. I don't remember that, sir. I remember there was one—well, the first check was for approximately $17,000.00.

Q. I show you a check for $5,445.00, dated July 9, 1945, and ask you if that was deposited in the account of the Her-Bert Company?

A. Yes, sir.

4184 Q. Then that cannot have been the check which you referred to?

A. I wouldn't know, sir, as I haven't got the invoices in front of me.

Q. You stated the check that you referred to was cashed at a check cashing agency?

A. No, sir; I deposited the checks in my account, then drew checks, cashed them at an agency, or some at the bank, and presented them the money in return.

Q. You left that step out before.

A. I am sorry if I did.

Q. He gave you the check which you deposited in your own personal account?

A. The company account.

Q. Then you drew a check on your account?

A. That's correct.

Q. You took it to the check cashing agency and got money for it?

A. Yes, that's right.

Q. You gave them two per cent commission?

A. Whatever the charges were.

Q. Is that the standard charge, if you know?

A. I think it was around two per cent. I don't recollect right now, sir.

4185 Q. Then you came back and you gave the cash money to Loperfido?

A. That's correct, sir.

Q. In both instances did you give it to Loperfido?

A. To the best of my recollection, yes.

By Mr. Lockley: Well, that is all.

Mr. McConnell: I have one more question.

Redirect Examination by Mr. McConnell.

Q. What was the name of your company, Mr. Rock?

A. The Her-Bert Company.

Q. You had a company bank account, did you not?

A. Yes, sir.

Q. You paid these checks out of the company bank account, didn't you?

A. Yes, sir.

Q. Now, you did have business transactions with Eatsum Food Products before the partnership, didn't you?

By Mr. Lockley: If you please, Mr. McConnell, you have a witness on direct examination, not cross examination, and I object to the leading nature of the ques-
4186 tions.

By Mr. McConnell: I beg your pardon. He is on redirect.

By Mr. Lockley: It makes no difference. You are still not permitted to lead.

By Mr. McConnell: It comes after your cross examination.

By Mr. Lockley: If your Honor please, I ask you to instruct Mr. McConnell to cease leading the witness.

By the Court: He may answer the question.

By the Witness: Repeat that question, please.

By Mr. McConnell: Read the question.

(Question read.)

By the Witness:

A. I think I did, sir, but I can't recollect.

By Mr. McConnell: All right. That is all.

By Mr. Lockley: That is all, Mr. Rock, thank you.

(Wtiness excused.)

By the Court: Well, it is about adjournment time.
4187 We will be in recess until 10:00 o'clock.

By Mr. Lockley: If your Honor please, may I make a motion to strike Mr. Rock's testimony while it is still fresh in my mind. It has no relevance to the issues in this case. It is immaterial.

By Mr. McConnell: It goes to the impeachment of the books and records.

By the Court: I am not in a position to say.

By Mr. Lockley: It doesn't impeach Lubben's books and records.

By Mr. McConnell: He was a partner at the time.

By the Court: We will take our recess until tomorrow morning at 10:00 o'clock.

By the Marshal: Will the audience please remain standing while the Judge as well as the jury leave the court room.

This Honorable Court will recess until 10:00 o'clock tomorrow morning.

By the Court: May I see Mr. O'Brien and Mr. Lockley just a minute.

(Whereupon an adjournment was taken until Thursday, October 8, 1953, at the hour of 10:00 o'clock A.M.)

4188

• • (Caption—No. 52 CR 143) • •

Before Nordbye, J. and J.
Chicago, Illinois,
Thursday, October 8, 1953,
9:30 o'clock A. M.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in chambers, outside the presence and hearing of the jury:

By Mr. O'Brien: Judge, I have some odds and ends, if you don't keep up with them they get lost in the case.

It occurred to me that the record would more plainly
4189 show the items we were talking about on the admission and exclusion of the disclosure hearing testimony if I had Roy Fuller make up a transcript, which is relatively small, which comprehends all of the pages that both sides mentioned, and he has done that.

By the Court: This isn't for the record.

(Discussion off the record.)

By Mr. O'Brien: For the record, I would offer as Defendants' Exhibit C, if I can describe it, Judge, the pages 143 to 226, inclusive, of the transcript of the disclosure hearing of November 12, 1952, not generally, or for the use of the jury, but collaterally, to make more clear of record the transcript that we were speaking of, or the parts that we were speaking of at the time that the government moved to read into evidence certain portions of that transcript and at the time that I asked that other portions also be read.

Now, this was prepared by Mr. Fuller. There are other copies of it, but I have only one in my bag. It may go in subject to verification by counsel.

By Mr. Lockley: I understand that there were some

pages of the transcript on which you had perhaps
4190 only one question and answer that you wanted read to the jury.

Is the complete page in that transcript?

By Mr. O'Brien: Yes, the complete page is here. They are all here, just bodily from the other transcript.

By Mr. Lockley: So it would be necessary to refer to the original record to determine which one of the questions you had reference to.

By Mr. O'Brien: No, it wouldn't. No, you can tell right here. This is complete in itself. It comprehends everything you talked about.

By Mr. Lockley: I understand that, but it also comprehends some additional questions and answers which you did not ask be read to the jury, doesn't it?

By Mr. O'Brien: Yes, so as to bracket everything that either one of us requested be read to the jury.

By the Court: Wouldn't it be more practical for you, or the Reporter to make up a transcript of that which the government offered and that which you offered, so you would have it in a form of that kind and could use it without referring to any other transcript?

By Mr. O'Brien: No, we don't have to refer to
4191 any other transcript.

By the Court: Yes, because you are including portions in that exhibit that you didn't offer.

By Mr. O'Brien: Well, that is true of Mr. Lockley's too. It skips around.

By the Court: It isn't Mr. Lockley's exhibit. You are offering the exhibit. I merely made the observation, wouldn't it be more feasible to make up an exhibit including that which Mr. Lockley offered and then the exact portions of the transcript that you offered, so there you would have it, in the event you made up a record, in concrete form and without reference to any other exhibit or transcript. It seems to me that would serve the purpose better than the plan you have now followed.

By Mr. O'Brien: Well, it would be, Judge. It is just a matter of work at a time when we have so much to do.

4192 By the Court: I don't care. I haven't any particular views on it. I just made that observation.

By Mr. O'Brien: The pages are the same as in the other record, as you know. This would satisfy me. If

your Honor wants me to do that, I will put someone on it.

By the Court: No, I haven't any suggestion in the matter. If you want to offer it in that form, why, very well.

By Mr. O'Brien: I think I will do that.

By the Court: All right.

By Mr. O'Brien: I have more than I can do.

By Mr. Lockley: I have no objection. It is just that I wanted to make it clear that there is more material in Exhibit C than you originally offered. I presume that the additional material merely tends to show the relevancy of the particular questions and answers that you had in mind.

By Mr. O'Brien: Well, it is true only because this is physically lifted from the other record and is much more restricted in size than that entire record would be.

By the Court: Am I correct in understanding that
4193 the Government takes the same position with reference to the relevancy of the portions offered by Mr. O'Brien as to which I sustained your objection?

By Mr. Lockley: Yes, your Honor.

By Mr. O'Brien: On why I am offering it only after the event, Judge, not to gain anything new from it, but only to make the record clear.

By the Court: I see. All right.

(Said document was received in evidence by the Court, as aforesaid, and marked Defendants' Exhibit C.)

By Mr. Lockley: If your Honor please, we have only a moment further and I would like to take up the matter of the subpoena duces tecum.

By Mr. O'Brien: Can I ask the Judge this short thing first, Mr. Lockley?

By Mr. Lockley: All right.

By Mr. O'Brien: On the Cunningham affidavit, Judge, have you reached any determination?

By the Court: I am going to sustain the objection.

By Mr. O'Brien: The objection to its admission
4194 is sustained?

By the Court: I am quite clear that the memorandum that you submitted to me does not substantiate your position. You must bear in mind that Mr. Cunningham made this affidavit for the purpose of obtaining a continuance and he merely attempted to set forth the tes-

timony to be given by Mr. Lubben, as he understood it, and at a time when he stated in open court that he had never even talked to Mr. Lubben.

Mr. Cunningham's only purpose in presenting this affidavit to the Court was to indicate the importance of Mr. Lubben as a witness and in no way was it presented to the Court as a binding statement of what Mr. Lubben was going to testify to.

The Court granted the continuance on this affidavit, it is true, but the continuance was granted because it was made to appear that Lubben was an indispensable witness.

4195 Even though it later develops that there may be some inaccuracies in Mr. Cunningham's statement, my view is that it would be just as if some motion—or even in an opening statement by counsel, if he stated that a doctor, for instance, was going to diagnose a case, as he understood it, as one involving a portion of the upper spine and it later developed that the doctor said, "No, it isn't in the upper spine at all, it is in the lower spine."

Well, it seems to me inconceivable that the opening statement in that way could constitute a binding admission and foreclose the doctor from stating the true facts. After all, if Mr. Cunningham was in error, and the true statement is given here by Mr. Lubben, who was the witness who was sworn in this case, the Court should strike out any other testimony that is contrary to the position taken by Mr. Cunningham.

I will deny the motion.

By Mr. O'Brien: I didn't submit the affidavit, Judge, in support of any motion. I offered the affidavit in evidence, and I believe, for the record, that what the Court has said about it goes only to its weight.

4196 By the Court: Well, no, in the presentation to me, by your memorandum, you are seeking to strike the testimony of Heitmann.

By Mr. O'Brien: I am sorry. Mr. Wattling must have prepared that. I did have a motion to strike his testimony, but I also introduced the affidavit in evidence, on the record, and that is what I am interested in.

By the Court: Well, my view is that it is not competent for any purpose.

By Mr. O'Brien: You see, I had it marked as an exhibit, Judge.

By the Court: Yes.

By Mr. O'Brien: That's Defendants' Exhibit 53 that we are talking about.

By Mr. Lockley: Would your Honor prefer to hear us later on the matter of the subpoena?

By the Court: I don't like to keep the jury waiting. I think it is rather unfair.

By Mr. O'Brien: I have, Mr. Lockley, a motion on the subpoena. I didn't want to interrupt when we got in yesterday. That is a motion to quash the subpoena.

By the Court: Have you considered the matter with a view to determine whether you have any support for your position that Mr. O'Brien is subject to a sub-
4197 poena?

By Mr. Lockley: Well, your Honor, the position that I would take in the matter is that the material which is in Mr. O'Brien's hand is in no way privileged. They are not documents belonging to the defendants, nor made up by the defendants, nor made up by the defendants' accountants. Even were they made up by the defendants' accountants, there is some question as to whether or not they would have any privilege.

But in this event they are actually documents prepared by third parties who have no interest in this case, except perhaps as witnesses.

By the Court: I ask that because I confess I haven't any views at this time whether your position is sound or not and I would like to have some support for your position.

By Mr. Lockley: All right, sir.

By the Court: I don't know that I have ever had a situation where a defendants' counsel in a criminal case has been served with a subpoena to produce documents. It is an entirely new matter to me.

By Mr. O'Brien: I may say, Mr. Lockley, that I have never seen it. I doubt if Mr. Calihan has ever seen it.

And I know that Wigmore says that there just isn't
4198 any such animal. He says that process cannot be so used.

By the Court: I wish you would spend a little time on it so I may be advised.

By Mr. Lockley: All right, sir.

4199 (And thereupon the following proceedings were had and taken in open court, in the presence and hearing of the jury:)

Nos. 420 [illegible]

[illegible]

[illegible]

[

In the
United States Court of Appeals
For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11108 *vs.*

THE SHOTWELL MANUFACTURING COMPANY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11109 *vs.*

BYRON A. CAIN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11110 *vs.*

FRANK J. HUEBNER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11111 *vs.*

HAROLD E. SULLIVAN,
Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

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By the Clerk: No. 52-CR-143, United States vs. Shotwell Manufacturing Company, et al. Case on trial.

HOWARD ROESER, a witness called herein on behalf of the Defendants, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination by Mr. O'Brien.

Q. Mr. Roeser, you testified before?
By the Court: He has been on the stand before.
By the Witness: Yes, sir, I have.
By the Court: The first name, please, Mr. Roeser?
By the Witness: Howard Roeser.
By the Court: Roeser?
By the Witness: Yes, sir.
By Mr. O'Brien:
Q. You have been sworn and you have testified in
4200 the case before on behalf of the Government and also on cross?
A. Yes.
By Mr. O'Brien: I am calling Mr. Roeser to testify as part of our case. He is comptroller of the company.
By Mr. O'Brien:
Q. Mr. Roeser, were you familiar with—
By the Court: I wonder if you wouldn't—I am sure the jury may forget that he was at one time with The Shotwell Manufacturing Company, and you better go over some of the preliminary questions to call that to our mind.
By Mr. O'Brien:
Q. You were comptroller of the company, were you not?
A. At one time, yes, sir.
Q. And I think you said that in February, 1946, February or March of 1946, you went to sales?
A. That is true.
Q. Prior to that time and some time in the latter part of 1945 you had something to do with the cash box which was maintained in the vault at the premises?
4201 A. Yes, sir.
By the Court: Speak up, Mr. Roeser.
By the Witness: Yes, sir.

By Mr. O'Brien:

Q. Now, as comptroller of the company are you able to tell us, Mr. Roeser, whether there was an account known as the miscellaneous officers and employees account?

A. Yes, sir, there was an account, an asset account of that nature.

Q. Do you recall whether early in 1946 there were transactions in that account by which money was withdrawn by the corporation and charged to that account?

A. In 1946, yes, there were some withdrawals, that is from the company's bank account.

Q. Yes, sir.

And charges, counter charges were to this employees and officers asset account.

Q. What was the total of those withdrawals?

A. Around fourteen thousand five hundred, or something like that.

By Mr. Lockley: Well, if your Honor please, 4202 aren't the books of the corporation in evidence?

By Mr. O'Brien: Yes, they are here, but he knows.

By Mr. Lockley: I object on the ground that the books are the best evidence.

4203 By Mr. O'Brien: If the witness knows, he can say.

By the Court: No. Well, if the books are the best evidence, I take it that is the only way you can establish it, and I assume that they are. I will sustain the objection.

By Mr. O'Brien: Well, may I have that book—

By Mr. O'Brien:

Q. Which ledger would that be in, Mr. Roeser?

A. That would be in the general ledger.

Q. Will you find that account, Mr. Roeser?

A. I found the account here, Mr. O'Brien.

Q. Now, can you identify the withdrawal items to which you have referred?

A. No, sir. There are totals here from the cash books for the whole month, assuming that it would be in this period here (Indicating).

Q. Where would the breakdown on those be?

A. Well, the breakdown as to how much would be in the cash disbursements book, there should be—pardon me. I didn't look behind that sheet, Mr. O'Brien. 4204 Is there a sub-breakdown there? Either that or it would be in a subsidiary ledger. No, there would

have to be a sub-ledger on this or the cash disbursements journal.

By Mr. O'Brien: Mrs. Morrill, do you know where that book is?

By Mrs. Morrill: I don't know whether it is here or not.

By Mr. O'Brien: It is really all I want to ask this witness about, your Honor. They have gone to get the subsidiary account or ledger and I just can't do any more until that is brought in, but it will be brought presently, I am sure.

By Mr. Lockley: It is satisfactory with me, Mr. O'Brien, if you want to withdraw him temporarily and take another witness.

By Mr. O'Brien: I think I better wait a minute or so because Mr. Roeser has some engagements and I said I would put him on first. I didn't anticipate the book wouldn't be here.

By the Court: Well, supposing, Mr. Lockley, we accept the testimony subject to a motion to strike?

4205 That is, if it isn't confirmed by the book. Is that all right?

By Mr. Lockley: That is satisfactory, your Honor.

By Mr. O'Brien: All right.

By Mr. O'Brien:

Q. What is your recollection of the amount, Mr. Roeser, independently of the subsidiary ledger?

By Mr. Lockley: I must object, Mr. O'Brien. I don't understand what you mean by "your recollection of the amount." In other words, I don't understand the question and I must object to it.

By the Court: Amount of what?

By Mr. O'Brien: The amount of the withdrawals.

By the Court: From the bank account?

By Mr. O'Brien: Yes, sir. Early in 1946, we are talking about, and I suppose I have to ask him.

By the Court: All right.

By the Witness: May I answer that one, your Honor.

By the Court: Yes.

By the Witness:

4206 A. Fourteen to fifteen thousand dollars.

By Mr. O'Brien:

Q. What was done with that money?

A. That money, I believe that money was used for the purchase of corn grain.

Q. In the first instance, what was done with it?

A. Well, that, I believe, was held in the cash box.

By the Court: When was this, please?

By the Witness:

A. This was in the early part of 1946, probably February.

By Mr. O'Brien:

Q. What is your recollection as to whether that was in—

Oh, here is the book. Thank you. That has not been marked, Mr. Lockley.

By Mr. Lockley: No, Mr. O'Brien.

By the Court: None of the defendants' books have been marked. That has been dispensed with.

By Mr. O'Brien:

Q. I call your attention to the initials O and E account book for the year 1946 of Shotwell Manufac-
4207 turing Company and to the first sheet of the employees account and ask you to examine it and see if you can tell us more precisely what the withdrawals were.

A. There is an entry dated January 31st to various executives and it appears it is from the cash disbursements book for $4,000.00, one total. In February there is another entry under the 28th of February to the same setup—there are various executives for $10,550.00. I will repeat that, $10,550.00, that I believe are two entries.

By the Court: I didn't understand, when you say drawn, do you mean the check was drawn and payable to certain executives?

4208 By the Witness:

A. No. I don't know who the checks were drawn to, whether they were drawn—it is marked here "various executives."

By the Court: What does that mean.

By the Witness: Well, at that time—incidentally it was a policy to record an officer employee's name in this account directly. This one has not been segregated, the first amount of $4,000.00, to any specific person as a loan to him. It is just a lump sum to the executive group of Shotwell. Actually, it became a dumping ground.

By the Court: It was a loan to a certain executive, is that right?

By the Witness: Yes, sir.

By Mr. O'Brien:

Q. That is $4,000.00 and $10,550.00?

A. $10,550.00. I don't see any others here.

Q. Those are the withdrawals to which you refer?

A. Yes, sir. I believe those are the ones. There is nothing ahead there in April, May or June.

Q. Well, for the purpose of his Honor's ques-
4209 tion, let me ask you a couple more. Those were withdrawals of cash from the company's bank account, you said?

A. Yes, sir. They definitely are.

Q. And the cash was deposited in the box which you maintained?

A. I believe so.

Q. And in order to charge the withdrawals of cash, these entries were made to the officers and employees miscellaneous account?

A. Yes.

By Mr. O'Brien: That's all.

Cross Examination by Mr. Lockley.

Q. Mr. Roeser, when a debit is made to this employees account under the title "Various executives" that indicates that various executives owed the corporation that much money, is that so?

A. Yes, sir.

Q. And the money was received by the corporation to make the loans through checks on the corporate bank account, is that so?

A. Will you restate that? I didn't quite follow the wording.

4210 Q. Well, as I understood your testimony, you said that checks were drawn on the corporation bank account?

A. Correct.

Q. I presume those checks were cashed?

A. I presume they are too.

Q. And the money was given to various executives?

A. No. The money was not given to various executives.

Q. Well, that is what the record shows, that it was given to various executives?

A. Well, the various executives as a group, a dumping ground group, were charged and they did owe the corporation this money, but the money was not actually given to the executives. It was actually put aside. There was a reason for this withdrawal.

Q. Well, did you put it aside?

A. Yes. I was told to put it aside, yes.

Q. And where did you put it?

A. I believe I put it in the cash box.

Q. In this cash box?

A. That is right.

Q. That you have testified about earlier

4211 A. Yes, sir.

Q. Now, do you know what happened to it?

A. Well, this was—it was melted in with the general money that ever went in there and then went out again when we directed to take it out.

Q. Was the money ever paid back to the corporation by the various executives to whom it was charged?

A. Mr. Lockley, I believe it was. However, I factually don't know. I have not seen a payment back myself. I haven't seen the books. Your books should disclose that.

4212 Q. Didn't you take money out of the box and give it to these various executives?

A. Not directly.

Q. So you don't know what happened to it after it went into the box?

By Mr. O'Brien: If I might interject something, your Honor—Mr. Lockley is asking him as to transactions, credit transactions after the time that the man ceased to be the comptroller. I don't think he is in a position to have knowledge but the books would show.

By the Court: Well, I think the question was a proper one.

By Mr. Lockley:

Q. Did you say you didn't turn the money over to the various executives?

A. That I didn't?

Q. Yes.

A. Not to them as individuals in the sense that I believe you are asking the question.

Q. Well, I am asking it. Let me put it this way:
4213 Did you turn over any of this money from the cash box to Mr. Cain, Mr. Huebner and Mr. Sullivan?

A. Directly?

Q. Personally.

A. Personally? Not as—from this money as a loan—

Q. What I want to know, Mr. Roeser, is this: Did you take money out of the cash box and give it to Mr. Cain, Mr. Sullivan or Mr. Huebner?

A. When I was directed to, yes.

Q. You did give them money?

A. Mr. Lockley, I would like—

Q. That's all I want you to tell me. You gave them money out of the cash box?

A. Yes, sir.

Q. You gave it to Mr. Huebner?

A. Yes, sir.

Q. You gave it to Mr. Sullivan?

A. Mr. Lockley—

Q. And you gave it to Mr. Cain?

By Mr. O'Brien: I object. It is not proper cross examination on the single transaction in the box.

4214 By Mr. Lockley: He is stating how the money got into the box.

By Mr. O'Brien: That is all he stated.

By the Court: The answer may stand.

By Mr. Lockley:

Q. Now, this loans and exchanges account, or offices and employees account, I mean, is that an income account?

A. No, sir.

Q. In other words, no matter whether they are debits or credits, this is not one of the accounts which shows up on a tax return eventually?

A. Only as an asset account.

Q. As an asset account?

A. Yes, sir.

Q. It has nothing to do with income, with profits or loss?

A. No, sir.

By Mr. Lockley: That is all, Mr. Roeser.

By Mr. McConnell: I would like to ask a question.

Redirect Examination by Mr. McConnell.

Q. Did you know the purpose of this transaction,
4215 of taking the money out of the bank account and putting it in the box?

A. I knew some of the reasons for it, yes, sir.

Q. Well, what were they?

By Mr. Lockley: Well, just a moment, please. Mr. Roeser, do you know it of your own knowledge?

By the Witness: Yes, sir.

By Mr. O'Brien: Of course he knows it.

By Mr. Lockley: I am not asking as to what somebody told him. I want to know if he actually knows what happened to that money.

By Mr. McConnell: That isn't the question I asked him, your Honor.

By the Court: What is it?

By Mr. McConnell: That isn't the question I asked him, your Honor. I asked him if he knew the purpose for this transaction of taking it out.

By the Court: I suppose he would have to learn it from somebody.

By Mr. McConnell: He was a comptroller of the
4216 company and was in charge of the affairs.

By the Court: If he had anything to do with it himself and can speak for himself, I think it would be proper. I don't think he can state what somebody else told him the money was to be taken out for.

By Mr. McConnell: I asked him if he knew the purpose and that's all I asked him.

By the Court: Counsel was objecting as to the foundation laid before the question was answered.

By Mr. McConnell:

Q. You were the comptroller of the company at that time, were you not?

A. Yes, sir.

Q. In charge of its moneys and assets and books and records at that time?

A. Yes, sir, during part of that time.

4217 Q. As part of your duty, you charged officers and employees accounts and took money out of the bank, is that correct?

A. Yes, sir.

Q. And put it in the box?
A. Yes.
Q. Why did you do it?
A. Because I was told to do it.
Q. Who told you?
A. Any one of many superiors. I don't know which one actually told me to do it. It may have been—
Q. Did they tell you why you should do that?
A. At the time they probably told me why or I knew beforehand why because of the previous conversations.
Q. Well, what do you know about it of your own knowledge?
A. Of my own knowledge I knew this happened: That the company needed funds to purchase grain corn at over-ceiling prices. I did know that.
Q. Well, that was the purpose of this transaction, wasn't it?
A. Yes, sir. The company didn't have any money other than going into their own bank account, and
4218 this was one way to develop some money in a hurry.
Q. Now what was done with the funds that remained in the cash box at the end of that corn shortage period, if you know?
A. I don't know.
By Mr. McConnell: That's all.

Recross Examination by Mr. Lockley.

Q. Mr. Roeser, do you know of your own knowledge whether The Shotwell Manufacturing Company ever bought one pound of corn?
A. Of my own knowledge?
Q. Yes.
A. The corporation was able to get corn syrup.
Q. Did it buy corn is what I am asking you.
A. Corn? I know of my own knowledge that on one transaction some car numbers were given to the company for grain.
Q. Did you ever know of your own knowledge whether the Shotwell corporation ever bought any corn?
A. On the basis of what I have just stated, that is the extent of my knowledge.
Q. Did you ever buy any corn on behalf of The

Shotwell Manufacturing Company?

4219 A. No, sir.

Q. Do you know of anybody else who ever bought any corn on behalf of The Shotwell Manufacturing Company?

A. Of my own knowledge?

By Mr. O'Brien: Just a minute.

By the Witness: I don't understand how he means that. Mr. Lockley, I believe that the company bought grain corn.

By Mr. Lockley:

Q. You believe it. You don't know it. Were you told it? Is that what you mean?

A. Yes, sir.

Q. You didn't have anything to do with the transaction yourself?

A. No, sir.

By Mr. Lockley: All right. That's all.

By Mr. O'Brien: One question, Mr. Roeser. Oh, never mind.

By the Court: That's all, Mr. Roeser.

By Mr. Lockley: That's all.

(Witness excused.)

4220 HOWARD A. HORAN, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?

A. Howard A. Horan.

Q. H-o-r-a-n?

A. Yes, sir.

Q. Where do you live, Mr. Horan?

A. Hartsdale, New York.

Q. Will you spell that for the Judge?

A. H-a-r-t-s-d-a-l-e.

Q. And you are with Penick & Ford?

A. Yes, sir.

Q. Of New York City?

A. Yes, sir.

Q. In that office?

A. Yes, sir.

Q. Does the company have other offices?
A. Yes.
Q. Or places of business?
A. Yes.
Q. Where?
4221 A. We have offices at Cedar Rapids, Iowa, New Orleans, Dallas, Atlanta, Georgia.
Q. A little louder, Mr. Horan.
A. Cedar Rapids, New Orleans, Atlanta, Georgia, Burlington, Vermont. We have offices in Brooklyn in addition to New York City, Dallas, Texas. I think those are the principal offices and a few other sub offices.
Q. What is your position or title with that company?
A. General bulk sales manager.
By the Court: What was the name of that firm, Penick & Ford?
By the Witness: Penick, P-e-n-i-c-k & Ford, Ltd., Incorporated.
By Mr. O'Brien:
Q. And were you bulk sales manager in 1945 and 1946?
A. No. I was western bulk sales manager located at Cedar Rapids, Iowa, where our corn grinding plant is located.
4222 Q. In your present position as bulk sales manager, do you have custody of the records of the company having to do with corn transactions?
A. Yes, such records as we have.
Q. Including those from the years 1945 and 1946?
A. Yes, such records as we have.
Q. I subpoenaed you to appear here to testify and and bring such records as you have for those years, did I not?
A. Yes, you did.
Q. Have you those pertaining to Shotwell Manufacturing Company and to General Confections, Inc. and Eatsum Food Products? Is that true?
A. Yes, I have brought such records as we were able to find in our office.
Q. Now, before turning to those records, let us take the system that was employed by the company—I will withdraw that.
By the Court: You haven't brought out as yet the

business of Penick & Ford.

By Mr. O'Brien:

Q. What is the business of Penick & Ford?

A. We are manufacturers of products from corn and from cane, sugar cane products and corn products.

4223 Q. You have one of the—

A. Principal—

Q. —corn refinery businesses of the country?

A. Yes, at Cedar Rapids, Iowa. That is our only corn plant. We have other types of plants at other locations.

Q. Was there any time in the year 1945 at which you found it difficult to obtain corn, raw corn?

A. Yes. Corn was not then available to us through normal channels.

Q. Did you then commence a practice of transactions whereby raw corn would be provided to the refinery and whereby you would grind it and supply a certain portion of the corn syrup—

A. Yes.

Q. —at ceiling?

A. Yes, we did, at ceiling, yes, sir.

Q. And the corn so provided, you bought at ceiling?

A. Only at ceiling as established by the government.

Q. Now, in relation to those transactions in which the corn was provided by others for grinding—

A. I didn't get your last expression.

4224 By Mr. O'Brien: Will you please read it?

(Question read.)

By the Witness:

A. For grinding, all right.

By Mr. O'Brien:

Q. (Continuing) —did you enter into contracts of any sort, written contracts?

A. No, we did not enter into written contracts as such and as would ordinarily be understood. They were usually verbal contracts, that is, agreements over the telephone or in conversation.

Q. That is, you made no written contract with the person who provided the corn?

A. None whatever.

Q. Did you have written contracts with the folks to whom you paid the ceiling price for the corn?

A. That would be the grain elevators or a grain dealer, yes, and only with them.

Q. So that in the case of all corn which you acquired for grinding and refining, you had written contracts with the elevators or—

A. We issued contract confirmation of purchase to those elevators or grain dealers, yes.

4225 Q. Is it true that they would ship the corn to your elevator?

A. Yes, at Cedar Rapids, Iowa, to our plant at Cedar Rapids, that is right.

Q. And did you in the year 1945 maintain at that plant a record of the people who had procured the corn?

A. Yes.

Q. Was that done in the case of Eatsum Food Products Company for the year 1945?

A. Yes. Now we kept a record of the corn that was sold to us at ceiling prices by grain dealers and by corn elevators as to whose corn—as to whom that corn was to be credited on an exchange or barter or trade sales basis.

Q. Do you have with you one of those contracts and one of those records maintained at your elevator?

A. I have some parts, some of those papers that you have asked for. Now, you would like to see a contract, such a confirmation contract as we sent.

By Mr. Lockley: Mr. Horan, I am afraid you are going to have to speak up and not look down in the box. I can't hear you.

4226 By Mr. O'Brien: He is just talking to me, Mr. Lockley.

By the Witness: I understand that you would like to see a contract confirmation such as we issued to a corn elevator.

By Mr. O'Brien:

Q. Yes, sir.

A. Our confirmation of a purchase of corn—that is one of those contracts.

By Mr. O'Brien: Will you mark this Defendants' Exhibit 79.

(Said document was marked Defendants' Exhibit 79 for identification.)

4227 By the Witness: May I see what I handed to you?

By Mr. O'Brien:

Q. And one of the records there from the elevator, Mr. Horan?

A. From the elevator?

Q. For '45?

A. I don't know just what you mean by record from the elevator. We have no papers here that were issued to us by an elevator.

Q. Your own elevator.

A. Oh, by our own elevator. I have no papers from our own unloading department. I have some memoranda here from our grain department which sets forth the car number, the date of arrival, the contents, which was furnished by our corn elevator to our grain department as a record of the corn receipt and the corn unloading. Is that what you have reference to? That's the only basic record I have of that kind, as I understand your question.

Q. This is not the record I mean (indicating).

A. Here is a record which—

By the Court: If you carry on that conversation nobody can hear it and nobody gets the benefit of it. And
4228 unless you can get your records straightened out—

By Mr. O'Brien:

Q. Perhaps this is it.

A. I think it is.

Q. Do you have amongst this group, Mr. Horan, a memorandum relating to the contract, Defendants' Exhibit 79 for identification?

By the Witness: Will you repeat that question.

(Question read.)

By the Witness:

A. I do not see it here. I would have to take time to find it. I assume that it is in here.

By Mr. O'Brien:

Q. Will you find it, please.

A. That might be any one of one or two hundred papers here. I do not see it here.

Q. All right. Let's pass it.

A. I do not see it, not that particular one. It would require some study to find it, or any one of those.

Q. You have the exhibit now, 79?

A. It is a single sheet.

4229 Q. Well, in 1945, speaking generally, Penick & Ford, at its Cedar Rapids office or plant—

A. Yes.

Q. —maintained memoranda showing the folks who were entitled to receive credit, as you say, for these barter or trade or corn deals.

A. That is so. Some sort of memoranda record.

Q. And the memoranda through which you were looking are such memoranda as you have been able to find for the year '45 in response to this subpoena?

A. The memoranda through which I was looking was a report of corn actually received and unloaded and marked for the credit of some concern that caused the corn to be shipped to us.

By Mr. O'Brien: Will you mark this sheet Defendants' Exhibit 80 for identification.

(Said document was marked Defendants' Exhibit 80 for identification.)

By Mr. O'Brien:

Q. Now, will you look at Defendants' Exhibit 80 for identification and tell us whether this is one of the elevator memoranda to which you have referred.

4230 A. This is a report made up by our grain department on the basis of a memorandum of some kind from our unloading department that this particular car was unloaded on this particular date, was shipped by a particular concern, and from a particular station.

And this particular memorandum is marked "Corn unloaded to date for Eatsum account."

Q. And it is so marked right at the top?

By Mr. Lockley: I object, your Honor, to any evidence respecting the Eatsum account. It has no relevancy to what the transactions may have been with the Shotwell Manufacturing Company.

By the Court: Well, the exhibit hasn't been offered as yet.

By Mr. O'Brien: I will connect that.

By Mr. Lockley: I object then to his testifying from the exhibit until such time as it is offered in evidence.

By Mr. O'Brien: It is purely a preliminary matter. It has no significance in itself.

By Mr. O'Brien:

4231 Q. But whether it be Eatsum, or whoever else it was who procured the corn, this particular record,

any such as Defendants' 80 for identification, would be headed with that name?

A. Yes. That was the mechanics of recording of the particular unloading for the particular account.

Q. Yes. Are these memoranda, such as 80 for identification, still available generally for the year 1945?

A. No, they are not.

Q. You have memoranda on Eatsum for the year 1945. Is there any special reason for that?

By Mr. Lockley: I object, your Honor, to any testimony relating to Eatsum transactions with Penick & Ford.

By the Court: He may answer.

By Mr. O'Brien: I am not asking about transactions.

By the Court: He may answer.

By the Witness:

A. To the best of my recollection, that comes about from the fact that somewhere late in the 1940's we received a letter inquiring about a payment of some kind which appeared to have a connection with the Eatsum
4232 Company.

By Mr. O'Brien:

Q. Was that a letter from the Revenue?

By Mr. Lockley: Well, I object—

By the Witness:

A. No, it was not.

By Mr. Lockley: —to the leading nature of the question.

By the Court: You are going outside the scope entirely.

By the Witness:

A. It was a letter from a concern that had bought some product from Eatsum, as I recall.

By Mr. O'Brien:

Q. Well, maybe—

A. As a matter of payment, we were trying to identify the record.

By Mr. Lockley: I object to any further answer from Mr. Horan.

Until the Court has ruled, please do not answer.

By the Court: I sustain the objection.

By Mr. Lockley: I move the answer be stricken.

4233 By Mr. O'Brien: I think it is great ado about nothing. I don't care about Eatsum, or those transactions.

By Mr. O'Brien.

Q. I just want to know, Mr. Horan, whether you had some special reason for retaining these Eatsum memoranda that did not exist as to such memoranda generally.

A. As I have attempted to explain, there was some correspondence late in 1945 that had to do with Eatsum when we got some records together and we happened to have kept there. We found them through happenstance.

4234 Q. Outside of that you don't have such memoranda for '45?

A. No, it was the general practice to destroy our records at the end of two or three years. We have always done that on our records, outside of ledger records.

By Mr. O'Brien: That is the only interest I have in the Eatsum memoranda, just to show what kind of record was kept.

By Mr. O'Brien:

Q. Now, did you also keep the Eatsum contracts?

By Mr. Lockley: If your Honor please—

By the Court: Yes.

By Mr. Lockley: if there is any reference to the Shotwell contracts—

By the Court: I don't see what you are driving at.

By Mr. O'Brien: I will develop it or it may be stricken.

By the Court: You haven't developed it as yet.

By Mr. O'Brien: I can't develop it all at once.

By the Witness:

4235 A. We had no contracts with Eatsum. We have corn contracts that had to do with corn that was shipped to us at the instigation of Eatsum. Is that what you refer to?

By Mr. O'Brien:

Q. Yes. It is the only kind of contracts that I understand there are, and those are for the shipment of corn—

A. And those are contracts—

Q. Please, Mr. Horan, if you will listen to the question—where you pay the elevator for the corn.

A. Right.

Q. Now, when I say contracts, that is all I mean.

A. All right. That's right.

Q. And you have preserved your contracts generally?
A. Yes.
Q. Not only as to Eatsum, but everybody else?
A. Yes.
Q. Now, again by contract I mean such an instrument, of which 79 for identification is typical.
A. Yes.
Q. Now, for the year 1946 did the company maintain the same type of memoranda in respect of those entitled to the credit for procured corn?
4236 A. Yes.
Q. The same type as I have here in Exhibit 80?
A. Generally, the same type, or something that would serve exactly the same purpose.
Q. That's right. You had one which served the same purpose.
By Mr. O'Brien: Will you mark this Defendants' Exhibit 81 for identification.

(Said document was marked Defendants' Exhiibt 81 for identification.)

By Mr. O'Brien:
Q. Mr. Horan, in 1946 the company maintained the same type of memoranda and information as it did in '45, according to this Exhibit 81 for identification?
A. Yes.
Q. Now, do you have those memoranda available?
A. No.
Q. For the year 1946?
A. No.
Q. And those are the memoranda again for that year which would show those who procured corn to be ground?
A. Yes.
4237 Q. And it would show—.
By the Court: Will you stand over a little? You stand right in front of counsel and he can't see the witness.
By Mr. O'Brien: I am sorry, Judge. It is a very bad court room, but I am sorry.
By Mr. O'Brien:
Q. I show you Defendants' Exhibit 81 for identification and ask you to state if this is a summary made of certain of the memoranda for the year 1946.

A. Yes. I assume that is marked 1946.
Q. I will show it to you.
(Document handed to the witness.)
A. Yes.
Q. And 81 purports to contain a heading General Confections, Inc., Bronx, New York, corn unloading account.
A. Yes.
Q. Again, was there a special reason for preserving this General Confections memorandum?
A. None other than what I have related in connection with some correspondence from the southwest in the late '40's. It may possibly have something to do
4238 with our transactions with that company.
Q. Have you preserved your memoranda relating to people generally who provided corn in the year '46?
A. No, sir.
Q. Now, you have brought with you all of the corn syrup invoices rendered to Eatsum and General Confections, have you not?
A. Yes, they all appear to be here.
Q. I show you again 79 for identification and ask you to state how you are enabled to connect that contract with Eatsum.
By Mr. Lockley: Your Honor, I object to any testimony relating to the Eatsum Company.
By Mr. O'Brien: It is not testimony relating to Eatsum. It is a matter of the mechanics of these records.
By Mr. Lockley: If he doesn't have any records for Eatsum—
By the Court: What is the objection, to show the nature of the records that they did keep and to establish that outside of a few records they have destroyed the
4239 others, is that it?
By Mr. O'Brien: Not exactly, no. I am working with the records that the man has been able to find.
By the Court: I understand.
By Mr. O'Brien: He does not have those which I would like to show for us and I want to show how the system worked where he has the records here to exhibit to us. And then I will come specifically to the Shotwell situation. And that I promise.
By the Court: All right.

By the Witness:

A. May I explain that it was the customary practice to write across the face of this corn confirmation contract the name of the concern that instigated the sale of the corn.

By Mr. O'Brien:

Q. I so understand. Now, that has not been done in the case of that document.

A. It is not on this document.

Q. How then did you select it as a contract which pertained to Eatsum?

A. I cannot with certainty answer that.

4240 Q. Would the Eatsum memoranda indicate what cars you had received for its account?

A. Are you referring to this type of memoranda?

Q. Yes, sir.

A. Yes, sir; that would show.

4241 Q. Now—

A. That would show in part. I have to qualify that for further explanation, if I am permitted to make it.

Q. Mr. Horan, if you will listen to my questions, please, sir. I asked you if the Eatsum memoranda would show the car numbers on the corn that was shipped in for Eatsum's account. Would they?

A. Yes, up to—up to the amount that we agreed to take from Eatsum on an exchange sale basis.

Q. Right.

A. Yes.

Q. I just wanted to know if it showed a car number.

A. That's right, up to that point.

Q. Now, 79 for identification also shows the car number, does it not?

A. It does.

Q. And the same is true of your other contracts with the elevators?

A. Yes. It shows or doesn't show it. That is what you mean?

Q. Yes.

A. There is a name on there or there isn't a name on there.

4242 Q. I am still talking about car numbers.

A. All right. That's right.

Q. Only car numbers.

A. That's right.

Q. And I want to know if the remaining sales contracts are typical or if this is typical of those in the fact that it shows the car number?

A. They all show the car number.

Q. That is all I want to know. Now, have you brought with you a recap of the invoices which you rendered Shotwell Manufacturing Company for corn syrup and corn products during the years 1941 to 1946, inclusive? I have it here, Mr. Horan.

A. I was going to say, we have it here.

Q. This is yours?

A. That's it.

By Mr. O'Brien: Will you mark this Defendants' Exhibit 82 for identification, consisting of three sheets.

(Said document was marked Defendants' Exhibit 82 for identification.)

By Mr. O'Brien:

Q. And is Defendants' Exhibit 82 for identification
4243 the summary or recap of the Shotwell corn syrup invoices rendered by Penick & Ford for those years?

A. Yes.

Q. And does it also show the quantities and the amounts paid?

A. Yes.

Q. And you have with you, also, have you not, the original invoices which are therein recapped?

A. Yes.

Q. Have you looked also for the papers or records which would show the instances, if any, in which Shotwell procured corn?

A. Yes.

4244 By Mr. O'Brien: Will you let me see those?

(Documents handed to counsel.)

By Mr. O'Brien: I will ask the Reporter to mark the documents which the witness just handed me respectively 83 to 87, inclusive, being contracts, your Honor, between Penick & Ford and the elevators for corn supplied by Shotwell.

By Mr. O'Brien:

Q. That is for corn to the credit of Shotwell?

A. Yes, sir.

(Said documents were marked Defendants' Exhibits 83 to 87, inclusive, for identification.)

By Mr. O'Brien:

Q. Are the instruments marked Defendants' Exhibits 83 to 87, inclusive, for identification, the contracts which you have so brought?

A. Yes, they are marked Shotwell.

Q. Well, I didn't ask you what they are marked. But are they the contracts?

A. Yes.

Q. Now, why did you select these and bring them
4245 in response to the subpoena?

A. Because that is what we found in our records.

Q. How were you enabled to find these?

A. By leafing through all of our corn confirmation contracts.

Q. And each of these is marked Shotwell, is it not?

A. Yes, they are.

Q. Now, were you able to find and have you brought with you any memoranda, such as Defendants' Exhibit 80 or Defendants' Exhibit 81—

A. No.

Q. —showing what, if any, corn was procured by Shotwell or furnished to you for grinding?

A. No.

Q. Without such memoranda, Mr. Horan, are you able to state whether there may not have been further contracts, other than these, Defendants' 83 to 87, inclusive?

A. Well, as I said, we went through all of our corn contracts and that is all we found.

Q. I see. That doesn't quite answer my question. Would you read that last question?

(Question read.)

4246 By Mr. Lockley: Well, your Honor, he has answered the question and I object to the leading nature of the question, in any event.

By the Court: Well, he may answer.

By the Witness: Read it again, please.

(Question read.)

A. I wouldn't have any way of knowing.

By Mr. O'Brien:

Q. In the case of Defendants' Exhibit 79 for identification, there is nothing on the face of the contract to show that that was for the account of Eatsum, is there?

A. There is nothing on here to show for whose account it is.

Q. Do you have other such contracts amongst your Eatsum and General Confections group where it is not indicated on the face for whose account it is?

A. Yes, we do.

Q. And were you able to bring those with you by referring to the memorandum, Defendants' Exhibit 81, and your memoranda for the year 1945, relating to Eatsum?

4247 A. That or similar memoranda that our grain department had at one time.

Q. Well, you have brought with you, have you not, all of the memoranda and records and papers which you have on the subject, as called for by the subpoena?

A. Yes, as we were able to identify them.

By Mr. O'Brien: I will offer in evidence the documents marked 79, 80, the three pages marked 81, the three pages marked 82, and the elevator contracts, 83 to 87, inclusive.

I should like leave of court to be permitted to substitute photostats of the original documents, 80 and 81, so that those originals may be returned to the witness. If they should go in, your Honor, is it agreeable that the photostats rather than the originals be put in?

By the Court: All right.

I think we will take our morning recess now. We will suspend for ten minutes.

By the Marshal: Will the audience please remain standing while the jury leaves the court room, and the Judge.

4248 This Honorable Court will recess for ten minutes.

(Recess taken.)

4249 By Mr. Lockley: If your Honor please, the government has no objection to Exhibits 82, 83, 84, 85, 86 and 87. I do object to Exhibits 79, 80 and 81 on the ground that they are immaterial, that they are irrelevant, that they relate to transactions with Eat-

sum and General Confections and that they have no bearing on the issues in this case and I likewise move to strike the testimony of the witness relating to these particular exhibits 80, 81 and 82.

By Mr. O'Brien: I forgot what 82 is.

By the Court: I am sorry.

By Mr. O'Brien: I forgot what 82 is.

By Mr. Lockley: It is the yellow sheet.

By the Court: 82, there is no objection to 82. It is a summary of the invoices for Shotwell.

By Mr. O'Brien? I see. The objection is to 79, 80 and 81?

By the Court: That is right.

By Mr. Lockley: That is correct. If I misstated them, I am sorry. That is correct.

4250 By Mr. O'Brien: My response to the objection, your Honor, and perhaps you better look at them and then I will tell you—

By the Court: Well, let me look them over.

By Mr. O'Brien: Yes, sir.

By the Court: I will sustain the objection as to 79, 80 and 81. 82 through 87 inclusive may be received.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 82 through 87, inclusive.)

By Mr. O'Brien: May I state my position on this, if the Court please?

By the Court: I am sorry?

By Mr. O'Brien: May I state my position on those three?

By the Court: Yes.

By Mr. O'Brien: I do not contend and neither did I offer 79, 80 and 81 for the purpose of showing transactions with Eatsum or General Confections as such.

I offer them for this reason: That they are the 4251 only documents available, the only ones preserved by the company which would show, your Honor, the pattern of recording and the mechanics of recording such transactions because they have destroyed or disposed of the similar memoranda and documents, that is, 80 and 81, for all other people.

Now, the relevancy and materiality, Judge, is this: I have asked Penick & Ford to bring in to the jury here

the contracts for corn that were supplied by or through Shotwell. They have brought in some four five such contracts which they have selected only because the name Shotwell is written on them. There may also be other contracts just as 79. If your Honor will look at that No. 79 exhibit which is that one right there (indicating), that second one, you will see that there is no mark on it of Eatsum Food Products which would enable Penick & Ford to identify it as one on which it had furnished the corn.

But, Mr. Horan says that they were able to select
4252 and to bring it because it ties in with those memoranda. Now, my point is that just as in that case, so in Shotwell's case, if they had comparable memoranda, if they had saved them, then they may have been enabled to pull other contracts similar to 79 for Shotwell, which although they did not have the name Shotwell on them, would be tied in by those memoranda.

By the Court: Supposing we leave it this way—

By Mr. O'Brien: Yes, sir.

By the Court: I will sustain the objection without prejudice to renew the offer in the event it appears to be material. As yet, I don't see that it is material.

4253 By Mr. Lockley: If your Honor please, his testimony as to the manner of bookkeeping, I have no objection to whatsoever, and this witness has so testified, but for the speculative nature of the evidence which Mr. O'Brien is trying to bring out, I think that those documents are entirely irrelevant. There also may not have been any additional contracts.

By the Court: It doesn't establish anything one way or the other. Mr. Horan said he couldn't tell one way or the other.

By Mr. O'Brien: Judge, that is quite true, but let me suggest to you that fundamentally in this testimony —I am talking now specifically of Shotwell transactions and I have asked the witness to bring such contracts as he could find as were identified, as were entitled to Shotwell.

By the Court: He stated there weren't any more transactions to Shotwell.

By Mr. O'Brien: Your Honor, but that there is this

showing, if I may submit it: I have put in evidence
4254 all of the invoices of corn syrup of Shotwell which is greatly in excess of those contracts and I have asked the witness to bring me what he can.

Now, I wanted to show what is available. While it is true he doesn't know, it is also true by that, on that method, on that showing, that there could have been many other of those cars of syrup on which Shotwell supplied the corn. It is all an integrated, connected thing.

By Mr. Lockley: Mr. O'Brien has positive evidence why that should be brought out.

By Mr. O'Brien: I should also be permitted to—

By the Court: That is why I suggested that I defer or that I make a ruling without prejudice to a renewal. It may become competent later on and no objections have been made to the foundation.

By Mr. Lockley: None whatever, your Honor.

By Mr. O'Brien: I wanted to fully state my position on it, Judge.

By the Court: I will adhere to my ruling.

4255 By Mr. Lockley:

Q. Now Mr. Horan, you were the bulk sales manager for the Western Division of Penick & Ford at Cedar Rapids; is that all during 1945 and 1946?

A. Yes, that is correct.

Q. Does the territory of the Western Division include Chicago, Illinois?

A. Yes, sir.

Q. So that any transactions with the Chicago concern would normally have come to your attention?

A. Yes, sir.

Q. Can you tell us what a bulk sales manager did as opposed to what other sales managers did you had in your organization?

A. Yes, we do have other sales departments. A bulk sales manager has charge of the administration of sales to food and industry.

Q. Now do you know whether The Shotwell Manufacturing Company had a quota with the Penick & Ford refinery based upon its purchases of corn syrup in 1944 or whatever base period you used?

A. Yes.

Q. It did have a quota?

A. Yes.

4256 Q. And in 1945 and in 1946, it would have been entitled to purchase a quantity of corn syrup based upon that quota, would it not?

A. Yes, sir.

Q. Irrespective of whether it had been instrumental in obtaining any corn for Penick & Ford?

A. Yes, sir, provided we could make it available or in ratio of what we could make available in a general way.

Q. Now, as I understand these contracts, there were fifteen cars of corn made available to Penick & Ford by The Shotwell Manufacturing Company in 1946. Am I correct on that?

A. That is what those contracts showed.

Q. Do you know how many carloads of corn syrup Shotwell was entitled to buy from Penick & Ford as a result of the purchase of these fifteen cars of corn?

A. Yes.

Q. How many was it?

A. The records show the exchange sale was on the basis of two tank cars of corn syrup on the fifteen cars of corn.

Q. So that Shotwell got two cars, two tank cars 4257 of syrup as a result of that purchase of corn?

A. Yes.

Q. Now Shotwell actually bought in 1946 a total of twelve cars of syrup, did it not? Do you have the exhibit there?

A. In the year 1946 you state?

Q. Yes.

A. I have the duplicate.

Q. Is that the same?

A. This is the transcript of it. Twelve. Twelve did you state?

Q. Twelve.

A. Twelve shows on the record here, yes.

Q. So that only two of that twelve were obtained as a result of the corn purchase arrangement?

By Mr. O'Brien: I object to the question, if the Court please.

By the Court: If he knows, he may state.

By Mr. O'Brien: Without a record—

By Mr. Lockley: He has already stated that two carloads were bought or sold as a result of the transaction involving fifteen cars of corn.

By Mr. O'Brien: Well, that isn't—

4258 By Mr. Lockley: There were a total of twelve cars, he said, that were bought in 1946 by Shotwell from Penick & Ford and it is a matter of simple arithmetic.

By the Court: You mean, from the records available?

By Mr. Lockley: Yes.

By the Witness: Yes.

By Mr. Lockley:

Q. Are you able to state from those records how many were bought by Shotwell on its quota arrangement?

A. Yes.

Q. How many?

A. On the quota, anything that we did not furnish against corn or the difference.

Q. That would be ten carloads, wouldn't it?

A. That would be two from twelve—ten.

By Mr. O'Brien: Do you have that on a record?

By the Witness: We show twelve tank cars.

By Mr. O'Brien: I know that, but do you have a record that shows what was furnished on quota?

4259 By the Witness: We have a record here somewhere that states we received the fifteen cars of corn and we sold in exchange two tank cars.

By Mr. O'Brien: I am not talking about the corn. I am talking about the remainder over and above the two tank cars.

By the Witness: No, I have nothing.

By Mr. O'Brien: That is what I mean.

By the Witness: I have nothing to show as regards the quota. We have something to show as regards the exchange quantities.

By Mr. Lockley:

Q. Now, as the western bulk sales manager in 1945 and 1946 would you have been the person to arrange the purchase of corn and the subsequent sale of corn syrup in the manner that you have testified to?

A. Well, the policy was fixed by our executive office

at New York as to the number of pounds of product, feed, oil or corn syrup that we would sell in exchange for corn, so many pounds per bushel.

Q. Were you the person who carried out that policy?

A. So far as the western territory was concerned,
4260 I had charge so far as it affected sales transactions.

One would call us on the phone and say they had corn to sell and they needed corn syrup and if they could provide the corn, how much corn syrup could we sell and we would say a trading basis was seven, ten, fifteen, seventeen, whatever it might have been as of that day. We would say "If you have corn to sell, go to your grain dealer or your elevator and have him sell that corn to our grain department, call up our grain department and have the elevator say 'It is for your account' when the corn is received, we will set a certain poundage of syrup aside for delivery to you at the ceiling price. We will buy the corn at ceiling price and we will sell you the product, feed, oil, corn syrup—" whatever it might have been—"at the ceiling price."

Q. In accordance with that arrangement, Shotwell provided fifteen carloads of corn to Penick & Ford?

A. That is what the record shows.

Q. And they got in return two carloads of corn syrup?

A. That is what the record shows for this
4261 period.

Q. Do you know of any other corn deals, as they have been called here, other than the one that I have just mentioned?

A. You mean as related to Shotwell?

Q. With Shotwell.

A. What the records show is what we have here.

Q. Did you actually buy any corn direct from Shotwell?

A. No. We bought corn only from grain dealers or elevators, grain elevators. We did not buy corn from individuals.

Q. You paid the ceiling prices?

A. We paid the ceiling price according to the Government grade on feeder products.

Q. You sold the corn syrup in this case and at the ceiling price?

A. In this case it was corn syrup and at the ceiling price.

Q. Do you know then of your own knowledge whether Shotwell Manufacturing Company or any of its officers paid any premium of any sort to any grain elevator or dealer to arrange the purchase of corn by Penick & Ford and their account?

4262 A. No.

By Mr. O'Brien: That is objected to, if the Court please. That is not proper cross examination. There is no such subject that came up on direct.

By the Court: I don't think he has so testified or intimated, one way or the other.

By the Witness: I would have no such knowledge, no.

4263 By Mr. Lockley:

Q. Do you know whether you yourself or anyone in your organization received any premium from The Shotwell Manufacturing Company or any of its officers for the sale of corn syrup—

By Mr. O'Brien: That is objected to.

By Mr. Lockley:

Q. —as a result of this deal?

By Mr. O'Brien: Not only is it not proper cross examination but there is no evidence for any contention that any corn refiner received premiums.

By the Court: Me may answer.

By the Witness:

A. The inference is that I received the money or the company received money over and above ceiling prices? No.

By Mr. Lockley:

Q. All right, Mr. Horan. That's all, Mr. Horan. Thank you.

By Mr. O'Brien: That's all.

By the Witness: Thank you.

(Witness excused.)

4264 SAM GERTZ, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. McConnell.

Q. Will you state your full name, please?
A. Sam Gertz.
Q. Is it Sam or Samuel?
A. Sam.
By the Court: Your last name is what?
By the Witness: G-e-r-t-z.
By the Court: Gertz?
By the Witness: Right.
By the Court: All right.
By Mr. McConnell:
Q. Where do you live, Mr. Gertz?
A. 414 Wellington Avenue, Chicago.
Q. Have you lived in Chicago all your life?
A. Yes, sir.
Q. Do you know a David Lubben?
A. Yes.
Q. How long have you known him?
A. I have known him since 1943.

4265 Q. Do you recall a conversation with him some time in the early part of 1948 at your home?
A. Yes, I do.
Q. Who was there?
A. Nobody. Just myself.
Q. Was Mr. Lubben there?
A. Lubben and myself. I had a conversation with him so he must have been there.
Q. I think that is pretty clear. What was said?
By Mr. Lockley: Well, your Honor, I object to any transaction that happened in 1948 between this witness and Mr. Lubben.
By the Court: I don't think you have laid any foundation for this by way of asking Mr. Lubben anything about this conversation.
By Mr. McConnell: I didn't want to lead him. I did lay a foundation with Mr. Lubben, yes.
By the Court: Did you?
By Mr. McConnell: I certainly did.

By the Court: I am just asking you. I didn't recollect it. The only way you can impeach, Mr. Lubben, of course, is to ask him about the conversation. Otherwise, the
4266 conversation is not immaterial. The only way you can bring it in is by way of impeachment.

By Mr. O'Connell: Well, I don't want to lead the witness. I don't want to be accused of leading the witness. I will be accused of it in a minute.

By the Court: Did you ask Mr. Lubben about this conversation?

By Mr. McConnell: I didn't ask him about the conversation, but I asked him about the transaction which is involved in the conversation, in which he made certain admissions.

By the Court: I confess I don't remember the transactions. I don't know what you are going to ask. Come up here.

(Whereupon the following proceedings were had and taken before the bench, beyond the hearing of the jury:)

By Mr. McConnell: This refers to the Haberkorn transaction about which I queried Mr. Lubben on cross examination as to whether or not he had forced Shotwell to buy the Haberkorn Company.

4267 By the Court: Whether he had what?

By Mr. McConnell: Forced the Shotwell Company to buy the Haberkorn Company. This conversation goes to certain admissions which Mr. Lubben denied on his cross examination.

By Mr. Lockley: He didn't mention anything to Mr. Lubben about any converrsation with Mr. Gertz.

By Mr. McConnell: But I asked him about the Haberkorn transaction.

By the Court: I think it may fairly come within the scope.

By Mr. Lockley: The proper foundation would have been to ask Mr. Lubben at the time whether he had such a conversation.

By Mr. McConnell: This is an admission that that was so. I wouldn't lay a foundation for a conversation—

By the Court: I will overrule the objection.

(Whereupon the following proceedings were had in open court, in the presence and hearing of the jury:)

4268 By Mr. McConnell:

Q. Now what was that conversation? What was said there?

A. Well, I owed Lubben—I owed the Haberkorn Candy Company—

By Mr. Lockley: I object to what you owed. You asked me what was said there.

By Mr. McConnell:

Q. What did Mr. Lubben tell or say to you at that time?

A. Lubben said he came to Chicago to sell the Haberkorn Candy Company to the Shotwells, and he made a deal with them to take it over. That was about the entire—then I owed him some money and he tried—

By Mr. Lockley: I object to whether he owed him any money.

By the Court: Yes.

By Mr. McConnell:

Q. Did you relate all of the conversation?

A. That is about all.

Q. Was there any statement made to you at that time about the chicken farm?

4269 A. Yes.

Q. What did he say about it?

A. He mentioned the fact that he made the Shotwell Candy Company take over the cost, the mortgage, I believe he said—put a mortgage on the farm so he could get out of it.

Q. Did he mention how much money was involved?

A. He said $75,000.00.

Q. Did he say what he was going to do about it?

A. He didn't say anything else. He just mentioned the fact that the chicken farm—

Q. Have you exhausted your recollection now of that conversation?

A. I believe I have, but I remember those two things.

Q. Did he suggest to you that he was going to make Shotwell pay $75,00.00 for that?

A. I believe he said he had a mortgage and he was going to make Shotwell hold it.

By Mr. McConnell: You may cross examine.

By Mr. Lockley: I have no cross examination.

By the Court: That's all, Mr. Gertz.

4270 By Mr. Lockley: If your Honor please, I move that the testimony of Mr. Gertz be stricken on the ground it has no relevance to the issues in the case.

By the Court: Well, it may stand.

(Witness excused.)

By Mr. Kirby: Will you mark these Defendants' Exhibits 88, 89, 90 and 91 for identification.

(Said documents were marked Defendants' Exhibits 88, 89, 90 and 91 for identification.)

By Mr. Kirby: There is a witness in this room but these documents have nothing to do with him so I don't think he need be excluded while I make the offer.

I offer in evidence four documents each certified by the appropriate official of the Government and each representing records of the Government with respect to the nature of the market in corn in 1945 and 1946. The first of them is document 88, and it is a letter from Chester Bowles, who was the then director of the OPA.

4271 By Mr. Lockley: If your Honor please, I object to Mr. Kirby's reading from these documents. I haven't seen them.

By the Court: He is identifying them in so far as it may appear to the Court what they are.

By Mr. Kirby: As far as Mr. Lockley not having seen them, I tendered all of them to him and he said he intended to object to them without reading them. I didn't mean to deprive him of the opportunity which he refused.

Now, the next document which is marked Exhibit 89, is a memoranda to the Secretary of Agriculture on May 2, 1946, from Robert H. Shields, administrator specifically with respect to the corn situation.

The next document is Defendants' Exhibit 90 and it is a report from the Enforcement Division, particularly with respect to corn and it is a report dated April 4, 1946.

Documents 88, 89 and 90 are certified by the archi-

4272 vist of the United States as having come from the government's records.

Document 91 is a report of the Federal Trade Commission.

By the Court: Federal Trade Commission?

By Mr. Kirby: Yes, your Honor. There are parts of the report that are kind of far, perhaps, from our particular interests but it reviews the situation on all of the corn markets throughout the country, and the pages that are particularly pertinent to our questions here are on pages 1, 19, and 26. The document is certified in its entirety but our interest is really limited to those pages which I specifically mean to state are competent.

I might say in general, describing these documents and not to presume to read them, that they represent the best description from an impartial source, the government itself, that we have been able to locate and we did get it from the government's archives. Particularly, they talk about confectioners in the black market, candy
4273 makers in the black market. That is why I think it is material.

By Mr. Lockley: If your Honor please, I object on the ground that they are immaterial and irrelevant. They have no relationship to the Shotwell Manufacturing Company and its alleged tax evasion. They are entirely outside the scope of the issues in the case.

There is no witness who can testify as to their general relevance.

I have no objection to the foundation of the records as being official records.

By the Court: I will look them over. I will defer my ruling until I have had an opportunity to examine them.

By Mr. Kirby: All right. Mr. Stone, will you take the stand, please.

RONALD STONE, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

4274 A. Ronald Stone.

Q. Mr. Stone, the acoustics in this court room are poor. Will you please speak in a loud enough voice so that you can readily be heard?

A. I will.

Q. You have to do better than that response. Now, Mr. Stone, where do you live?

A. I live at 7 Book Avenue in Newark, New Jersey.

Q. And how long have you lived in Newark?

A. Approximately 27 years.

Q. Do you know a David Lubben?

A. I do.

Q. When did you first meet David Lubben?

A. In the summer of 1944.

Q. Where?

A. At the law office of one Herbert Fenzer in New York.

Q. Did you thereafter associate in any way with Mr. Lubben in business?

A. I did.

Q. And over what period of time?

A. From the summer of 1944 to approximately the middle of March, 1946.

Q. You have heard of an Eatsum Food Products
4275 Company which was a proprietorship?

A. I have heard of it.

Q. And you were associated with Lubben during his proprietorship period in part?

A. I was associated with him.

Q. During the period he was operating as a proprietor and by the way, when did that period end?

A. That period ended May 31, 1945.

Q. In 1945, what did you have to do with his business?

A. I was an assistant to Mr. Lubben in the general purchasing of all raw materials necessary for the operation of his business.

Q. How often were you at the office?

A. During 1945, during the proprietorship days of 1945 after the second week in January of that year I was there every day from 9:00 o'clock in the morning until 5:00, 6:00 or 7:00 in the evening.

Q. Did you have a desk?

A. I did.

Q. What was the setup, physically?

A. Well, now, Eatsum Food Products, that was the trade name of David Lubben—it had about, what pur-
4276 ported to be enough space for six offices on the third floor of the building on Broadway and 60th Street. I don't recall the exact number.

Mr. Lubben's office, if I may describe it that way, was

in that corner (indicating), and about 20 feet from his office was my office. I had a little office in the same suite.

Q. And who else was there in early 1945?

A. In early 1945—well, we had a Miss Norman there who was Mr. Lubben's secretary, and Miss Feldman who was the bookkeeper. We had Frieda somebody—I don't recall her second name, who was—

Q. Frieda Seiderer?

A. I believe that is her name, Seiderer, or something.

Q. She is married now and her married name is Strum, is that the same name?

A. I don't know, but I know there was a girl by the name of Frieda.

4277 Q. All right. Who else?

A. And then we had about four or five assistant bookkeepers and in the early—I would say about a month or two after the beginning of the year, a Mr. Roy Hankermyer, an uncle of Mr. Lubben's by marriage came along to occupy space and also work for the Eatsum Food Products and about the latter part of April or the early days of May, a Mr. Joseph Keenan also came along to work there.

Q. What did Keenan do?

A. To the best of my recollection, Keenan never did anything.

Q. What did Mr. Keenan do before he came there, do you know?

A. Yes, I do know.

Q. What d' . he do?

A. Mr. Keenan was administration head of the OPA in charge of sugar rationing for manufacturing purposes in the metropolitan New York area.

Q. During what period?

A. I don't know. It was prior to his coming to work for Eatsum.

Q. And how long did he stay with Lubben?

A. He stayed with Lubben until the dissolution of
4278 the partnership.

Q. That would be on until—

A. About March of 1946.

Q. And this fellow Keenan, in that period that you mention, up until March of 1946, did he do anything that you saw in that period?

A. To the best of my knowledge, he never did anythiing.

Q. Now, had you ever met Mr. Keenan—strike that.

In Mr. Lubben's testimony here, and I am referring now to page 980 and 981—

By Mr. Lockley: Will you tell me which volume?

By Mr. Kirby: It is Volume 8.

By Mr. Kirby:

Q. He was asked whether he had had a cash box before the partnership and he answered: "There may have been one, sir, but I don't think there was very much or—if anything, in it. I can't remember."

Now, you were there before the partnership?

A. Yes, sir.

Q. Was there a cash box there?

4279 A. There was a cash box from the first time I met Mr. Lubben and it continued until the time we ceased doing business.

Q. When is the first time, now?

A. I met Mr. Lubben in the summer of 1944.

Q. How do you know there was a cash box?

A. Because Mr. Lubben put his hand into the box and came up with $2300.00 to give me to buy 100 bags of sugar.

Q. What do you mean? What do you mean, buy a hundred bags of sugar?

A. Mr. Lubben needed 100 bags of sugar and the only way he could get that, in view if the fact that he didn't have a basic sugar quota—

By Mr. Lockley: When and where is this?

By the Witness: This took place in Mr. Lubben's office at Broadway—at Lexington Avenue and 43rd Street. It was—he had a little office. I don't recall the name of the building but it was on Lexington Avenue and 43rd Street.

By Mr. Kirby:

Q. So that when—

By Mr. Lockley: When?

4280 By Mr. Kirby:

Q. When did you first see this cash box?

A. About either June or July of 1944, in that period.

Q. And describe now what you saw with respect to a cash box before the partnership?

A. Before the partnership?

Q. Before the partnership.

A. Oh, before the partnership.

Q. I have read you Mr. Lubben's testimony that there

wasn't any or didn't amount to anything or he didn't remember.

Now, what did you see with respect to a cash box?

A. In his desk in his office he had somewhat—not a steel box, but it appeared to be a hard paper box. In it he had, well, several envelopes and from one of these envelopes he took out $2300.00 and gave it to me to buy the sugar for him.

By Mr. Lockley: When?

By the Witness: July, the latter part of June or July of 1944.

By Mr. Kirby:

Q. Now, describe during the remaining period of
4281 the proprietorship what you saw with respect to his running a cash box. Just what did you see?

A. From the time that I was there, every day beginning the first or second week of January, 1945, there was a tin cash box each day.

By the Court: Was that during the partnership?

By the Witness: No, sir. That was during the proprietorship, prior to the partnership, from approximately the first or second week of January, 1945.

By Mr. Kirby: The Court will remember what Mr. Lubben's testimony was.

By the Court: I thought he said June, 1945.

By Mr. Kirby: You would be exactly right then, January.

By the Witness: There were numerous transactions in cash.

By Mr. Kirby:

Q. Well, did you have anything to do with them? Do you know this of your own knowledge?

A. I do, because—

Q. What do you know about it?

4282 A. Because I purchased materials. I purchased for him corn sugar, cane sugar and beet sugar. I purchased with him and for him ration evidence which always was paid in cash.

Q. What do you mean "ration evidence"?

A. Evidence—

By Mr. Lockley: I object to what he means by ration evidence.

By Mr. Kirby: I am asking the witness to describe his transactions, just what he knows of it.

By the Court: Well, he may answer.

By the Witness:

A. By ration evidence is meant the check—a check issued on a bank account ostensibly by some wholesale sugar dealer or sugar refiner made out to a wholesale grocer in so many thousand pounds and this check entitled you to go to a refinery or to a wholesale grocer and buy your sugar. Without this check, your money didn't mean anything. You had to have this ration evidence in order to procure the sugar.

By Mr. Kirby:

Q. That is your points, isn't it?

4283 A. That is right. That is what it is, but in large amounts instead of putting it out in five pound lots like the little coupons, they merely permitted you to issue one big check of 20,000, 30,000, 50,000, whatever you wanted.

4284 Q. What was it you bought for cash, did you buy the sugar or did you buy the points?

A. There were times we bought sugar and there were other times we bought the ration evidence to give to someone else who would give us the sugar with our ration evidence.

When we didn't have the ration evidence we bought the sugar on the black market.

Q. What do you mean by that?

A. It means where sugar was worth perhaps $8.20 a bag, we paid nineteen and twenty dollars a bag for it, without ration evidence.

Q. Without points?

A. That's correct, without points.

Q. So that these transactions with Lubben, with respect to the rationed sugar, were all in cash, you say?

A. Every one was in cash.

Q. Now, when you would buy the sugar you wouldn't give the points?

A. If we bought sugar on the black market we didn't give any points.

Q. And when you bought the points?

A. Then we paid the regular market price for the

4285 sugar.

Q. But did you pay separately for the points?

A. Yes, sir. We had to buy the evidence, the ration evidence.

Q. When Mr. Lubben was a witness he testified, with respect to the purchase of sugar certificates, and I now am going to refer to Volume 10, at page 1248, and in my cross examination I asked him whether he had ever purchased sugar certificates for cash. He asked me whether I meant whether he ever went out and bought them. I said yes. He said he never went out and bought them. Then I asked him if he ever paid for any that were brought in. And he said, "I think once, sir."

Now, were there more than one transaction in the purchase of these sugar certificates?

A. Why, of course.

Q. Don't argue with me. The question is: Were there?

A. Yes.

By Mr. Lockley: The question is whether Mr. Lubben had more than one transaction, not whether Stone had more than one. Mr. Lubben was asked whether he 4286 bought more than once.

By Mr. Kirby:

Q. The question is whether there were more than one transaction in which you personally participated with Lubben, involving the purchase of sugar certificates.

A. I don't want to be argumentative, but that question to me is a little ambiguous. Now, so far as I am concerned, I have made several—I made several purchases of ration checks for Mr. Lubben. And Mr. Lubben also made several purchases of ration evidence.

Q. I then showed—after Mr. Lubben's answer to me that there was only one—a document which is in evidence as Defendants' 1-A, B, C, and D, and I will hand it to you.

Do you know in whose handwriting that is?

A. Yes.

Q. Whose handwriting is that?

A. That is Dave Lubben's handwriting.

Q. Now, would you pick out the exhibit—and if you will turn to the back you can see the number—which is Exhibit 1-D.

By the Court: You see, when you say Exhibit 4287 1-D, the government may have a 1-D. You have got to identify whether it is the defendants or the government's. Otherwise the record becomes just confusing.

By Mr. Kirby: You are exactly right. And it is the

Defendants. And it surely would get it mixed up. That's right, Judge.

4288 By the Witness: Will you repeat that question?

By Mr. Kirby:

Q. Well, pick out 1-D.

A. This is marked 1-D.

Q. Is your name on that any place?

A. Well, on the second line, my name is on it.

Q. What does it say?

A. It says "Ronnie Stone Dextrose, $3,058.62."

Q. Does that indicate money paid out or money paid in?

A. That is on money paid out.

Q. Dextrose, that is a type of sugar made from corn, is it?

A. That is correct. That's corn sugar.

Q. What kind of a deal is that in Lubben's handwriting there?

A. This was for the purchase of corn sugar.

Q. For cash?

A. For cash.

Q. Did that come out of the cash box?

A. It sure did.

Q. Now, is there any other reference to you on that sheet in Mr. Lubben's handwriting?

4289 A. No, sir.

Q. Do you see any references there to the purchases of sugar certificates?

A. Yes. Here is an item, "June 6, 91 bags"—no. Excuse me. That can't be. It says "91 bags, nine fifty." That must be for corn sugar.

By Mr. Lockley: What year, please? Never mind any further explanation.

By the Witness: It says May 28th. There is no year on here.

By Mr. Lockley: Do you know what year it is?

By the Witness: Yes, sir.

By Mr. Lockley: What year is it?

By the Witness: 1945.

By Mr. Kirby:

Q. Now, how long in 1945, prior to that sheet in Mr. Lubben's handwriting had you participated in the purchase for cash of sugar ration certificates?

A. How long—
Will you repeat that, please.
(Question read.)
By Mr. Kirby:
4290 Q. Well, if the question isn't plain, I will rephrase it. That's in the middle of '45.
A. This begins May 18th of '45.
Q. All right. Now, my question is, had the same things been going on earlier than that?
A. It had been going on from approximately the middle of February of 1945.
Q. And always out of the cash box?
A. Yes, sir.
Q. And was that in the proprietorship period?
A. Yes, sir.
Oh, yes, my name is here again. I am sorry. I see it down there.
Q. What does that say?
A. "June 15, Stone, 1900"—
By the Court: Speak up.
By the Witness:
A. "Stone, 1979 bags, $494.75."
By Mr. Lockley: Read the rest of it, Mr. Stone.
By the Witness: C-o-m-m.
By Mr. Lockley: That's commission?
By the Witness: Commission on purchases.
By Mr. Lockley: And the rest.
By the Witness: That is all there is. Oh, before
4291 June 15th, is that what you wanted?
By Mr. Lockley: It reads, "Stone commission on purchases before June 15," isn't that what it reads?
By the Witness: That's right, sir. 1999 bags, $494.75.
By Mr. Kirby:
Q. What was that about?
A. Apparently purchased for him 19—
By Mr. Lockley: Mr. Stone, do you know?
By the Witness: Right now I don't know.
By Mr. Lockley: Well, don't testify as to what you think might have happened.
By the Witness: I don't know, no.
By Mr. O'Brien: If the Court please, I object to counsel admonishing the witness. I would suggest that he

direct his remarks to the Court, and not tell the witness to—

By Mr. Lockley: I apologize to the Court.

By the Court: You defer your questions until the witness is turned over to you for cross examination.

By Mr. Kirby:

4292 Q. Mr. Stone, having looked at that memorandum that Mr. Lockley called your attention to, do you have any memory of any commission deals with Lubben?

A. With Lubben?

Q. Yes.

A. Yes, I had some commission deals with Mr. Lubben.

Q. What were those about?

A. For the purchase of sugar, corn sugar, or any raw materials. This took place prior to about the 15th—or perhaps March 1st of 1945. I wouldn't know the exact date.

By the Court: You let your voice drop, Mr. Stone. You must keep it up if you are going to be heard.

By the Witness:

A. There was a period before I became steadily employed with Lubben when I was working on a commission basis.

By Mr. Kirby:

Q. Now, then, have you Defendants' Exhibit 1-C? Will you pick that out, please.

A. I have that.

Q. And in whose handwriting is that?

4293 A. That is David Lubben's handwriting.

Q. Is your name on that any place?

A. Yes. It says, "June 21, Stone, doughnut mix, $1700.00."

Q. Do you remember what that was about?

A. I do.

Q. What was that?

A. That was for the purchase of some sugar that had a little vanilla extract added to it in order to take it out of the category of pure sugar. Some of the food processors would take sugar, add a little vanilla extract, and that would remove it from any connection with the OPA.

Now, I purchased for Mr. Lubben, apparently—I can't tell from this—so many bags of this doughnut mix.

Q. For cash?

A. It was cash, of course.

Q. Is your name on there any place else in Lubben's handwriting?

A. No, sir.

Q. Now, while you are there would you take a look at 1-B?

A. Yes, sir.

4294 Q. And do you see some references to some money received from a man by the name of Bert Rock?

A. Yes, I do.

Q. And in whose handwriting is that reference?

A. That is Dave Lubben's handwriting.

Q. And did you know anything about the deals—well, I shouldn't be so general. How much money is shown there as having been received from Bert Rock?

By Mr. Lockley: I object, your Honor. The record itself, in evidence, is the best evidence of that.

By the Court: Well, I assume it is a preliminary question. He may answer.

By the Witness:

A. There are three items totaling $17,000.00.

By Mr. Kirby:

Q. Is that cash?

A. I have no idea. I have no knowledge of this transaction at all.

Q. Do you know what the deals were with Bert Rock?

A. I have no idea.

4295 Q. All right. I now want to go to another question of Mr. Lubben's testimony, and I am referring to Volume 8, at page 897, and we were talking about—I don't know whether I was asking him the questions or not, but he was being asked, in any event, about cash boxes, and he was being asked about candy sales, and the question was:

"Q. And you put cash receipts from candy sales in that candy box, didn't you?

"A. I don't recall any candy sales, sir, that were sold for cash."

Now, let me ask you, do you know anything about, during the period—let's take the proprietorship first, and then we will go to the partnership—do you know anything about candy sales for cash?

A. I do.

Q. And what do you know about it? Just tell me what you saw.

A. I know that—

By Mr. Lockley: Well, if your Honor please, I object on the ground that the cross examination of Mr. 4296 Lubben related entirely at that time to the co-partnership and that Mr. Kirby's examination of this witness should be likewise limited to any transactions during the co-partnership.

By the Court: If that is true, I think it should be limited to the partnership.

By Mr. Kirby: I think it is true, and I will go directly to the co-partnership, not to get into any confusion. But I do think it is true that he testified there was no cash box of any kind before, you see.

By Mr. Lockley: He testified that he didn't remember, Mr. Kirby.

By Mr. Kirby: Well, all right.

By Mr. Kirby:

Q. Let's get to the partnership period, Mr. Stone. Do you remember anything about candy sales, whether cash was involved?

A. That would have to be subsequent to June 1st.

Q. Yes.

A. Yes, there was one transaction to a fellow by the name of Rubinson. There was another transaction to 4297 a fellow by the name of Wachtel. There might have been two to Wachtel. And there was one to Imperial Candy Company of Ohio.

Those were cash transactions, in my presence.

Q. And what happened to the cash—first, were those cash candy transactions?

A. Those were candy transactions.

Q. And did the cash go into the candy cash box?

A. It went into the candy cash box.

Q. Did you know a fellow by the name of Ducor, D-u-c-o-r?

A. Yes, he has a refugee. Mr. Ducor, or some name similar to that.

By Mr. Lockley: If your Honor please,—

By Mr. Kirby:

Q. Who was Mr. Ducor?

By Mr. Lockley: —he was only asked if he knew him.

By Mr. Kirby: That's right.

By the Witness:

A. He was a refugee dealing in candies, buying and selling candies.

By Mr. Kirby:

Q. And how did he deal, by check or by cash?

A. Only by—

4298 By Mr. Lockley: I object as to what Ducor did. It is certainly beyond the boundaries of this case.

By the Court: Yes, without more than that I will sustain the objection.

By Mr. Kirby: Well, if the Court please, Mr. Lubben's answer was just as flat and specific as it can be, page 897, "I don't recall any candy sales, sir, that were sold for cash." He said that just as flat as he could say anything.

By the Court: Maybe I lost—

By Mr. Lockley: There is no reference in that transaction to Mr. Ducor.

By the Court: Maybe I lost the trend of your question. Are you asking him whether or not there were any cash deals between Lubben's companies and his man Ducor, is that it?

By Mr. Kirby: Of candy; yes, sir.

By the Court: He may answer. Or the answer may stand.

By Mr. Kirby: Then may that portion where he
4299 describes Ducor as a refugee stand? That was part of his answer.

By the Court: I haven't any objection.

By Mr. Kirby: All right.

By Mr. Kirby:

Q. Now, how did Ducor deal, by check or by cash?

By Mr. Lockley: If your Honor please, I object again. What Mr. Ducor did is entirely irrelevant. If he has reference to what Mr. Ducor did at one specific transaction with Mr. Lubben, that is something else. But he is asking what—

By the Court: I assume he asked, Counsel—and he said it had reference to a transaction with Mr. Lubben.

By Mr. Lockley: He hasn't laid any foundation as to when, where or whether it was with Mr. Lubben.

By the Court: I think you will have to make it more definite.

By Mr. Kirby:

Q. Who did Ducor deal with?

A. With Mr. Lubben.

4300 Q. And what product was he dealing with him about?

A. About hard candies.

Q. And did they deal by check or by cash?

A. They dealt—

By Mr. Lockley: I object, your Honor, on the ground that he has not laid a proper foundation. We don't know whether he is talking about 1901 or 1951.

By the Court: Yes, the time and place.

By Mr. Kirby:

Q. When, Mr. Stone?

A. This took place prior to June 1, 1945.

Q. It took place during the proprietorship period?

A. (Witness nods.)

Q. Can you be any more definite than that?

A. Between February 15 and May 31 of 1945.

Q. Was there more than one transaction?

A. There must have been between ten and fifteen transactions.

By Mr. Lockley: Well, please. If your Honor please, I would like to have him discuss each transaction separately and not guess.

By the Court: Well, the answer may stand.

4301 By Mr. Kirby:

Q. And were they always for cash?

A. They were for cash.

Q. Now I want to turn to another portion of Mr. Lubben's testimony—

By the Court: Well, we will take our noon recess now.

By the Marshall: Will the audience please remain standing while the jury and the Judge leave the court room.

This honorable court will recess until 2:00 o'clock this afternoon.

(Whereupon a recess was taken in the above-entitled cause to 2:00 o'clock p.m. of the same day, being Thursday, October 8, 1953.)

4302 • • (Caption—No. 52 CR 143) • •

Chicago, Illinois,
Thursday, October 8, 1953,
2:00 o'clock P. M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein in the presence and hearing of the jury:

By the Court: I see Mr. O'Brien isn't here yet.

By Mr. Kirby: Mr. O'Brien asked if he might be excused for a few minutes. If it is all right I will just
4303 move along.

By the Court: All right.

RONALD STONE, a witness heretofore called herein on behalf of the Defendants, having been heretofore first duly sworn, resumed the stand and was further examined and testified as follows:

Direct Examination (Ctd.) by Mr. Kirby.

Q. Mr. Stone, at the recess I was going to come to another subject, and that relates to the partnership of Eatsum Food Products. You know about the start of that, don't you?

A. I do; yes, sir.

Q. Mr. Lubben, in his testimony, in Volume 4, at page 410, in speaking of the partnership and of the partners, said:

"And on my side was a Ronald Stone and a Ro Hankermyer."

Now, were you a partner in the Lubben group?

A. Yes, sir; I was a limited partner in that group.

Q. And on the other side were Livorsi, Loperfido,
4304 Giglio and that group?

A. Yes, sir.

Q. Now, when did that partnership start?

A. Officially it came into existence on June 1, 1945.

Q. Had it some start unofficially before that?

A. There had been negotiations for approximately seven —about seven weeks prior to that. Perhaps more.

Q. And what did you have to do with the negotiations?

A. I was instrumental in arranging—through a mutual friend of both Mr. Giglio and myself—to have Mr. Giglio come down to the then proprietorship to discuss with Dave Lubben the possibility of a partnership.

Q. Were there such discussions?

A. Yes, sir.

Q. And who participated in them?

A. The first discussion took place at Mr. Lubben's home, about the first week in April. It was on a week day night. I don't recall the day, but I know it was at night, at night time, in his apartment. This apartment was on Madison Avenue and 35th Street.

4305 Q. And who was there?

A. Dave Lubben, William Giglio, Louie Roth and myself.

Q. And who was Louie Roth?

A. Louie Roth was Mr. Giglio's accountant.

Q. And were there subsequent meetings?

A. There was a subsequent meeting several days after the first one, which took place on a Saturday afternoon, also in Mr. Lubben's apartment.

Q. And who was there then?

A. At that meeting there were other people besides those who were interested in the discussions about the partnership. But those people who were discussing the possibility of a partnership were Dave Lubben, George Burry, Louie Roth and myself.

4306 Q. And were there further discussions after that before the partnership was formed?

A. There were further discussions; yes, sir. There was one further discussion in which all the parties, excluding George Burry, met for the purpose of agreeing upon terms. But prior to that, the meeting I referred to before, of a Saturday afternoon, Giglio told Lubben that he was not interested in any partnership at that time.

Q. Well, after Giglio said he wasn't interested in a partnership, who made the next move?

A. Dave Lubben left for the coast on some business. Several days thereafter I received a telegram from Dave Lubben, from Los Angeles, to the effect that "Must have deal with Giglio. $5,000.00 in it for you if deal is consummated." Signed by Dave Lubben.

Several days, perhaps four or five days after that, when Lubben returned from the coast, he immediately called me into his office and asked me whether I was able to do anything about reviving the transaction. I said yes, I had arranged a telephone call to Mr. Giglio,

who told me that it is not in his hands, that if Louis
4307 Roth is satisfied as to the financial condition of the

Eatsum proprietorship, then he, Bill Giglio, would enter into such a partnership.

Q. And they finally did?

A. They did agree on the terms.

Q. Now, in Mr. Lubben's testimony at page 410 he said:

"I am very sure that my people didn't have any interest in it. It was mine."

Now, did you—who is identified as one of his people—did you make any investment?

A. I did make an investment.

Q. And did you have an interest in the partnership?

A. I did have an interest in the parnership.

Q. What was your investment?

A. My investment was $10,000.00, $5,000.00 in cash of my own and $5,000.00 that I borrowed.

Q. Did you remain a partner throughout the life of the partnership; did you later assign your interest to Lubben?

A. On November 27, 1945, I gave Mr. Lubben an assignment of my limited partnership interest.

4308 Q. Did you continue about the premises and about the business after November of—

A. Yes, sir; I was there until the day the partnership dissolved

Q. And when did it dissolve?

A. March 8, 9, 10, somewheres around that date, of 1946.

Q. Now, Mr. Lubben testified, with respect to the dissolution of the partnership, in Volume 9, and he testified particularly around page 1068 about going to a Mr.

Blumberg and asking his advice, and saying that he wanted to get away from there. Then he said:

"'I wanted to get out of here.' And the result is, sir, I left him the accounts receivable, I left them the money in the bank, I gave them all of the inventory—but mind you, sir, I was a fifty per cent partner in this thing—all of the inventory, and I gave them everything, with the exception of the desk I had when I came with them, plus the leasehold on the plant up in the Bronx, and the machinery that I had in the Bronx."

4309 Now, did you know personally what the facts were with respect to the dissolution?

A. Yes, sir; I do know those facts.

Q. And do you know what Mr. Lubben, upon the dissolution, did get?

A. Mr. Lubben received the factory, which was free and clear of any encumbrance, which Mr. Giglio valued at $200,000.00, but Mr. Lubben said it was worth only $125,000.00. So that figure of $125,000.00 was satisfactory to Mr. Giglio. Mr. Lubben also got credit for $150,000.00 which he himself said he drew and which he did not account for at that time.

Q. Well, what about this last item, what is that $150,000.00 item?

A. About December 24th or 25th of 1945, Lubben took a trip for the Christmas holidays and New Years holidays to Cuba. During the period that he was away Roth made a thorough check of the books of Eatsum Food Company partnership and found unexplained—

By Mr. Lockley: Excuse me. Your Honor, I would like to have it known whether the witness is testify-
4310 ing from his own knowledge, of whether he is testifying from hearsay.

By the Court: Yes.

By the Witness: My own knowledge.

By Mr. Lockley: If it is from his own knowledge, I would like to know how he came of such knowledge.

By the Court: I think so.

By Mr. Kirby:

Q. Is this something you know about it?

A. Yes.

Q. How do you know about it?

A. Because I was there when Mr. Roth made the account—the audit and came in to Mr. Giglio and said, "There is about $200,000.00 worth of unexplained cash checks here."

Q. And was that taken up with Lubben?

A. When he returned Mr. Giglio took it up.

By Mr. Lockley: Excuse me again. If your Honor please, I would like to know if the witness was present at this conversation or whether he is testifying from hearsay.

By Mr. Kirby:

4311 Q. Will you tell us?

A. Yes, sir.

By the Court: Were you present at the conversation?

By the Witness: I was present; yes, sir.

By Mr. Kirby:

Q. And who else was present?

A. Mr. Roth, Mr. Giglio, Dave Lubben and myself.

Q. And the argument was about checks to cash?

A. The argument was about the checks which were unexplained.

Q. And to whom—who were the payees on those checks?

A. All the checks were made out to cash.

Q. Now, in Mr. Lubben's testimony here, in Volume 9 at page 1116, he was testifying about some arguments just prior to the dissolution of the partnership, and is that approximately the time you are now talking about?

A. There was no argument on this day of January 10th, or approximately that day, when he returned from Cuba, because Mr.—

Q. What was said?

A. Because Mr. Lubben said, "Whatever I drew I

4312 can explain." So he said, "I will have a statement within a few days showing just where the money went."

Q. So then what happened next?

A. I don't know whether it was a month later, three or four weeks, somewheres around that period, that Mr. Giglio again asked Lubben for the statement.

By Mr. Lockley: Excuse me.

By Mr. Kirby:

Q. Were you there?

A. At that one I was not there; no, sir.

Q. Just tell us about any conversations with Lubben about these cash checks when you were there?

A. The next time that there was a discussion took place—

By Mr. Lockley: May I have a foundation as to time and place?

By Mr. Kirby:

Q. Fix the time and place.

A. About March 8th or 9th of 1946.

4313 Q. And who was there?

A. Lou Roth, Giglio, Lubben and myself.

Q. And this is just before the dissolution?

A. This was on the day. This was the day of the dissolution.

Q. Mr. Lubben testified in his examination, at page 1116, talking about cash checks, he said:

"Yes, sir. We had constant arguments about it, Mr. Roth and myself."

Now, did you hear any of those arguments about these checks to cash?

A. Yes, there were arguments.

Q. Now, tell us specifically about this one at the break-up of the partnership; who said what and who was there?

A. I was in Mr. Lubben's room. We were seated together, near his desk, when Mr. Giglio walked in. And he said to Lubben, "Have you got that statement yet?"

Lubben said, "No."

Giglio said to Lubben, "Call up the factory right now and shut everything down. As of tonight there is no more Eatsum. Liquidate everything."

Q. What checks is he talking about, of what statement?

4314 A. About those same checks unaccounted for.

Q. And how much was it said that they amounted to?

A. Roth contended that they amounted to $200,000.00. However, at the split-up Lubben agreed that it was about a hundred and fifty thousand and took that in consideration as part of his split, the assets for which he was to get credit for.

4315 Q. What happened after this conference between Lubben?

A. It was agreed after Giglio said he wanted to set off everything, to charge proper people with whatever they took and then split the proceeds down the middle. Lubben suggested and asked Mr. Giglio in view of the fact that that was Lubben's business, that was his line, he said, "Let me have the factory."

Q. What was his line?

A. The candy factory. He says, "Don't sell that. Let me take the factory. You take the inventory. You take the accounts receivable and payable," which was satisfactory to Giglio and Roth and then Lubben said, "I will buy back from you the inventory."

And that is the way they arrived at a split.

Q. And did Lubben give notes for the inventory?

A. He gave notes for part of the inventory. At that time he gave no notes. There was jut a tentative agreement. "This is the way we are going to split."

Q. What happened after that?

4316 A. I don't know.

Q. Were you around there any more?

A. I was around, but I don't know what happened.

Q. When did you leave?

A. I think I remained around there for about another six or seven weeks.

Q. And did Lubben then start the General Confections?

A. The next day Lubben started General Confections.

Q. So you were there through the period of the proprietorship and through the partnership and up to about the start of General Confections?

A. No, I had nothing to do with General Confections.

Q. I see. Up until the start, you were there?

A. Yes, sir.

Q. Now, after you left, when did you next see Lubben?

Oh, by the way, while you were there, did you ever meet any of the defendants, Cain, Sullivan or Huebner?

A. I saw Mr. Huebner upon two or three occasions.

Q. Where?

A. At 19 Rutgers Street.

4317 Q. Is that the office of the company?

A. That was the office of the partnership.

Q. And what did you see when he was there?

A. I saw nothing so far as he is concerned.
Q. Were you introduced to him?
A. I was introduced to him, yes, sir.
Q. Was everybody else introduced to him?
A. Yes, he was introduced to Mr. Giglio. He was introduced to Mr. Roth and I believe Mr. Lubben took him around and introduced him.
Q. All right. Now, after you left there when did you see Lubben again?
A. I believe I saw Lubben perhaps three or four months after that.
Q. And—
A. Up at General Confections, up at his place.
Q. And was any business discussed at that time?
A. If I recall correctly, I loaned him $5,000.00.
Q. Well, when did you next see Lubben after that?
A. About October, 1948.
Q. Where?
A. At his place in Hillsdale.
Q. What do you mean at his place?
A. He had a farm or a combination farm and 4318 factory.
Q. And what was that about, who was there?
A. There were—it was on a Sunday afternoon and my wife and I were invited up to dinner there, but that wasn't the specific purpose of our visit.
Mr. Lubben had called me on the telephone to tell me that he had been down to the Intelligence Unit of the Internal Revenue Department for an investigation of his tax matters and of Eatsum and he told me that he had given to one of the agents my name and he asked me to come down and he wanted to talk to me about it.
That Sunday afternoon I came to his home. He told me of his conversation with the Intelligence Unit investigator. He told me to corroborate his story. There was no corroboration and there was no—
By Mr. Lockley: Pardon me, wait. If your Honor please, what story?
By Mr. Kirby:
Q. Yes, what story did he want you to say?
A. He wanted me to corroborate his story that we merely took everything away from him so that he got

nothing.

4319 Q. What did you say?

A. I said "that is not true, definitely not true," with the result that we, my wife and I left.

Q. Have you seen—

A. After—

Q. Have you spoken to him?

A. Yes, I have—I have spoke to him perhaps a year or so later when I was packaging some chewing gum. The person who held the lien, warehouse lien on my merchandise wasn't satisfied with the way the merchandise was moving, so this person solicited Dave Lubben to sell them the gum for me and that was the last time I spoke to Mr. Lubben.

By Mr. Kirby: You may cross examine.

By Mr. Lockley: If your Honor please, I move to strike the testimony of this witness on the ground it is entirely immaterial and irrelevant. It is an attempt to impeach on a purely collateral issue brought about by the defendants on their own cross examination. It has no relevancy whatsoever to the real merits of this case.

The Court will recall that it had serious doubt at
4320 the time the defense was cross examining on some of these collateral issues as to whether or not it was relevant. The defense is now attempting to take certain isolated statements which are purely on collateral issues, on matters not touched upon on direct examination and begin a new trial on new and inconsequential matters and issues.

We are prepared, if necessary, to rebut and refute most of the statements which are made by this witness. If we are required to do that, as I said before, we will do it. If we take into consideration every immaterial and collateral matter we are going to be here far beyond the time that should be allotted for the trial of this case.

By the Court: Well, I will overrule the objection.

By Mr. Lockley: I have one question.

Cross Examination by Mr. Lockley.

Q. Are you the Ronald Stone who on May 10, 1948, in the United States District Court of New Jersey was convicted of perjury?

4321 A. Yes, I am.

By Mr. Lockley: That's all.

Redirect Examination by Mr. Kirby.

Q. What did that matter relate to?

A. That matter related to the fact that I signed an affidavit for the release of somebody on bail. I put up my property for the person's release. The equity in my property was not sufficient to satisfy the terms of the court and therefore that was considered perjury on a bail bond.

Q. Did you dispute the matter?

A. Did I dispute the matter? No, sir.

By Mr. Kirby: Thank you.

By Mr. Kirby:

Q. By the way, Lubben knew about that when you associated with him?

A. Oh, of course.

Recross Examination by Mr. Lockley.

Q. You served time in jail?

A. Yes, sir.

Q And you were a lawyer?

4322 A. Yes, sir.

By Mr. Lockley: That's all.

By the Witness: May I—

By the Court: Oh, I think that's all.

By the Witness: Okay, sir.

By the Court: That's all.

(Witness excused.)

4323 FRIEDA STRUM, a witness herein called on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?

A. Frieda Strum.

Q. Where do you live, Mrs. Strum?

A. 3521 DeKalb Avenue, New York.

By the Court: I don't think the jury heard that. Do you live in New York?

By the Witness: Yes.

By the Court: New York City?

By the Witness: Yes.

By Mr. O'Brien:

Q. You have to speak a little more loudly than you have, Mrs. Strum.

Were you formerly a bookkeeper at General Confections, Inc.?

A. Yes.

Q. And that company commenced to do business about March 8th of 1946?

A. I don't recall.

4324 Q. Were you the bookkeeper from the time the company began business?

A. No, I was not.

Q. When did you first come with the company?

A. I believe it was in 1944. It was in 1944.

Q. Was that General Confections?

A. No, it was not.

Q. Well, I am only talking about General Confections.

A. Oh, I see. Yes, I was with General Confections at its start.

Q. And at the start, was Miss Feldman there?

A. Yes, she was.

Q. At General Confections?

A. That is correct.

Q. Now, maybe I misunderstand. I better go back to the beginning. Had you originally worked for the proprietorship, Eatsum Food Products?

A. That is right.

Q. And at that time, was Miss Feldman there?

A. At the time I was there—she came in shortly after I did.

Q. And after she came in, did she run the office?

A. That is correct.

4325 Q. And did you work under her?

A. That is right.

Q. And you stayed all during the proprietorship?

A. You mean the partnership?

Q. No. The proprietorship.

A. Yes.

Q. Down to the time of the partnership with Giglio and others?

A. I was through that.

Q. And you also worked through the partnership?

A. That is right.

Q. Until General Confections, Inc. was formed and started business?

A. Yes.

Q. Giglio had no connection with General Confections, did he?

A. I don't know anything about Mr. Giglio.

Q. Well, he wasn't around at General Confections, I mean?

A. Are you talking about the firm in the Bronx?

By the Court: No one contends he was, so why go into that?

By Mr. O'Brien:

Q. After you left the partnership, did Miss Feld-
4326 man stay on or did she come with you?

A. No. Miss Feldman stayed at the Rector Street address and I went with Mr. Lubben.

Q. And how long did Miss Feldman stay away?

A. I don't recall exactly but it must have been about four to six months, something on that order.

Q. And then she came over?

A. That is right.

Q. During the time she was away, were you the bookkeeper?

A. Yes.

Q. Who had responsibility for the books?

A. Well, when I went up to the Bronx, it was—there was quite a good deal of work and I couldn't handle the books, really, at that time.

Q. Were there some girls helping with the books?

A. There was one girl. There was a typist and she did a little bookkeeping but the accountants came in at that time, I believe, to do the books.

Q. Were the accountants Bercu and his associates?

A. I don't think so. I think they were Sproull-Scholz.

Q. Were the books kept up during that time, to
4327 your knowledge?

A. The books were very far behind at that point.

Q. Did they continue until Miss Feldman got back?

A. That is right. I think beyond that point, as well.

Q. During the time that you were there and before Miss Feldman got back, did you have anything to do with the keeping of any kind of a record on overages?

A. Yes.
Q. What record did you keep?
A. I kept a book and recorded each transaction. Exactly what company are you referring to when you say overages?
Q. General Confections.
A. When you say overages, for which concern?
Q. Well, suppose you tell me.
A. Well, not Shotwell, if that is what you mean.
Q. Well, then you had nothing to do with the recording of Shotwell overages?
A. Not that I recall, no.
Q. There were some other suppliers of candy, were there not?
A. Yes, there were.
4328 Q. You may state whether Two Star Confections or Gum Products were such suppliers?
By Mr. Lockley: Well, your Honor, I think that is immaterial.
By the Court: Yes. I think so. I will sustain the objection.
By Mr. O'Brien: Well, perhaps it isn't entirely material at this point to know just who they were, although there is some evidence which I think makes it material.
By Mr. O'Brien:
Q. You did keep a record of overages on some suppliers?
A. That is right.
Q. Will you look at Government's Exhibit No. 73-A and tell me if that memoranda was made by you? Tell me whether or not it was made by you.
A. Well, my handwriting isn't on it, so I wouldn't know.
Q. The hand notations which do appear on it are not yours?
A. No.
Q. Well, will you look at Government's Exhibit 153-A purporting to be a cash authorization slip and tell
4329 me if that is in your handwriting?
A. No, it is not. There is something here that looks like it..
By the Court: I don't hear you, Miss Strum.

By the Witness:

A. There is something here that looks like it might be, but I couldn't be sure.

By Mr. O'Brien:

Q. To what are you referring?

A. This date right here (Indicating). It might be Miss Feldman's handwriting.

4330 Q. Miss Feldman wrote—

A. It looks like it might be my date here. However, the rest of them look like Miss Feldman's so I assume the date might be hers.

Q. If there is anything on here that is your handwriting, it is the—

A. The date.

Q. The figures after the item date?

A. That is correct.

Q. Will you look at Defendants' Exhibit 55-A and tell us whether you did or did not type that instrument.

By Mr. Kirby: That is Government's Exhibit 55-A.

By Mr. O'Brien:

Q. I mean Government's Exhibit 55-A.

A. There is nothing in writing here that would identify it as mine.

Q. Is the same true of 55-B?

A. That is correct.

Q. Is there anything about those items, is there anything else about those items which in any way refreshes your recollection so as to enable you to remember anything about them?

4331 A. Well, I recognize the name of the candy, if that is what you mean.

Q. I mean about the preparation of it.

A. No.

Q. 55-C?

A. No.

Q. Is that your handwriting?

A. No.

Q. Government's Exhibit 13.

By the Court: What number?

By Mr. O'Brien: 13.

By Mr. O'Brien:

Q. Is any of that in your handwriting?

A. No, it is not.

Q. Government's Exhibit 102. Do you know whether you did or did not type that document?

A. No, I do not.

Q. Is there anything on the document that would refresh your recollection as to whether you did or didn't write it?

A. No.

Q. Government's Exhibit 101, in whose handwriting generally is that document?

A. This is Mr. Lubben's handwriting, but I see
4332 some of my figures on there.

Q. That is what I was about to ask you. I asked you generally it is in his handwriting?

A. That is right.

Q. In the lower right hand corner there are figures 2, 4, 5, and a total?

A. That is correct.

Q. Which is in your handwriting?

A. Yes.

Q. Can you tell us the occasion or circumstances for your putting that writing on this exhibit?

A. I don't remember the exact instrument, no.

Q. Do you remember anything about the circumstances as to the paper coming to you for that purpose or anything else?

A. I do not.

By the Court: Mr. Lockley?

By Mr. Lockley: Are you through?

By Mr. O'Brien: Just a moment. That's all.

Cross Examination.

By Mr. Lockley: Do you have the exhibits? You put them back. Thank you, Mr. O'Brien.

Q. Miss Strum, you were shown Exhibit No. 13 and you said it was not in your handwriting. Do you
4333 recognize whose handwriting that is?

A. Well, part of it is Mr. Lubben's.

Q. Is it all in Mr. Lubben's handwriting?

A. No, it isn't.

Q. What part isn't?

A. I believe this is not (indicating).

Q. The four entries on the top you think are not in his handwriting, is that right?

A. That is right.

Q. Exhibit 101 I think you already identified. The majority of those are in Mr. Lubben's handwriting and these figures alongside are yours?

A. That is right.

Q. Do you know what those figures represent?

A. Looking at the statement I can see it is an extension of the figures there.

Q. You just did the multiplication?

A. That is right.

Q. I notice on the top it has the multiplication for all amounts by ten cents a pound. It is fairly simple matter to put over a decimal and get the right amount on the extension?

A. That is right.

Q. On the bottom it has the extensions at $2.25
4334 a. dozen. Do you recall, does that refresh your recollection as to why it was given to you for the extension to be made?

By Mr. O'Brien: I object to the question.

By the Court: If she knows she may state.

By the Witness:

A. No, I do not recall.

By Mr. Lockley:

Q. Do you know if Mr. Lubben was a very good mathematician?

A. I don't think--he may have been a good mathematician but I think he preferred not to add too much.

Q. I show you Government's Exhibit 112. Do you recall whether you typed that?

A. I don't know whether I typed it but there are two Julys here that are in my handwriting.

Q. Most of it is his writing except there are two places where the word "July" is written in in place of an actual date?

A. That is correct.

Q. And those are written in your handwriting?

A. That is correct.

Q. Do you recall whether you would have written
4335 those in at the time the exhibit was originally prepared?

A. Would I have what? I am sorry.

Q. Would you have written those in at the time the exhibit was originally prepared?

A. Probably.
Q. Or was it written in at a later date?
A. I don't recall.
Q So far as you know, it was written in—
By Mr. O'Brien: I object. The witness said she didn't recall.
By the Court: Well, he hasn't completed his question. I don't know what the purport of it would be.
By Mr. Lockley: The purport of it was to ask if she wrote in the figures on or about the time of July, 1946, as shown by this document.
By the Court: She may answer.
By the Witness:
A. I wouldn't remember, but probably at the time the statement was made.
By Mr. Lockley:
Q. You were shown a number of other documents
4336 that you had no recollection about.
A. No.
Q. And your inability to help, Miss Strum, is merely that you don't remember, is that it? It isn't that you deny that those documents were ever prepared by you?
A. I can't deny it. My handwriting is on them. I don't recall them.
By Mr. Lockley: That's all. Thank you.

Redirect Examination by Mr. O'Brien.

Q. You are talking about only those that you identified.
A. Those that I identified, that is right.

Recross Examination by Mr. Lockley.

Q. How about the remainder of them, then, Miss Strum? How about Exhibits No. 73-A and No. 55-A and B and C?
A. Even those that have my handwriting, I am not sure I prepared them. I know I wrote exactly what is written in my handwriting and that is all.
Q. Did you also do typing for the company?
A. I did very little typing.
4337 Q. You didn't do very much typing?
A. No, I didn't.

Q. All right. Thank you, Miss Strum.

By Mr. O'Brien: All right. Thank you very much.

(Witness excused.)

By Mr. O'Brien: Your Honor, excuse me just a moment. I will proceed in a moment.

Mr. Lockley, is Mr. Schwartz available?

By Mr. Lockley: He is up on the fourth floor.

By Mr. O'Brien: Do you have more of his papers?

By Mr. Lockley: I have some.

By Mr. O'Brien: I want to have Mr. Schwartz who is here from Washington, Judge. He has certain documents which I would like to refer to before I go on with the other witnesses. I told him that we would have him on call so we do have no interruption or delay.

By the Court: I am not sure—who are we waiting for? Who is he?

By Mr. O'Brien: Mr. Schwartz, Judge. This witness, I understand, is upstairs, and Mr. Twohig has gone
4338 to get him. He is a witness who is responding from Washington with some documents.

4339 By a Juror: Your Honor, what was your ruling on the objection of the defense—I mean the objection of the prosecution to Mr. Stone's testimony?

By the Court: I overruled the objection.

By the Juror: Thank you.

RICHARD C. SCHWARTZ, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. O'Brien: I am sorry for the delay, your Honor. If it weren't that we skipped one witness I should have notified them about Mr. Schwartz.

By the Witness: I have been standing by upstairs. I am sorry.

By Mr. O'Brien:

Q. What is your full name, Mr. Schwartz?

A. Richard C. Schwartz.

Q. And where do you live?

A. I live in Silver Springs, Maryland.

4340 By the Court: A little louder, Mr. Schwartz.

By the Witness: I live in Silver Springs, Maryland.

By Mr. O'Brien:

Q. And you are connected with the Treasury Department?

A. Yes, I am.

Q. And in what capacity?

A. I am in the Enforcement Division of Chief Counsel's office, Bureau of Internal Revenue.

Q. And you appear here in response to a subpoena which I had served?

A. I did.

Q. Was the subpoena served upon you personally and you are here—there is a subpoena served upon you perally, is there not?

A. Yes, sir, there is one served on me personally.

Q. And also you are here in response to a subpoena served upon Mr. Humphrey?

A. That's correct, sir.

Q. The Secretary of the Treasury?

A. Yes, sir.

Q. And I have agreed with you and counsel for the
4341 government that you might appear instead of Mr. Humphrey?

A. I am so advised, sir.

Q. Do you have the subpoenas here?

A. Yes, I do.

Q. May I see the one to the Secretary? Don't pull them out. I will confine my attention to that.

(Documents handed to counsel.)

A. There are two subpoenas in the file.

Q. That's right. Have you brought with you the items mentioned in No. 2 of the subpoena, namely, all correspondence, memoranda, telegrams, et cetera, relating to the subject-matter of disclosure? Can you identify what I am talking about here?

A. I have brought with me all of the Treasury Department records in Washington called for by the subpoena. But I have no records from the Treasury in Washington, and we found none, respecting a disclosure in this particular case.

4342 Q. Let me ask, Mr. Schwartz, would you have custody in Washington, at the Treasury Department, of all papers relating to the income tax matters of this company, including any papers on disclosure?

A. Only in so far as such papers might relate to events which transpired in Washington before officials of the department in Washington, as to which there may have been a record prepared.

Q. I see. And to the extent that such events transpired in Chicago, at any of the agencies here, they would not be included within your record; is that my understanding?

A. They would not be included within the records kept in Washington. However, any documents bearing on the matter which were kept here in Chicago, I believe were gathered together by a special agent here in the Chicago area.

Q. Have those been furnished to you for response to subpoena?

A. This morning there was a package handed to me of documents which were gathered together here in the Chicago area from the offices of the Internal Revenue here.

Q. And those you have separately?

4343 A. Yes, sir; they are in a separate folder.

Q. Have you brought with you the press releases mentioned in section three of the same subpoena?

A. I have, sir.

Q. And are those accompanied by any documents or memoranda pertaining to the approval by the Secretary of the Treasury, or the Commissioner of Internal Revenue, or either of them, of the publication of those press releases?

A. They are, to the extent that a diligent search by a special agent in Washington located any papers bearing on the press releases.

Q. Going back to the files, or folders, whatever they may be, that were handed you by the Chicago officers for response to the subpoena, are there any papers amongst those which you object to producing?

By Mr. Lockley: If your Honor please, I don't know if this witness is familiar with matters contained in that folder. He said they were handed to him very recently.

By Mr. O'Brien: Well, I don't know.

By the Court: If we are going to take a great
4344 deal of time finding out what he has produced, couldn't you do that at some time other than the court hours? I thought it might expedite matters, that is all.

By Mr. O'Brien: I would be glad to attempt that, Judge. I don't see why it should take much time, though.

By the Court: All right. It seems to be rather ponderous right now.

By Mr. O'Brien: I can make it a lot snappier. I am just trying to recognize the man's right. He is here from the Secretary of the Treasury, a cabinet officer, and I can't ask him out of hand to produce—

By Mr. O'Brien:

Q. Suppose you produce the press releases, Mr. Schwartz.

A. I have here the press release, as twenty-nine thirty, called for in your subpoena, which was issued on January 10, 1952.

By Mr. Lockley: If your Honor please, I object as to the materiality of any press release which may be—

By the Court: It isn't before me. I am in no posi-
4345 tion to rule on it until an offer is made.

By Mr. O'Brien:

Q. Is that the only one that is available of those called for?

A. I produce a press release dated May 25, 1947, called for by your subpoenas.

Q. Are there any further ones, Mr. Schwartz?

A. In addition I produce press release of October 5, 1945, called for by your subpoena.

Those, sir, are the three press releases in your subpoena.

Q. And the mimeographs.

A., I produce mimeograph—a certified copy of a mimeograph dated September 8, 1919, called for in your subpoena.

Q. And the one from 1934?

A. I also produce a certified copy of the 1934 mimeograph called for by your subpoena.

Q. Yes, sir. And are there authorizations pertaining to those, or do you still have one, Mr. Schwartz?

A. Also in your subpoena, in that particular para-
graph, you called for a copy of a speech by a former
4346 chief counsel—

Q. Yes, sir.

A. —Mr. Wenchel. I produce a mimeograph copy of that speech.

4347 Q. I think that completes the list of that portion of the subpoena, except for any collateral authorization that there may be. Are there any such in existence?

A. I have a photostatic copy of what purports to be a notice to the field offices of the Bureau of Internal Revenue that Mr. Wenchel would give this speech last referred to.

Q. Anything further in the way of authorization or direction?

A. There is nothing further in the way of authorization or direction.

Q. There are just the two subpoenas. The matters called for in the second subpoena are compilations and summaries of which I was since advised in the proceeding that there are none and consequently do not call for any response to the subpoena. I am speaking of the second now, Mr. Schwartz, and going back to the first.

Now, will you produce the items mentioned in the first section of the subpoena—which now becomes the last item that I am going to talk about, your Honor,—that is No. 1 in the subpoena. I think it is No. 1. No, it is No. 2.

4348 A. No. 2 of the subpoena relates to any documents connected with the disclosure, or alleged disclosure, in this case. Those are the documents which were handed to me, which have been gathered together here in the Chicago area. They were handed to me as I came into the court room.

4349 Q. Well, you do not know what is in there?

A. I do not know what is in these envelopes.

Mr. O'Brien: I wonder, your Honor, if we might not during the recess run through those with Mr. Lockley and Mr. Schwartz.

By the Court: Supposing we take our recess now and see if you can make some progress.

We will recess for ten minutes.

By the Marshal: Will the audience please remain standing until the jury and the Judge leave the court room.

This Honorable Court will be in recess for ten minutes.

(Recess taken.)

By the Marshal: Will the party who lost a $25.00 Treasury bill, and recognizes the name on it, let me know.

By the Court: The Marshal found a Treasury bill on the floor and he asked me for permission to make an announcement. I gather you have all heard it. If any of you lost such a document you can get in touch with him.

4350 By Mr. C'Brien: Judge, on the basis of finding a Treasury bill Mr. Schwartz should return oftener?

By Mr. O'Brien:

Q. Have you, during the recess, segregated the documents mentioned in Section 2 of the first subpoena, Mr. Schwartz?

A. We have, sir. And I have in my hand now those documents which relate to the subject-matter called for in Section 2 of the subpoena.

Q. Would you produce those, please?

A. The first document is an interoffice memorandum under date of October 31, 1945, together with an assignment sheet, route slip, dated November 2, 1945, in the matter of Hankermyer, Roy, and David G. Lubben.

4351 By Mr. Lockley: Might I suggest, Mr. Schwartz, that there are some notations which are not a part of the original files and which should be detached at such times as they are turned over to Mr. O'Brien.

By the Witness: I neglected to say, on that last, it was a photostatic copy and not the original.

By Mr. O'Brien: Would you like that notation?

(Document handed to the witness.)

By Mr. O'Brien: Will you mark this Defendants' Exhibit 92 for identification?

(Said document was marked Defendants' Exhibit 92 for identification.)

By the Court: Why don't you have those marked, those you want to have introduced, and introduce them, and I will rule on them. I don't see any purpose in having—

By Mr. O'Brien: Just give me the documents and I will ask the Reporter to mark them for identification, 93 and upwards, detaching the slips.

4352 By Mr. O'Brien:

Q. You want those slips?

A. Yes, if I may have back the slips on the top of each document.

By Mr. O'Brien: In fact, if it may be agreed, the Re-

porter can mark these afterwards, Judge. We can take them from 93 up, this group.

By the Court: I think so.

By Mr. O'Brien: Then the group which the witness first produced, before the recess, go right on with the numbers, as to those, for identification only.

And I think very shortly I can excuse the witness.

By Mr. O'Brien:

Q. I will ask Mr. Schwartz if there are any other papers which you have brought in response to the subpoena?

A. Yes, sir; I have brought with me all of the files we could locate in Washington which cover the office of the Chief Counsel in Washington, and the Intelligence Division in Washington; and those files consist of the confidential reports of the agents and interdepart-
4353 mental correspondence, and copies of such documents that came into headquarters over the years involved.

By Mr. Lockley: Which papers do you mean, Mr. Schwartz?

By the Witness: Since the investigation was initiated. When the agent makes the final report he transmits a copy to Washington. And a copy of that report then is in the headquarters final—the final report.

By Mr. O'Brien:

Q. And do you have that final report here?

A. I have the copies of the final reports of the agents.

Q. May I see that?

A. Those are the confidential files of the Treasury Department, your Honor, and I would not wish to submit those to counsel.

Q. In that connection, Mr. Schwartz, you are not declining to respond on the basis that you are a subordinate, because we have an agreement that such objection would not be made, that you might produce anything which Mr. Humphrey, if he were here, would be willing or
4354 ordered to produce, is that not true?

A. That is correct, sir. I have them here today.

Q. So, speaking for him, you regard the reports which you have mentioned as being confidential or privileged in some sense, is that it?

A. That's correct, in that each one of these reports, as well as facts, they may contain hearsay, the identifi-

cation of informers, and they have conclusions of subordinate officials.

Q. And would you be willing to produce them exclusive of the names of the informants?

A. No, sir, I would not be willing to produce them exclusive of names of informants.

4355 Q. Let me ask another question. Would you be willing to produce them so that they might be marked for identification and be made available to the Court so that the Court could determine whether they are or are not privileged?

A. Yes, sir; I would be willing to present the matter to the Court.

Q. And willing to abide by such decision of the Court, if the Court should conclude that they are not privileged, and might be used, if otherwise material and relevant?

Do you understand me, Mr. Schwartz?

A. I am not sure that I understand the full implication of your question. I am sorry, sir.

Q. If they were so submitted to the Court, and if the Court determines that they are not privileged, are you willing to abide by that?

A. I am willing to abide by any ruling that the Court may make on the admissibility or the relevancy of these reports.

Q. And that includes the point of privilege?

A. Yes, sir.

Q. Well, would you then produce the documents to be marked for identification and to be—

4356 By the Court: Well, it may be that even marking them for identification might disclose confidential material. And I don't know that that is necessary until the Court has seen the documents and determined which ones, if any, should be admitted in evidence. Whether or not the remaining documents should be impounded, I haven't a very clear idea about it, but we can work it out.

By Mr. O'Brien: I think so.

By the Court: I wouldn't think it was necessary to mark all the documents, because in the very marking, you are exhibiting—or you may give it to the Reporters—confidential information.

By Mr. O'Brien: I have no desire to do that, and abide by the Court's suggestion.

By the Court: Can't we leave it that way and you mark the exhibits that Mr. Schwartz has produced and then you and Mr. Lockley can take up with me later the manner in which we are going to handle the alleged confidential information.

By Mr. O'Brien: All right. So that the documents
4357 themselves may be left with Mr. Lockley.

By the Court: Yes.

By Mr. O'Brien: And we need not detain the witness. Now, I do not know, Judge, which, if any, of these documents I might wish to offer in evidence, speaking of those already identified.

By the Court: Why don't you look them over and decide which ones you want to offer before they are marked. Maybe there are some you don't even want to have marked.

By Mr. O'Brien: They are quite numerous. I will look them over. But my point is that I don't think I need do it while the witness is here.

By the Court: No. There is going to be no objection to the foundation, if any of these documents are admissible?

By Mr. Lockley: No, your Honor, I will make no objection to that. I will make objection as to their materiality.

By the Court: Yes, I understand that.

4358 By Mr. O'Brien: In that event, I am through with the witness, on those understandings.

By Mr. Lockley: I should also reserve an objection, your Honor, to such portions of the press releases, speeches, and mimeographs which have just been identified. I would like to reserve an objection to any of the interdepartmental memorandums and work product which lead up to the final end result.

You will find in the files which Mr. Schwartz has produced memorandums and speeches which were eventually disclosed to the public, but here will also be in there a great many rough drafts, notes and interoffice memorandums of various sorts, which are in no way relevant to this issue. They are only the work product of subordinate officials, and were in some cases not accepted by the officials in authority at the time the eventual memorandum or speech was produced.

And I think as to those I would object, to anything
4359 but the eventful work product, the eventual result.

By Mr. O'Brien: Those I have not yet seen. They have not been handed to me. And, of course, I haven't even had them identified, nor have I offered them.

By the Court: I take it you haven't any questions of this witness, Mr. Lockley?

4360 By Mr. Lockley: I would like to clear one thing.

Cross Examination by Mr. Lockley.

Q. Mr. Schwartz, do you have authority to waive the privilege of the sovereign of the United States Government to reveal these documents to the Court?

By Mr. O'Brien: I object to the form of that question, if the Court please. If the Court properly understands it—

By the Court: I am not sure that what regulations there may be in the Treasury Department. The various departments as I recollect it, have this regulation.

By Mr. Lockley: I understand, your Honor, that Mr. Schwartz is here in lieu of the appearance of the Secretary of the Treasury.

By the Court: Yes.

By Mr. Lockley: And that he has the same authority that would clothe the Secretary of the Treasury under these circumstances.

By the Court: Oh.

By Mr. Lockley: And I am inquiring now as to whether under those circumstances he has such authority—

4361 By the Court: Very well.

By Mr. Lockley: —as may waive whatever privilege the sovereign—whatever privilege may exist in the sovereign as to these papers and memoranda.

By the Court: He may answer.

By Mr. O'Brien: I don't know that I understand the question, Judge. Do you mean that Mr. Schwartz has authority to waive the privilege, if there be one?

By Mr. Lockley: That is right.

By Mr. O'Brien: You are asking him whether he does have such power?

By Mr. Lockley: I am asking him where it lay, for the record.

By the Witness:

A. My authority is to submit any paper or document

which in the eyes of the Court has relevancy to the issues in this case but not to submit confidential reports which might otherwise in the eyes of the Court be found not relevant.

By Mr. O'Brien: Well, I certainly would agree with that.

By Mr. Lockley: All right. That's all.

4362 By Mr. O'Brien: That's all.

(Witness excused.)

By Mr. Lockley: With Mr. O'Brien's permission, your Honor, I will take those files back up to the United States Attorney's office for safekeeping.

By the Court: Yes.

By Mr. O'Brien: I suppose, Mr. Lockley, there is some way to get the report or copy of the report pulled and made available to the Judge so he doesn't have to select it from all those papers?

By Mr. Lockley: Yes. That was one of the things I had in mind, to take the burden of that selection off of the Court.

By Mr. O'Brien: If the Court please, I have some statute and legal sections which I should like to read into the record. They are relatively short and—

By the Court: On what issue?

By Mr. O'Brien: Well, I suppose on several of the issues. The first I should like to read is the section of the Price Enforcement Act that sanctions—

By the Court: Can't the Court take judicial notice

4363 of it?

By Mr. O'Brien: The Court will, but the jury will not be advised as a fact.

By the Court: The question is whether or not it is material.

By Mr. O'Brien: Well, the materiality that I have in mind, so far as that section is concerned is testimony which has been given bearing on the issue of intent.

By Mr. Lockley: If your Honor please, if it is material at all, the appropriate way would be through an instruction to the jury at the appropriate time.

By the Court: I would think so.

By Mr. O'Brien: Well, I think under our practice, if the Court please—

By the Court: I haven't any particular objection, if you want to make it part of the record. If it is material, it may be proper.

By Mr. O'Brien: I have covered that in an essential respect. I have only two others and they are very short, but let us take this one.

4364 By the Court: All right.

By Mr. O'Brien: I am referring to the United States Code, the 1946 edition, entitled 50 and to Section 925 of that title, and I should like to read into the record—that Section 925 has to do with enforcement and I should like to read into the record Sub Section B of 925 reading as follows:

> "Any person who wilfully violates any provision of Section 4 of this Act (Section 94 of this Appendix) and any person who makes any statement or entry false in any material respect, in any document or report required to be kept or filed under Section 2 or Section 202, shall, upon conviction thereof be subject to a fine of no more than $5,000.00 or to imprisonment for not more than two years in the case of a violation of Section 4(c) and for not more than one year in all other cases or to both such fine and imprisonment. Whenever the administrator has reason to believe that any person is liable to punishment
> 4365 under this sub section, he may certify the facts to the attorney general who may, in his discretion cause appropriate proceedings to be brought."

The other section is Sub Section E of 925 providing in material part—I am not reading the whole sub section but only the pertinent part, as follows:

> "If any person selling a commodity violates a regulation order or price schedule prescribing a maximum price or maximum prices and the buyer either fails to institute an action under this sub section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the administrator may institute such action on behalf of the United States within such one year period. If such action is instituted by the administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this sub section by

either the buyer or the administrator, as the case may
4366 be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this sub section shall be a bar to the recovery under this sub section of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

I would like to read a further short part, a final part of this statute. It is again in sub section E of 925:

"If any person selling a commodity violates a regulation order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on acount of the overcharge. In any action under this sub section the seller shall be liable for reasonable attorneys' fees and costs to
4367 be determined by the court plus whichever of the following sums is greater. First, such amount not more than three times the amount of the overcharge or the overcharges upon which the action is based, as the court in its discretion may determine."

I should like to read into the record a provision from the Internal Revenue Code in effect in the year 1948 showing the state of the law at that time on the matter of the deduction of premium payments as part of the cost of goods.

It is the Internal Revenue Bulletin, the Cumulative Bulletin for 1945 and I am referring to Volume 22, page 57. The heading is "Internal Revenue Code."

"Amounts paid in 'black market' transactions in excess of ceiling prices established by the Office of Price Administration may not be allowed either as a part of the cost of goods sold or as a business expense deduction in computing income subject to Federal income taxation."

The text being "Advice is requested whether a tax-
4368 payer may, for Federal income tax purposes, include an amount paid in excess of the ceiling price established by the Office of Price Administration, as a part of

the cost of goods sold, or deduct such excess payment as a business expense.

"Section 4(a) of the Emergency Price Control Act of 1942 provides:

"It shall be unlawful"—I think, your Honor, I can skip the sections of the act to which I have already referred, which I have already read in.

By Mr. Lockley: If your Honor please, I object to any further testimony on the ground that there has been no evidence that Shotwell paid any over-ceiling prices yet, so whether they had an offset for them is beside the point. There has to be proof first that they paid them before there is proof that they are entitled to take a deduction.

By the Court: Well, is that regulation material under the present state of the evidence?

4369 By Mr. O'Brien: I don't understand that, Judge.

By the Court: I say, under the present state of the evidence, is that regulation material? It may become material, I recognize, but is it material now?

By Mr. O'Brien: I think so.

By the Court: Well, you may read it and if it isn't connected up, why, I will entertain a motion to strike.

By Mr. O'Brien: After referring to the sections of the Price Enforcement Act which I have read and to certain of the court decisions, the bulletin concludes:

4370 "The foregoing cases support the conclusion that an amount paid to a seller of goods in excess of the legal price for such goods may not properly be recognized for tax purposes. The excess payments are not legitimately to be classified as a part of the cost of goods sold, and public policy decrees that no tax advantage may be derived from such expenditures.

• • •

"Accordingly, it is held that amount paid in 'black market' transactions in excess of ceiling prices established by the Office of Price Administration may not be allowed either as a part of the cost of goods sold or as a business expense deduction in computing income subject to Federal income taxation."

Now, your Honor, I should like to bring in and read the contrary determination in 1952.

By the Court: No, I don't think that that should be a part of the record. That is a matter for the Court to consider.

4371 By Mr. O'Brien: In order to clearly express it—

By the Court: No. It isn't part of the record. That is for the Court to determine. It is a question of law.

By Mr. O'Brien: Judge, there is also a question of fact, I respectfully submit.

By the Court: But not in this instance.

By Mr. O'Brien: I think there is.

By the Court: I am sorry. I have to disagree.

By Mr. O'Brien: All right, sir. But I have got it here anyhow and I am only trying to remind myself that I want to bring it in.

I have only one other matter here and it has to do with the publicity on tax returns, that is, the publicizing of tax returns and I should like to read the Section 26 of the Federal Revenue Code, Chapter I, Part 4, 58, Sub part 16, which provides that such tax returns while unavailable to the public are available to any other agency of the government.

By Mr. Lockley: Your Honor, I fail to see the slightest materiality.

4372 By the Court: Yes. I don't comprehend the materiality of it.

By Mr. O'Brien: Well, your Honor, if you think that it is a matter which can be more correctly presented by instruction, assuming that I am correct in the law—

By the Court: I am sure I can make it clearer, if it is appropriate matter to be placed in the instruction, than you can by reading it into the record.

By Mr. O'Brien: I am only reading it in.

By the Court: I would be glad to hear you on it if it is on a material matter and maybe the Court will put it in an instruction. I don't know.

By Mr. O'Brien: I do not myself regard it as the proper subject-matter of an instruction. I regard it as a matter of fact to be proved on the issue which I mentioned to you.

By the Court: Which issue, intent?

By Mr. O'Brien: Yes, your Honor.

By Mr. Lockley: Your Honor, there has been no show-

ing that these taxpayers had any intent one way or the other.

4373 By the Court: Let us pass it for a moment. I would be glad to hear you on it and I won't foreclose a reoffer of it, but at this time I don't understand the materiality. I won't foreclose you on it, however.

By Mr. O'Brien: All right, Judge. Maybe I can get it more compact.

By the Court: Maybe you can.

By Mr. OBrien: Then, may I suggest this, Judge: I would like to adjourn—I would like to recommend that we adjourn at this time. I have excused three witnesses whom I did not think it worthwhile to put on in view of some conversation which we had and I would like to spend the time in getting ready for the witnesses tomorrow in the hope that we can, by doing that, reach a conclusion sooner than I thought possible before.

By the Court: Well, are we progressing?

By Mr. O'Brien: We are progressing.

By the Court: Is it fair to ask you when you think you may conclude with your testimony?

4374 By Mr. O'Brien: Well, tomorrow is Friday. I would say that we would close with our testimony not later than Tuesday and I hope before that.

By Mr. McConnell: I think I can make a more optimistic estimate. I don't see why we can't get this case closed if not tomorrow the first thing Monday morning. I wasn't in on this discussion this morning as to the possible adjournment.

By the Court: I haven't any objection. If you think it will expedite matters by adjourning now, we may do so. We will adjourn until 10:00 o'clock tomorrow morning.

By the Marshal: Will the audience please remain standing while the Judge and jury leave the court room.

This Honorable Court will recess until tomorrow morning.

(Whereupon an adjournment was taken until Friday, October 9, 1953, at the hour of 10:00 o'clock A. M.)

4375

• • (Capion—No. 52 CR 143) • •

Before Nordbye, J. and J.

Chicago, Illinois,
Friday, October 9, 1953,
10:00 o'clock A. M.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the jury:

By the Marshal: This Honorable Court is now in session.

By the Clerk: 52 CR 143, United States of America *vs.* Shotwell Manufacturing Company, et al., case on 4376 trial.

By the Court: Mr. O'Brien, may I see you and may I see Mr. Lockley for a moment.

(Whereupon a discussion was had between Court and counsel beyond the hearing of the jury and the reporter.)

By the Court: All right, you may proceed.

(Whereupon the following proceedings were had and taken in the presence and hearing of the jury:)

BYRON A. CAIN, one of the defendants herein, called as a witness herein on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. You are Byron A. Cain?
A. I am Byron A. Cain.
Q. One of the defendants in this case?
A. I am.
Q. Where do you live, Mr. Cain?

A. At 1155 Mohawk Road, Wilmette, Illinois.

Q. And how long have you resided there?

4377 A. About ten years.

Q. With your family?

A. With my family.

Q. And that is, with Mrs. Cain and your children?

A. Mrs. Cain and my four children.

Q. Who are your children?

A. I have a daughter, Mary, nine years old; a daughter, Patricia, eleven; a son, Jim, sixteen, and a son, Jack, twenty-two years of age.

Q. Are they in school?

A. Mary and Pat are in the Faith, Hope and Charity School. Jim is in New Trier High School, his senior year, and my son, Jack, is married and is living in Chicago.

Q. How long have you lived in Chicago or this area?

A. Since January 1, 1927.

4378 Q. Where were you born?

A. I was born in Union City, Indiana, and moved from Union City to Indianapolis. Before I moved, I lived in Union City and spent the greater part of my life, before coming to Chicago, in Indianapolis.

Q. What is your business or occupation?

A. I have been in the real estate business since 1920.

Q. And here in Chicago since 1927?

A. In the real estate business in Chicago since 1927.

Q. Did you acquire an interest in the Shotwell Manufacturing Company?

A. Yes, I did.

Q. About when was that and what was the interest?

A. I acquired an interest in the latter part of 1941 or early in 1942. I acquired the sum of 13,000-odd shares of stock in The Shotwell Manufacturing Company.

Q. Out of a total of how many shares outstanding do you recall?

A. Out of 100,000 shares.

4379 Q. Did you then proceed to participate in any way in the affairs of that company?

A. Yes, I did. Yes, we had a serious financial problem at the time, and my primary work was on the reorganization of the company, and putting it back on its financial feet.

Q. Who were your associates at that time?

A. Alfred D. Shotwell was President, Frank Huebner was Vice President and Superintendent—

By Mr. McConnell: Can we have it a little louder, please? We can't hear you back here.

By the Witness:

A. Frank J. Huebner was Vice President and Superintendent. Stanley Graflund was an officer out there at the time. Mr. Harold E. Sullivan, Mr. Shotwell, Mark Law, Frank Huebner, and myself were directors.

By Mr. O'Brien:

Q. Had Mr. Huebner and Mr. Graflund been there before you acquired your stock interest?

A. Yes, they had. They had been there quite some time before.

Q. How about Mr. Law?

4380 A. Mr. Law was a Director at the time I went there.

Q. Mr. Huebner was the operating superintendent of the plant?

A. That is correct.

Q. And their business, as we all know, I think, is the manufacture of candy for sale?

A. That is right. We manufactured candy and marshmallows.

Q. Is there a difference in relationship, are marshmallows regarded as candy?

A. Well, it differs in that we sell through the grocery store, or did in those days, and that was about the major item that sold in the grocery store.

Q. How much time did you devote to the business?

A. Well, in the early days of the refinancing, I devoted whatever time was necessary to get that job done. My program, my routine program was to get to the factory around three in the afternoon and work until our job was done, whatever time it was done.

Q. Well, will you tell briefly the general nature 4381 of your duties as Director, from day to day?

A. Well, my duties were to consult with all of the heads of the departments, and to just kind of coordinate the organization so that it would function smoothly. I discussed problems, sales problems with the sales manager, and factory problems with Mr. Huebner—any problems that might come up in the auditing department with Mr.

Graflund, Mr. Roeser, Miss Morrill, whoever happened to be in that particular department at that time.

4382 Q. Do you know David G. Lubben?

A. I do.

Q. When did you first meet him?

A. I think it was in the latter part of 1944.

Q. And will you tell where, under what circumstances?

A. Well, he was brought into my office by Mr. Huebner and John Bond, who was the west coast broker for The Shotwell Manufacturing Company, and I met him. Mr. Bond said that he could—he was a pretty capable fellow.

Q. Let's see. You had some discussion at that time and four were present, you, Huebner, Bond and Lubben?

A. That is correct.

Q. And what was talked about or what was said then?

A. Well, Mr. Lubben asked if he could have the New York territory, which at that time was not covered by The Shotwell Manufacturing Company. We did not have a broker in the area. And as an inducement for our giving him that territory, he said that he could get us some. critical materials that we needed to manufacture mer-

4383 chandise. And I took Mr. Huebner and Mr. Lubben over to Mr. Hogan and suggested to Hogan that he be put on as our New York representative, at least, give him a try.

Q. Is that your full recollection of the conversation?

A. I turned him over to Hogan with instructions that he be put on. That ended it, so far as I was concerned.

Q. Now, what, if anything, was said about candy?

A. Well, we gave him a—

Q. What was said?

A. We made him our New York broker, and in so doing we set up a quantity of candy that could be shipped in to that New York market, and a certain portion of that candy could be directed by him, as our broker, to his company, which at that time, I believe, was the Eatsum Food Products Company. He, of course, received a commission on any merchandise that he sold to customers other than himself. And he did have quite a good many customers other than the Eatsum Food Products Company. But he got a commission on all business shipped into that territory.

4384 Q. Was there commission paid on the goods shipped to Eatsum?

A. Oh, yes.

Q. As well as those shipped to the customers in the territory?

A. Oh, yes.

Q. And was that arrangement carried out, was it put in effect?

A. It was.

Q. When did you next have a business conversation with Mr. Lubben?

A. I would think in the spring—

By the Court: Have you brought out when this first meeting was?

By Mr. O'Brien: I think so.

By the Witness:

A. In the late part of 1944 I think it was.

By the Court: All right.

By the Witness:

A. The next meeting that had anything to do with our business, Mr. Huebner and I were in New York in either the spring or very early summer of 1945, and either Mr. Lubben told me or Huebner—

By Mr. O'Brien:

4385 Q. Did you meet Mr. Lubben there?

A. Yes, we did.

Q. At that time?

A. Yes, we did.

Q. Is that as close as you can place the time, the spring of '45 or the early summer?

A. That's about as close as I can place it.

Q. And you, Huebner and Lubben were present?

A. That's correct.

4386 Q. Now, what occurred or what was said at that time?

A. Well, Mr. Lubben felt that if we would make a trip to Boston, he could get us a couple carloads of chocolate. A carload of chocolate is approximately 50,000 pounds, and we needed it badly. So we naturally made a trip to Boston.

Q. Did Mr. Lubben go with you?

A. Yes, he did. The three of us went. We made a luncheon date with a Mr. Nelson, I believe. It was the United Chocolate Refiners, a subsidiary of the United Cigar Stores, who, in turn, are a subsidiary of Liggets. And we had this luncheon in Boston.

On the train going up to Boston Mr. Lubben said, "Now, if I am successful in getting this chocolate, I want a substantial amount of candy shipped to me, which I, in turn, will ship to the United Cigar Stores or to the Liggett stores."

Q. Was this an additional amount of candy?

A. Oh, yes, an additional amount of candy. It was a large amount. We were a hundred thousand pounds of chocolate—that is, if the deal went through—and it
4387 would naturally be a hundred to two hundred thousand pounds of our merchandise.

Q. Was anything said about overages on that candy?

A. Oh, no, no overages—no mention of overages made on that transaction.

Q. Well, what happened in Boston, then, did you have the luncheon with Mr. Nelson?

A. We had the luncheon with Mr. Nelson.

Q. Was that immediately following your discussion in New York and your arrival in Boston?

A. Yes, it was the same day. I think we came back the same night. I don't believe—but I couldn't be sure—that we stayed overnight.

We had the luncheon. Nelson agreed to ship the chocolate. We agreed to ship Lubben the merchandise we agreed to ship, and Mr. Lubben, in turn, agreed to ship the merchandise to whoever it was he was supposed to ship it to. And that was the end of the deal. It was one of those ring around the rosy things.

Q. Did you get the chocolate?

A. We did.

Q. Two cars?

A. Two cars.

4388 Q. From United Chocolate Refiners?

A. That's correct. The only shipment of chocolate we ever received.

Q. How long after, do you know?

A. I wouldn't know that, Mr. O'Brien. I would imagine within a week or ten days, two weeks.

Q. Well, is it your recollection that it came in due course?

A. It did come in due course.

Q. You haven't consulted your record to see precisely when it arrived?

A. I would have to have somebody consult the records for me. I wouldn't know how to do that.

Q. Were there any overages involved on the chocolate, as far as Shotwell was concerned?

A. No, sir; we paid ceiling price for the merchandise.

4389 Q. And as far as you know, that is all it was, there weren't any averages involved with anybody?

A. That's right.

Q. When was the next transaction in which you had any business discussion with Mr. Lubben?

A. I would say in September or October of 1945.

Q. Where was that?

A. At our office, Shotwell Manufacturing Company.

Q. And who was present?

A. Well, I was with—Mr. Huebner, Mr. Lubben and myself were present. And there may have been others, although I can't place them in there at this time.

Q. What occurred at that conversation?

A. Lubben had been advised prior to that conversation by Mr. Huebner that we would be unable to ship the quantities of merchandise we had been shipping to him, because of the acute shortage in our plant of corn syrup. Lubben contacted, Mr. Huebner—

By Mr. Lockley: Just a moment, Mr. Cain, I object to any recitation of hearsay by Mr. Cain.

By the Court: Yes.

4390 By Mr. Lockley: What he had to do with this—

By the Witness: I am trying to bring out the reason for the meeting.

By the Court: Your answer wasn't responsive.

By Mr. O'Brien:

Q. Just tell us what occurred in the conversation.

A. Well, a meeting was arranged in my office and Mr. Lubben said that if we would ship him merchandise that he would pay us a cash overage on the merchandise and show us how to go into this market and cause corn to be delivered to the refiners so that the life blood of our business could continue to flow into it, namely, corn syrup.

Q. What was said about the rates of overages to be paid?

A. It may not have been consummated at that one meeting, there may have been two, but the deal was ultimately consummated whereby we started at a rate of three cents on gum work and five cents on chocolate items that were to be shipped to Eatsum Food Products Company. The

money, in turn, was to be turned over to somebody
4391 in The Shotwell Manufacturing Company, which, in turn, was to go out for the purchase of raw corn.

Q. Now, did those rates—well, excuse me. Did you tell Mr. Lubben that you would do that?

A. We did.

Q. And did you proceed to do it?

A. We did, we proceeded to ship him merchandise.

Q. How long did those rates continue?

A. About February of 1946.

Q. Was there a change at that time?

A. There was a drastic change in the market in corn syrup.

Q. No, a change in the rate.

A. Yes, there was.

Q. To what?

A. To five and ten cents a pound.

Q. And how long did that rate continue?

A. Until about June of 1946.

Q. And at that time what happened?

A. The rates went to ten cents on non-chocolate items and 18⅔ cents on chocolate items.

Q. What, if any, instructions did you give about the receipt of the overage money?

A. I instructed Mr. Roeser and Mrs. Morrill and—
4392 well, I know those two were instructed—a box was to be opened up in our vault and the moneys that came in there from this transaction were to be put into that box and to be paid out at the request of any one of the three people in the place. Mr. Huebner was there all the time, Mr. Shotwell was there all the time, at that time.

Q. And what, if anything, did you tell them about the acquisition of corn?

A. Well, I told them we had to acquire corn to get the corn to the refinery and that they should get that by—
4393 By Mr. Lockley: I object, your Honor, unless there is a time and a place for this particular conversation, if it is a conversation.

By the Court: Yes.

By the Witness: This is concurrently or shortly after.

By the Court: Now, wait till the question is put.

By Mr. O'Brien:

Q. When was it that these instructions were given, Mr. Cain?

A. I would say the latter part of September or the first of October of 1945, in the office of the Shotwell Manufacturing Company.

Q. Now, did you tell any of those folks specifically who to pay the money to?

A. I did not.

Q. Do you know of your own knowledge of any of the people to whom the money was paid?

A. I never saw the money being paid to anybody. But in my position out there and in my conversation—

By Mr. Lockley: Well, I object, your Honor. He never saw it being paid.

4394 By the Court: You have answered the question.

By Mr. O'Brien:

Q. Now, let me ask this, in your daily visits to the company, and your attention to the work, did you learn that the corn syrup was being obtained?

A. It was being obtained.

Q. And were there reports to you from time to time from Huebner, Roeser, Mrs. Morrill, as to the paying of the money for the corn?

A. There was—

By Mr. Lockley: I object, your Honor, on the ground that his answer would require hearsay.

By Mr. O'Brien: Well, there is an exception to the hearsay rule.

By the Court: Yes, I think that is an exception to the hearsay rule.

By Mr. O'Brien: What was his Honor's statement?

(Record read.)

4395 By the Witness: Read the last question to me? Did I answer?

By Mr. O'Brien:

Q. How long did the corn shortage last?

A. The corn shortage lasted into August or September of 1946.

Q. Do you recall, Mr. Cain, what it was that relaxed the situation as to corn at or about that time?

A. Well, yes, I do. The corn, the 1946 corn crop was —and corn almost became a glut on the market—not a glut, but it was a plentiful supply. The minute we knew what the 1946 corn crop was, there was no more shortage, and the OPA had gone off of the item on June 30th, I believe it was.

Q. Speaking of the box, did you at any time know of the down town safe deposit box?

A. Yes. I was advised by Mr. Graflund.

Q. Did you know the box? Did you just know the box?

A. We always had a box at the City National Bank for securities.

Q. In connection with these overage transactions, did you have any report from Mr. Graflund concerning
4396 the deposits of money to that box?

A. He advised me he had taken some twenty-five or twenty-seven thousand dollars down to the downtown box because he felt it was too much money to carry in our safe at the factory.

Q. How long were the boxes maintained for such purpose?

A. From the latter part of September.

By Mr. Lockley: I am sorry, Mr. O'Brien. I believe there were two boxes, and I am not clear as to which one you are referring to.

By Mr. O'Brien: I was referring to both. I think I said boxes.

By Mr. Lockley: Well, I am sorry, if your Honor please, but I understand the first box was already in existence, and had been for some time.

By Mr. O'Brien: And I asked him how long were the boxes maintained for that purpose, that is, for the deposit of the overage sums of money. I assume they still had the physical boxes long afterward.

By Mr. Lockley: All right.

4397 By the Witness:

A. The boxes were closed out in about—I would say in about July or August of 1945 or 1946, or so.

By Mr. O'Brien:

Q. Do you have knowledge as to how that was done?

A. Yes, I do. There was a substantial sum of money left in one of the boxes, and I don't know which one, and I was asked what to do with the money, and I said, "Deposit it to our bank account."

4398 Q. Who did you tell that to? Who did you tell to do that?

A. Whoever the comptroller was at the time. I said, "Just deposit it in our bank account, the Merchants National Bank, to The Shotwell Manufacturing Company." And that was what was done with the money.

Q. Do you remember how much money that was?

A. Approximately $15,000.00, or some such sum.

Q. Now following that, when was your next discussion with Lubben concerning business matters?

A. I would say in the fall of 1946.

Q. Do you remember where it was?

A. It was in the plant office, I think.

Q. Well, now, do you recall, Mr. Cain, you say you think—will you give us your best recollection?

A. Yes. It was—Mr. Huebner brought him into my office at the plant.

Q. Was it at the plant?

A. It was at the plant and it was in the latter half of 1946.

Q. Was anyone else present?

A. Mr. Huebner was, yes.

4399 Q. Anyone else, I said.

A. I can't recall of anybody else being present.

Q. Now what was said in that conversation?

A. Well, Mr. Lubben and Mr. Huebner came into the office, and he said, "Mr. Cain, I have worked out deals with several of my people"—.

By the Court: Who said this?

By the Witness:

A. (Continuing) Mr. Lubben. "Worked out deals with several of my customers—my accounts." One of them was Urban. I know he mentioned him. I think he mentioned two or three at the time whereby they would take preferred stock in the General Confections Company, "In lieu of the money I owe you on overages."

I said, "How much do you owe us?" This was, as I say, in the fall, and the figure was mentioned as being somewhere between forty-eight and fifty thousand dollars, and I said, "Lubben, we don't want your money. We don't need it. The need for the money has long since ceased so we will forgive it. I don't want stock in your General Confections Company."

4400 That just—that ended the transaction. He said, "I am certainly very grateful. Nobody else ever done that for me," and that about ended it.

4401 By Mr. O'Brien:

Q. Were those moneys ever paid?

A. They were not.

Q. What do you know about unbilled shipments?

A. When I returned from California—that goes into about the middle of April of 1946, and Mr. Huebner advised me that in my absence, the corn situation had become so acute that Lubben had suggested to him that in order to get money quick that he would advance the money, that is, prepay the money if we would ship these shipments to him and not bill him, and in that set of circumstances there would be no overage coming to us on the payments.

Frank was so desperate for money that he shipped several unbilled shipments.

Q. As to the money, was the money—did Mr. Huebner say that the money was to be paid in advance or after the shipment?

A. It was to be paid in advance. We needed the money. That was the most critical time of the whole corn shortage.

Q. Was that the first time that you know of the unbilled shipments?

4402 A. That was the first time I knew of it.

Q. Did you have a transaction?

By Mr. Lockley: Excuse me, Mr. O'Brien. I am afraid that I didn't get the note as to when this particular transaction occurred.

By Mr. O'Brien: This particular unbilled shipment?

By Mr. Lockley: Yes.

By Mr. O'Brien: In April of 1946, I understood him to say.

By Mr. O'Brien:

Q. Is that right, Mr. Cain?

A. That is correct.

Q. Did you have a transaction which involved a loan at the Sterling Bank?

A. I did. That was in about the—oh, spring or early summer of 1947.

Q. Had you had a talk with Mr. Lubben about it around about that time?

A. Yes. Mr. Lubben was either—well, he needed money.

Q. Well, now, first tell us, Mr. Cain, the formal re-

quirements, where the conversation was, who was present and what was said?

4403 A. To the best of my recollection, Mr. Lubben took—discussed the matter with Mr. Huebner and myself in the offices of the Shotwell Manufacturing Company first and said that he needed $75,000.00 and that he needed it desperately and wanted to know if we would make a loan on his home and factory. He had two homes, I think, at that time and the farm, and we had—I had the place appraised, arranged with the New York bank to make him the loan. I took back a mortgage for the $75,000.00 and the loan was to be paid on monthly payments. I don't recall what they were, but so much money every month, and I presume, I would guess now it was to be paid out in three or four years.

Along about December or November, or December of 1947, I was advised by the Sterling—one other condition I made with Lubben at that time was he was to send a financial statement of his business to us at Shotwell every month so we would know where he was going. So, about the fall, late fall or early winter, 1945, I was advised by the Sterling Bank that this note had defaulted. I immediately contacted Lubben and asked him to get his statements in to us so we could see what the situation was, and I didn't get a statement.

4404 Q. What did happen, Mr. Cain? Did you have some further talk with him?

A. Yes. I think after that conversation with him he came to Chicago and said it would be—if we would—

By the Court: When?

By Mr. O'Brien: Excuse me.

By the Court: When?

By Mr. O'Brien:

Q. When did he come to Chicago?

A. Well, that would place it in mid November or the first part of December.

Q. Of what year?

A. 1947

Q. Yes, sir.

A. And he said if—he just had to have another fifty thousand dollars, just had to have it.

"Well, I said, "Mr. Lubben, I don't believe we would be interested in loaning you another fifty thousand dol-

lars. You have fallen down on the payment of the seventy-five thousand"—

Q. By the way, Mr. Cain, I forgot to ask you; When you arranged for the $75,000.00 loan and when you
4405 talked to Mr. Lubben about it, did you or did you not tell him that at a future time you would lend $50,000.00 in addition?

A. I did not. There was no fifty thousand discussed at that time. Seventy-five thousand was the limit that he needed at the moment.

Q. Well, go on. You said you had a talk with him about fifty thousand dollars here in Chicago.

A. Here in Chicago.

Q. Now, then, go ahead with that.

A. Well, I told him that I would send Mr. Graflund and Mr. Busby to look over his situation. I did that for two reasons: One, I wanted to know what the situation was as to the loan we presently held, the seventy-five thousand. Secondly, I wanted to know what his books reflected as to the over-ceiling payments that had been made to The Shotwell Manufacturing Company.

So I sent Mr. Busby down there to find out whether the company was good for an additional loan, and Mr. Graflund, I told him to scrutinize the books and find out what it reflected with regard to the over-ceiling payments that had been made to The Shotwell Manufacturing Company.

Q. Did Mr. Busby report to you in any way?

4406 A. Mr. Busby reported to me on a Saturday, about the 10th day of January. He called and asked if we could have an appointment on Sunday morning at my house and suggested that I have Mr. Sullivan there at the same time.

That appointment was kept. Mr. Busby was there and he said that in his examination, No. 1, that the General Confections Company at that time was in no condition for anybody to make it any kind of a loan; it was just in desperate financial condition, so we could forget that.

No. 2, that it had come to his attention we had received some over-ceiling payments from the various Lubben companies and that we might have a serious tax problem.

Q. Did he say how that had come to his attention?

A. He said that Mr. Graflund had told him of the—in his examination, while he was examining the books and checking it up, Mr. Graflund had disclosed to him the fact that we had received these over-ceiling payments.

Q. And did Mr. Busby ask you if you had received overages?

4407 A. Yes, he did, and I told him that we had.

Q. What did he say about it?

A. He said we might have a serious tax problem. I said, "I don't see how we could have a serious tax problem. The money was taken in and the money was paid out and we don't owe any taxes."

"Well," he said, "that isn't the way it works. If you take in money, over-ceiling, it is not a deductable." And Mr. Sullivan and I, in unison, said, "Well, look"—

Q. You mean, if you pay out money over-ceiling?

A. If we pay out money over-ceiling that money cannot be deducted for the purpose of income tax. It can't be taken off. I said, "It doesn't seem fair to me, but if that is the rule, what can we do about it? How can we straighten it out?"

He said, "Well, there is this disclosure policy of the Government's."

I said, "What is that? Tell us about it." And he told us about the disclosure policy of the Government, we go in and tell the Government about what had gone on and that we would be assessed a tax and that would be that, and Mr. Sullivan and I told him to go down

4408 and tell whoever he thought should be told about the problem, and to report back to us and find out—especially find out whether this policy is still in effect.

4409 Q. When you so instructed Mr. Busby, did you tell him to name the company?

A. I told him not to name the company at that meeting.

Q. And did you get a report from him?

A. I got a report back from Mr. Busby—

Q. I don't want the details for a minute. Did he report to you?

A. He did.

Q. To whom did he say he had talked?

A. He said he had talked to Ernest Sauber, who was the Deputy Collector of Internal Revenue.

Q. Did you thereafter go with Mr. Busby to see Mr. Sauber?

A. Yes, sir. I think—

Q. When?

A. I think I went with Mr. Busby, or by myself, to see Mr. Sauber, in the latter part of January, but that one I can't be too sure of, but right after the confirmation of the Haberkorn deal, and between that time and the third day of March, when I returned to California. I flew back in and I went in to see Mr. Sauber with Mr. Busby and myself, and to discuss this problem with him.

4410 Q. What did you do with the $50,000 loan to Lubben?

A. We didn't make it.

Q. What, if anything, did you say to Lubben about it?

A. I just told him that we wouldn't make his loan.

Q. Now, where did you next hear anything about this loan of $50,000?

A. Well, the next I heard of it was a phone call and I was in California, and I got a phone call from Mr. Sullivan.

Q. Harold Sullivan?

A. Harold Sullivan. From the—I think he was at the Gotham Hotel in New York, and he said that Lubben and one of his men, strong arm men, is the way he had put it, had been in to see him, and had insisted that this $50,000 loan be made, and that he pulled out a bunch of marked up invoices, and some memoranda things, and that he had told him he would have nothing further to do with him, he wouldn't be blackmailed, and that was that.

And he said, "I am going on back to Chicago". I said, "Harold, keep me advised."

4411 Q. When did you next hear of any business transaction with or through Lubben?

A. I was called by Mr. Sullivan, I would think, about the 10th of February.

Q. What year?

A. 1948, and told that we had bought from Lubben, the Haberkorn Candy Company, and that in the transaction we had sold to Lubben or to—in the transaction,

anyway, our mortgage, which was paid down at that time to $67,000, was going into the deal, and an additional amount of cash to make up $101,000, was being paid for the Haberkorn Candy Company.

Q. Is it true that thereafter Mr. Davidson came to California and procured from you, as he said, an assignment of the mortgage?

A. Yes, he did. He procured an assignment of the mortgage, and that was the end of Davidson.

Q. And at that time, what, if anything, did you do about the bank loan?

A. I paid the bank loan off. I tried to pay it off with a Shotwell Manufacturing Company check, but because I had personally guaranteed the loan, to begin
4412 with, they asked for a personal check from me, so Shotwell issued this check to me, and I in turn issued my check to the bank.

4413 Q. Then that was in February, March of 1948. When was the assignment, Mr. Cain?

A. It was in February, 1948, about the middle of February.

Q. Following that, when did you next have to do with anything concerning Lubben or his companies?

A. I think the next time I saw Lubben was in the latter part of June of 1948.

Q. Prior to that, had you had any discussion about the so-called overage items with anybody?

A. Yes, we had. We had made our disclosure to the government and it was—

Q. Well, let me direct your attention to a conversation in New York at the candy convention in June of 1948.

A. Well, a Mr. Tobias who had been Mr. Lubben's bookkeeper—one of the many—called me at the Waldorf Hotel where the convention was being held and said he had some information that I would be very much interested in.

I said I would be very happy to see him. I said, "Come on up to my room", and he did. He told me he had been in the employ of Lubben, working out
4414 there on the books, and that Lubben was laying off everything he could, possibly could think of, on the Shotwell Manufacturing Company.

I said, "Can you get any evidence of it so we can—so we know what is going on?"

And he said, "Yes, I think I can."

He said, "It is going to take some work."

I said, "I don't care. Go ahead. I will see that you are paid for it."

Q. When did you next see Lubben?

A. The next time I saw Lubben was in June, the latter part of June of 1948.

Q. By the way, in or around that time, had you procured any data from Sproull-Scholz, the accountants, as to what Lubben's records showed?

A. Yes, we had. Back in the—we met Ed Sproull, I think, in the early part of—well, about the middle of 1947, early 1948. I think it was in the early part of 1948. And we discussed this.

By Mr. Lockley: Excuse me, sir. May I have a foundation as to who "we" is?

By Mr. O'Brien: Well, that is right, yes.

By Mr. O'Brien:

Q. Mr. Cain, you must say precisely whom it was 4415 and not just "we".

A. Well, I mentioned that Mr. Huebner, Mr. Sullivan and myself met Ed Sproull in 1948.

Q. All right. Now, my question has to do with the time of the procurement from Sproull of papers showing the Lubben figures.

A. We got those figures from Sproull—

Q. Mr. Cain, take your hand down because that interferes with your voice.

A. I am sorry.

We received those figures from Sproull in the first half of the year.

By Mr. Lockley: Excuse me, sir. May I have a foundation as to what he is talking about? He said figures.

By Mr. O'Brien: I thought I described it sufficiently.

By the Witness: Well, the books and records of the Eatsum—

By Mr. Lockley: I don't think so. You said in 1948 you had met with Sproull. Now, he is talking about the figures.

By Mr. O'Brien: Will you read my question, 4416 please. Mr. Lockley, either you are mistaken or I am. I thought I incorporated that in the question. Read the question.

By the Court: Are you asking for conversation with Sproull or are you asking for some documents he received?

By Mr. O'Brien: I just wanted to know if it is a fact he received some figures. I am not interested in proving them now. It is a circumstance I will take up later.

By the Witness: We asked Sproull to assemble some data from his work sheets and get it to us because we were in the process then of trying to assemble all of the figures that we could to put an absolute ceiling—

By Mr. O'Brien:

Q. I just want to know, Mr. Cain, if you got some figures.

A. We did get some figures.

Q. All right. Now, when was it then that you next met Lubben?

A. In the latter part of June of 1948.

Q. Where was it?

4417 A. I met him—

Q. Well, let me put it this way. Will you tell us the circumstances. Where were you and how did you happen to meet him?

A. Well, I was at the Gotham Hotel in New York and I had called Pat Grace and asked him to have dinner with me. Pat is a bachelor and he likes to fill in the time, anyway, so he came down and we had dinner and went up to my room in the Gotham and a phone call came in from Lubben and he asked if he could see me and I said yes. I said, "Yes, Dave, come on over."

He said, "Well, what about meeting me half way?"

I said, "Where would half way be?"

He said, "There is a place on the other side of the George Washington Bridge called the Riviera."

I said, "Fine. I will be over." And I asked Pat to go with me and the two of us went to the Riviera and took a table and later on Lubben and Sam Davidson came in.

4418 Q. Had you met Davidson before?

A. I think the first time I ever met Davidson was in connection with the mortgage, which would be before.

Q. Now did they join you at your table?

A. Yes, they did.

Q. And was there a conversation?

A. Yes, there was a conversation.

Q. With four people present?

A. Yes, there was four of us, Pat Grace, Lubben, Davidson, and myself.

Q. What was said?

A. Well, we carried on a general conversation for a while, and then I said, "Dave, what is on your mind? Let us get down to brass tacks."

He said, "Well, I can have an opportunity of getting a fra[illegible]se for a soft drink in one of the Central or South American countries." I don't recall what it was.

"And I am going to need some money." And he said, "I would like for you to come up with it."

"Well," I said, "I don't know, Mr. Lubben, but," I said, "it isn't concrete now, is it?

4419 He said, "No."

I said, "Whenever it is concrete, why don't you do this: You call Mr. Grace and if you have something that is concrete and worthy of consideration, I will think about it at that time."

Q. Did you discuss tax matters at that meeting?

A. No, sir.

Q. Mr. Lubben testified that at that meeting you said that a couple of agents had come into your office and that Graflund like a fool gave them papers. Did you say that?

A. No, I did not.

Q. Is it a fact that there had been a visit to your office by an agent?

A. Yes. While I was in New York, Mr. Krane came into our office on a collateral investigation of one of Lubben's companies. Mr. Graflund called me—

By Mr. Lockley: I object, your Honor, to what Mr. Krane was doing. I am sure Mr. Cain doesn't know what Mr. Krane's job was in coming to the office.

4420 By the Court: That portion may be stricken, with reference to Mr. Krane. That portion of his answer with reference to Mr. Krane may be stricken.

4421 By Mr. O'Brien: Mr. Lockley, if there is any doubt in your mind as to why he was there, I can offer in evidence the telephone call from New York which brought him there, and his report on what he was there for. I don't see why you should raise that point.

By Mr. Lockley: I think Mr. Krane and the Government are in a better position to know why Mr. Krane was there, rather than Mr. Cain.

By the Witness: Mr. Krane told me.

By the Court: There isn't any question before you.

By Mr. O'Brien: We will put in the documents when we get to it. We will put in the writing, why he was there.

By the Court: Proceed with your examination.

By Mr. O'Brien: Yes, sir.

By Mr. O'Brien:

Q. Did Mr. Graflund call you about that while you were in New York?

A. Yes.

4422 Q. What did you tell him?

A. I told him to give them anything they wanted.

Q. Mr. Lubben testified that you said that you knew Hannegan and that Hannegan had referred you to Grace. Did you know Hannegan at the time of that meeting?

A. Yes, I have known Hannegan for quite some time.

Q. Robert Hannegan had been Chairman of the Democratic Committee?

A. That's right.

Q. And Postmaster General?

A. That's right.

Q. Did Mr. Hannegan refer you to Mr. Grace?

A. No, sir; I knew Mr. Hannegan myself. Nobody had to refer me to him.

Q. Excuse me. Did you ever talk to Mr. Hannegan or to anybody else in politics about this case?

A. No, sir.

Q. Did you or Mr. Sullivan ever try to get this matter disposed of through a political connection?

A. No, sir.

4423 Q. Outside of the connection which you had in Washington with Mr. Schoeneman, which you testified to before, did you have any conversation about the settlement or disposition of this case with anyone except the agents right here in Chicago?

A. No, sir.

Q. Who did introduce you to Mr. Grace?

A. Tom O'Neil, a mutual friend of Mr. Grace and myself, Mr. Sullivan. And at that meeting Mitchell McKoewn's name was mentioned. And the McKoewns and

Graces are very close friends from Brooklyn. McKoewn lived in Chicago, and has for fifteen years. And McKoewn and myself were very close friends. So it was just one of those things.

Q. Did you or Shotwell have any occasion to hire Mr. Grace until September of 1948?

A. No, sir; we employed Mr. Grace in September of 1948.

Q. Now, will you tell the jury why?

A. Well, we had been advised that the New York office—we had been attempting to settle this tax matter of ours. I had been importuning the Revenue Office to get out there and get the thing settled, and let us pay our tax.

4424 By Mr. Lockley: If your Honor please, I object to what he had been attempting to do, and what he had been advised, unless we can get down to specific circumstances and conversations. This is so general, that I have no idea what he is talking about.

By the Witness: I will take it from there, Mr. Lockley.

By the Witness:

A. I called Mr. Sauber at least—

4425 By Mr. Lockley: Now, when was this?

By the Witness: I will enumerate the times.

By the Court: Well, place the time.

By Mr. O'Brien:

Q. Give us the period of time over which you had been calling him?

A. I saw Mr. Sauber on about the 1st of March—on or about. I returned from California at about the middle of April. I called Mr. Sauber when I returned from California and asked him why they hadn't had an agent out there to get this tax matter settled that we discussed.

He said that he would check into it and see that somebody—and take it up with Wright's office and see what happened. It had been reported to Mr. Wright's office.

I again called Mr. Sauber in, I would say, the middle of May of 1948 and asked if anybody was going to get on that case. He told me not to be disturbed about it, that there were a lot of them, so just to wait, time would take care of it.

After this Tobias meeting in New York I came back and personally saw Mr. Sauber and asked if he
4426 wouldn't see that something was done about this case and he said he would take care of it.

Q. And did they, by July, get an agent out?

A. Yes, they did.

Q. To check the books?

A. Yes.

Q. And who was that agent, do you remember?

A. I only met him once or twice. Lima, I think.

Q. Lima. By the way, in this meeting at the Riviera—I am mistaken. Let's go on.

By September of 1948 had you procured any bill or statement from the agents or the Revenue?

A. Not a bill. I interceded for them and said, "Let's get—"

Q. I just want to know if you had received—

A. O. K. We had not received a bill.

Q. What then was the occasion of retaining Grace in September of 1948?

A. Well, in the course of our many conversations I knew that Mr. Grace was friendly with somebody in the Department of Internal Revenue in New York and we had been advised that because of some complication between some of Giglio's partners—

4427 By Mr. Lockley: I object to the general nature of this testimony. He is talking about the course of many conversations, and "we had been advised." I don't know what conversations he is talking about nor who he is talking about.

By the Court: I think he should state what he hired Grace to do.

By Mr. O'Brien: All right.

By the Witness:

A. I hired Grace to find out if the New York office was holding up any settlement of the Shotwell case.

By Mr. O'Brien:

Q. What did he report to you?

A. He reported to me that they were not, and that we should proceed—that as long as we had made our disclosure, to proceed in the Chicago office as we had been doing.

Q. At the time of the Riviera meeting had Grace been retained to act as counsel for you or the company?

A. He had been retained to act as counsel for The Shotwell Manufacturing Company in New York.

4428 Q. At the time of the Riviera meeting?

A. No, no. No, this was in September. I am sorry.

Q. I am asking about that time.

A. No, he did not.

Q. Did you tell Lubben at the Riviera meeting to get in touch with Cramer?

A. No, I did not.

Q. Did you, in August of 1948, receive a call from Mr. Lubben—from Mr. Cramer's office, I am speaking about?

A. Yes, I did.

Q. Will you tell the jury what was said by Lubben in that phone conversation and what was said by you?

A. Mr. Lubben called and said, "Mr. Cain, I am in Mr. Cramer's office in Boston. And I want $135,000.00 from you two fellows."

I said, "Mr. Lubben, I have been into the Internal Revenue Department. We have made a complete disclosure of our whole transactions with you and we don't want anything further to do with you."

Q. Did that end the conversation?

4429 A. That ended the conversation.

Q. You spoke of figures and of some attempt to assemble data in connection with your disclosure?

A. Yes, sir.

Q. Did you have some meetings about that at the plant?

A. We had several meetings about it. We were trying to—

Q. I just want to know if you had the meetings.

A. Okay.

Q. And did you have before you the data which you had been able to assemble?

A. It was before all of our people there who were working on the data.

Q. And by your people, whom do you mean?

A. Oh, there was Mrs. Morrill, Mr. Graflund, Mr. Roeser, Mr. Busby—they were all working on the data, trying to get it together.

Q. Mr. Huebner?

A. Mr. Huebner was there.

Q. Don't say, "all", just tell us who. Did you have there the Sproull Scholz paper before you finished?

A. We had the Sproull Scholz paper. We had
4430 the Tobias papers. And we had some papers that were procured by, or sent by Lubben to the plant at the time of the closing of the Haberkorn deal.

4431 Q. There were some papers which Mr. Lubben turned over to Shotwell at the time that the Haberkorn deal was concluded?

A. That's right.

Q. Do you know of your own knowledge whether those papers included memoranda, recap sheets and items of the sort in evidence here?

A. Yes, they did.

Q. What was said, if anything, by Mr. Huebner, Mr. Graflund, Roeser or Mrs. Morrill, as to the amount of the overages?

A. Well, they all expressed amazement at the amount, Mrs. Morrill, Huebner, Graflund, Mr. Busby and—

Q. What did they say?

A. They said it was utterly impossible, no money like that had ever come into our hands.

Q. What did you say to Busby and to them?

A. I said, "I don't care how much money came in. I don't care. Just get the absolute ceiling that this guy could possibly charge us with, get the absolute ceiling." I said "He is a super-salesman and I don't want any traffic with him at all. Let's put the absolute ceiling in and then let the government assess us, even if it is
4432 three or four times as much money as we owe them. It is all right with me."

Q. And did Mr. Busby proceed to assemble the data in that way, as far as you know?

A. Yes, he did.

Q. And when you mentioned—in the testimony that has been read here, as taken from a prior proceeding before the Court—when you mentioned the sum, or receipts of $400,000.00, was that amount one which was arrived at in that way?

A. It was arrived at in that way.

Q. Now, you had a meeting with Lubben and Davidson in New York, in October of 1951, did you not?

A. I did. I sought that meeting myself.

Q. Is it true, as Mr. Lubben testified, that at that meeting you told him that you were most anxious to get the tax matter with the government straightened out and that you folks had offered to pay four hundred to four hundred fifty thousand dollars to get it done?

A. Yes, sir.

Q. What was the purpose of your visit to New York at that time?

4433 By Mr. Lockley: Excuse me, Mr. O'Brien. I don't think you—

By Mr. O'Brien: October, 1951.

By Mr. Lockley: All right.

By Mr. O'Brien: It is the same time.

By the Witness:

A. The purpose of my visit to New York in 1951 was to importune Mr. Lubben to—

By Mr. O'Brien:

Q. Maybe I shouldn't ask it that way; Mr. Cain, because then you don't give us the conversation.

A. I will give you the conversation.

Q. Suppose you just tell us who was there and what was said.

A. I flew to New York on a Saturday morning in 1951, after contacting Lubben. I called him and asked him to meet me at the airport, or asked him if he could meet me and have lunch with me in New York.

And he met me at the airport with Sam Davidson, his lawyer. And we went to the Gotham Hotel for lunch.

My only purpose—I asked Mr. Lubben if he would do just two things. I said, "I think it would help me
4434 to settle this thing, this income tax problem that everybody now knows I have, and I want to get it settled, and if you will just do two things, tell the truth about the few barter deals, the barter deals we have had, and tell the truth about that 48 to 50 thousand that I forgave in the fall of 1946, I think we can get it closed up."

And he agreed with me that he would do that. That was the end of our conversation about business.

Q. And it is true, as he says, is it not, that the remainder of the conversation was also pleasant and they took you to the airport?

A. They took me back to the airport. He discussed his Puerto Rican venture, and a few other things. And we left on a friendly note.

4435 Q. Did Mr. Lubben say at that time that there were not those transactions and that that forgiveness had not occurred?

A. No, he did not.

Q. Now, Mr. Cain, when asking you about the unbilled shipments, I meant also to ask you about the syrup sales. You have said that the price controls on corn went off June 30, 1946. At that time, and in October, 1946, particularly, did Shotwell have on hand a considerable quantity of corn syrup?

A. Yes, we did. The corn syrup that we had on hand was—

Q. Just tell me where it was, what it consisted of, and what, if any, talk you had with Lubben about it?

A. Well, let me first tell what we had. We had some barrels of corn syrup in warehouse that we had gotten in as a reserve against a shortage of corn syrup. They had been standing there quite some time.

Now, Shotwell Manufacturing Company don't use barrels of corn syrup. We use carloads. We had underground tanks where we could put in four or five

4436 cars of corn syrup and just pump it through the building. So that the barrels of corn syrup were only a reserve. The barrels had been there. They were leaky barrels. And Mr. Huebner told Lubben we had them. We were going to sell them. And we sold them to Lubben.

Q. And what did you sell them for, when—

By Mr. Lockley: Excuse me.

By Mr. O'Brien: Maybe I shouldn't do that.

By Mr. O'Brien:

Q. Did you talk to Lubben about the sale of the corn syrup?

A. Yes, I did.

Q. When was that, approximately?

A. That was in the fall of '46.

Q. And did he say he would take it?

A. Yes, he said he would take it.

Q. And at how much?

A. I think it was around six cents a pound.

Q. Well, don't you know?

A. That is what our books reflect.

Q. How about overage?

A. There was no overage on corn syrup at that
4437 time.

Q. Did you ask Lubben for overage on that corn syrup?

A. No.

Q. Did Lubben say he was going to pay you overage on that corn syrup?

A. No.

Q. Did Lubben pay any overage on that corn syrup?

A. He never did.

Q. Yes. There is another conversation Mr. Lubben testified to, Mr. Cain. He said, speaking of some three checks for $13,000.00 plus apiece, that he went to see you about those checks. Do you recall that testimony?

A. Yes, I do.

Q. And that then, or at some later time, you told him that you were not in the business of taking cash in order to pay taxes; do you recall that testimony?

A. I recall that testimony.

Q. Did that ever happen?

A. No, sir; it never happened.

Q. When those checks came in—I needn't bother with them now—were you in Chicago?

4438 A. No, I was not. I was out in California.

Q. And did you ever hear anything at all about these checks until you got back?

A. No, I did not.

Q. And at that time did you have any talk with Lubben about it?

A. No, I did not.

Q. Did you ever have any talk with Lubben—

A. Lubben never mentioned a check to me in his life.

Q. —about the three checks, or any other checks?

A. No, sir.

By the Court: We will take our morning recess now. We will suspend for ten minutes.

By the Marshal: Will the audience please remain standing while the Judge, as well as the jury leave the court room.

This honorable court will recess for ten minutes.

(Short recess.)

4439 By Mr. O'Brien:

Q Just one more question, Mr. Cain. After you gave your instructions on the box and the cash did you require or suggest that any accounting be kept of those moneys by the people in charge?

A. I did not.

Q. Did any of them at any time ever bring to you an account calling to your attention what the amounts were and what had been done with the money?

A. They did not.

Q. Did you ask to see such an account?

A. I did not.

Q. Did you know at the time that any such figures had been made?

A. I did not.

By Mr. O'Brien: You may cross examine.

Cross Examination by Mr. Lockley.

Q. Mr. Cain, you stated to Mr. O'Brien that when you first secured an interest in The Shotwell Manufacturing Company in 1941 you acquired 13,000 shares out of a total of 100,000.

A. I think that is correct.

Q. Were those your personal holdings?

4440 A. No, I believe that was my family holdings at that time.

Q. That was the total amount held by you and your family?

A. I think that's correct.

Q. You had it split up at the time the stock was issued, did you, to various members of the family?

A. That's right.

Q. Now, how much did you pay for that stock?

A. I paid—I acquired that stock through reorganizing the company. In other words, it was a bonus. I didn't pay anything for it in cash.

Q. You got it for nothing?

A. Well, I wouldn't say that. I did perform services for it.

Q. You got it then in exchange for the work you did?

A. That is correct.

Q. But you paid no cash?

A. That is correct.

Q. And you got a salary, didn't you, from the corporation, as an officer and director?

A. I did, yes.

4441 Q. Together with Mr. Sullivan and Mr. Triplett, didn't you acquire fifty-one per cent of the stock of The Shotwell Manufacturing Company at the time of that reorganization?

A. I think that is correct.

Q. And that gave you control of the corporation, didn't it?

A. Fifty-one per cent is control, yes.

Q. Now, you stated that you met Mr. Lubben first in the latter part of 1944 through Mr. John Bond?

A. I think that is correct.

Q. You think that's correct?

A. Yes.

Q. And had Mr. Lubben ever done any business with your company prior to the time you met him?

A. He could have.

Q. But you didn't know about it?

A. I wouldn't know.

Q. If he did.

A. I wouldn't know.

Q. Do you know whether he had a quota with The Shotwell Manufacturing Company for the purchase of candy?

A. I wouldn't know that. If he had a quota with

4442 Shotwell at that time?

Q. Yes.

A. No, I wouldn't know it, but I don't believe that he did.

Q. You set up a quota for him at the time you named him your broker, isn't that so?

A. I set up a quota for the district. A quota was set up for the district by Mr. Hogan, I believe it was, who was sales manager at the time.

Q. Mr. Lubben wasn't going to get that candy, he was just being permitted to sell it on behalf of Shotwell to various customers and he got five per cent, isn't that the way it worked?

A. Well, plus the fact that he got a commission on the merchandise that he sold to his own company.

Q. You are quite sure of that, Mr. Cain?
A. Definitely.
Q. Well, if your records show that Mr. Lubben actually bought merchandise from The Shotwell Manufacturing Company much earlier than the time you state you met him, how could you account for that, since he had no quota?
A. Well, I had sixteen thousand customers. It would be possible.
4443 Q. You had sixteen thousand customers at that time?
A. Approximately.
Q. And Mr. Lubben is the only one with whom you did any black market business?
A. That's correct.
Q. I show you these various exhibits, which are accounts receivable ledger cards of the Shotwell Manufacturing Company with Eatsum Food Products, and I point out to you that there are various entries on here dated as early as May and June of 1944, is that correct?
A. Yes, sir.
Q. Well, that would indicate then that you were actually doing business with Mr. Lubben much earlier than you originally thought. Here again are some fairly large purchases in 1944, in May.
A. This is about $1500.00 of total purchases.
Q. All right.
A. Over a period of several months. It doesn't amount to anything. This pretty well proves the statement, Mr. Lockley. In November we started to ship him some real merchandise. Up to that time he got one—probably
4444 two thousand dollars worth of merchandise.
Q. And he was dealing with you in May, isn't that correct?
A. That's entirely possible.
Q. And he didn't have any quota at that time?
A. If we gave him merchandise, we sold him merchandise. We had a right to do with our quotas what we wanted.
By Mr. Lockley: These are Exhibits 200.
By Mr. Lockley:
Q. Now, at the time you had the conversation with Mr. Lubben and Mr. Bond relative to the purchase of this

chocolate, was anything said by Mr. Lubben that he was going to charge you any over ceiling for the chocolate?

A. No, sir.

Q. You bought it at the regular ceiling price. And in turn you made him your broker?

A. Let's get it straight, Mr. Lockley. The chocolate that I testified to from United is not the chocolate that Mr. Lubben sent—caused to be sent to the Shotwell Manufacturing Company prior to that time. He caused to be sent some—diverted some chocolate from the Burry
4445 Biscuit Company and some chocolate from the Peter Paul Company.

Q. And that is the chocolate which was involved in the arrangement whereby he became the broker, isn't that it?

A. And in addition to that he got merchandise.

Q. That is the chocolate that was involved. That was back in 1944?

A. I presume that's correct. But he got merchandise, and lots of it.

Q. And you didn't see him again, after you originally made him your broker, until the spring or early summer of 1945, is that correct?

A. Well, it could be incorrect in that I saw the man, but I had no conversations with him that were of any importance.

Q. And at that time you went with him to see Mr. Nelson of the United Chocolate Refiners?

A. That's correct.

Q. Now, was there any overage that you paid to Mr. Nelson for the chocolate you received on the shipments from United Chocolate Refiners?

A. No, sir.

Q. All Mr. Lubben did then was introduce you, is
4446 that right?

A. Mr. Lubben induced Mr. Nelson to ship chocolate to the Shotwell Manufacturing Company, in return for the Shotwell Manufacturing Company shipping candies to Lubben, who, in turn, was going to ship a portion of that candy to the United Cigar Stores and the Liggett chain.

Q. You didn't pay the United any overage for the chocolate?

A. There wasn't any money paid in overage. Everybody paid ceiling price.

Q. Did Lubben pay the ceiling price?

A. Yes.

4447 Q. When he bought the candy from you which you made out of this chocolate he paid the ceiling price for it, is that right?

A. That is correct.

Q. When did the overages begin?

A. In about September or October of 1945.

Q. That's the first time?

A. That's the first time.

Q. Well, Mr. Cain, how do you account for the fact that as early as 1944, and certainly as early as January, 1945, Mr. Lubben on the invoices he received from The Shotwell Manufacturing Company was marking a ten cent over-ceiling and was drawing checks to cash and was showing them on his records as drawn for the purpose of paying The Shotwell Manufacturing Company?

A. If you can tell me that, you are a better man than I am.

Q. Was it in anticipation that he was going to arrange such a deal with you in September or October that he began this system in January?

By Mr. O'Brien: If the Court please, I object to that. How can he account for what was in Lubben's mind, in

4448 making these self-serving statements?

By the Court: Yes, I will sustain the objection.

By Mr. Lockley:

Q. Did you ever see Mr. Lubben in January of 1945?

A. I can't say that I did or did not. I don't know.

Q. Did you attend the Diamond Horseshoe with him at that time?

A. No.

Q. Did you go to the—what is the name of the place in the Bowery? It escapes me now,—did you go to a night club in the Bowery with him?

A. Not to my knowledge.

Q. Do you remember if you went to New York in January of 1945?

A. No, sir; not at this moment. I was there quite often.

Q. Have you ever been to Toots Shore?

A. I have been there but I don't believe in company with Mr. Lubben.

Q. Well, according to his weekly expense account, Jan-

uary 20th, he had dinner with Huebners, Sullivans,
4449 Burrys—do you know somebody named Kums?

A. I don't.

Q. Did Mr. Lubben send your wife some flowers on that occasion?

A. Not to my knowledge.

Q. Didn't you get a fruit basket from him at that time?

A. I don't recall.

Q. Do you recall whether you were even in New York at that time?

A. No, I don't.

Q. On January 19th.

A. But I wasn't on that party, in my judgment. My best memory is that I wasn't on that party.

Q. Did you go to any shows that you can recall on January 16, 1945, in New York?

A. I don't recall the trip, Mr. Lockley.

Q. Did you ever see Up in Central Park?

A. I can't recall.

Q. You don't remember having seen it?

A. I didn't see Up in Central Park.

Q. You don't remember?

A. I don't remember. I don't think I saw it.

4450 Q. Would you say that you were not in New York on January 19, 1945?

A. To the best of my knowledge, I was not. But if I was there I still wasn't on those parties. And I would think I would remember that.

Q. Did you ever go on any parties with Mr. Lubben?

A. Yes, sir; I was out with Mr. Lubben on two occasions, that I can remember, in New York.

Q. Which were those?

A. What?

Q. Which ones were those?

A. I went with him one night, with Mr. and Mrs. Krasne, and Mrs. Cain, and Mr. Lubben and myself, and we went over to wherever Milton Berle was playing and had dinner.

On another occasion I went out with him just to dinner with Mr. and Mrs. Burry and Mrs. Cain and myself. That's the only two occasions I can recall of being out with Mr. Lubben in New York.

4451 Q. Do you remember where they were?

A. I can't recall, no.

Q. Do you remember where you went to see Milton Berle?

A. No, I don't.

Q. Do you remember where you went to dinner with the Burrys, and Mrs. Cain and Lubben?

A. It was in '45, '46, that period.

Q. It was one of those two years?

A. Yes.

Q. But you don't remember specifically?

A. No. I was in New York at least four, five times a year, and sometimes for extended stays.

Q. Where did you stop when in New York?

A. Either the Waldorf or the Gotham.

Q. Were you ever out at Lubben's farm?

A. Once or twice.

Q. And who was with you at that time?

A. Mrs. Cain, Mr. and Mrs. Krasne, I think, on both occasions.

4452 Q. Was Mr. Lubben ever a guest at your home?

A. Once.

Q. When was that?

A. Oh, I would put it in the indictment years.

Q. 1945 or 1946?

A. That is right.

Q. You are not able to fix it more specifically than that?

A. No, I cannot.

Q. In any event, you used to see Mr. Lubben for social events at various times during 1945 and 1946?

A. I would say during the years 1945 and 1946 I was with him socially, probably, three or four times. That isn't unusual with him, though. I was with all my brokers over the country.

Q. Did you see him in business connections other than socially at frequent intervals during those two years?

A. Well, he was a broker of Shotwell. I certainly did.

Q. You saw him on frequent occasions?

A. No, not on frequent occasions. I did not handle those problems. He saw Mr. Hogan or Mr. Huebner, 4453 whoever was in charge of the department.

Q. Now, you said that Mr. Lubben first offered to pay the overages in order to buy corn syrup for Shotwell in September or October of 1945, is that correct?

A. That is correct.

Q. Mr. Lubben made the offer to you, did he?
A. To Mr. Huebner, and it was passed on to me, or I think the two of them were there at the time.
Q. And you approved the arrangement?
A. Eventually, it was approved.
Q. Who set the amounts that were to be paid in overages?
A. Mr. Lubben.
Q. He suggested the three cents, did he, for the gum work?
A. Yes, sir.
Q. And five cents for chocolates?
A. That is right.
Q. And that continued until February, 1946?
A. Approximately right about that time.
Q. Well, now, who raised the rate from three cents to five cents for the gum work and from five to ten cents for the chocolates?
4454 A. I think we did. The pressure for money was getting greater all the time.
Q. Who raised it the next time, in June, 1946, to ten cents for gum work and 18⅔ cents for the chocolates?
A. I would say we did at Shotwell.
Q. When you say "we" who do you mean?
A. I mean Mr. Huebner and myself, Mr. Sullivan, whoever happened to be there.
Q. Were these matters discussed at the meeting of the Board of Directors?
A. No, I don't think we took Mark Law into our confidence. Mr. Shotwell, Mr. Huebner, Mr. Sullivan and myself had complete knowledge of it and I think Mark had a pretty good idea of what was going on. Everybody that had anything to do with the candy industry, knew.
Q. You mean about your getting money?
A. I mean about the shortage of corn syrup and the necessity of getting money.
Q. Then I presume you also mean that they knew you were getting money, is that so?
A. Yes, they knew we were taking money in the company. Mr. Shotwell paid some of it out.
4455 Q. And when was that?
A. 1945 and 1946.
Q. Well, can't you give me a little more definite date?
A. No, I can't, because I just wasn't there.
Q. And to whom did he pay it, if you know?

A. I know one person he paid it to was a gentleman by the name of Keely. I don't know the man. I never saw him, but he told me he paid him.

Q. Mr. Shotwell is dead now, isn't he?

A. He died last year.

Q. Do you know how much Mr. Shotwell paid to Mr. Keely?

A. No, I do not.

Q. Well, you originally instructed Mrs. Morrill and Mr. Graflund to open this box, is that the idea, that was kept in the vault?

A. Miss Morrill and Mr. Graflund—Mrs. Morrill and Mr. Roeser. I don't know who the comptroller was at the time, but I think all three of them had knowledge of it.

Q. Did you actually see Mr. Shotwell pay any money to Mr. Keely?

A. No, sir. I never met Mr. Keely. Mr. Shotwell told me. In my position, I assumed he was telling me the
4456 truth.

Q. It is pure hearsay, so far as your testimony is concerned?

By Mr. McConnell: I object to that as argumentative, as to whether it is hearsay.

By Mr. Lockley:

Q. Well, Mr. Cain, did you ever pay out—

By the Court: I think it is a proper question. I think that is a proper question.

By Mr. Lockley:

Q. Did you ever pay out any of the money from the box?

A. No, sir.

Q. Did you ever get any of the money from the box?

A. No, sir.

Q. For your own personal use?

A. No, sir.

Q. Do you know how much money went into the box in all during 1945 and 1946?

A. No, sir.

Q. Do you know of your own knowledge to whom
4457 one dime of that money went that you saw paid out?

A. I don't think I can answer that question by "of my own knowledge."

I was in the factory quite often and I talked to these fellows about the problem and I knew that the money was

going down or people were coming in and picking up money in the factory to get raw corn. I did know that of my own knowledge but who it went to, I don't know.

4458 Q. You said you knew people were coming to the factory?

A. That is right.

Q. Who was coming to the factory to get the money?

A. I don't know.

Q. Who was paying them the money?

A. Well, Mr. Graflund, I have sat here while he testified he paid out six payments for corn.

Q. You heard that? Were you sitting in this trial?

A. In this trial. Mr. Hogan took money down to Dr. Doe. Mr. Roeser took money down to Dr. Doe.

Q. Did you hear Mr. Hogan say he took money down to Dr. Doe?

A. Well, he said, "I am not silly enough to think it wasn't money. I took an envelope down that was kind of squashy."

Q. Could it have been marshmallows, probably?

A. It could have been, in a nice, big brown manila envelope!

Q. Do you know the total amount of the money which went through that tin box during the period of its existence?

A. No, I do not.

Q. Did you ever see the record that was kept by

4459 Mr. Roeser and Mrs. Morrill?

A. I think—now, that was—no, I don't think I saw it, but I think it was used in the summary sheet that was being worked on by Mr. Busby.

Q. And when was that?

A. Oh, that was during, I would say, during March, April, May, June of 1948.

Q. What did you have to do with the compilation of that summary sheet?

A. Well, when they had—when they followed my instructions and I said, "Now, look, we have a dangerous character here. Get the absolute top of any amount of money that can have been claimed to have been paid us by this fellow Lubben and report that."

And then they were working, trying to build up an expense item against us to satisfy our own—I don't know why. They were trying to do something. They were trying to show the offsets.

Q. They were trying to show that you had spent all of the money you had taken in, is that correct?

A. That is right, we did that too, but we did not collect the four hundred thousand dollars but we had

4460 no—but I insisted they use that figure.

Q. How do you know you didn't collect the four hundred thousand dollars? You just testified you did not know how much money was in the box.

A. There was nothing like four hundred thousand dollars or any ways approaching that amount of money that went through that box.

Q. How do you know that?

A. Because the people who took care of it told me so.

Q. Who were they?

A. Mr. Roeser, Mr. Graflund, Mrs. Morrill.

Q. Didn't Mr. Roeser, Mr. Graflund, Mrs. Morrill say they kept a record of the amount of money that went in and out of that box?

A. They did.

Q. And didn't Mr. Graflund testify that you instructed that that record be destroyed?

A. I think Mr. Graflund was mistaken.

Q. Didn't he also say that you later instructed Mrs. Morrill to destroy the record?

A. I think he was mistaken.

Q. Who is this dangerous man that you are referring to that you were dealing with?

4461 A. Lubben.

Q. This is the man you had out to your home socially and at whose home you were socially?

A. Mr. Lockley, when you deal with a con man, you don't find it out to begin with.

4462 Q. When did you find it out?

A. I found it out in 1947, when he blackmailed us into making that loan, and in 1947 when he tried to blackmail Mr. Sullivan and continually blackmailing, the continual blackmailing he carried on since that time, and I found out what his books reflected.

Q. Well, now, you just testified—

A. It was just a duplicated pattern of blackmail.

Q. You testified you were friendly with him in 1951?

A. I did not say I was friendly with him. I was down there to see if he had one little whit—down there to have him have one little whit of human conscience to admit to what was actually the fact.

I said, "You are a salesman. For goodness' sake, won't you be honest for once in your life and get the Government out of my hair?"

Q. We will get to the so-called blackmail in due course, Mr. Cain, and you will have an opportunity to talk about that.

Now, you stated at the time this box at the vault
4463 was closed out that you instructed the comptroller to deposit that in the Shotwell bank account?

A. That is correct.

Q. Do you know how much that was?

A. Yes. I understand it was approximately $15,000.

Q. And is that the amount that was shown on the Employees Exchange Account yesterday of $14,450.00, or some odd figure as loans to various executives?

A. I was advised that that is the way it was handled.

Q. It was put on the Exchange account records?

A. Well, what was done, the money was taken out of the Shotwell bank account, put into the box, and then taken out of the box and put back into the bank account. How it was handled on the books, I wouldn't know.

Q. So it never appeared, that $14,000 in company income, is that correct?

A. That is correct, but it wasn't anything that was extracted from the company. It was put back in.

4464 Q. Your position is that every dime that you got from Mr. Lubben you spent out?

A. That is correct.

Q. You don't know anybody that you spent it with, and you don't know how much you got?

A. I did not give it to him. I couldn't know of my own knowledge. I presume that is what you are asking me.

Q. Who is in charge of the company, Mr. Cain?

A. I was either Vice President or President of it during that period.

Q. Well, was there anybody else there that had the authority to pay out thousands, tens of thousands of dollars to people they didn't even know?

A. You betcha.

Q. Who was that?

A. Mr Graflund, Mr. Huebner, Mr. Shotwell.

Q. And you let all of those people handle this four hundred thousand dollars, as you have calculated it, without making any accounting of it whatsoever?

By Mr. McConnell: I object to the assumption of four hundred thousand dollars.

By the Court: He may answer.

By Mr. Lockley: It is his own figure.

4465 By the Witness: Well, there was never at any time, by the farthest stretch of your imagination, four hundred thousand dollars paid to anybody in The Shotwell Manufacturing Company, or anything approaching that amount.

By Mr. Lockley:

Q. Well, no matter how much money there was, you mean you gave those employees a free rein, did you, as they pleased, with the cash that came in and out of that bank?

A. Definitely. I wouldn't call them employees. They were well above that category. I mean by that, they were level in the department. They are men of absolute integrity.

Q. You sat here and you heard all the testimony. Did you hear one of those people testify that you paid money, any of that money out?

A. I heard them say they took a package down to somebody, or somebody came and got a package.

Q. Nobody knows who the money went to or how much was paid?

A. That is correct. I don't, anyway. I won't say nobody does, but I do not.

4466 Q. Did you once describe these people as nameless and faceless people?

A. I did, and quite a good many of them were, the people that took money.

Q. Well, who made the agreement with these nameless people that they were to get some money in exchange for which you would get corn or corn syrup?

A. Well, it was peculiar practice in those days.

Q. And who made the agreement?

By Mr. McConnell: I object to that. It assumes there was an agreement.

By the Court: The objection is overruled.

By the Witness: Will you read the question to me please?

(Question read.)

By the Witness:

A. Well, there were three or four people in the office

that were empowered to make a deal. I don't know what you would call it agreement for. But, if somebody came in from New York and called somebody in the Shot-
4467 well plant, either Mr. Huebner, Mr. Roeser, Mr. Graflund, or somebody, and said, "I can procure five or ten cars of corn, and the market on corn is extra dollars"—I don't know—it varied from two thousand, two hundred and fifty, to seven hundred and fifty dollars, I think was, our range out there a car. If he told us he could get that corn, the boys were instructed to give him the money and then follow it through and let him—if the corn was delivered to the refiners, that was the end of it. We forgot it.

By Mr. Lockley:

Q. Now, we are dealing with at least two somebodies in there.

A. There is always going to be one somebody.

Q. Can you name anybody who came into the Shotwell Manufacturing Company with such a deal?

A. I think Dr. Doe sent messengers in there at least ten times.

Q. I want to know what you know.

A. Well, I know from what my associates told me, he sent messengers.

Q. Do you know of your own personal knowledge that anybody ever approached the Shotwell Manufacturing Company regarding such a deal?

4468 By Mr. O'Brien: I think he has answered.

By the Court: You mean whether or not he was present?

By Mr. Lockley: Yes, your Honor.

By the Court: He may answer.

By the Witness:

A. I wasn't present, but I know that it was done.

By Mr. Lockley:

Q. Well, who laid down the terms of the so-called deals?

A. The corn market.

4469 Q. The corn market. Who is he?

A. The market is—the market for corn fluctuated from day to day and you paid the over-ceiling price, whatever that market was, and everybody in the candy industry using corn, in the consumption of corn syrup, knew that the cost of corn syrup was from day to day.

There were fifty brokers in this town who did nothing but handle corn and those fellows would call.

Q. Who would call?

A. Well, Dr. Doe would call.

Q. Is Dr. Doe a corn broker?

A. He was a dentist. He wasn't a corn broker. He was one of the biggest in town at the time.

Q. He is a dentist?

A. That is right.

Q. Did he ever call you?

A. He never called me. That wasn't my part of the business. I wasn't handling it, but I knew about it.

Q. Well, how do you know he called then?

A. I was told by my associates that he called and I know they weren't lying to me. I knew the condi-
4470 tions.

Q. Well, who told you? Whihc ones? Which of your associates?

A. Mr. Huebner, Mr. Shotwell. You will find that Graflund and Roeser got some calls on it.

Q. I don't believe they testified to that.

A. I don't think they were asked.

Q. Well, your counsel had an opportunity to do so. Who told you that it was two and a quarter or two and a half, or whatever it was, a bushel that you were referring to, $2.25 or $2.50 a bushel?

A. Well, it isn't true. That isn't the way the corn was purchased in those days. It was so much a car. This bushel figure, I mean, so far as we were concerned, it wa so much a carload of corn and the market stayed at two hundred dollars for a very short time and moved up to five and moved up to seven hundred and fifty dollars a car.

Q. How do you know that?

A. Well, Mr. Lockley, I was in the candy business and every single candy manufacturer in the United States knew what the market, the black market on corn was during that period. Every one of them had to procure
4471 corn the same way we did. We discussed it among ourselves. We discussed it at candy conventions.

Q. Just how did you procure it?

A. You mean, what was the modus operandi? How was the corn procured? We paid—

Q. Who? Let us start out at the beginning. Who is "we"?

A. Somebody in the Shotwell Manufacturing Company paid some money.

Q. You can't be more specific than "somebody"?

A. Well, Mrs. Morrill made payments, Mr. Graflund made payments, Mr. Huebner made payments, Mr. Shotwell made payments.

Q. All right. Now, to whom?

A. Now you want me to answer of my own knowledge?

Q. Yes, if you know.

A. Do you want me to tell you what they told me?

Q. Do you know whether they made any payments other than what they told you?

A. I wasn't there, Mr. Lockley.

Q. Did you hear any of them testify here that they made payments?

A. Yes, sir. Mr. Graflund testified that he made
4472 six or seven payments.

By Mr. O'Brien: Well, he did so testify.

By Mr. Lockley:

Q. We were getting started. You said "we made payments." Now, you are not able to testify to whom? Are you able to state how much?

A. Whatever money came in that box went out.

Q. Every dime of it?

A. Every dime of it.

Q. Now, do you know when?

A. At various times during this corn shortage.

Q. Mr. Cain, you have been a businessman for how many years?

A. Well, quite a good many.

Q. You are a director, I understand, of about fourteen different corporations?

A. I thank Mr. Lubben for that compliment. I am director of my real estate office and one or two other organizations.

Q. And you are interested in various business enterprises, aren't you?

A. I am in the real estate business.

Q. And a man with your business experience is
4473 going to permit even $10,000.00, let alone $400,000.00 to go out of his office without any knowledge

of where it is going, to whom, what for?

By Mr. McConnell: I object to that as argumentative.

By the Court: He may answer.

By the Witness:

A. Mr. Lockley, at no time was there ever $400,000.00 paid to the Shotwell Manufacturing Company or any members of our organization.

Now, I told that to Mr. Sauber. I told it to Mr. Wright. I told it to Mr. Krane, and Mr. Mammel, and now I am telling you. It never happened.

By Mr. Lockley:

Q. Mr. Cain, the government claims it is more than that. I was just using your figure of $400,000.00.

A. I don't care what you used.

Q. You said with respect to the unbilled shipments, Mr. Lubben again made the initial approach in April of 1946 and offered to pay all cash for some shipments so that money could be gotten for corn syrup.

Am I correctly reporting your testimony?

A. With the exception of syrup, you are correct.

4474 Q. All cash, or did he—you were to buy corn syrup with the money so paid you?

A. That is right, we were going—

Q. On that revolving basis?

A. On that revolving basis, yes.

Q. Mr. Cain, wouldn't it have been just as possible, if you wanted cash, to write a check to cash and go down to the bank and cash it?

A. In retrospect, I assume that may be, maybe you are correct, although I don't know how we could ever have accounted for it in our books.

Q. You didn't account for this on your books?

A. No, but we didn't take it out of our books either. It never went in and it never went out.

Q. What you mean, I assume, is that the money that you secured from Mr. Lubben was not included as income on your books?

A. That is correct.

Q. And the money that you paid out to these various people, whoever they may have been, whatever times it was, by whoever paid it, was likewise not included in your books as an expense, is that correct.

A. That is correct.

4475 Q. You never told your auditor about it either, did you?

A. No, I did not.

Q. And you had a certified public accountant working on your books at that time, didn't you?

A. That is correct. In fact, I didn't give it a thought.

Q. You must have given it some thought, Mr. Cain.

A. I mean, from a bookkeeping point of view, I didn't give it a thought. I just assumed if money came in and money came out and Uncle Sam got what was due him, everybody was going to be happy.

Q. Now did you make any payments for any other raw material other than corn syrup?

A. Not to my knowledge because—I know what you are getting at. Go ahead.

Q. You didn't, to your knowledge?

A. That is right.

Q. And did you ever tell anybody in your office that you had made payments for other raw materials besides corn syrup?

A. No, I did not, not to my knowledge.

Q. Did you ever tell Mr. Busby that you had?

4476 A. No, no. I gave him those figures that you are talking about, but then I didn't tell him anything. I said, "Put these figures down on the sheet and make it balance."

Q. Well, let us start talking about the time when you had this conversation. When was that?

A. What conversation?

Q. When you spoke to Mr. Busby and said, "Put these figures down on this sheet."

A. That was after they were working, trying to assemble these figures for over a period of over a few months in the early part of 1948.

Q. In the early part of 1948?

A. That is right.

Q. Can you fix it any more definitely than that?

A. No, I can't. I would say it is in the first—in the first half of 1948.

Q. And for what purpose were these figures prepared?

A. They were prepared at my instruction, these figures.

By Mr. McConnell: What figures are you talking about? Now there is no showing of any figures. He
4477 is apparently referring to a document which is not identified.

By the Court: He has the right to ask him a few questions in order to lay a foundation, I suppose, for subsequent questions.

By Mr. Lockley:

Q. In any event, you had a meeting with Mr. Busby some time in the early part of 1948?

A. That is correct.

Q. And who else was present?

A. Mr. Graflund, Mr. Huebner, Mrs. Morrill, Mr. Roeser, and I don't know whether Mr. Sullivan was there or not.

Q. Did you have some conversation at that time about the costs of raw materials?

A. Yes, we did.

Q. And can you tell us what that conversation was?

A. Well, they were trying to—they were trying to justify these expenditures by running down all of the car numbers of corn cars that we had caused to be de-
4478 livered to these various companies. I think we found some—I don't know how many, 150, 200 or 300 cars.

I don't know what it was. Anyway, the amount was not anywhere near the amount of Lubben's claim they had then ascertained from the books of one of his auditors so I simply said, "Put this down on the paper."

I was only in the room about five minutes. I said, "Work it backwards, Leon. Put this down, put this down, put this down. It isn't going to be allowed anyway; the Government says you can't be allowed any taxes." I says, "Just put it down anyway because, God knows, we don't owe them on the basis of one hundred thousand dollars, even on the basis of the Commissioner's ruling."

By Mr. Lockley: Will you please mark this Government's Exhibit 185 for identification.

(Said document was marked Government's Exhibit 185 for identification.)

By Mr. Lockley:

Q. Now at the time you had this meeting with Mr. Busby and the others, did you prepare a document showing the amounts, the arbitrary amounts?

A. No. I just told them what to put down and
4479 "work this backwards and whatever is left, charge it to something else."

Q. I show you Government's Exhibit 185 for identification and ask you if you have seen it before. Have you seen the original before?

A. Yes.

Q. Is that in your handwriting?

A. Yes.

By Mr. O'Brien: If the Court please, I think I shall object to it until we at least have some definitive ruling by the Court on the scope of the issue.

By the Court: Well, he may answer.

By Mr. Lockley:

Q. That was the record that was made by you?

By Mr. O'Brien: I mean, your Honor, where the record is talking of this disclosure.

By the Court: Yes, I understand.

By the Witness: Yes, this was a record that I scratched down in that room, I presume, at the time that I was talking with this group of people.

By Mr. Lockley:

4480 Q. And then you gave it to Mr. Busby?

A. And then I said, "Work it backwards, charge it—you have got your corn worked out as best you can. Work it backwards as best you can in miscellaneous and make it balance?"

4481 Q. Work it back from what?

A. From the corn figures they worked out as best they could, that they could substitute, and then he made a miscellaneous charge and made it add up to the same figures I instructed him to use on the Lubben figures.

By Mr. Lockley: If your Honor please, I offer in evidence Exhibit, Government's Exhibit 185.

By Mr. Lockley:

Q. Were you at this meeting that you testified about, working up those figures for any particular purpose?

A. We were working them up to turn them over to whatever government agent would come in and say just what we did say when he did, when he came in, that the ceiling price during those years—

Q. You were going to turn them over to the Bureau of Internal Revenue?

A. That is right.

Q. And did you subsequently turn over those figures, if you know?

A. I think Mr. Busby did.

Q. Do you know to whom?

4482 A. I wouldn't know of my own knowledge, no, any more than I know about that corn money that we paid out.

Q. Were those figures correct?

A. No, they were not correct without the explanation that I gave to them, and I have given them that explanation consistently ever since I turned them in.

By Mr. Lockley: Will you please mark this Government's Exhibit 186 for identification.

(Said document was marked Government's Exhibit 186 for identification.)

By Mr. Lockley:

Q. Now, I show you Government's Exhibit 188 for identification and ask if you have seen that before?

A. I don't know.

Q. Do you recall whether that was a document prepared by Mr. Busby at your instructions?

A. It could very well be but I couldn't say.

By Mr. O'Brien: Well, if you know, Mr. Cain.

4483 By the Witness: What?

By Mr. O'Brien: If you know.

By the Witness:

A. I don't know. Mr. Busby prepared it. He can identify it.

By Mr. Lockley: Any objection?

By Mr. Kirby: I object to this on the ground that unless we go into the disclosure thing in its entirety, it would be improper to go into it piecemeal.

I further object because it is not binding on my client.

By Mr. Lockley: If your Honor please—

By the Court: It may be received.

By Mr. McConnell: I object to it on behalf of the corporation, on the basis shown here, that it is not binding on the corporation under any circumstances.

By the Court: I will receive it in evidence.

(Said document was received in evidence by the Court and marked Government's Exhibit 185.)

4484 By Mr. Lockley:

Q. At the top of Exhibit No. 185, Mr. Cain, there is the figure "20 months at $3,000, total $60,000". Do you know what that particular entry is? What is the significance of it?

A. Well, reasonably well. It was—

By the Court: I think I should make this statement with reference to that exhibit, that without further foundation, I don't think it is competent evidence as to Mr. Sullivan.

By Mr. Lockley: As to Mr. Sullivan.

By the Court: I will sustain Mr. Kirby's objection, with the limit I have indicated.

By Mr. Lockley:

Q. Was Mr. Sullivan present at the time this document was prepared?

A. I couldn't say that he was. I say I am not sure. I am not sure about it.

Q. Was Mr. Huebner present?

A. Yes, Mr. Huebner—when that document was prepared? I couldn't say that either. I don't know whether I just scratched it off in my office and took it out and
4484A threw it down or what. I don't know who was present at that time other than Mr. Busby. I know all of those people were working to accomplish this one purpose and that they weren't getting it accomplished. I thought I would do it from memory, boom, boom, boom. I see I didn't. I made it from memory.

By Mr. Lockley: If your Honor please, I offer it merely as to Mr. Cain and the corporation.

By the Court: Very well. It may be received.

By Mr. Lockley:

Q. Mr. Cain, at the time you testified on the motion to suppress the evidence at page 167 and 168, were you asked the following question and did you make the following answer:

"Q. What did you do about assembling the data that you told Sauber that you would assemble pending the arrival of the agent?

"A. We started out to make a compilation. We were primarily interested in over-ceiling payments to us, anything that could be charged to us. That is
4484-B the only thing we were interested in.

"So we started out to assemble that data, and as things usually do, the agent didn't appear and he didn't appear, so it dragged.

"The minute he appeared everybody went to work on it again.

"Mr. Busby, I think, had a man working on it continuously from about, oh, January, February, right on through, but then we put the whole staff on it, Mr. Huebner, and the whole gang of us got to work, Mr. Sullivan, and we assembled what would give him something to go by and we told him that."

Now, it is your testimony that Mr. Sullivan was not present then at the time this was prepared?

By Mr. O'Brien: I object. He is talking about the income items that they were assembling over a period of months and not about this thing he said he wrote out in two minutes.

By the Court: He may answer.

By the Witness:

4484-C A. Will you accept Mr. O'Brien's answer?

By Mr. O'Brien: Oh—

By the Witness: I was—This thing was done from January and Mr. Sullivan certainly knew of the assembly of these figures for the Government.

By Mr. O'Brien: What figures?

By the Witness: The figures that we ultimately gave Mr. Lima or Mr. Busby gave Mr. Lima, whatever they were, but this thing, I got it myself, but who was present, I don't know.

By Mr. Lockley:

Q. I return again to the top line where it says "20 months at $60,000". Do you know what that particular entry has significance with?

A. I think—

By Mr. Kirby: If the Court please, I again want to object. He is going into the disclosure question piecemeal. If it is not a competent issue, then I think it is error to inject it in this fashion.

By the Court: I will overrule the objection.

By Mr. Lockley: If your Honor please, it is not
4484-D any intention to get into the disclosure. These are figures which the defendant Cain has submitted or prepared prior to the time the agent came to the—

By Mr. McConnell: I object to advising everybody what he thinks the facts are. He is testifying.

By Mr. Lockley: I intend to use it to impeach the
4485 witness's statement as to how the money which went into the bank—

By the Court: I overruled the objection.

By Mr. Lockley: Will you answer the question, Mr. Cain?

By the Witness: Will you restate the question, Mr. Lockley:

By Mr. Lockley:

Yes. What is the significance of the 20 months at $3,000, total $60,000, that entry which appears on the top of that page?

A. It has no particular significance. I was simply compiling some figures that would offset the money that Lubben—ceiling figures of approximately $400,000.00 that we put down on that paper, it has no particular significance at all and I so stated to the government at the time. They told me that these figures—they told me these things would not be allowed, that he could forget about them, they weren't going to get us any deductions.

Q. All I asked you was what does that figure mean?

A. I think I testified three times about it. These
4486 figures, all of them, mean exactly the same thing.

By Mr. O'Brien: Please, Mr. Cain, listen to the question.

By Mr. Lockley:

Q. Let us take it one at a time. What are the "20 months"?

A. I don't know. I just put it down.

Q. It doesn't have any meaning at all?

A. Not at all.

Q. What does the figure "at 3,000" mean?

A. That is an approximate figure.

Q. An approximate figure of what?

A. What figure are we talking about, Mr. Lockley, No. 1?

Q. Well, maybe this will help: Does it mean receipts or does it mean disbursements or does it have any other significance?

A. I haven't the slightest idea. It is just some scratches.

Q. The next line is "1945, received $204,100.00."
A. On the next line?
Q. Right there (Indicating).
A. I imagine that was information being given me by the auditor, I presume, after they worked up 4487 those figures.
Q. You don't know where the "Received—"
A. I don't know that those figures on the top of the page are mine. I am sure they are not. This chocolate amount, corn syrup, are mine (Indicating).
Q. Let us take those one at a time. There is a column under the heading "1945" with the word "Choc." Is that short for Chocolate?
A. That is right.
Q. And across from it the figure 45,000?
A. That is right.
Q. Now, did you make that entry?
A. Yes, I did.
Q. And what does it mean?
A. Well, it means that I was just going to tell them—I put these figures down and instructed them to deduct it from that sheet, that memoranda sheet.
Q. Does it mean the Shotwell Manufacturing Company paid $45,000.00 for overages in chocolate?
A. We caused—
Q. Does it mean that? Just answer that question, Mr. Cain, and we will get along all right.
A. We gave Mr. Lubben candy and he caused chocolate to be shipped to Shotwell. On his books who charged us an overage and we knew that.
4488 Q. Mr. Cain, I am afraid you are not answering my question. I asked you if that $45,000 means that The Shotwell Manufacturing Company paid $45,000 overage for chocolate?
A. $45,000 or its equivalent in merchandise.
Q. And to whom did you pay it?
A. Dave Lubben.
Q. You paid Dave Lubben $45,000?
A. Gave him the candy. The same thing. He charged us on the books.
Q. He paid you for the candy?
A. He paid us for the candy, but we didn't get any

money from the overage. He charged us on his books and we knew it. The only way I could offset it was this way.

Q. So David Lubben was paying out $45,000 for chocolate in overage and you were going to give Shotwell a deduction, is that it?

A. How could they get a deduction?

Q. You have the figure down.

A. I was advised by Sauber and Busby that we couldn't get a deduction. Now, how could we get a deduction?

4489 Q. Did you pay $45,000 to anybody in overages for chocolate?

A. No, I did not.

Q. So when you submitted this to the Bureau of Internal Revenue, you knew you were not submitting a correct figure?

A. I didn't submit it to the Bureau of Internal Revenue.

Q. You submitted it to Busby?

A. That's correct. And I told Lima and I told Sauber just exactly what I had done. I said, "I am dealing with a guy that's nuts. He is crazy. And I am giving you the absolute ceiling. Now, give me a bill. Forget these things down here, because they are no more true than the figures at the top. But get me a bill and I will pay it."

Q. Is the next entry, milk, 10 mos,—is that ten months?

A. I don't know what it means.

Q. And the figures, 30,000, did you buy $30,000 worth of milk in the black market, or pay $30,000 in overages for milk?

A. No, sir.

Q. Do you know if anybody in The Shotwell Manufacturing Company did?

A. No, sir.

4490 Q. Did Mr. Lubben buy $30,000 worth of milk for you?

A. Not to my knowledge.

Q. In other words, that figure means nothing whatsoever?

A. It means just exactly what I told the Government it meant, when I put it down there. They said, "You are not going to get a deduction." And I said, "Okay."

Q. What is the purpose of putting it down if it doesn't mean anything?

A. I wish I hadn't put it down.

Q. The next figure, corn syrup, 12,000; is that $12,000 the amount which you allege you paid in the black market for corn syrup in 1945?

A. The same answer, Mr. Lockley.

Q. Well, I would like to know what the answer is?

A. It is quite hard for you folks to believe, but I just took these figures and put them together on short commodities, and said, "Put that figure down as against that ceiling of $400,000 that we have arrived at, as the maximum that Lubben can charge us, and let it go at that."

4491 Q. And if the maximum you had arrived at had been $800,000, you would have doubled these figures, is that the idea?

A. Because his figures were no good to begin with. They were not true.

4492 Q. So his figures being no good, and your figures being no good, that makes it correct to be given to the Bureau of Internal Revenue?

A. Except, Mr. Lockley, I was told by the Bureau of Internal Revenue that no matter what, I would not get a deduction for anything. And I said, "That's all right with me."

Q. So therefore, it was all right to give them false information?

A. No, that isn't false information.

Q. Is it correct, Mr. Cain, that you paid $30,000 for milk in 1945?

A. No, it isn't correct, and I so told them.

Q. If you told them, why did you give them this incorrect document?

A. I told them just exactly what I have told the Judge, and the Jury, and you, right now, that when these figures came in, they were so astounding that we just couldn't believe it. And I said, "Look. Put it in there. Put the whole ten ceiling in there and give it to the Government and I will pay taxes on it."

They had told me previously. "You cannot deduct five

cents for over ceiling payments."

4493 Q. Mr. Cain, do you know how much the Government has charged that you evaded on the income of The Shotwell Manufacturing Company?

A. How much?

Q. I have to look it up myself. But it is around a half million dollars. It is $507,000, I believe.

Now, from your own books and records you were come mighty close to that figure, weren't you?

A. No, sir.

Q. Four hundred thousand? Isn't that the figure you come up with?

A. That was relatively simple. I explained that to the Department of Internal Revenue, and told them how we had arrived at it. I said, "Look. We disregarded all trade-ins, all barter deals. We took the top ceiling price that was ever given to us by this fellow, Lubben, and we used the top ceiling price, namely, ten and eighteen and three-quarters."

When we saw those books, we knew Lubben had phonied the whole setup. Every one was false.

4494 Q. And he started phonying them back in January, and didn't have a deal with you until October?

A. He phonied them all the way through. If he made a trade deal, he made a trade deal.

By Mr. Kirby: I might call Mr. Lockley's attention to Mr. Lubben's testimony that he had instructed the—

By Mr. Lockley: I am perfectly willing, Mr. Kirby, to have you make all of the speeches you want, after I have finished with your witness. But at the present time—

By the Court: Let's not have any colloquy. He is examining the witness.

4495 By Mr. Lockley:

Q. Mr. Cain, there is another entry, cocoa bean deal, $30,000.00 in 1945. Did you have any cocoa bean deal of $30,000.00 in 1945?

A. No, we did not.

Q. Did you have any sugar deal for $37,000.00 in 1945?

A. No, we did not.

Q. Did you have a cocoa bean deal of $22,000.00 in 1945?

A. No.

Q. Did you have any sales expense of—the figure has been changed. It looks like it ends up being $18,000.00, am I correct?

A. That was the thing I was trying to think of, that sales expense. That was Busby's—in order to make it balance, by working it backwards, we used the sales expense figure and just fitted into the pattern.

Q. In other words, you just put in some arbitrary figures and then you plugged that one so that they would balance, is that correct?

A. That is correct. But we didn't do it for the 4496 pose of defrauding the Government. We knew darned well the Government was going to charge us on the top. All I hoped to do—and I told him I hoped to do it—was that they would give some consideration to the fact that we must have had some trade deals and must not have received all that money. But I said, "Whatever you hand me a bill for, I will pay it."

Q. Did you tell them with whom you had the trade deals?

A. Sure I told them.

Q. And who was that, who did you tell them?

A. I told them we had lots of deals. I just described—

Q. Did you tell them with whom?

A. Lubben.

Q. Were all those deals with Lubben?

A. These deals are no more deals than Lubben's books were.

Q. This is just a phoney, fictitious piece of record that you made up?

A. That is a memorandum I made for the auditor. I said, "Give them that."

Don't get me wrong. When it was given, it was 4497 explained. And Mr. Sauber and Mr. Lima and these gentlemen will so testify. It was certainly explained to them.

Q. Now, on this corn syrup figure of $12,000.00 in 1945, was that in accordance with the figures which you had been working up for these many months, as you say?

A. No, that is corn syrup. I don't know where I have got corn syrup on the sheet.

Q. Didn't you say that you had been working up some corn syrup figures?

A. Well, it should be corn.

Q. It should be on a corn deal, is that the idea?

A. That's right; I would think so.

Q. Was that $12,000.00 figure on the square, for the corn, on the square?

A. I wouldn't know that, Mr. Lockley. I am just not enough of a bookkeeper. I wanted to get this thing done.

Q. Didn't you say you had been going through the books and finding out the carload shipments and the car numbers and determining how much corn you had gotten in that period; does that $12,000.00 figure have any relationship to the work that you had been dong on the books?

4498 A. Now, I think, Mr. Lockley, that I said that I had caused my people who knew something about books to go through and find out what was going on. And that they were wasting a lot of time doing something I thought was needless, trying to substantiate these outgoing payments. And I said, "Forget about it. Here, I will scratch it down for you." And I scratched it down. That is what these figures are. I just scratched them down on paper.

By the Court: I think it is recess time. Mr. O'Brien and Mr. Lockley, please.

(Discussion before the bench outside the hearing of the reporter.)

By the Marshal: Will the audience please remain standing while the Judge and the jury leave the court room.

This honorable court will recess until two o'clock this afternoon.

(Whereupon a recess was taken in the above-entitled cause to 2:00 o'clock p.m. of the same day, being Friday, October 9, 1953.)

4499 • • (Caption—No. CR 143) • •

Chicago, Illinois
Friday, October 9, 1953
2:00 o'clock p.m.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley,
Mr. Vincent O'Brien
Mr. Thomas C. McConnell
Mr. William Kirby

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:—

By the Marshal: This Honorable Court will now resume its session.

4500 BYRON A. CAIN a witness heretofore called herein on behalf of the Government, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination (Continued) by Mr. Lockley.

Q. Mr. Cain, at the close of the morning session, we were discussing Exhibit No. 185 for the Government. I call your attention to the fact that on the right hand side of that exhibit, under the "1945" heading is the word "Recd." which I assume is "Received", and the figures "204,100". Is that $204,100.00?

A. I wouldn't know, Mr. Lockley.

Q. And then after the list of items and amounts is the figure "194,000", and the word "carryover 10,000". Do you know what that figure means?

A. No, I don't, not at this time.

Q. Does that mean that that is $10,000 left over in the box from 1945, carried over to 1946?

A. No, it has no reference to that. It is just a memo-

randa that I prepared. It has no reference to it at all.

4501 Q. Then in 1946, is a figure "168,600" to which the 10,000 has apparently been added to make the total of 178,600. Do you know if that indicates the amount of money which was either received or spent in 1946?

A. No, I do not.

Q. Now, is that in your handwriting?

A. Yes, it is.

Q. But you don't know what it is?

A. It is just a scratch paper that was picked up in connection with something that I did at some time or other.

Q. Did it mean anything to you at the time you prepared it?

A. I can't answer that, because I don't know just the whole import of this document. It is just a scratch paper that was picked up at that time.

4502 Q. And you had to get the figures of 204,100 and 168,600 for 1945 and 1946 from someplace. Do you recall where you got them?

A. I have explained that. I don't recall where these figures came from.

Q. Well, I know you explained that the figures representing amounts paid out were arbitrary, just guesswork, but did you have any basis for the other figures which apparently are made up of the amounts paid out?

A. I don't recall, Mr. Lockley. Mr. Busby would be in a better position to tell you what we prepared it for.

Q. But you prepared it and not Mr. Busby, didn't you?

A. This is just a scratch paper and it doesn't mean anything.

Q. But you prepared it, didn't you?

A. My writing is on some of it, yes.

Q. Well, isn't most of it your handwriting?

A. Yes, but it is just a scratch memorandum. It doesn't mean anything. I don't see—

Q. Well, it must have meant something or you wouldn't have prepared it, Mr. Cain, do you think?

4503 By Mr. McConnell: I object to the argument.

By Mr. Lockley: I won't go into it. You are right, Mr. McConnell.

By Mr. Lockley:

Q. The next item for corn syrup under the year 1946 is $87,000.00 and apparently it has been struck over to be $87,775.00. Do you know what that means?

A. No, I do not.

Q. Does that mean that you paid out that much money for corn syrup in 1946?

A. Is this another question?

Q. Yes.

A. No, I do not. I do not know.

Q. Does that $87,775.00 figure have any relevance to the figures which you had been working on for some months, you say?

A. I had not been working on the figures. The organization had been working on them and I just worked on the assembly of them. I can't explain it because I don't know what the figures were.

4504 A. And the "milk $15,000", does that represent the amount paid out for overages in milk during 1946?

A. I can't explain that figure, either.

Q. Were there ever any overages paid out for milk in 1946?

A. Not to my knowledge.

Q. And "sugar, $54,825.00"; did you pay out any such amount for sugar in 1945?

A. Not to my knowledge.

Q. Do you know if you paid out any amount for sugar in 1946? I beg your pardon—1946.

A. I don't think we did.

Q. And "sales expense"?

By Mr. McConnell: I object. He has been over these items.

By Mr. Lockley: I have not been over this item, Mr. McConnell. If your Honor please, may I continue my examination in orderly course?

By the Court: Yes, proceed.

By Mr. Lockley:

Q. The "sales expense" item is again the figure 4505which is struck over but which appears to be $21,000? Does that represent sales expenses which were incurred by the corporation and not charged on the corporate books in 1946?

A. No, it does not. And I don't recall what it represents.

Q. Were there such sales expenses in 1946 which were not charged on the company books?

A. Not to my knowledge.

Q. Finally, there is a figure "$338.76 to balance". Do you know what that figure is?

A. No, I don't. That, again, is not in my handwriting.

Q. Would that appear to be the amount which was left in the cash box at the end of 1946?

A. I couldn't answer that. That had nothing to do with the cash box.

Q. In other words, this sheet has no meaning whatsoever?

A. Other than previously explained.

Q. And you prepared it for your accountant?

A. I don't believe I prepared it for my accountant. I prepared it for my own jotting down. Have you got down all the memoranda I have jotted down for the last thirty years?

4506 Q. Did you hand this to Mr. Busby, your accountant?

A. I can't answer that. I don't know.

4507 Q. Well, is this the sheet you had reference to when you were testifying on the motion to suppress, at page 168, and you said:

"And then they were in a dilemma about what to do about the pay-outs, and I said, 'I will tell you what we will do about it: give me a piece of paper.'

"I said, 'Busby worked backwards.'

"I wrote it down this way—'there is your pay-outs.'"

Is that the piece of paper you took, and to which that testimony has reference?

A. I am inclined to believe that it is, but I would like to amplify that just a little, if I can. The time that we spent on this was spent in finding out how much the maximum income to the company was, not the outgo. We didn't care what the outgo was. Because we knew it wasn't going to be allowed to us, anyway.

Q. Well, Mr. Cain, you just have the one candy plant in Chicago, do you not?

A. I am president of the Homewood Manufacturing Company, successor of Shotwell Manufacturing Company.

Q. I meant, of course, in 1945 and 1946. You
4508 had no other plant but the one right here in Chicago?

A. That's correct.

Q. And had you ever discussed whether you were going to buy any additional plants?

A. I may have.

Q. Because of the freight differential between the East Coast and the West Coast, and Chicago?

A. Yes, we, I think, at one time, considered expanding to the west and east coasts.

Q. Now, you made a loan of $75,000 to Mr. Lubben. Do you recall about the time of that?

A. Yes, I recall the loan.

Q. When was it?

A. About the middle of 1947.

Q. About July of 1947. Now, actually, you didn't make that loan, that loan was made by the Sterling National Bank, wasn't it?

A. That's correct.

Q. They gave Mr. Lubben the money?

A. That's right. I endorsed the note.

Q. And you guaranteed the note?

A. That's right.

Q. And you put up some securities, to guarantee
4509 the note?

A. That's right.

Q. And Mr. Lubben gave you a mortgage on all of his real estate, his personal property, his equipment, everything he had, didn't he?

A. That's right.

Q. And you had all that appraised before that, didn't you?

A. To the best of my ability, yes.

Q. Who appraised it for you?

A. Well, I think as to the machinery and plant, I probably would have taken Mr. Huebner's opinion. As to the real property, I would have taken the opinion of myself.

Q. And what was the appraisal?

A. There was no formal appraisal ever made.

Q. Well, did you figure that the plant was worth $75,000, and the equipment and machinery?

A. I figured the underlying security for my mortgage was worth $75,000, and I wouldn't lose any money.

Q. So you weren't taking any risk when you loaned Mr. Lubben that $75,000, or arranged the loan, I
4510 should say?

A. I wasn't in the mortgage business. I didn't desire to make the loan.

Q. But I mean, you weren't taking any risk on it, you were well secured, were you not?

A. I think I have answered the question.

By Mr. McConnell: Can you talk a little louder? We can't hear you back here.

By the Witness: I will be glad to.

4511 By Mr. Lockley:

Q. And Lubben made further monthly payments against that mortgage or against that loan, I should say?

A. For about four months.

Q. And he reduced it to about sixty-six or sixty- seven thousand dollars, I think you said?

A. That is correct.

Q. That was a demand note that the bank had on Mr. Lubben, wasn't it?

A. I don't recall.

Q. And isn't it true that Mr. Lubben didn't default on the note, but that the bank called in its demand note and he was unable to pay the $66,000.00 balance?

A. No, that is not true.

Q. What is the fact?

A. They said he had failed to make the payments that were due under the arrangement that had been made with the bank.

Q. And who told you that?

A. The Sterling National Bank.

Q. The president of that bank is a good friend of yours, isn't he?

4512 A. I wouldn't say a good friend. He is a friend of mine, though. We are not close personal friends.

Q. Didn't you tell him to sew up Lubben with a mortgage, with everything he had?

A. No, he had nothing to do with the mortgage.

Q. Do you recall the conversation that you had with Special Agent Krane about July of 1948?

A. No.

Q. At your office, at Cain & Culhane?

A. No.

Q. Do you know Special Agent Krane?

A. Very well.

Q. He is the gentleman sitting right here?

A. Right.

Q. Didn't you tell Mr. Krane at that time that you weren't concerned about any loss as a result of your guaranteeing that $75,000.00 loan to Lubben because it was your intention to have an east coast plant?

A. No, I didn't.

Q. And that if Mr. Lubben defaulted on that note you would have an east coast plant at a much lower cost than it would be if you had to go out and build or buy one?

4513 A. No, I didn't.

Q. You don't remember telling that to Mr. Krane?

A. No, I don't recall.

Q. Who owned the securities you put up to the Sterling National Bank?

A. Shotwell Manufacturing Company.

Q. Who got the mortgage?

A. Byron A. Cain as agent for The Shotwell Manufacturing Company.

Q. Now, at the time that $75,000.00 loan was made wasn't one of the conditions of the loan that Mr. Lubben would change the location of his plant from the Bronx to New Jersey in order to cut down on some of his costs?

A. No, there was no condition to the loan at all. There may have been a recommendation by someone other than myself. But I made no condition to the loan at all.

Q. Didn't Huebner actually help him lay out the New Jersey plant?

A. That is entirely possible.

Q. Did you have anyone go out to Mr. Lubben's office at that time and examine his books in July of 1947, or around there?

4514 A. I don't think so.

Q. Did Mr. Graflund go?

A. No, not to examine his books.

Q. I am speaking of the middle of 1947, at the time this loan with the Sterling National Bank was arranged.

A. Well, if he did, I don't remember.

Q. Didn't he come back and tell you that he didn't think $75,000.00 was going to be enough to save Mr. Lubben financially, that he would need a hundred and a quarter?

A. No, I don't recall.

Q. I think you have testified here that that $75,000.00 loan was in the nature of a shake-down or blackmail?

A. I felt that it was.

Q. Were you required to make that loan, Mr. Cain?

A. No, but I had been doing something that I was very ashamed of, with an individual who I lost all confidence in, so I just felt that I was obligated to do it, if I wanted to keep my name clean.

4515 Q. You felt it was a blackmail, although you got the securities back which you thought were of sufficient value to safeguard you against any loss, is that so?

A. That's correct.

Q. And you felt it was a blackmail even though Mr. Lubben was making regular monthly payments to reduce that loan to the Sterling National Bank, is that so?

A. Well, he made four.

Q. He made at least that many. He reduced it from seventy-five to about sixty-six thousand, and that is not including the interest, isn't that right?

A. That's correct.

Q. Now, in 1948, about January, I think you said, you sent Busby and Graflund to Lubben's plant in connection with an additional $50,000.00 loan which he had requested, am I correct?

A. That's correct.

Q. Mr. Busby was to check Mr. Lubben's financial condition to see whether or not it was a good risk for $50,000.00?

A. That's right.

Q. And he found out that it wasn't a good risk?

4516 A. That's right.

Q. So you didn't make the loan?

A. That's right.

Q. Did you characterize that as blackmail?
A. It was an attempt at blackmail.
Q. You weren't required to make the loan, were you?
A. I didn't.
Q. You never gave him the $50,000.00, did you?
A. No, I did not.
Q. And you sent Mr. Graflund along at that time, too?
A. That's right.
Q. Did you tell Mr. Graflund to get hold of any papers that he could of Mr. Lubben's with respect to his over-ceiling dealings with the Shotwell Manufacturing Company?
A. No, that isn't the instructions I gave Graflund.
Q. What were the instructions that you gave Graflund?
A. I told him to inspect the books and see what the books might reflect so that we would know what the situation was there.
Q. Did you tell Mr. Graflund to tell Mr. Lubben
4517 that he was going to do that?
A. I didn't tell him to tell Lubben anything.
Q. He was to do this without Mr. Lubben's knowledge, is that it?
A. He was to do it in any way he could, for my benefit, and for the benefit of the Shotwell Manufacturing Company. I wasn't interested in Mr. Lubben at that time.
Q. You say you weren't interested in Mr. Lubben at that time?
A. That's right.
Q. Weren't you considering making him a $50,000.00 loan.
A. I didn't make the loan.
Q. I know that. But weren't you considering making him one at the time you sent Mr. Busby and Mr. Graflund back there?
A. Well, I sent them down to find out if it could be made or should be made.
Q. Well, you mean you were going to make him a $50,000.00 loan, but you weren't interested in him at that time?
By the Witness: Will you read the question back?
4518 By Mr. McConnell: I object to that question as having a double aspect. I don't know how anybody

could answer that question.

By the Court: Overruled.

(Question read.)

By the Witness:

A. I was interested in him to find out what his books reflected.

By Mr. Lockley:

Q. Well, had you decided before you sent Mr. Busby that you weren't going to make the $50,000.00 loan?

A. I sent Mr. Busby down to find out whether there was—whether I should make it. But, on the other hand, my mind was pretty well made up, I thought, at the time.

Q. You mean you made up your mind that you weren't going to make it before you sent Mr. Busby down?

A. Well, if Busby had given me a differential report I might have changed my opinion. But he didn't. He gave me the report I expected to get.

Q. Then you were entirely a free agent as to whether you made the loan to Mr. Lubben or whether you
4519 didn't make the loan to Mr. Lubben, is that right?

A. I considered myself such, because I refused to make the loan.

4520 Q. Is that consistent with your claim that this was a blackmail attempt?

By Mr. McConnell: I object to that.

By Mr. Lockley:

Q. You weren't forced to make the loan, were you?

By the Court: Overruled.

By the Witness:

A. Well, I wasn't in the business of loaning money.

By Mr. Lockley:

Q. Were you forced to make the loan, Mr. Cain?

A. No. And I didn't make the second loan.

Q. Exactly. You did exactly as you wanted to. There was no force, whatsoever.

By Mr. McConnell: Is that a question or statement?

By Mr. Lockley:

Q. If Busby had reported back to you that Lubben had a good financial condition, would you have made the loan?

A. I can't answer that at this time.

Q. When Mr. Busby did return, you and Mr. Sullivan had a meeting with him, is that so?

4521 A. That's correct.

Q. Was that on a Sunday at your home?

A. To the best of my recollection, it was.

Q. And at that time you discussed the question of overages, that Mr. Busby had first found out about it—

A. That's right.

Q. —on his trip with Mr. Graflund. And that was about what time, do you remember?

A. The meeting in my home?

Q. Yes.

A. I couldn't be definite about that. It was on a Sunday.

Q. Well, was it 1948?

A. Oh, yes. Around the 11th day of January, 1948.

Q. About the last part of January. And you told Mr. Busby at that time that Shotwell Company received over-ceiling payments from Lubben, is that correct?

A. That's correct.

Q. And what did Mr. Busby tell you?

A. Well, Mr. Busby told me that over-ceiling pay-

4522 ments were not a proper deduction from the income tax return, and as long as our income tax return hadn't reflected the income that we could be in difficulty.

Q. Did he say what kind of difficulty?

A. Tax difficulty.

Q. Was he any more specific than that?

A. That was specific enough for Mr. Sullivan and myself.

Q. All right. And then did you have any further discussion?

A. And then—yes, sir, we asked him whether—he told us about the disclosure policy of the Government. And we told him to go down and find out whether that policy was still in effect.

Q. All right. What did he tell you about the disclosure policy of the Government?

A. He told us if we went in and told the Government there were errors and omissions in our income tax return, and that they would send somebody out and straighten it out, we could pay our bill.

Q. Did he tell you that you had to go in and see the Government before the Government started making an investigation of you?

4523 A. I don't recall what he told me on that matter.

Q. Did he tell you that in order to make a voluntary disclosure, there had to be an admission of liability?

A. I certainly admitted liability. I didn't agree with their policy, but I admitted the liability, if that was the policy.

Q. Didn't you try to wipe out the liability with this sheet of figures on Exhibit 185?

A. I couldn't wipe out the figures. I was told that nothing was deductible from this income that we had received, that that was a rule of the Commissioner of the Department of Internal Revenue.

Q. Did Mr. Busby tell you that you could avoid criminal prosecution if you went to the Bureau of Internal Revenue and made such a voluntary disclosure?

A. He did.

Q. Why were you fearful of criminal prosecution if you owed no tax?

A. Mr. Busby told me we did owe a tax. He said under the Commissioner's ruling, we owed a tax.

Q. Didn't Mr. Busby tell you that before you could

4524 be prosecuted criminally, it had to be a willful evasion?

A. I wouldn't know enough about that. You ask Mr. Busby.

Q. Did he tell you it had to be intentional?

A. I can't answer that.

Q. Well, you did send Mr. Busby to Mr. Sauber in the Bureau of Internal Revenue, didn't you?

A. Yes, sir.

Q. And you told him not to reveal the name of the company that he was inquiring about?

A. That's right.

Q. What was the purpose of that?

A. To find out if the policy was still in effect. That's all I asked him to do.

4525 Q. Did you have any discussion with him as to what you would do if the policy wasn't in effect?

A. No, I did not.

Q. And you stated that you never got any bill from the Bureau of Internal Revenue. Did you ever file any amended returns for the Bureau of Internal Revenue reporting any additional income?

A. When I talked to Mr. Sauber, he told us it would be impossible.

Q. Did you try?

A. Mr. Sauber said it would be impossible for us to file an amended return.

Q. Did you ever offer the Government any amount of money in settlement of your tax liability and have anybody in the Government refuse it?

A. I asked them to give me a bill.

Q. Have you ever offered any money to anybody in the Bureau of Internal Revenue in settlement of your tax liabilities and have them refuse it?

A. No, not just that way, no.

Q. As a matter of fact, didn't you testify in your motion to suppress that you would never pay a dollar to the Bureau of Internal Revenue if you could help it?

4526 A. No, I don't think I did. If I did not owe it I might have said—

By Mr. O'Brien: I object to the form of the question, if the Court please. If he is trying to impeach him, let him read the question and the answer and that would take care of it.

By the Court: The question and the answer should be read.

By Mr. Lockley:

Q. Going back to your Exhibit No. 185, did you testify in the motion to suppress, page 220 in reference to that exhibit—you were asked:

"Q. What is it supposed to mean if it is not supposed to mean that?"

And did you answer:

"A. Mr. Ryan, there was a summary sheet. This was a sheet that really was for our own purpose. We had made our disclosure months and months and months before this sheet was put out, and when we got down to this figure, Lima was in. We had to do something quickly, so I said, 'Give him these figures

4527 and we will go ahead and work.'"

Does that refresh your recollection as to why it was prepared, a to what it means?

A. This was prepared as a memoranda for them to use outside of that sheet, that we recorded very carefully all of the income that we were charged with on Lubben's books.

Q. For what purpose was it to be used?

By Mr. Kirby: Well, I object on the ground we have certainly gone over that to exhaustion.

By the Court: Well, the exhibit is not admissible as to your client.

By Mr. Lockley:

Q. Well, was Exhibit 185 used for the purpose of preparing Exhibit 186, if you know?

A. I don't know.

By Mr. Kirby: Excuse me, Mr. Lockley. I would assume, your Honor, not only that the exhibit is not admissible against my client but all of the testimony with respect to it is not admissible.

By the Court: I think that necessarily follows.

4528 By Mr. Kirby: Thank you, your Honor.

By Mr. Lockley:

Q. Now on direct examination with Mr. O'Brien this morning, you stated that Mr. Sullivan called you while you were in California, if I understood you correctly, and said that he had bought from Lubben the Haberkorn Candy Company. Was that your testimony?

A. That is correct.

Q. Do you know from whom the Haberkorn Candy Company was actually bought?

A. I found it out when I got back to Chicago.

Q. It wasn't bought from Mr. Lubben, was it? Who was it bought from?

A. I didn't find that out until just recently. Lubben handled the negotiations of the deal, as I understand it. I didn't know. I wasn't there, so I probably shouldn't testify.

Q. The fact of the matter is that Haberkorn Candy Company was sold in its entirety to the Shotwell Manufacturing Company by Eddie Urban, is that correct, and his wife?

A. I can't answer that. You will have to ask another witness. I don't know anything about that transaction. I wasn't there.

4529 Q. Well, do you know that the Shotwell Manufacturing Company paid $65,000.00 for the stock in Haberkorn Candy Company?

A. Our books reflect that we paid $101,000.00 for the stock.

Q. That isn't what I asked you.

A. That's all I can answer.

Q. I asked you how much was paid?

A. $101,000.00 is all I know about.

Q. And to whom was it paid?

A. I can't answer that, Mr. Lockley. I did not handle the transaction. I wasn't here when it was handled.

Q. Who did handle it? Who did handle the transaction?

A. Mr. Sullivan, Mr. Huebner—I don't know. You will have to ask them.

Q. The fact of the matter is that the books of the Shotwell Company show the cost of that stock at $101,000.00, do they not?

A. That is my recollection.

Q. So that there was a directors' meeting at which it was recommended that the stock be bought at that price, isn't that so?

4530 A. If that is what the records reflect, it probably was.

Q. And wasn't that figure actually made up from the $65,000.00 which was paid to Eddie Urban plus the amount which was lost on the loan, the $75,000.00 loan, to Mr. Lubben?

By Mr. McConnell: I object to the assumption that it was paid Eddie Urban. There is no evidence I know of that it was paid to Eddie Urban.

By Mr. Lockley: You have got the contract itself and the exhibits.

By the Court: He may answer.

By the Witness:

A. I know nothing about that transaction, Mr. Lockley.

By Mr. Lockley:

Q. Did you ever see a copy of the contract of sale of the Haberkorn Candy Company?

A. It was all an accomplished fact when I got back to Chicago, so there was no reason for me to look at the contract of sale.

Q. Now, you also mentioned a man named Tobias?

A. That is right.

4531 Q. When did you meet him?

A. The first time I ever met Tobias was during the candy convention at the Waldorf in 1948.

Q. When was that?

A. In June of 1948.

Q. Are you able to fix the date more accurately?

A. No, I am not. I am not even sure about the June—it was around that time of the year, though.

Q. And how did you come to meet Mr. Tobias? Who introduced you?

A. I don't recall. I know that Tobias was at the General Confections Company when Mr. Busby and Mr. Lubben, or Mr. Graflund, made their trip down East. He was employed there at that time.

Q. Did you meet him there at that time?

A. No, I did not. They reported it back.

Q. How do you know he was there?

A. They reported back to me and I believed them.

Q. The first time you met him was at the time of the candy convention in June of 1948. Did he just come up and introduce himself to you?

A. Did I say 1945? Let me correct that, Miss Reporter. That was 1948.

Q. 1948?

4532 A. Yes.

Q. We will pass that for a moment. I will show you a document which is defense Exhibit 9, a contract for the sale of the Haberkorn Candy Company, and I ask you if you will read this portion which relates to the payment of purchase price and see if that refreshes your recollection as to the cost of that stock?

A. To my knowledge, I have never read this contract before.

4533 Q. Well, do you know if the contract is wrong or right?

A. I would assume that it is right.

Q. And the contract says that the "buyer agrees to pay the sellers the total sum of $65,000.00", is that correct?

A. I would assume the contract speaks for itself.

By Mr. McConnell: Aren't there some more provisions in that contract?

By Mr. Lockley:

Q. Now was Mr. Tobias in your suite at the Waldorf at the candy convention?

A. He came up for about an hour.

Q. As a matter of fact, he was there at the time Mr. Graflund called you and told you that a Judge Krane had just come to the Shotwell Company and had taken the books, was he not?

A. No, he was not, not to my knowledge.

Q. Are you sure of that?

A. I said not to my knowledge.

Q. Well, did you ever see him again after that?

A. Yes, I saw Tobias once again after that, I think.

4534 Q. Well, let us find out first what happened at the candy convention with Mr. Tobias. Did you have a conversation with him at that time?

A. Yes, we did.

Q. And what did you talk about?

A. He said that he could give us some figures on the Lubben enterprises and tell us what had been going on with their books. I said if he could, we would be very happy to have that information. He said it would take some time. I said, "Whatever time you spend, we can reimburse you for it."

Q. Did you offer to pay him for that service?

A. Yes.

Q. Did you pay him directly?

A. No, sir.

Q. How did you arrange the payment?

A. I asked him to present his bill to Pat Grace and asked Pat Grace to pay the bill.

Q. How much was it?

A. $500.00, if my memory serves me right.

Q. How about Ed Sproull, did you also tell Ed Sproull to pay him some money for you?

A. No, sir. No, sir.

4535 Q. Didn't you know that Tobias collected $750.00 from Pat Grace?

A. No, sir, he did not.

Q. Do you know that he collected $750.00 from Ed Sproull?

A. No, sir.

Q. It was charged off on their books as accounting purchases and you reimbursed him, didn't you?

A. We did not.

Q. Do you mean to say that Mr. Grace just gave Mr. Tobias $500.00 which you never repaid him?

A. Now let us get one question at a time. I said that I employed, I asked him to send his bill to Mr. Grace and I would reimburse Mr. Grace for $500.00. That is the only thing I know about it. These other questions, I can't answer. I never heard of them before.

Q. Is that all that happened at the time you met him at the Waldorf, at the candy convention?

A. That is about all.

Q. When did you next meet him?

By the Court: Who?

By Mr. Lockley:

Q. Mr. Tobias, sir.

4536 A. Well, I don't know definitely that I have met him since then.

Q. Did you ever telephone him and ask him to meet you?

A. Not to my knowledge.

Q. Did you ever write him a letter?

A. No, not to my knowledge.

Q. Did you ever send him a telegram?

A. There is a--we could have sent him a wire. He could have called me on the phone and told me about these

papers and I could have told him I was going to be in New York later and then when I was in New York I could have wired him and said I was going to be at the Waldorf. I don't know.

Q. Did you have such a later meeting?

A. There was no later meeting. I am talking about the only meeting we had.

Q. The meeting at the candy convention?

A. That is the only one I recall.

Q. That would be about June 21st?

A. That would be about the time.

Q. I show you Government's Exhibit 187 for identification.

4537 By Mr. Lockley: Will you please mark that Government's Exhibit 187 for identification.

(Said document was marked Government's Exhibit 187 for identification.)

By Mr. Lockley:

Q. And I ask you if that is the telegram which you sent to Mr. Tobias.

A. It purports to be, yes.

Q. Well, did you send it?

A. I don't recall sending it.

By Mr. Lockley: I offer Government's Exhibit 187.

By Mr. McConnell: I have no objection.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Government's Exhibit 187.)

By Mr. Lockley:

Q. And this reads: "Mr. Tobias. Dated July 8, 1948. Telephone Tremont 2-6394. Arriving Gotham Hotel at P. M. tomorrow, 7-9-48. Would like to see you about five P. M. B. A. Cain."

Do you have any recollection as to whether you sent that telegram?

4538 A. No, I don't, but that could possibly be the one meeting I have confused with the other meeting. I don't recall two meetings although it could have happened.

Q. The candy convention was not on July 9th, was it?

A. No, it was not on July 9th, but the meeting I refer to as having happened at the candy convention, it could have been this July 9th meeting. I don't recall the two meetings. I do know there was one meeting.

4539 Q. What happened on this meeting, on June 9th?

A. The only meeting I recall is the one meeting. Whether it was in June or July, I don't know. My testimony for the one meeting would have to stand because I can't clear up the two meetings.

Q. Well, who was there at the one meeting you do remember besides yourself and Mr. Tobias?

A. I believe Mr. Sullivan and Mr. Huebner were with me, although I couldn't be sure of that.

Q. Wasn't Pat Grace there, too?

A. No, sir; not to my knowledge.

Q. Didn't you have a meeting on July 9th with Pat Grace and Harold Sullivan and Mr. Tobias and yourself at the Gotham Hotel?

A. If I did, I have no recollection of it now.

Q. Didn't you ask Mr. Tobias at that time to use his influence with the Bureau of Internal Revenue in New York to delay the issuance of the summons for the books and records of General Confections?

A. I did not. I did not know that Tobias was ever connected with the Bureau of Internal Revenue.

Q. Isn't it a fact that you told Tobias you could
4540 have this investigation killed very easily, because you were a very close friend of Bob Hannegan's, at that conference?

A. I certainly did not.

Q. Isn't it a fact that you told Tobias at that conversation you had excellent contacts that would reach to the White House?

A. I certainly did not.

Q. Did you have any other meetings with Tobias after this one of July 9th?

A. I recall only one meeting with Mr. Tobias.

Q. Did Tobias turn over any of Lubben's records to you in accordance with your agreement?

A. It is my understanding that some records were sent to our plant. I don't know.

Q. What were they?

A. I don't know.
Q. Were they original records?
A. I can't answer that, Mr. Lockley. I don't know.
Q. Do you know whether or not you still have them?
A. No, I don't know.
Q. Didn't you at a later time tell Mr. Tobias, it
4541 would be worth five thousand dollars to you to get Special Agent Krane off this case?
A. I certainly did not.
Q. Now you stated that you never used any political influence to settle your case?
A. That is right.
By Mr. McConnell: I object to this. This isn't impeachment on a material issue in this case.
By Mr. Lockley: It was brought out on direct, if your Honor please.
By the Court: You haven't finished your question as yet, I assume?
By Mr. Lockley:
Q. You stated that you went to see Mr. George Schoeneman?
A. That is correct.
Q. Who was he?
A. He was a Director of Internal Revenue.
Q. He was Commissioner of Internal Revenue?
A. Or a Commissioner, whatever the name was.
Q. He was in charge of the whole operation of the Bureau of Internal Revenue in the United States?
A. That is correct.
4542 Q. Who arranged that appointment?
A. I met Mr. Schoeneman at a garden party at the North Shore, and we—I talked to him about it. I told him I was having a lot of trouble getting a bill out of the Chicago office, and he said, "Why don't you come to my office". And he said; "You can talk to me one of these days". And I did. I went down there and talked to him.
Q. Did you have Mr. Hannegan as a week end guest at your home in 1948 after Special Agent Krane had been into your office and the Shotwell Manufacturing Company?
A. No, sir. Mr. Hannegan was never a week end guest in my home.
Q. Was he a guest?
A. He might have been a dinner guest, a barbecue out in the kitchen, or out in the yard—I don't know.

Q. Did you talk to him about your tax case at that time?

A. When Mr. Hannegan died, he didn't know I had a tax case, nor did anyone else in politics, nor did any lawyer in the City of Chicago.

4543 I did not even tell the lawyers. I didn't employ a lawyer on this case until 1951, when we employed Daniel Taylor. I was ashamed of it, and I didn't want anybody to know about it. You can rest assured I did not tell any of my political associates, whether they were Republican, or whether Democrats.

Q. How about Pat Grace? Did you employ Mr. Grace?

A. Not in connection—only in connection with one phase of this thing, and that was to find out whether New York was holding up the settlement of this case in Chicago because of the connection that would have been brought out in the newspapers.

Q. What did he tell you?

A. He wrote me a nice letter—no, he didn't either. He called me and said it wasn't—it had nothing to do with it.

4544 Q. Is that the only time he ever performed any professional services for you?

A. I can't recall now what I might have called upon Mr. Grace to do other than this tax matter and that was just an inquiry.

Q. Was he a tax lawyer?

A. No, he was not. He was a friend of somebody. In our social conversation, I found out he was friend of somebody and I said, "If you get an opportunity, find out."

Q. You found out he was a friend of Dan Bolick's, who chief of Intelligence in New York?

A. Thank you very much.

Q. Is that the name?

A. That is the name I was trying to think of, yes.

Q. You said early in 1948 you and Mr. Huebner and Mr. Sullivan met Ed Sproull and asked him to assemble some information for you?

A. That is correct.

Q. Mr. Sproull is a New York accountant, isn't he?

A. That is right. He was Mr. Lubben's accountant.

4545 Q. What was the nature of the information you asked him to get for you?

A. Any information he could give us so that I could get this absolute ceiling to report to the Government in conjunction with our disclosure.

Q. Did you ask Mr. Lubben for any of that information instead of going for it in a roundabout way and asking Mr. Sproull and Tobias?

A. I asked Mr. Lubben for information that I didn't get. He didn't have any books and records or anything else, so we dug it out and got it. I wanted the best that I could get.

Q. You say that this next meeting with Mr. Lubben was in the latter part of June, 1948, at the Riviera night club?

A. That is correct.

Q. Was that still during the period of the candy convention?

A. I don't think so. I think the candy convention was over.

Q. Had you come back to Chicago in the meantime?

A. I imagine so.

Q. And you say Mr. Lubben called you?

A. Yes, Mr. Lubben called.

4546 Q. At the Gotham?

A. At the Gotham.

Q. How did Mr. Lubben know you were in town?

A. Oh, I don't know.

Q. You hadn't had any contact with him prior to that?

A. Not to my knowledge.

Q. For how long?

A. Well, the last memory of a meeting with him is the one I testified to.

Q. Well, how long were you in New York on this particular visit when you had Mr. Grace as your guest for dinner at the Gotham?

A. I can't recall, Mr. Lockley. It was possibly two or three days. It is according to what my business was at that time.

Q. Mr. Lubben called you at that particular time at the Gotham Hotel, not knowing you were in town?

A. He could have called just as a matter of fact. I don't know how he got the information.

Q. At the meeting that you had at the night club, the Riviera night club, there was no reference whatsoever made to Mr. Lubben's leaving the United States so he

wouldn't be available to testify against you?

4547 A. None.

Q. The sole purpose of that meeting was so Mr. Lubben could borrow some money and buy a soft drink franchise in South America, is that right?

A. That is right.

Q. By the way, when did you meet Mr. Pat Grace?

A. I am inclined to believe that it was in 1948. It could have been in 1947.

Q. When?

A. I don't know. It could have been in 1948 or 1947.

Q. How long before you had a meeting at the Club Riviera?

A. Well, it was some time before that. I can't—

Q. Well, how long?

A. I don't know, Mr. Lockley. My memory doesn't go back.

Q. Six months, six weeks, six days?

By Mr. McConnell: Now, you have three questions in there and I object to that form of the question. He is asking about six months, six weeks, six days.

By the Court: I don't think that constitutes a question.

4548 By the Witness:

A. My answer is I don't recall.

By Mr. Lockley:

Q. Well, was it a very long time?

A. Not a very long time, no.

Q. Well, how many—

A. I know it was a short period of time prior to the Riviera meeting.

Q. How many meetings had you with Mr. Grace from the first time you met him until the night of the Riviera meeting?

A. As I recall, we were with Mr. Grace on two or three occasions during the candy convention. Whether that was that particular candy convention in 1948 or whether the convention was in New York in 1948, I don't know for sure. I mean, the convention that I met Mr. Grace at. I met him on two or three occasions. He was with Tom O'Neil quite a bit.

Q. What was Mr. Tom O'Neil's business?

A. He was a broker for the—or, he was a broker for raw materials, candy and primarily for Mars.

Q. Was he a Chicago man?
A. Yes, a Chicago man.
Q. Is O'Neil still alive?
4549 A. No, he is dead.
Q. There was no mention made at the Riviera meeting of any money except a loan to Mr. Lubben by you, is that correct?
A. I don't know what sum he was going to put it at at the Riviera meeting. It was rather an indefinite sort of thing. I said, "If you don't have the franchise at this time, wait until it gets concrete and tell Mr. Grace about it when it develops." I don't know whether it was a loan or a gift or whether he was going to invite me to participate.
4550 Q. Is that in your opinion what constitutes blackmail?
A. In my opinion it was the start of blackmail.
Q. Did you give him the money?
A. No, sir.
Q. So the next time you heard from him was a telephone call from Mr. Cramer's office in Boston?
A. That is right.
Q. Just exactly what did Mr. Lubben say on the telephone call?
A. Well, he says that he was in Cramer's office and he was trying to raise $135,000.00 and he wanted to know if I would participate in it and I said, "I want no part of it."
Q. No, no.
A. I said no.
Q. Did he say what he wanted the $135,000.00 for?
A. It was a very short conversation. He didn't get a chance to. I just said no.
Q. Was that another attempt at blackmail?
A. In my judgment, it was.
Q. Did you pay him the money?
A. No, I did not.
Q. Did he threaten you in any way?
4551 A. No.
Q. How long had you known Mr. Cramer?
A. I met Mr. Cramer once in my life before he walked into this court room the other day and I don't know when that once was. It was some time during, I imagine, the indictment years.

Q. Did you ever meet him at Ed Sproull's office?
A. Never.
Q. The next time you met Mr. Lubben was the meeting at LaGuardia Field, is that correct?
A. That is correct.
Q. Which you sought?
A. What is that?
Q. You sought Mr. Lubben out at that time?
A. That is correct.
Q. Did you know at that time that the special agents of the Intelligence Department were going to New York to conduct another phase of the investigation of The Shotwell Manufacturing Company case?
A. I did not.
Q. And told Mr. Lubben that you were willing to pay four hundred or four hundred fifty thousand dollars income tax, is that correct?
4552 A. That is correct.
Q. And you wanted him to tell the truth about the barter deals. Now, just exactly what barter deals did you discuss with him at that meeting?
A. I didn't discuss any. I just said generally barter deals and I also wanted him to tell the truth about the $450,000.00.
Q. We will get to that in a minute. Let us get to the barter deals. How many barter deals did you have with Mr. Lubben during the course of those two years, during 1945 and during 1946?
A. It is impossible to reconstruct on our books and it is impossible to reconstruct it on their books. There are so few—
Q. Tell us about those which involved the United Chocolate Company.
A. The Druckerman deal is another. I think Lubben got five or ten thousand cases of candy on that deal.
Q. Did you hear Mr. Druckerman testify?
A. Yes, I did.
Q. You heard Mr. Druckerman testify that Mr. Lubben was in no way responsible for introducing him to you or at least he didn't remember he was?
4553 A. That is where Mr. Druckerman was in error. Mr. Druckerman and Mr. Lubben came into the plant and I was there.

Q. Did you hear Mr. Druckerman testify he didn't sell any of that candy to Lubben?

A. Certainly he didn't. I gave Mr. Lubben five thousand cases besides five thousand cases I gave Druckerman at ceiling price.

Q. And you got paid?

A. Sure, I got paid.

By the Court: I think both of you should be a little careful. The reporter has a difficult time with both of you having a habit of talking at the same time.

By the Witness: I will be more careful.

By Mr. Lockley: All right.

By Mr. Lockley:

Q. Well, I don't understand, Mr. Cain, if you got paid for the candy that you shipped to Mr. Lubben, how it in any way affects the cost of these products to you.

A. It doesn't in any way affect the cost of the products to me, but in Mr. Lubben's memoranda that he
4554 has introduced, the evidence he has charged The Shotwell Manufacturing Company with, of getting over-ceiling payments on every single shipment we ever shipped him, as this money was the only consideration he ever got and that isn't true.

4555 Q. Well, how much money did you get from him?

A. I don't know. But it wasn't anyways near that $400,000, and, in my humble opinion, it wasn't a third of it.

Q. You don't know how much it was?

A. That's correct.

Q. You didn't ever see any of the money?

A. If I did, I didn't see it very long.

Q. You never paid any of it out?

A. Not a penny.

Q. You kept no record of it?

A. I kept no record of it.

Q. But you are positive it wasn't as much as Mr. Lubben said it was?

A. Definitely.

Q. And he does have records. Well, what is this forty or fifty thousand dollars forgiveness in '46, that you asked Mr. Lubben to tell the truth about?

A. It is simply as I stated. Mr. Lubben came into the office in the fall of 1946, and said he was in—didn't have the money to pay on the overages that he owed us, and

asked us to take preferred stock in General Confec-
4556 tions. And I think, if you will check his books, that a lot of people did take preferred stock.

Well, I didn't want any part of Lubben as a partner. Don't get me wrong now. If the money had been paid to us, it would have gone with the other fifteen thousand dollars into Shotwell, if he could have paid us the money. But I didn't want any part of Lubben as a partner in any company. I said, "Lubben, we don't want any part of the deal. We will forgive you the money if you don't have it. Pay what you owe us on the books, the ceiling prices, and forget about the overage you owe us. That period of our life is over."

Q. So that he did never pay you the last forty or fifty thousand dollars of the premiums that he has charged to the books?

A. That forty-eight to fifty thousand dollars, that's correct. And I made that statement in the presence of Huebner, and maybe somebody else out in the plant at the time.

Q. Now, was Mr. Lubben paying this money to you?

A. No, he was not.

Q. Well, how do you know it wasn't paid then?

4557 A. Because he said it wasn't paid. He said he owed the Shotwell Manufacturing Company that money. If he admits it, I am not going to deny it.

4558 Q. Do you know if he ever gave it to Mr. Huebner?

A. Mr. Huebner was there when he said he owed it.

Q. He never paid the money to you, did he?

A. No, sir.

Q. Did he ever pay any money to you at any time?

A. Never at any time.

Q. Then how do you state that he didn't pay this forty or fifty thousand dollars, if you weren't there?

By Mr. McConnell: I object to that as argumentative. He has already testified that the man said it.

By the Court: He has answered that question.

By Mr. Lockley:

Q. This was in 1946, the latter part of 1946?

A. That's right.

Q. That he offered you stock in General Confections?

A. I think that's correct.

Q. And you refused it because you didn't want to be in any way connected with him, is that correct?

A. That's correct.

Q. But in July of 1947 you guaranteed him a
4559 $75,000.00 loan?

A. I think I testified about why I made that loan. In the first place, I didn't want to lose the money.

Q. Lose what money?

A. The seventy-five thousand.

Q. You never had to make the loan in the first place, did you?

A. Well, I made it.

By Mr. O'Brien: Mr. Cain, just listen to the question.

By Mr. Lockley:

Q. Mr. Lubben had no quota with your company, did he, except the one that was set up at the time he arranged the purchase of that small amount of chocolate, and then you made him a broker?

A. I wouldn't be able to say on that. I am inclined to say he had some kind of a quota. All our customers did.

Q. Well, was he a customer in 1941, the base period for the quotas?

A. Well, we put a lot of customers on our books, and a lot of them went out of business between '41 and '45 and '46. Our quotas shifted.

Q. Do you know how much business Lubben did
4560 with the Shotwell Manufacturing Company in 1945 and 1946 just on invoices alone?

A. No, I do not.

Q. Do you know how much the gross sales of the Shotwell Manufacturing Company were in 1945?

A. I would say around five million dollars.

4561 Q. Do you know whether or not Mr. Lubben wasn't one of your biggest single customers in that year?

A. Oh, I don't think so. He was one of our larger customers.

Q. He was one of your larger customers?

A. That's right.

Q. And is the same true in 1946?

A. Yes, sir.

Q. Was there any other customer, who didn't have any quota in the base period, given the same amount or nearly that amount of candy as Mr. Lubben was in '45 and '46?

A. No, sir.

Q. And you say he only paid you premiums for this short period from—what are the dates again?

A. September or October of '45 until around July of '46.

Q. But you made pretty substantial sales to him, didn't you, in the months from January to August of 1945?

A. That is correct.

Q. And you continued to make substantial sales
4562 to him, didn't you, from July to December of 1946?

A. I think that's correct.

Q. And you mean that the sales that you made from September of '45 until about July or so of 1946 were the only premium sales?

A. That is correct.

Q. And the rest of them, you let him have without any premium whatsoever?

A. That's right.

Q. And in 1945, particularly before he began paying premiums in September, he had no quota base?

A. I would think that he would have some quota base, but I don't know how large it was. I know he got a tremendous amount of candy as a result of that United Chocolate deal, and I don't know what other deals might have been in there.

Q. Was Mr. Lubben the only man who could find any raw materials for you?

A. Mr. Druckerman found some for us.

Q. Mr. Druckerman sold you some sugar, didn't he?

A. That is correct.

Q. And that was his business, wasn't it?

4563 A. That's right.

Q. And you paid him the ceiling price for it?

A. That's right.

Q. And, in turn, you sold him some candy?

A. That's right.

Q. At ceiling price?

A. That's right.

Q. It was a perfectly legitimate business transaction?

A. Perfectly legitimate.

Q. It would have no bearing whatsoever on the in-

come on your books, just so long as it was all recarded?

A. That is correct.

Q. Now, do you know a person named Krasne?

A. I certainly do.

Q. Did you call Mrs. Krasne some time in 1946, the spring of 1946?

A. Yes, I did. Wait a minute. Mrs. Krasne? Oh, I did not.

Q. Who did you call then?

A. Either Mr. Krasne called me or I called him. I don't know which it was.

Q. Did you have a conversation at that time
4564 about some jewelry?

A. Yes, Mrs. Cain and Mrs. Krasne had taken some jewelry of Mrs. Cain's over to a jeweler that Mrs. Krasne had, to have it remodeled. And I asked—he said he was coming through Chicago and I asked him to pick it up and bring it with him. I fully expected to get a bill from the jeweler. When he arrived here he told me that Lubben—who was sitting next to him, and he had told me he was sitting next to him when I talked to him,—he said, "The big fellow is sitting here." I said, "Give him my regards."

So when Krasne came in and told me Lubben had advanced the money, I didn't say anything. I just let it go. And the next time I saw Lubben I paid him the $1,450.00 that he advanced to Krasne. And that ended the transaction.

4565 Q. How did you pay him?

A. In cash.

Q. Where did you get the cash?

A. Well, I always have cash.

Q. You always carry $1450.00 around with you?

A. No, but I can always get $1450.00. I think you will find, if you check the Waldorf Hotel, that I cashed a check in sums of—on different occasions for about a thousand or two thousand dollars.

Q. When did you cash a check for this $1450.00?

A. I didn't cash a check for $1450.00. I gave him $1450.00 out of the money I had.

Q. Out of money that you had?

A. I either had or got for that purpose. And I certainly wouldn't have cashed a check for $1450.00. But

he had paid it in cash and I returned it to him in cash.

Q. And you never said anything to Mrs. Krasne about Mr. Lubben was going to bring the money over to her so she could pick up the jewelry?

A. I did not.

Q. And did you hear Mrs. Krasne's testimony on the stand?

A. I did.

4566 Q. How do you know Mr. Lubben paid her the money in cash?

A. She told me—or he told me. I think the way the transaction was handled, that Lubben handed Krasne the money and he gave it to Mary. I don't know. It certainly wasn't handled in the manner she testified to. In any event, I paid Lubben back.

By Mr. Lockley: That is all, your Honor.

By Mr. McConnell: I would like to ask one question, if I may.

Redirect Examination by Mr. McConnell.

Q. Mr. Cain, you stated—I don't know whether I heard you right, I thought I understood you to say that you had—you and the Sullivan families, your family and the Sullivan families had 50 per cent control, or 51 per cent control of this corporation in 1945. You didn't, did you?

A. No, we did not.

Q. And the two families together didn't have control until along the latter part of '46 when the Shotwell stock was bought.

4567 A. And then you would have to take in all our family, all branches of the family. But our control of Shotwell Manufacturing Company was acquired in the fall of '46, when we bought the Shotwell—when the company bought the Shotwell stock.

By Mr. McConnell: That is all I have to ask.

Recross Examination by Mr. Lockley.

Q. In 1942, when the Shotwell Manufacturing Company was reorganized, wasn't it a part of the reorganization plan, or agreement, that you and Triplett, and the Sullivans were to get 51 per cent of the stock?

A. There was 51 per cent of the stock, or about

that amount of stock paid out to a group of people. But Mr. Shotwell and I could have controlled the company—not me, because I didn't take a share of the stock. I would like to correct my testimony on that. That stock was divided among my family. I didn't have any to begin with, or maybe 500 shares, something like that.

By Mr. McConnell: I would like to ask one more
4568 question, if I may.

Redirect Examination by Mr. McConnell.

Q. Mr. Lockley drew from you an admission on cross examination that you had paid nothing for your stock. Now, didn't you guarantee the obligations, the payment of the obligations to the creditors of the Shotwell Company?

A. Yes, sir.

4569 Q. To what extent did you guarantee them?

A. Well, I didn't expect it to go as far as it did. We were out for about a half a million dollars before we got very far along.

Q. You gave them your personal guarantee?

A. That's correct.

Recross Examination by Mr. Lockley.

Q. Did you ever pay a dollar on that?

A. Fortunately I didn't have to. I paid the obligation off.

Q. I am afraid, Mr. Cain, I didn't quite understand you. Do you mean you paid off the corporation's obligations personally?

A. No, the corporation paid the obligations that I had personally guaranteed and that relieved me of any responsibility to take care of it.

Q. You personally never paid any part of it?

A. No, the corporation paid it.

Redirect Examination by Mr. O'Brien.

Q. Just one thing, Mr. Cain. You were asked
4570 about records sent by Tobias. Did you ever get records from Tobias, or did you get some figures from him?

A. I don't recall, Mr. O'Brien, what came from them.

Whatever it was sent into the auditing department for the purpose that they were gotten and that was it.

By Mr. O'Brien: That is all.

By the Court: Is that all, gentlemen?

By Mr. Lockley: That is all, your Honor.

(Witness excused.)

By the Court: I think we will take our afternoon recess now, members of the jury. We will suspend for ten minutes.

By the Marshal: Will the audience please remain standing while the jury and the Judge leave the court room.

This Honorable Court will recess for ten minutes.

(Recess taken.)

4571 By Mr. Kirby: Harold Sullivan, please.

HAROLD E. SULLIVAN, one of the defendants herein, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. Harold E. Sullivan.

Q. You are one of the defendants?

A. I am.

Q. Where do you live, Mr. Sullivan?

A. I live at 1140 Ramona Road, Wilmette, Illinois.

Q. Where were you born?

A. I was born on a farm near Woodstock, Illinois.

Q. When?

A. When? 1896.

Q. And what was the family into which you were born?

A. It was a rather large family. I am one—the youngest of seventeen children.

Q. And where was the farm?

A. It was between Woodstock and Marengo, Illi-
4572 nois, in McHenry County.

Q. Your father was a farmer?

A. That's right.

Q. How long did he live?

A. Well, he was killed when I was eight years of age.

Q. And your mother?
A. She died when I was three.
Q. How long did you stay on the farm?
A. Well, I went to high school, in Chicago, St. James High School at 29th and Wabash Avenue.
Q. Keep your voice up, will you?
A. Then I went for two years to St. Joseph's College at Rensselaer, Indiana. I finished my high school course there. Then I returned to the farm for about a year and a half.
Q. Then what did you do?
A. Then I came back to Chicago.
Q. Who did you live with?
A. I lived with my sisters, here in Chicago.
Q. Where?
A. Well, originally at 3208 Rhoads Avenue, Chicago, Illinois.
Q. Did you work?
4573 A. I worked and I went to school at Loyola University, nights.
Q. Studying what?
A. Studying law.
Q. Where did you work in the daytime?
A. At the Chicago and North Western Railroad.
Q. And how long did you continue your night law studies at Loyola?
A. One year, interrupted by military service. I enlisted in the Army in 1917. I joined a local outfit which later became part of the Rainbow Division, 149th Field Artillery. We were sent overseas and I spent about twenty months overseas.
Q. When you came back what did you do?
A. I went to work for the North Western Railroad again. And in the year 1919 continued my studies at Loyola University.
Q. When did you graduate?
A. I graduated in 1921.
Q. When were you licensed to practice law?
A. 1921.
Q. And have you practiced law continuously since?
A. Continuously.
Q. Alone, or in association with others?
4574 A. In association with others.
Q. Name them.

A. Well, John E. Crahen, who has passed away not too long ago, John O'Toole, my brother, George, Mitchell Kilanowski, Ed. Hess, Stanley Sarneg, and I believe that is all.

4575 Q. What has been the general type of your practice?

A. Chancery and corporation work.

Q. Chancery work mostly has to do with property, is that it?

A. That's right.

Q. Have you held some position in the Courts?

A. I have been a Master in Chancery. I am just finishing my nineteenth year as a Master in Chancery of the Circuit Court of this County.

Q. And what is a Master in Chancery?

A. From a layman's point of view, it is an assistant of the Judge.

Q. Well, what do you do?

A. Hear cases, and report on the law and evidence, hear testimony of witnesses, and file a written report to the Judge on my finding, on the law and on the facts.

By Mr. Kirby: Will you mark this Defendants' Exhibit 93 for identification?

(Said document was marked Defendants' Exhibit 93 for identification.)

4576 By Mr. Kirby:

Q. And are you appointed by one of the Judges, or by all of them?

A. By all of the Judges of the Circuit Court.

Q. And is Exhibit 93 for identification, the type of an order which is entered in the Masters in Chancery appointment in this Circuit?

A. That's right.

Q. And is that a copy of an order with respect to you?

A. That is.

By Mr. Kirby: This illustrates the practice, and I offer it in evidence, your Honor.

Any objection?

By Mr. Lockley: I have no objection.

By the Court: It may be received.

(Said document was received in evidence by the Court and marked Defendants' Exhibit 93.)

By Mr. Kirby:

Q. And that appointment as Master in Chancery was last renewed just last year?

A. December of last year.

4577 Q. Mr. Sullivan, when were you married?

A. I was married in 1928.

Q. To whom?

A. My wife's maiden name was Stella Maguire.

Q. And she still lives?

A. She still lives.

Q. Where did you live when you did marry?

A. Well, our first home was at 2448 Estes Avenue, Chicago, Illinois.

Q. How long did you live there?

A. I lived there for nine years.

Q. And then?

A. With the increase of the family, we needed larger quarters, and we moved to another apartment in the same building, 2448 Estes Avenue, and I lived there for nine years. And at my present address, I have been living for six years.

Q. How many children were born of the marriage?

A. Three.

Q. Name them.

A. One is deceased. Died at the age of a year and a half, and I have two boys living, Harold E. Jr., 24, and Joseph J., 22.

Q. Where does Harold, Junior, live?

4578 A. Harold Junior was just recently discharged from the Service, and he is living at home.

Q. How about Joseph? Where does he live?

A. Joseph J. was married last June, and now has a home of his own at 4246 Sheridan Road, Chicago, Illinois. And, incidentally, he is leaving for the Service next Wednesday.

4579 Q. When did you first hear about the Shotwell Manufacturing Company and how did you hear about it?

A. Well, I more or less lived with it for a number of years. I first heard about it from a neighbor of mine who happened to be the secretary and, I believe, vice president of the Shotwell Manufacturing Company as far back as 1929.

Q. And when you say a neighbor, where did he live and what was his name?

A. Charles Hall, Charles R. Hall. He lived at—I don't know his exact address, but it was in the same building I lived. I think it was 2466.

Q. He lived in the same apartment building with you and he was an officer of Shotwell?

A. That's right.

Q. Well, then what did you have to do with the Shotwell Company after 1929?

A. Well, in time Mr. Hall became a client of mine and eventually introduced me to Mr. Shotwell, who, likewise, became a client of mine. And I did work for Mr. Shotwell personally, and for the company, from 1929 up until the time that I became interested in it financially.

Q. And what was the general nature of the work
4580 you did for Mr. Shotwell during those years?

A. Well, various matters that would come up in connection with the corporation, personal tax matters, and matters of a general nature, together with advice by me to Mr, Shotwell on various maneuvers in connection with the company, ways of financing and so forth.

Q. What was the situation with respect to the financial status of the company in those years?

A. When I first became acquainted with Mr. Shotwell, and with the Shotwell Company, they were in dire need of financing and continued that way as long as I knew them, up until the time that we took over the management of the Shotwell Manufacturing Company.

Q. Did Mr. Shotwell, in 1941, attempt to work out with others his financial difficulties?

A. In 1941 Mr. Shotwell came to me and told me that his—no, I believe it was a little bit previous to that—told me that he was in danger of being forced into bankruptcy. At that time I negotiated a loan for him with the Savage Brothers Machinery Company, which tided him over.

Mr. Shotwell at that time was a rather elderly man,
4581 and in the crash of the 20's he had lost all of his personal fortune. At one time he was a wealthy man. Now, subsequent to that he again was in financial difficulties and he came to me and told me that he was propositioned on letting a fellow come in and manage the company and that this fellow agreed to give him—oh, Mr. Shotwell agreed to give him an option on all of Mr. Shotwell's stock for $150,000.00. In the meantime he was to be general man-

ager of the company. That option was to be exercised any time within five years. I did not know the party who was going into the company.

Q. Well, how did that turn out and how did you and Mr. Cain happen to get into it? Just let's get to that.

A. Well, about a year later he again told me that the party who was in there wanted to make a different deal with him, that he didn't figure that the property—or the company was a success and wanted to make another deal with him.

I told Mr. Shotwell—he wanted me to take hold of it. I said, "Well, I don't know whether I am your man or not. If I could get somebody associated with me who knows
4582 something about business I would be glad to attempt it."

Well, he says, "That will be O. K. with me." And in February—I think it was February 12th, Mr. Cain, Mr. Triplett and myself took over the management of the Shotwell Manufacturing Company.

4583 Q. What about the creditors, what did you do with respect to the creditors?

A. We immediately called the creditors together, told them that henceforth we would pay cash for everything that we purchased, and asked them to go along with us and please freeze their accounts for a period of five years, with monthly payments, of course, spread over a period of five years. I mean, the present accounts or liabilities that we found when we went in there.

Q. How much did the liabilities total, just roughly, Mr. Sullivan?

A. I would say about two hundred thousand dollars.

Q. Was there any guarantee given by you men personally?

A. We had to guarantee accounts up to the extent of nearly a half a million dollars.

Q. Mr. Shotwell stayed in as President, did he?

A. That's right.

Q. Was Mr. Shotwell finally bought out?

A. Mr. Shotwell was bought out, I believe, in July of 1945.

Q. And how much was he paid?

A. He was paid in excess—I am quite sure, I think
4584 it was $435,000.00, for his stock. Likewise, we entered into a non-competing contract with him for a period of

eight years, which is still in effect, $15,000 a year.

So, all in all, I think Mr. Shotwell and his family got in excess of $600,000.

Q. His family still gets that fifteen—

A. That's right.

Q. Now, after the new group took over—oh, by the way, when you did take over, who was operating, who was running the plant itself?

A. Well, most of the people that you have seen here in the last few days. There was Frank Huebner—you mean before we got into it?

Q. Yes.

A. Frank Huebner, Stanley Graflund, Martin Erekson —Howard Roeser came there later—Mr. Shotwell. I believe that's at least the main officers of the company when we took it over.

Q. As far as you personally are concerned, did you run the manufacturing operation?

A. No, I did not.

Q. How often were you out at the plant?

A. Well, I was out at the plant maybe for—oh,
4585 once a week, maybe for two or three hours.

Q. Now, in the years in question, of 1945 and 1946, how often were you at the plant?

A. I would say about once a week, maybe for two or three hours a day.

Q. So you have been connected with it in one way or another since 1929 and had an interest financially since approximately '42, is that right?

4586 Q. Now, from 1942 until the present day have you ever prepared an income tax return for Shotwell or any income tax return for Shotwell?

A. Never.

Q. Specifically, did you have anything to do with the 1945 income tax return in question here?

A. None whatsoever.

Q. Did you have anything to do with the 1946 income tax return which is in issue here?

A. None whatsoever.

Q. When is the first time you ever actually saw the 1945 or the 1946 return?

A. I believe the first time that I have actually seen the returns has been in this court room.

Q. And have you to this day read or examined it?
A. No, I haven't.
Q. Mr. Sullivan, you have met a David Lubben?
A. Yes, I have.
Q. How many times in your whole life, up until the time he appeared in court here, have you seen David Lubben?
A. I don't believe that it is more than on five or six occasions.
Q. Have you ever received any money from David
4587 Lubben?
A. None, never.
Q. Have you ever seen him pay any money?
A. I never have.
Q. Has anybody given you any money from David Lubben?
A. No.
Q. Mr. Lubben testified here that on about February 14th, 1946, he made out some checks which have holes in them now, and they are Government's Exhibits 14, 14-A and 14-B. One day when he was on the stand he said he came up to your office and showed you those checks. Now, did he ever do any such thing?
A. He never did.
Q. Did you ever see those checks before this trial?
A. I never did.
Q. Now, Mr. Lubben came back the next day and himself dropped that testimony. You heard that, did you?
A. Yes, I did.
Q. But he then said that he had come up to your office in August or September of '46. Did he do that?
4588 A. Mr. Lubben has never been in my office.
Q. Well, he said that he came up to your office and that you said you needed some money for building a driveway on your farm in Marengo. Did you hear him say that?
A. I heard him say that.
Q. Now, what farm in Marengo do you own?
A. I own the old Sullivan homestead.
Q. And how long has that been in the Sullivan family?
A. One hundred years.
Q. Is there a driveway on it?
A. There is a driveway on the farm that has been there for fifty years.

Q. Did you in 1946 put in a new driveway?
A. I did not.
Q. When is the first time you saw the driveway that is there right now?
A. Well, when I was born, I believe, if I could see then, Mr. Kirby. But it is at least fifty years.
Q. So did you ever have any discussion with Mr. Lubben at all—
4589 A. I did not.
Q. —about wanting cash money to build a driveway?
A. I did not.
Q. That is the only proof you heard Mr. Lubben say—that is the only instance in which he mentioned you at all when he was on the stand, isn't that right?
A. That's right.
Q. Now, when is the first time you ever met Lubben?
A. I believe it was in New York at the candy convention in June of 1945.
4590 Q. Did you spend any time with him?
A. No, I did not.
Q. Did you ever go out to dinner with him, you or your wife?
A. On one occasion.
Q. Was there more than just yourself and your wife; were there other people there?
A. Yes, there was Mr. and Mrs. Berry, or Burry.
Q. Berry?
A. Berry. And another couple. I have forgotten their name. I think Mr. and Mrs. Huebner and myself and wife.
Q. And about when was that, do you know?
A. Well, I am not sure.
Q. Were there any other occasions?
A. That was the only occasion I ever was out with him socially.
Q. Now, on that occasion, when you were out socially with him, was that a time when he came up into the hotel rooms, where you and Huebner were?
A. I don't ever remember seeing him in the hotel room, where myself and Huebner were.
4591 Q. Your wife was with you?
A. What is that?
Q. I mean, in your hotel room, that was where yourself and your wife were?

A. That's right.

Q. But was Huebner—I mean Lubben up there at that time?

A. Not that I ever recall.

Q. Now, during the year 1946, which is the next year, that is the time when Lubben said he came up to your office and that so-called driveway conversation took place. Now, he wasn't up there then?

A. I never—Lubben was never in my office.

Q. Well, did you talk to Lubben about any business matters at all in the indictment years of '45 or '46?

A. I never did.

Q. When did you first talk to Lubben about any business matters?

A. Well, I believe it was in January of 1948.

Q. Where?

A. In New York.

Q. Where in New York?

4592 A. I think at that time we were staying at the—what is it, Wicker Hotel?

Q. Warwick?

A. Warwick Hotel in New York.

Q. Who was staying there?

A. Well, I believe Mr. Cain, Mr. Huebner, myself. If I recall correctly, we came from Boston at that time. I might be mistaken, but it is my memory that we came in from Boston, and we saw Lubben and a party by the name of Cary on Shotwell—on Lubben's problems. Lubben had been seeking additional money from Shotwell.

Q. What do you mean, additional money?

A. Well, he got a loan previous to that time of $75,000, which Shotwell guaranteed.

Q. That's the Sterling bank transaction?

A. That's the Sterling bank loan.

Q. And now he wanted—

A. And the information that I received from Mr. Huebner was that he had some other proposition to offer. And we met with Mr. Cary and with Mr. Lubben, and his proposition was to the effect that we subordinate the loan of $75,000 to a new loan to be put on by budget factors.

4593 It is a concern that I believe Lubben himself had an interest in, with Mr. Cary, and that we subordinate our loan. I told him that I wasn't in favor of it, and that I didn't intend to do anything about it.

Q. Had you already had—you and Mr. Cain, an adverse report from Busby?

A. That's right, in late '47 or early 1948.

4594 Q. You say the net effect of that was you told him no?

A. That is right.

Q. When was the next time you met Lubben?

A. Well, according to the records of the company, I was in New York, I believe, the 4th, 5th, 6th and 7th of February, 1948.

Q. Mr. Sullivan, keep your voice up.

A. All right.

Q. In February, early, in 1948?

A. That is right.

Q. And where were you?

A. At the Gotham Hotel.

Q. With whom?

A. Frank Huebner.

Q. And what happened?

A. I believe by appointment again through Mr. Huebner, Lubben wanted to see us, and Lubben made an appointment to see us one morning at the Gotham Hotel. He arrived there with Mr. Davidson about ten thirty in the morning, as I recall it.

I don't know whether it was on the first day we arrived, or the second day, but anyway we made an appoint-

4595 ment, so he came up to the room.

Q. Did you have a parlor?

A. Yes. —And sat down, and again discussed this loan of $50,000.

Q. What was said, Mr. Sullivan?

A. Well, he says, "I have to have fifty thousand dollars. I have a lot of pressing things that I have to pay." He went on to say that he even was paying off Federal Agents.

I said, "Lubben, as far as I am concerned, you are not going to get fifty thousand dollars from us, or fifty thousand cents."

I said; "We did guarantee a loan for you of seventy-five thousand dollars." I said, "One of the conditions of the loan was that you send us a monthly statement as to the condition of your business, and that was in June of last year. To date, we have received no statement from you, and as a matter of fact, I am just not interested."

Davidson and Lubben were in the room, as I said, and Mr. Huebner, and then he turned down a brief case alongside of his chair.

Q. Who did?

4596 A. Lubben.

And he says, "Perhaps after I show you these, you will think differently about it." And he opened up the brief case, and he pulled out some invoices that he said, "Here are some invoices that maybe will make you change your mind."

I said, "Let me see them." He gave me some invoices and some memoranda, marked up invoices, and I said to him, "These are a fake." I said, "I don't scare very easily." I said, "This looks like blackmail to me."

He said, "Well, you can call it whatever you want." He said, "I have got a lot more of these at the office, and you can call it blackmail, or whatever you want, but some day, I am going to see to it that you are in a peck of trouble."

"Well", I said, "I don't scare very easily, and you can do whatever you damn well please with these papers." And with that, I left him, or he left me. He left the room.

4597 Q. Have you seen Lubben again after that?

A. I have never seen Mr. Lubben again after that time.

Q. Until—

A. I think I will take that back. I think I was out at the airport one day and I happened to see him passing by but until he came into this court room here—

Q. Until the trial?

A. That is right.

Q. Did you give him the fifty thousand?

A. I did not give him the fifty thousand.

Q. Did you call Byron Cain and tell him of the threat?

A. I called Byron Cain who happened to be in Palm Springs, California, at the time, and I told him what happened.

Q. What was the next thing that happened?

A. The meeting with Mr. Lubben?

Q. Yes. How did you get the account or the seventy-five thousand and those matters finally straightened out?

A. Well, I did say to him, I said, "There is only one

thing that I would like to do." I said, "I would like
4598 to have you get out of my hair. You owe us seventy-five thousand dollars. Make some arrangements to pay for it. If necessary, you can name your own ticket on it, but I want to have you get out of my hair."

About two hours later I received a call and the party told me at the other end of the wire that he was Irving Carry. He began talking to me and I recognized his voice and then he said, "What do you mean by pushing my boy friend around?"

I said, "What are you talking about?" He said, "You know what I am talking about." He said, "Dave Lubben."

I said, "If you have anything to say to me, well, don't say it to me on the telephone. Come up to my suite and say it."

Now, that is about the only thing that happened in New York. About four days later or maybe a week later, Frank Huebner called me up and he told me that Lubben had been in touch with him and that there was a chance of straightening out the loan in New York by taking over the Haberkorn Candy Company, that that was Lubben's suggestion.

4599 I said, "Frank, you know how I feel about the situation and any deal you make is a good deal, assuming that there is some equity to it." Then I told him to get ahold of Busby, have him check over the statements of the Haberkorn deal and if he thought it was a good deal, why, to go ahead and make it.

Q. And the Haberkorn deal was finally made?

A. That is right, about a week later.

Q. And that was the end of any deals with Lubben, so far as you know?

A. That was the end of any deal with Lubben, and as I said, I don't think I saw him except this one day at the airport, until I saw him in this court room.

4600 Q. Mr. Sullivan, what was the first knowledge you ever had of Shotwell engaging in any over-ceiling cash deals with David Lubben?

A. Well, the first knowledge I ever had was in the late summer of 1945.

Q. And how did you find out about that, at that time?

A. Well, the corn syrup situation was very critical.

Q. How did you find out about it?

A. Frank Huebner called up on the telephone and told me that we were in danger of having to close the plant because of the making, or the inability to get corn syrup. He wanted to know if I could do anything about it.

I said, "No, I don't believe I can, but I will try." And I called up, oh, two or three people that I knew in the corn syrup business, and I asked them what the situation was, and they practically told me there was none available to the processor—to the manufacturers, unless we were able to get corn—

By Mr. Lockley: If your Honor please—

By the Witness:

A. —to the refinery.

4601 By Mr. Lockley: Pardon me, Mr. Sullivan. I object, unless Mr. Sullivan specifies the times, the places, and the individuals with whom he had the conversation.

By the Witness:

A. Well, one I talked to was Tom O'Neil, a broker. Another gentleman, I believe I talked to was Bob Adam, that testified here the other day. Another one—I am trying to think of his name, he was with Penick and Ford—not Horan. Dave O'Connor.

By Mr. Lockley: How do you spell it, Mr. Sullivan?

By the Witness: O'Connor?

By Mr. Lockley: O'Connor.

By the Witness: And I believe that's all, but they all had the same story.

By Mr. Kirby:

Q. Then did you talk to Huebner again about it?

A. Then I talked to Huebner about it, or he called me up. I don't know whether he called me up, or whether I called him up, and he told me that he had been talking

4602 to Lubben, and that Lubben had a way of getting corn syrup, or corn. He said that Lubben represented that he had several people out in the field buying raw corn, to be sent to the various refineries, and that if we could send him candy, and permit him to pay the overages, we could get the cash, and he would send in some men to pick up the cash, and we would eventually get the corn syrup.

I talked to him about a week later, and he told me also that there were other places where he could make, procure corn deals, and that is about—

Q. By Mr. Lockley: I object again, your Honor, unless Mr. Sullivan specified to whom he was talking, and when.

By the Court: Objection sustained.

4603 By Mr. Kirby:

Q. Who were you talking to on these phone conversations?

A. Frank Huebner.

Q. When was it?

A. It was in the late summer of 1945.

Q. And you heard Mr. Lubben—I mean, you heard Mr. Ryan testify here that he had originated through Lubben that type of deal?

A. That is right.

Q. And was that what Huebner described to you over the phone?

A. That is right.

Q. Now after that conversation with Huebner, did the plant close down?

A. No, it did not close down.

Q. Did it get the raw materials?

A. It got the raw materials.

Q. Did you personally handle any of the money?

A. I never handled any of the money. I never saw any money.

Q. Did you ever handle the cash box?

A. I never handled the cash box. I didn't know where the cash box was kept, as a matter of fact.

4604 Q. Your knowledge of it was that they were getting cash and spending cash?

A. That is right.

Q. Now when—

A. And that was general in the trade.

Q. What was general in the trade?

A. Getting cash and—

By Mr. Lockley: Well, if your Honor please, I object to what was general in the trade.

By Mr. Kirby: Wait a minute.

By the Court: I will sustain the objection.

By Mr. Kirby: I beg the Court's indulgence for a minute. On the question of a person engaging in evasion and on the question of whether he is intending to defeat the Government of its taxes, it does matter what the witness testifies.

By the Court: Ask him if he knew there was a tax problem presented by these transactions.
By Mr. Kirby:
Q. When did you first learn, Mr. Sullivan, that a
4605 tax problem was presented by these transactions?
A. I first learned of that in January of 1948.
Q. From whom?
A. Mr. Busby.
Q. Had you known before that of the now abandoned theory that those were not proper deductions?
A. I knew that at that time—are you talking about 1948 now?
Q. I am not talking about Busby. I am talking about your knowledge prior to the Busby conversation.
A. Well, I didn't know at that time that they were not proper deductions.
Q. The first person that told you that such was the Government's then policy was Busby?
A. That is right.
Q. Well, you know, as a matter of fact, that that is not the present Government policy?
A. That is right.
Q. But once you did learn of that policy and that it posed tax questions, what were your instructions?
A. My instructions to Busby—
4606 By Mr. Lockley: Just a moment, please, if your Honor please. If your Honor please, what instructions, to whom, when and where?
By Mr. Kirby:
Q. Yes. Did you give any instructions?
A. Yes, I did. That was at the meeting in January at Cain's house and I told Busby to immediately do something about it.
Q. To do what?
A. Well, he suggested that a disclosure of some kind be given, and I told him to go down and see the Collector of Internal Revenue and make a disclosure.
Q. Now, to go back to the tax returns themselves, Mr. Sullivan, you say that you never did see them?
A. I never did see them.
Q. Did you at any time have any intent to defeat the Government of any of its taxable revenue?
A. I never did.

Q. On either year?
A. On either year.
Q. Were you even an officer of the corporation in 1945?
A. I was not.
4607 Q. When did you become an officer of the corporation in the indictment years?
A. I believe the record shows July 1, 1946.
Q. And by that time the 1945 return had already been filed?
A. That is right.
By Mr. Kirby: Thank you. That's all.

4608 *Cross Examination by Mr. Lockley.*

Q. Mr. Sullivan, you are a lawyer?
A. Yes, I am.
Q. For how long?
A. Thirty-two years.
Q. And in that length of time, have you ever prepared any income tax returns?
A. I don't even prepare my own.
Q. I understood that on your direct examination with Mr. Kirby you said one of your duties when you were working in the early years of The Shotwell Manufacturing Company was advice on matters of a personal nature, tax matters, and so forth, is that correct?
A. Well, that means personal property tax, real estate tax,—not income tax.
Q. Now you stated that after you interested Mr. Cain and Mr. Triplett in the Shotwell Manufacturing Company that the stock of Mr. Shotwell was eventually bought?
A. That is right.
Q. By whom?
A. By the company. He was retired.
4609 Q. The corporation bought it?
A. That is right.
Q. So the people who had stock left in the corporation thereby increased the value of that holding, isn't that right?
A. You mean per share?
Q. Yes.
A. Yes, that is right.
By Mr. Kirby: I object to his mathematics because if

the money goes out to buy the stock and then the stock comes in—

By the Witness: I assume—

By the Court: You have answered the question.

By the Witness:

A. (Continuing) I assume that he meant because the shares are reduced that the same amount of money being left in the company, it would increase the value of the shares. By taking the money out of the corporation, naturally it reduces the shares.

By Mr. Lockley:

Q. Yes. Have you ever represented any client in connection with the income tax matters?

4610 A. I never have. I take it back. I did. I don't say I ever represented as of record, but I advised him and I put him in touch with an income tax lawyer.

Q. You stated that you went out socially on one occasion with Mr. Lubben, Mr. Burry, Mr. Cain and Mr. Huebner, but you failed to state when that was. Do you have any recollection?

A. I wouldn't. No, I wouldn't.

Q. Do you know where you went?

A. I am not sure of that. I know we did go down to the Bowery, finally. That I know.

Q. Did you go to the Diamond Horseshoe that night?

A. And I believe the Diamond Horseshoe. I think that is right.

Q. That possibly could have been January 19, 1945?

A. Well, it possibly could have been.

Q. Now, you were not an officer of The Shotwell Manufacturing Company until July of 1946?

A. That is right.

Q. How long have you been a director?

A. Well, I am not sure. I think I was a director when we took over the control of Shotwell.

4611 Q. That was around 1942, was it?

A. 1942.

Q. And you continued as a director, didn't you?

A. I believe that is true.

Q. Who was the attorney for the corporation?

A. I was.

Q. And you continued as attorney for 1945 and 1946?

A. That is right.

Q. Didn't you receive a salary?

A. I did.

Q. Was that only in connection with your professional duties as an attorney?

A. Not necessarily. I think the first few years that was true, but not of later years. I drew a salary.

Q. Isn't it a fact that you received a salary of $600.00 a week, effective July 1, 1946?

A. That could have been true.

4612 Q. You were only working there two or three hours a week?

A. Well, when I say working there, that doesn't necessarily mean I am physically present at the plant. There are other things that I do as an attorney for the corporation. That doesn't necessarily mean I have to be at the plant.

Q. And of course you also received attorney's fees in addition to the $600.00 a week, didn't you?

A. No, never. I am sure of that. If you have got proof to the contrary, it is certainly something that I know nothing about.

Q. When you were referring to the $75,000.00 loan that you stated Lubben had obtained from Shotwell, are you quite sure of yourself on that, Mr. Sullivan, that the Shotwell Company guaranteed that loan?

A. That the Shotwell Company guaranteed the loan?

Q. Yes.

A. Yes. You are bartering with words. Mr. Cain guaranteed the loan with Security, so the Shotwell Company—

4613 Q. In other words, it was Mr. Cain who actually—

A. He signed the name, if that is what you mean, sure, the guarantor.

Q. And whatever arrangement Mr. Cain had with The Shotwell Manufacturing Company, was between him and the corporation?

A. Well, he signed it as agent of the corporation. It was never intended that Cain personally should guarantee the loan.

Q. And you knew about the loan at the time it was being approved, then?

A. No. I really didn't until after it was approved.

Q. You mean that Mr. Cain could take $85,000.00 worth

of the corporation's assets and pledge them to a loan without the approval of the directors?

A. Well, I don't know whether it means that or not, but he did that, and he did it with my consent. I mean, my subsequent consent. Maybe I didn't like it, no.

Q. So you subsequently approved what he could have done?

A. Yes, that is what aggravated me in the deal, as a matter of fact, one of the things. I didn't see why we
4614 should be loaning or guaranteeing loans in New York when we had enough to do of it here in Chicago.

Q. Just what were your duties with The Shotwell Manufacturing Company?

A. I was general counsel of the company. I helped in the sales of the company. I called on the syndicate trade of the company, fostering sales, which was done. I earned my salary at the company, I believe.

Q. And you were aware in the latter part of 1945 that the company was receiving over-ceiling premiums from Mr. Lubben, is that correct?

A. That is right.

Q. Did you continue to be aware that that situation existed throughout 1945, the balance of the year?

A. That is right.

Q. And were you aware of the fact that it also continued through 1946?

A. I believe up until June or July of 1946, that is true.

Q. Do you know at which time the practice ceased?

4615 A. I think it was in July of 1946, possibly August.

Q. How did it come to your attention that that practice had stopped?

A. My conversation with Mr. Huebner, Mr. Graflund, Mr. Roeser.

Q. Did they keep you advised of how much money was at hand at all times in the box?

A. They never did.

Q. You mean you just had a casual conversation with one of them in the hall and he said, "Mr. Lubben stopped bringing in any premium payments"?

A. How is that?

Q. How did it come about that you knew Mr. Lubben wasn't bringing any money in?

A. Because they told me they closed up the cash box.

Q. When was this?
A. As I said, I think it was July or August of 1946.
Q. Who told you?
A. I believe it was Mr. Graflund told me.
Q. And where was he?
A. Where was Graflund?
Q. Yes.
4616 A. He was out in the factory.
Q. And what did he say?
A. Well, he told me that the deal was all over, that they deposited whatever money was left in the cash box in the Shotwell Company account.
4617 Q. Was this just a casual conversation?
A. I don't think it was casual. I was interested in knowing whether the deal was through.
Q. Did you ask him about it? Is that how it came about?
A. Well, as a matter of general conversation. I don't know whether he told me, or I asked him.
Q. You knew about the premiums being paid in 1945. As a lawyer, weren't you also aware of the fact that those premiums should have been reported on the income tax returns of the corporation?
A. Well, I didn't know but what they had been reported on the income tax of the corporation, and I was never told that they were not.
Q. Did you ever inquire?
A. I don't know as I ever inquired. I just naturally thought that in making up the tax return, those things would be taken care of. We have a CPA, and we have a group of auditors out there.
Q. And how—
A. Well, as I said, I don't pretend to know anything about income tax or books and records.
4618 Q. Well, did you know whether or not these items were being included in the books and records?
A. I didn't even know that. I did not know how it was being handled.
Q. Do you know what the purpose of it was in handling it in cash?
A. I assume that that was the only way that these people would get you the corn. In other words, you couldn't handle it by check.

Q. Well, what people?

A. Well, what people? I mean the people who were going out in the country and buying corn. They were interested in cash, and not taking checks.

Q. Who were they?

A. Well, do you want me to tell you by actual knowledge? By actual knowledge, no. What knowledge I have gained through the company, I can mention a couple of them. Mr. Keeley and Doe, and then I think there was a fellow, Rockenfelder. I never saw him. I don't know anything about him, but this is knowledge I gained through my position in the company.

Q. Did you ever pay any money to Mr. Cain?

4619 A. No, I didn't.

Q. I wish you wouldn't break in on me, Mr. Sullivan.

By Mr. Lockley: I am sorry, your Honor. I realize it is difficult for the reporter.

By the Witness: I am sorry. I didn't mean to do it.

By Mr. Lockley:

Q. Who is Rockenfelder? How do you spell it?

A. I think your guess is about as good as mine. I never saw the name written out. That is the way I understood the name.

Q. What is his first name?

A. I don't know.

Q. Well, what business is he in?

A. Well, I understood he is one of these lags that was going out in the country and buying corn from the farmers?

Q. Who told you that?

A. Mr. Huebner.

Q. Did you ever see him?

A. I never saw him. I never saw Dr. Doe. I never saw Keely.

4620 Q. So, so far as you know, not a dime of this cash money was spent for the corn in the black market?

A. Except from the knowledge that I have gained by reason of my position with the company.

Q. And what is that?

A. What do you mean?

Q. What knowledge is that?

A. Well, I just got through telling you, I was told;

and I have every reason to believe that there was money paid to Keeley, that there was money paid to Dr. Doe, that there was money paid to this Rockenfelder.

Q. Were any figures mentioned?

A. Well, at times, sure, there were figures. They told me figures ranging from—

Q. Well—

A. —$18,000 to $8,000 at a time.

Q. Can you tell us as closely as possible the date upon which you were told, and who told you, and the amount in each instance?

A. Well, as a matter of fact, I don't believe that I was too much interested in it, after we were getting our corn
4621 syrup; and therefore, I believe that it must have been some time in 1946, and when you say "Who told me", I think it was a matter of general conversation in the office, Graflund, Roeser, Mrs. Morrill, Al Shotwell, Frank Huebner, Byron Cain.

Q. It was your understanding that this money was being paid for corn in the black market, is that so?

A. You mean being paid for raw corn in the black market? Yes.

Q. Did you, as a lawyer, not warn your client that it was violating a criminal law of the United States by conspiring with others to evade the OPA laws?

A. We knew that we were violating the OPA laws, but there is a question of survival. If we didn't do it, it would have meant that our factory had to shut down, and we were not the only ones that were doing it. Everybody in the confectionary business did it.

4622 Q. Weren't you getting allocations of corn syrup?

A. Not at that critical period, we were not. Otherwise we would have had no occasion to go out on the black market and buy corn.

Q. Can you tell us how many cars of corn were bought by The Shotwell Manufacturing Company in this manner or were arranged by The Shotwell Manufacturing Company?

A. I couldn't tell you within 200 cars, no, except what I have heard.

Q. Could you tell how many cars were allocated on the quotas of corn syrup from the various refineries?

A. You mean what—

Q. During 1945 and 1946?
A. You mean cars of corn syrup?
Q. Yes.
A. No.
4623 Q. You think it possible that you did receive some corn syrup during that period under allocation?
A. I don't think there is any question about it. And that is just knowledge that I have gained from my position in the company, not personal knowledge. I had a lot of friends in the corn syrup business. Still have, I hope.
Q. Did you ever receive any currency from Mr. Cain or Mr. Huebner during 1945 or 1946?
A. I never received any currency at any time from anybody.
Q. Are you aware of the fact that a record was being kept of the currency in the black box in the office?
A. I was not. I didn't know how it was handled. There were people out there at the factory that I had confidence in. And I wasn't worried about it.
Q. Now, in the conversation you had with Mr. Huebner when he told you that corn syrup was hard to get, he told you that Mr. Lubben had approached him with a suggestion for getting corn?
A. That's right.
Q. Will you tell me again the substance of that
4624 conversation with Mr. Huebner?
A. Well, he said Mr. Lubben called him, or either called on him, I don't know which, and told him he had a way of getting corn to refineries, and that he—if he could get the candy and get us some money—or get some money to us in cash, he would send somebody to the factory to pick it up and eventually we would get the corn syrup.
Q. You mean that Mr. Lubben was going to send the money to the Shotwell Manufacturing Company for candy?
A. That's right.
Q. And then he was going to send somebody to the Shotwell Manufacturing Company to pick up the money?
A. I don't know how—what his modus operandi was. Maybe he wasn't. But maybe he told somebody to go to the Shotwell Manufacturing Company and they could get cash to purchase corn.
Q. Wasn't candy then on a seller's market?
A. You are talking about what year?

Q. 1945 and 1946.

A. No. On a seller's market? Yes.

Q. Yes.

A. Yes. You mean that candy was hard to get.

4625 Q. Wasn't corn, likewise?

A. Corn was hard to get, sure.

Q. You stated that you hadn't improved your driveway any at your farm at Marengo in fifty years. Have you made any other improvements around the farm in the last years since 1945?

A. I have made a lot of improvements on the farm. And I paid for them.

Q. Didn't you buy additional land in 1945 and 1946?

A. I think I bought 79 acres adjacent to me in 1949—or I believe it was '47. Maybe you are right. Maybe it was '46. It cost $10,000.00.

Q. Now, in 1948 Mr. Lubben met you at the Gotham with Mr. Huebner and Mr. Sullivan?

A. Mr. Huebner and Mr. who?

Q. Mr. Lubben met you at the Gotham Hotel with Frank Huebner and Mr. Sullivan, and Mr. Lubben had Mr. Davidson with him, is that correct?

A. That's right.

Q. In February of 1948?

A. It was, I think—according to my records it must have been around the 4th or 5th of February.

Q. And that was after you had turned him down

4626 on the $50,000.00 loan?

A. That's right.

Q. Is that correct?

A. That's right. And that's the time he came with the invoices, too.

4627 Q. Well, now, was that before or after the Haberkorn deal has been consummated?

A. That was just previous to the Haberkorn deal. As a result of my meeting there the Haberkorn deal was born, although nothing was said of it at that time. But about a week later Mr. Huebner called and said that Lubben had been in touch with him, or was in town—I think he said he was in town.

Q. Now, did Mr. Huebner go out to Mr. Lubben's home during the particular visit to New York?

A. I think that Mr. Huebner went out to his home on that particular visit. I am not sure.

Q. And do you know what the purpose of Mr. Huebner's visit was at that time?

A. Lubben apparently got in touch with him and told him he was turning over some invoices to him.

Q. Are those the invoices that you said Mr. Lubben threatened you with?

A. That I don't know, because I wouldn't believe Lubben if he told me they were the same invoices.

Q. Well, what would cause him to turn them over?

4628 A. What would cause Lubben?

Q. Yes.

A. I wouldn't know what would cause him to turn them over. He stated here on the stand that he never intended to turn them over.

Q. Now, what did Mr. Davidson say during all of this conversation when Mr. Lubben was allegedly threatening you?

A. Mr. Davidson had a rather conciliatory attitude. He said nothing. He was afraid there may be trouble, I think. I mean physical trouble.

Q. Didn't he remonstrate at all with Mr. Lubben when he was attempting to blackmail you in this way?

A. Yes, he did. He says, "Now, Dave." And he waved his hand at him.

Q. And had you ever met this man, Irving Carry, who called you a couple of hours later?

A. Yes. And he is a typical "hood," if you want my opinion of him.

Q. Did he threaten you?

A. Yes, he did. I mean, I don't know what you mean by threat. But certainly his tone was such as to indicate

4629 that it wasn't a little social gathering of some kind that he wanted to see me about.

Q. Well, I am not associating with "typical 'hoods,'" Mr. Sullivan. Could you tell me what one is like?

A. Well, maybe he is—he is a rather large fellow. Impresses me as being very ignorant and tough.

Q. He talked to you on the telephone and you gained all this impression of him?

A. Oh, no. No, I saw him before. Otherwise I wouldn't have had that impression, likely.

By the Court: I think it is adjournment time. Well, members of the jury, it is adjournment time and we will recess until Monday morning at ten o'clock.

I trust you will bear in mind the admonition I have given you, that you should not talk to anybody about this case during the time you are serving as jurors. And if anybody does talk to you about it I want you to report the matter to the Court.

I trust all of you will have a happy week end.

By the Marshal: Will the audience please remain
4630 standing until the jury and the Judge leave the court room, please.

This honorable court will recess until Monday morning at ten o'clock.

(Whereupon an adjournment was taken in the above-entitled cause to Monday, October 12, 1953, at 10:00 o'clock A. M.)

4631 • • (Caption—52 CR 143) • •

Chicago, Illinois
Monday, October 12, 1953
10:00 o'clock a.m.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley,
Mr. Vincent O'Brien
Mr. Thomas C. McConnell
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:—

By the Clerk: No. CR 52 143, United States versus The Shotwell Manufacturing Company et al. Case on trial.

4632 HAROLD E. SULLIVAN one of the defendants herein, heretofore called on his own behalf, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination (Continued) by Mr. Lockley.

Q. Mr. Sullivan, on Friday when Mr. Kirby was questioning you, were you asked the following questions, on page 4597 of the record:

"Question: How did you get the account or the $75,000 in those matters finally straightened out?

"Answer: Well, I did say to him, I said, 'There is only one thing that I would like to do.' I said, 'I would like to have you get out of my hair. You owe us $75,000. Make some arrangements to pay for it. If necessary, you can name your own ticket on it, but I want to have you get out of my hair.'"

That is not the complete answer, but that is a portion of it. Do you recall making that answer?

4633 A. I do.

Q. Now, did you have anything to do with Mr. Lubben at the time the $75,000 loan was negotiated?

A. No, I didn't.

Q. You had no part of that negotiation?

A. No. You mean of the loan itself?

Q. That's right.

A. No.

Q. In July of '47?

A. No.

Q. That was done entirely by Mr. Cain, is that correct?

A. Well, I don't know whether it was by Mr. Cain or not. I think Mr. Huebner was also present.

Q. Mr. Cain personally guaranteed the loan?

A. Well, again you are bantering with words. Shotwell guaranteed the loan.

Q. It was done in Mr. Cain's name, he was acting as agent for the Shotwell Manufacturing Company, is that correct?

A. That's right.

4634 Q. Well, in any event, you knew that Mr. Lubben had given Mr. Cain, as agent for The Shotwell Manufacturing Company, a mortgage in the amount of $75,000.00—or a mortgage, rather, for security on the $75,000.00.

A. Well, I knew that there was a mortgage. As a matter of fact, as I understand it, the bank wouldn't give the mortgage unless the loan was guaranteed by Mr. Cain.

Q. Well, the bank didn't give the mortgage, Mr. Sullivan, Mr. Lubben gave the mortgage, is that correct?

A. I mean they wouldn't loan the money. Put it that way.

Q. And Mr. Lubben gave the mortgage, not the bank, he gave the mortgage to Mr. Cain, isn't that so?

A. Yes, but the bank put up the money.

Q. That's right.

A. Yes.

Q. The bank put up the money, but Mr. Lubben gave the mortgage to Mr. Cain, is that so?

A. That's right.

Q. And you heard Mr. Cain testify that he had
4635 had the property appraised and that he thought that his $75,000.00 was well protected?

A. Well, I don't know as he said that it was a regular appraisal. I think he looked over the factory and the machinery, and the property, yes. But not a regular appraisal.

Q. Well, didn't he say that he had ample security?

A. Well, I think perhaps there was ample security, yes.

Q. Well, then, as a lawyer you were perfectly well aware of the fact that you could have foreclosed on that mortgage if Mr. Cain had considered that it was worth more than the $75,000.00, and on which there was a $66,000.00 balance, isn't that so?

A. Well, I believe so, yes.

Q. Well, then, as long as you could have done that, why was it necessary for you to tell him to name his own ticket?

A. Well, I think that I have already stated my reason for that, and that was when he wanted the $50,000.00 from Shotwell, the additional $50,000.00, and pulled out these marked up invoices and memoranda.

4636 As a matter of fact, I wouldn't have given him seventy-five cents in the first place.

Q. Well, I don't quite follow your reasoning, Mr. Sullivan. He owed you $66,000.00 on a mortgage, and the property which was mortgaged was well worth $66,000.00, and yet you were willing to let him write his own ticket because now he wanted an additional $50,000.00, is that correct?

By Mr. Kirby: I object on the ground that that isn't a question. That is kind of a summary argument.

By the Court: He may answer.

By the Witness: Will you restate the question, please.

(Question read.)

By Mr. McConnell: I object to the assumption that the property is worth $66,000.00.

By Mr. Lockley: That is the testimony, your Honor, of Mr. Cain.

By the Court: He may answer.

By the Witness: In the first place, I don't know whether the property was worth $66,000.00.

By Mr. Lockley:

4637 Q. You heard Mr. Cain testify.

A. Well, that doesn't necessarily mean that that is the value of the property. That might be his opinion as to the value.

Q. You are the attorney for The Shotwell Manufacturing Company.

A. I was the attorney for The Shotwell Manufacturing Company.

Q. And wasn't Mr. Cain in the real estate business?

A. That's right. Not in New York.

Q. Well, did you, as attorney for The Shotwell Manufacturing Company ever recommend that that mortgage be foreclosed?

A. I told you what my recommendation was.

4638 Q. Well, what was it?

A. Well, as I said previously, there was only one thing I wanted to do with Lubben. That was to get Lubben out of my hair. And I meant it.

Q. Couldn't you have done that by foreclosing the mortgage?

A. If you wanted to go through that trouble, yes.

Q. You are a lawyer. Is it trouble to foreclose a mortgage?

A. Certainly it is. And you are a lawyer and you know it is.

Q. You got paid for being the lawyer for the Shotwell Manufacturing Company, didn't you?

A. Well, I don't know what time you are talking about.

Q. I am talking about—

A. When I was an officer, no.

Q. You got $30,000.00 a year for being attorney in 19[illegible], didn't you?

A. I don't know the exact amount that I got for being the attorney. But if you say that is right, that is what I got.

Q. If the books say $30,000.00, will you say that is correct?

4639 A. I think it is.

Q. And you got $15,000.00 for the first six months of '46?

A. That I don't know. But if that is what the records show, that is what shows.

Q. And you got $15,000.00 for the last six months, only it was called salary?

A. That's right.

Q. And you continued to get that amount during '47 and '48?

A. I believe so.

Q. You were representing the corporation?

A. That's right.

Q. And yet you didn't know anything about this $75,000.00 loan which Byron Cain was making out at that time, in the corporation's name?

A. I don't know whether that is an exact statement or not. I knew that Lubben wanted money, yes. But, as I told you, I wouldn't have recommended the loan, nor did I recommend the loan. As a matter of fact, I criticized Cain for making the loan.

Q. Well, Cain made the loan personally. The corporation didn't have to take it over from Cain, did it?

4640 A. Well, I don't believe in running out on Cain, either. If that's what you mean. Certainly I could have lightly said, as a stockholder, "Well, no, this is not a corporate matter." I knew well that it was, though.

Q. Well, you subsequently entered into the Haberkorn deal, didn't you?

A. That's right.

Q. What did you have to do with the Haberkorn purchase?

A. Well, I had very little to do with the Haberkorn purchase. I don't know whether I covered it or not. But I will be glad to tell you what—if I didn't, I will be glad to repeat it.

Q. You had very little to do with it?

A. Very little to do with it.

Q. Did you hear Mr. Cain's testimony, at page 4411, where he said:

"I was called by Mr. Sullivan, I would think, about the 10th of February, 1948, and told that we had bought from Lubben the Haberkorn Candy Company, and that in the transaction we had sold to
4641 Lubben or to—in the transaction, anyway, our mortgage, which was paid down at that time to $67,000.00, was going into the deal, and an additional amount of cash to make up $101,000.00, was being paid for the Haberkorn Candy Company."

Did you have that conversation about the 10th of February with Mr. Cain?

A. I think so.

4642 Q. Well, then, you must have had something to do with the Haberkorn Candy Company.

A. I didn't say I didn't have anything to do with the Haberkorn Candy Company. I didn't say I didn't.

Q. Well, then, what did you have to do with it; did you have anything to do with the transactions which led up to the purchase of that company?

A. I had nothing to do with the transactions that led up to the purchase of that company. Mr. Huebner called me on the phone—this is shortly after we got back from New York in February—and he told me that Lubben had been in touch with him, and that he wanted to sell us the Haberkorn Company. I asked him if there was any equity in the Haberkorn Company. He said, yes, there was, it looked as though there was some equity in the Haberkorn Candy Company, over and above their obligations.

I said, "Get hold of Busby and have him make an audit." And I said, "You know how I feel, I want to get that fellow out of my hair." Meaning Lubben.

4643 And that is the extent of what I had to do with Haberkorn, with that deal, with this exception, that I approved the contract, I believe, which was drawn in Eckert and Peterson's office.

Q. Did Lubben own the Haberkorn Candy Company?

A. I don't know what your contention—yes, Lubben owned the Haberkorn Candy Company.

Q. You are a lawyer, Mr. Sullivan. You know the difference between owning something and not owning

something. Now, did Lubben own the Haberkorn Candy Company?

A. Yes, he did. And you could prove that he owned it very easily.

Q. Did you buy the Haberkorn Candy Company from Lubben?

A. No, we didn't buy the Haberkorn Candy Company from Lubben, because he had a nominee. His sister was his nominee in the Haberkorn Candy Company.

Q. Did you buy the Haberkorn Candy Company from his sister?

A. No, because that was also worked—the sister sold her stock to the Urbans, on the very day that the contract was entered into.

Q. And Urban sold all the stock to The Shotwell
4644 manufacturing Company?

A. With the connivance of Lubben, yes.

Q. So it must have been with the connivance of The Shotwell Manufacturing Company?

A. The Shotwell Manufacturing Company didn't have anything to do with it.

Q. You weren't required to buy the Haberkorn Candy Company, were you?

A. I just got through telling you, there was only one thing that stuck in my mind, "I want to get rid of this fellow, and get rid of him forever, if it is possible."

Q. You could have done that by foreclosing the mortgage?

A. Oh, we could have done a lot of things. I presume.

By Mr. Kirby: If the Court please, I think this is just generating into an argument between a couple of lawyers.

By the Court: Yes, I think the question is argumentative.

4645 Q. Well, what was the purchase price of the stock of the Haberkorn Candy Company from the Urbans?

A. The contract shows $65,000.00, but that wasn't the deal.

Q. Just a second. We will get to that.

A. All right.

Q. The contract shows $65,000.00, you say, and you know that the meeting—or the minutes of the stockholders meeting of The Shotwell Manufacturing Company

showed that the cost of that was $101,000.00, don't you?

A. I believe that is right, without looking at the minutes.

Q. Was the difference of that $36,000.00 actually paid to anybody?

A. I don't follow you now.

Q. Was the $36,000.00 difference between the $65,000.00 shown on the contract and the $101,000.00 shown on the minutes of the corporation actually paid out—

A. It was—

Q. Will you let me finish my question. Was it actually paid out to anybody?

A. It was forgiven as to Lubben, or for Lubben.

4646 Q. Did Lubben get $36,000.00?

A. Yes, he got credit for $36,000.00.

Q. That was the forgiveness on the loan?

A. That is right.

Q. And you put it on your books as the cost of the Haberkorn Candy Company?

A. Well, it should be the cost of the Haberkorn Candy Company because the deals were made at the same time. That was the purpose of the deal.

A. And Shotwell Manufacturing Company only paid $65,000.00 for the Haberkorn Candy Company stock, didn't it?

A. And a forgiveness of $35,000.00 on the loan, or 36,000, whatever it happened to be.

Q. You paid $65,000.00 to the Urbans for their stock?

A. That is right.

Q. And a year later when the Haberkorn Candy Company was dissolved, you took a loss on your tax return on the basis of the $101,000.00 cost rather than the 65,000, didn't you?

A. Well, now, I don't know why you would argue with me about that for the reason that I told you previously

4647 I know nothing about what the books might show and we have a CPA out there who perhaps could advise you a lot better than myself on that very deal.

Q. In any event, The Shotwell Manufacturing Company, neither they nor Byron Cain lost a dime on the Haberkorn Candy Company deal, did it?

A. 101,000. Maybe not that much. Maybe we did salvage something. That's all we lost.

Q. Now when did you learn, or did you learn in 1945 of the per poundage amount of overages being paid to Mr. Lubben?

A. Let me have that question again.

Q. Did you know in 1945 of the unit price per pound overages being paid by Mr. Lubben?

A. I didn't know in 1945, no, I didn't. Did I personally know? No.

Q. Well, in any event, you testified that you knew that there were some overages?

A. That is right.

4648 Q. Well, I wondered if you knew what it was for poundage—

A. Well—

Q. Will you let me finish my question.

By Mr. McConnell: Let him answer your question.

By Mr. Lockley: I haven't finished it yet.

By Mr. McConnell: He is answering your question.

By Mr. Kirby: I want to object to the young gentleman who has borrowed the title of District Attorney in Chicago and who is not allowing this gentleman to answer the question.

By the Court: Wait a minute. You address your remarks to the Court and I will determine whether or not they are sound or otherwise.

Proceed.

By Mr. Lockley: Miss Reporter, will you read the question back?

(Question read.)

By the Witness: Is that a question?

4649 By Mr. Lockley:

Q. I wondered if you knew how much of the overages were per pound?

A. No, I didn't know about how much it was or whether it was on unbilled shipments or whether it was overages per pound. I didn't know.

Q. Did you know at the time that the overages were increased, as Mr. Cain testified?

A. No, I did not know.

Q. Did you know about the increase in June subsequently, in 1946?

A. No, I did not know.

Q. All you were aware of is there was some sort—

A. There was some cash coming in as the result of a deal with Lubben and that's all I knew.

Q. Well, did you know about the so-called unbilled shipments where no invoices were rendered?

A. I didn't know anything about the unbilled shipments, as I told you previously. I didn't know how it was handled until subsequently.

Q. And when did you learn that?

A. I think it was in 1948.

Q. And what was the occasion of learning that information?

4650 By the Witness: I did not get the question, please.

By Mr. Lockley:

Q. Well, how did you come about to learn it?

A. That was at the Busby meeting.

Q. You heard the testimony of your employee, Mr. Ericson, that you were present in the spring, or March or April of 1946?

By Mr. McConnell: I object to that. He didn't testify to that on cross examination. He said he didn't know who was there. He said he couldn't tell.

By Mr. Lockley:

Q. When the ABC Candy Company name was selected on the bills of lading?

A. Mr. Ericson was wrong and he didn't testify to that on cross examination.

Q. He testified to that on direct examination?

A. That is right, and he subsequently said that he might be mistaken and he was mistaken.

Q. That would be an unusual transaction, would it, Mr. Sullivan?

A. That would what?

Q. That would be an unusual thing, a meeting of

4651 that sort where you are making up bills of lading without invoices and using a fictitious name on the bills of lading?

A. Well, I presume it would be, yes, sure.

Q. And isn't it likely that circumstances of that sort are likely to be remembered quite easily by a person who was participating in it?

By Mr. McConnell: I object to that.

By the Witness: What is the question? I mean, are you arguing with me now?

By the Court: To whom do you refer, to Mr. Ericson or to Mr. Sullivan?

By Mr. Lockley: I will withdraw the question, your Honor.

By Mr. Lockley:

Q. Did you know that this money was needed for the purpose of buying corn at the time?

By Mr. O'Brien: What do you mean by "this money"?

By Mr. Lockley:

Q. The cash overages and the money on the unbilled shipments.

A. I was so told.

4652 Q. You knew that, did you, in the spring of 1946?

A. I was so told.

Q. Didn't you look into it yourself? Did you rely entirely on what other people told you?

A. I told you the other day when the matter was brought to my attention, I made an attempt to contact a few friends of mine that happened to be in that particular line of business, and tried to get some corn syrup, and I told you the results, that there wasn't any to be had unless the corn was furnished to the refinery.

Q. And that is why The Shotwell Manufacturing Company needed cash, is that correct, then?

A. That is right, and every other confectioner did the same thing, too, and even the Government did it, to the extent of fifty million bushels of corn.

Q. Did you have to get this cash for Mr. Lubben?

A. Did we have to get that cash for Mr. Lubben?

Q. Yes.

A. I don't suppose so. We had to have cash and you couldn't deal in checks, that is certain.

Q. You could have cashed a check in the bank.

4653 couldn't you?

A. I don't know the extent of our bank account at that time. I presume that it could have been done, and I am sorry it wasn't done in that way.

Q. But at that time, by that do you mean 1946, you had an account with Shotwell Manufacturing Company at the Merchants National Bank, did you?

A. I think so.

Q. Was this one of the monthly statements rendered by the bank?

A. I don't know that I have ever seen that before. I guess it is. This in itself doesn't mean anything. You show me the liabilities of Shotwell, and maybe I can answer it.

Q. Well, would you say that The Shotwell Manufacturing Company had on deposit at that bank account, at that time, $400,000?

A. I think it said three hundred and something.

Q. There is one that is $409,000. It varies during the periods.

A. Yes.

Q. And in April, it was around three hundred?

A. We had a bank account at the City National, 4654 too. I don't know how much money was in there, but it would likely be increased, if that is what you want to know.

Q. Didn't the daily balances average from $350,000 to $400,000?

A. I wouldn't know?

Q. Doesn't it say so on the bank account?

A. Not the daily average, no.

Q. It shows what the daily balance is?

A. Maybe by the end of the month, or by the 10th of the month, it might be entirely different.

Q. Take a look at it.

A. I don't know what the tax obligation is. I would venture to say the tax obligation at the end of the month was at least that much.

Q. You have got April. Take a look at March, and look at May, and see if it doesn't run around three hundred and four hundred thousand dollars?

A. If you say it does, it does. I have never seen them before. If you say it does, and it shows so, that is what it shows.

Q. If you had so much money in the bank, why did you have to get the cash from Lubben?

A. Again, I think you are arguing with me. 4655 It is unfortunate that I ever saw Lubben, or ever did get the money from him.

By Mr. Lockley: I move that the answer be stricken, if the Court please.

By the Court: It is unresponsive. It may be stricken.

4656 By Mr. Lockley:

Q. I asked you if you had this money in the bank, why was it necessary to get the cash from Mr. Lubben?

A. Well, because, as you know, no one was interested in anything but a cash deal, the people that were getting the corn from the farmers, or however it was obtained.

Q. Well, you could have written a check to cash, taken it down to the bank and gotten the money and used that cash, couldn't you?

A. That is right. As I said before, it is too bad it wasn't done that way.

Q. And you did do it on one—

A. But apparently Lubben sold somebody a bill of goods that he could get this corn for them and it had to be handled in this way.

Q. What do you mean, "Apparently Lubben sold somebody a bill of goods", to whom did he sell a bill of goods?

A. I take it he talked to Frank Huebner.

Q. And Huebner never came to you?

A. I told you Huebner called me.

Q. Did he ever mention this to you, about Lubben

4657 getting the unbilled shipments and getting corn for them, and so on?

A. I didn't say that. I knew that there was a way by which Shotwell was getting cash from Lubben. I didn't know the deal, whether it was unbilled shipments, whether it was marked up invoices, or what it was, and I didn't know that until the latter part of, the late summer of 1945.

Q. Well, the fact of the matter is that you could have gone to the bank and gotten money that way without getting it from Lubben, isn't that true?

A. If you are trying to ask if the bank would recognize a check and whether or not we had money in the bank at that time, the answer will be yes.

Q. As a matter of fact, Mr. Roeser testified that on one occasion you had gone to the bank and gotten $1450.00 which was part of the employees—

A. $14,550.00.

Q. You are interrupting me again, Mr. Sullivan. I am sorry, Mr. Sullivan, but I haven't finished my question.

A. I am sorry.

Q. (Continuing) And you put that money through the employees exchange account and then subse-
4658 quently made another entry in the employees exchange account at the time it was paid back.

It was done one time and it could have been done again, couldn't it?

By Mr. O'Connell: I object to the question. It assumes it was $1450.00. The evidence shows it was $14,550.00.

By Mr. Lockley: I will accept the correction, $14,500.00.

By Mr. McConnell: $14,550.00.

By the Witness: I have no quarrel with that.

By Mr. Lockley:

Q. You stated further that this was a question of survival, is that correct, when it came to violating the OPA laws?

A. That is right.

Q. You were asked:

"Q. Did you, as a lawyer, not warn your client that it was violating a criminal law of the United States by conspiring with others to evade the OPA laws?

"A. We knew that we were violating the OPA
4659 laws, but there is a question of survival. If we didn't do it, it would have meant that our factory had to shut down, and we were not the only ones that were doing it. Everybody in the confectionery business did it."

Is that the reason these entries weren't reflected on the books of the corporation?

A. Well, I think I previously said I do not know or I did not know how the books were handled and I did not know that they didn't reflect on the books of the corporation. We have auditors out at the factory and certainly they know more about keeping books than I do and I just naturally thought that the books did reflect it.

4660 Q. And you never asked about it, whether it was on the books or not, is that correct?

A. That is right.

Q. But you knew it was being dealt in cash?

A. And I knew it was being paid out in cash, too.

Q. And you never had any record to whom it was paid out?

A. Well, if we did, I never saw it.

Q. And you never paid any of it out?

A. I never saw it.

Q. You never saw any of it being paid out?

A. No.

Q. You never got any of this yourself?

A. I never saw any of the money, never got any of it myself.

Q. Well, this was a matter of extreme importance to the corporation, was it not, that you were violating the OPA laws, that you were subject to possible criminal prosecution, and subject to possible treble damages. Didn't you ever take that up with the officers of the corporation at your directors' meetings, or otherwise?

A. Certainly.

4661 Q. Well, when was that?

A. I think it was more or less general. We knew that we were violating the OPA. And I also knew that the Government did the very same thing. The Government went out and bought fifty million bushels of corn—

By the Court: You didn't answer the question.

By Mr. Lockley: I move to strike that portion, your Honor.

By the Court: All right.

By the Witness: All right.

By Mr. Lockley:

Q. Well, did you at these directors' meetings, if that is what it was, discuss the mechanics of how this was handled?

A. Well, I don't know as I follow you. How what was handled?

Q. The receipts and payments of currency?

A. No, no.

Q. Well, what did you discuss about it?

By Mr. McConnell: I object to the subject of the directors' meeting. I haven't heard anything about the directors' meeting.

4662 By the Witness: No.

By Mr. Lockley:

Q. State when you did discuss it with the other officers

of the corporation.

A. I wish you would be more specific in your question. What do you mean? Discuss what?

Q. I am talking about the receipt of currency, and the payments of currency during 1945 and 1946. Now, you said you had some discussions with the officers.

A. I had a discussion with Huebner. Subsequently I might have talked it over with Cain, or with Mr. Shotwell.

Q. Well, now, when was—

A. There was no formal discussion of it.

Q. —when was your first discussion with Huebner?

A. I told you that he called me up and said he couldn't get corn.

Q. That is the first time?

A. What is that?

Q. That was the first time?

A. That was the first time.

Q. When was that?

4663 A. That was in the late summer of 1945.

Q. And that is when you contacted some of your acquaintances?

A. That is right.

Q. Well, did you have any other discussion with him subsequent to that?

A. Well, I think maybe general discussion. I knew that the money was coming in, and I knew it was going out.

Q. That was all. You didn't ask him how much was coming in, and how much was going out, whether you were getting any corn, or anything of that sort?

A. No. There was one time when there wasn't any cash, and that was the reason for drawing the checks on the company so they could pay out the cash to get the raw corn.

Q. Well, you didn't tell him: "Look, Frank, this is in violation of the OPA, and we better not put any of it on the books"—

A. No, I didn't. I didn't know how it was going to be handled on the books, and I naturally thought it

4664 was going to be handled by the auditors, and I assumed only that Busby knew about it. It was a matter of general conversation, and talk, but apparently, he didn't know about it. But I thought he did.

Q. Well, did you ever tell him yourself?

A. No, I never told him. I never had any occasion to tell him.

4665 Q. Didn't you know it would have to be kept off the books or the OPA investigators would locate it?

A. That was true after—that wasn't true after June of 1945 when the OPA went off, or am I right—1946, June 30th.

Q. How about the period prior to that?

A. Certainly it had to be kept off the books or you would be subject to perhaps additional trouble. I know that now. I didn't know it then, I don't believe.

Q. Well, are you sure?

A. Am I sure about what?

Q. You said you don't believe you knew it then. Are you sure you didn't know it then?

A. I don't ever remember discussing it. I am not positive.

Q. Of course you knew that if it was off the books for OPA purposes, it was also off the books for Internal Revenue purposes, didn't you?

A. Not necessarily. Not necessarily.

Q. You didn't know anything about those. You didn't concern yourself with such matters?

A. No, I didn't.

4666 Q. Now, when you were discussing the meetings with Mr. Lubben at the Gotham Hotel, you said that Davidson was present and Mr. Huebner, at page 4596:

"A. Lubben.

"And he says, 'Perhaps after I show you these, you will think differently about it.' And he opens up the brief case, and he pulls out some invoices that he said, 'Here are some invoices maybe will make you change your mind.'

"I said, 'Let me see them.' He gave me some invoices and some memoranda, marked up invoices, and I said to him, 'These are a fake.' I said, 'I don't scare very easily.' I said, 'This looks like blackmail to me.'"

And some more to the answer.

Now, I want to show you some of the invoices which are in evidence here and which contain markings, and ask if you can tell me if these are the markings, the

marked up invoices of the nature that he showed you, Exhibits 23-A and B and 24-A and 25-series, 26-series, 29-series. Now, is that the type of markings that
4667 you were referring to on these invoices that Mr. Lubben showed you?

A. That is right.

Q. Do you know if those are the invoices that he showed you?

A. I wouldn't have any idea.

Q. Do you recall whether the invoices he showed you were addressed to the Eatsum Food Products Company or to General Confections?

A. No, I do not. I couldn't say positively.

Q. But that is the nature of the markings that you are referring to that appear on those invoices, is that correct?

A. Well, together with his statement that that is what they were.

Q. Well, I am sorry. I didn't hear you.

A. Together with his statement that he had marked up invoices.

Q. And he pulled these out of the brief case and he handed them to you?

A. That is right.

Q. That is the kind of invoices he gave you?

A. I wouldn't say they were exact duplicates. Are these the invoices? Is that what you mean, similar invoices?

4668 Q. Are these the Shotwell Manufacturing Company invoices?

A. That is right.

Q. I assume they were Shotwell invoices he was referring to?

A. That is right.

Q. These are addressed to the Eatsum sale proprietorship or Eatsum Food Products Company?

A. That, I wouldn't be able to tell you.

Q. And it could not have been the partnership invoices, could it, because Mr. Lubben had left all the partnership records with Mr. Giglio when the partnership broke up. You heard that testimony, didn't you?

A. I did not know it at the time.

Q. And you heard with respect to the General Con-

fections Corporation that they were not marking up invoices at that time, that they used this cash authorization slip, is that right?

A. I think that is what the testimony—

By Mr. McConnell: This witness can't testify as to what the testimony was.

By the Court: All he can determine is whether or not he heard that.

4669 By Mr. Lockley: That is right, your Honor.

By Mr. Lockley:

Q. Are you able to state with any certainty whether it was the sole proprietorship invoices he showed you?

A. No.

Q. Those were the only ones that contained markings according to the testimony, is that correct?

A. I wouldn't know, as I said before. I wouldn't know.

Q. You were here, weren't you, and you heard the testimony?

A. I am not quarreling with you about the testimony.

Q. That is what I want to know.

A. Yes.

Q. You heard that testimony?

A. Now, what is it again? I don't want to be admitting something that I am not sure I am admitting. What is it again?

4670 Q. With respect to the partnership, that the invoices and all the records were left with Mr. Giglio at the time that Mr. Lubben left on March 9, 1946?

A. That is right.

Q. And with respect to the General Confections Corporation that the invoices were not marked up, that they marked up the cash authorization slips instead. You heard that testimony?

A. Yes, I did.

Q. As a matter of fact, here are some of the General Confections invoices, and they—

By Mr. McConnell: I don't understand that that is a correct statement. As I understand it, the books and records of the Giglio partnership were not all left here. He has introduced in evidence here memoranda, recap sheets which he says are records of the partnership.

By the Court: I think what counsel has reference to

is that the testimony was that it wasn't the practice during the partnership to mark up the invoices. That is my recollection.

4671 By Mr. Kirby: If the Court please, Miss Feldman, who was the bookkeeper, insisted on three or four occasions that she didn't know whether they were marked up or not in the partnership period.

She said she was quite certain they were not in the General Confections period.

By the Court: That may be.

By Mr. Kirby: Yes, because when we sought to go into impeachment on the depositions, Miss Feldman, she ducked that and said, "I don't know one way or another." And certainly, I don't think that the witness should be expected to summarize what was the testimony.

By the Court: I don't think he should determine just what the testimony is.

You can ask him whether or not invoices that Lubben showed him were similar to those you are exhibiting to him. I suppose that is the correct question.

By Mr. Lockley:

Q. Were the invoices Mr. Lubben showed you 4672 similar to these during the period of the General Confections? Do they contain the sort of markings that you referred to?

A. I don't see any markings on this one.

Q. Well, the fact is there are no markings of that nature on any of them, are there?

A. Well, I didn't look at the rest of them. Now, what is the question, whether—

Q. Did those invoices during the period of General Confections contain the sort of markings that were on the invoices Mr. Lubben showed you at the meetings at the Gotham Hotel in February, 1948?

A. You mean the General Confections invoices, right? I assume that they weren't General Confections invoices for the reason that there are apparently no markings on them. There were markings on the invoices I have reference to.

Q. Didn't you hear your own witness, Mr. Edward Sproull, the public accountant, testify that Mr. Lubben had given him the books and records of the Eatsum sole proprietorship in May, 1945, and that he had kept them for an unpaid accounting bill?

A. No. I heard that he had got the records. I don't know why he kept them. That isn't entirely clear
4673 to me. I don't know as he testified to that.

By Mr. Kirby: If the Court please, that is an inaccurate summary of Mr. Sproull's testimony.

By Mr. Lockley: Let me read it then.

By Mr. Kirby: Mr. Sproull testified that the records were there. Lubben was back several times and finally the Government got them.

By Mr. Lockley: I will read it.

By the Court: Well, maybe. I am not too clear on just what the purport of his testimony was.

By Mr. Lockley:

Q. On page 3413, didn't Mr. Sproull testify with respect to Mr. Lubben:

"Q. Thereafter when did you next see him?

"A. I next saw him on one occasion shortly after that when he brought in his—some income tax returns that he had filed for prior years.

"Q. Was there an occasion when he brought into your office and left with you for safekeeping
4674 the books of Eatsum Food Products proprietorship?

"A. That was approximately May, 1945.

"Q. And did that happen?

"A. That did.

"Q. And how long did the books remain there?

"A. Until September, 1948."

Now, did you also hear Mr. Sproull testify that he had turned over those records to the Treasury Department in September of 1948 in compliance with a subpoena?

A. I did.

4675 Q. That subpoena calls for invoices, among other documents?

A. I don't know.

Q. Well, there is the copy of the subpoena.

By Mr. McConnell: Well, the subpoena speaks for itself. What do we get in addition by having this witness confirm what is in that subpoena?

By the Court: I think now you are getting into an argument with the witness, rather than propounding a question to him that he can answer.

By Mr. Lockley:

Q. Now, Mr. Sullivan, if Sproull & Scholz had these invoices, and records of Lubben from May, 1945 until September of 1948, the fact of the matter is that you didn't have them in January or February, 1948, at the time you say he came up to the Gotham Hotel?

By Mr. Kirby: I object to the question on the ground—

By Mr. Lockley:

Q. (Continuing) . —is that correct?

By the Court: Yes, I think it is a matter of
4676 argument that you are indulging in now, rather than propounding a question.

By Mr. McConnell: Further than that—

By the Court: Now, I ruled favorably, and why carry it on?

By Mr. McConnell: You are right. I ought to have learned that a long, long time ago.

By Mr. Lockley:

Q. Did you ever meet a Mr. Tobias?

A. Once I met Mr. Tobias.

Q. When was that?

A. I think it was—

By the Court: A little louder, Mr. Sullivan, please.

By the Witness: All right.

By the Witness:

A. Well, I know I was in New York at that convention at the time.

By Mr. Lockley:

Q. At the candy convention?

A. I think it was in 1948.

Q. That was at the Waldorf Astoria?

4677 A. Yes.

Q. The candy convention in 1948?

A. I don't remember if it was at the Waldorf, but I think it was at the Waldorf. I wouldn't be sure about it.

Q. Who else was present besides Mr. Tobias at that time?

A. Well, I think Mr. Cain was present.

Q. With Mr. Huebner? Was he also present?

A. I am not sure.

4678 Q. And do you remember what the conversation was with Mr. Tobias there?

A. Well, generally speaking, yes. It was to the effect

that Lubben was doctoring the books and he thought we should know about it.

Q. That is what he told you?

A. That's right.

Q. Was Mr. Tobias present at the time when Mr. Graflund called Mr. Cain and told him about Special Agent Krane coming into the office of the Shotwell Manufacturing Company in Chicago?

A. I don't even remember the telephone call.

Q. You don't remember that at all?

A. And I wouldn't know. I am sure he wasn't. I am sure Mr. Tobias wasn't. I don't think that he was there over ten minutes.

Q. Isn't it a fact that at that meeting Mr. Tobias came to you and told you that Mr. Lubben was going to go to the Bureau of Internal Revenue and tell about his dealings with you?

A. No, it was not a fact.

Q. And Mr. Cain said that if he would keep the Shotwell Manufacturing Company and its officers informed of what was going on in the Bureau of Internal
4679 Revenue he would make it worth his while?

A. No, no such statement made.

Q. Do you recall any other meetings with Tobias?

A. I recall no other meeting with Tobias.

Q. That's the only one?

A. That's right.

Q. Do you recall Mr. Cain being questioned on direct examination, and that he was asked:

"Q. Did you or Mr. Sullivan ever try to get this matter disposed of through a political connection?

"A. No, sir."

On page 4422. Do you remember that testimony?

4680 By Mr. O'Brien: Well, Judge, I don't know as I care especially about the particular question, but if I may note the general objection, I do not think that it brings the matter within the scope of the witness's direct, just because the record of Cain's direct or cross is directed to him. Any such testimony was not, in fact, within the scope of this witness's direct examination.

By the Court: Well I will overrule the objection. The question isn't whether Cain's testimony was called to his attention on direct. If it is fairly within the scope of the direct, then it may be proper.

By Mr. O'Brien: I mean there was no direct of any kind about this to the witness.

By the Court: The entire matter has been gone into. I don't think the Government is limited on cross examination to the very specific matters that you may have touched upon. This entire field is open now for cross, I take it, the entire field encompassed within the

4681 charge of the indictment.

By Mr. O'Brien: Well, all right.

By Mr. Lockley:

Q. Have you ever attempted to have this matter disposed of through use of political influence?

A. Well, I don't know what you call political influence.

Q. Do you know a Mr. James B. McCahey?

A. Yes, I do.

Q. Who is he?

A. Well, he is president of the Dunn Coal Company here in town. He was president of the Board of Education of the city of Chicago for fourteen years. In my opinion he is a highly respectable man.

Q. Is he a lawyer?

A. No.

Q. Is he a tax expert?

A. Is he what?

Q. A tax expert.

A. No.

Q. Does he have any official government connection?

A. None that I know of.

4682 Q. Well, on September 7, 1950, didn't you write him a letter asking him to do what he could about getting this investigation settled?

A. I wrote him a note, a synopsis of our problem, and suggested to him that we needed help, and asked him if he had any suggestions, as I recall the letter.

I didn't write him a letter, I delivered it to him in person. I think I have a copy of the letter in my files, if you want it.

Q. Well, if Mr. McCahey wasn't a lawyer or a tax expert, or a government official, why did you turn to him for advice?

A. Well, when you have a problem, if you think somebody might be able to give you advice, he doesn't nec-

essarily have to be a lawyer, or a tax expert, or anything else. I have talked this matter over with a lot of people, looking for advice.

Do you think it is a pleasure for me to be up here the way I am right now?

4683 By Mr. Lockley: I move to strike that.

By the Court: Yes, it may be stricken as not responsive.

By Mr. Lockley:

Q. Well, did you understand that Mr. McCahey was a friend of some high government official; is that why you went to him?

A. Not necessarily. I think that he is—or has friends in government service. There is no question about that. But who they are, I wouldn't be sure. I know he has several friends in the government service.

Q. Did you ever see Government's Exhibit 185 at the time it was prepared to subsequently?

A. Never.

Q. Well, do you know of your own knowledge whether the Shotwell Manufacturing Company spent one dollar for sugar, or cocoa beans or milk, or corn syrup in the black market?

A. Except what I have been informed, is all, through my position with the Shotwell Manufacturing Company.

Q. Did you ever see Government's Exhibit 186 before? It is for identification.

4684 A. Yes, I have seen that.

By the Court: A little louder, please.

By the Witness: Pardon me.

By the Witness:

A. I am not sure now. What is this? No, I don't recognize this.

By Mr. Lockley: If your Honor please, at this time I would like to move to strike the testimony of the witnesses Cain and Sullivan relative to the amounts of overages which were paid by the Shotwell Manufacturing Company in the black market during the years 1945 and 1946 on the ground that it is based entirely upon the hearsay testimony of other employees, that they have not testified of their own knowledge that any such amounts were paid out, and, to the contrary, they have testified that they knew of no particular transactions at which such money was paid out.

By Mr. O'Brien: The Court has already ruled that is an exception to the hearsay rule.

4685 By the Court: Yes. I will deny the motion.

By Mr. Lockley: And I move to strike Mr. Sullivan's testimony that the government was buying corn in those years.

By the Court: Yes, that may be stricken.

By Mr. Lockley: I likewise move to strike his testimony as to what other candy companies may have been doing during 1945 and 1946.

4686 By Mr. Kirby: That was responsive, and it bears upon the witness' knowledge and intent.

By the Court: That may stand.

By Mr. O'Brien: I was going to say, Judge, for the record—

No, you have ruled.

By Mr. McConnell: Don't talk after he has ruled.

By Mr. Lockley: That is all.

By Mr. Kirby: Will you mark this Defendants' Exhibit 94 for identification?

(Said document was marked Defendants' Exhibit 94 for identification.)

Redirect Examination by Mr. Kirby.

Q. Mr. Sullivan, I hand you a document marked Defendants' Exhibit 94 for identification, and I ask you if you have ever seen that before.

A. Yes, I have.

Q. Mr. Lockley was asking about your writing a James McCahey in September of 1950. Do you recall those questions?

A. That's right.

4687 Q. And he asked what you wrote him about?

A. Yes.

Q. What does that document purport to be?

A. This is the copy, office copy, of the letter that I handed to Mr. McCahey.

By Mr. Kirby: I now ask its admission in evidence, and would like the witness to be permitted to read what it was he wrote him, as long as Mr. Lockley has indicated he is interested in that.

Do you have any objection?

By Mr. Lockley: No objection.

(Said document as received in evidence by the Court, and marked Defendants' Exhibit 94.)

By Mr. Kirby:

Q. Would you read the letter?

A. All right. This is a copy of a letter which I gave to Mr. McCahey.

By the Court: How do you spell his name?

By the Witness: M-c-C-a-h-e-y.

A. It is addressed to Mr. James B. McCahey, Morrison Hotel, Chicago, Illinois. In re: Shotwell Manufacturing
4688 Company, 3501 West Potomac Avenue, Chicago, Illinois.

Q. Read it loud enough so that everyone can hear it.

A. All right.

"Dear Jim:

"You will recall that I talked with you some time ago, pertaining to an apparent claim of the Government for income tax due for the years 1944, 1945, and 1946, from The Shotwell Manufacturing Company.

"I do not have the figures before me at the present time, but I know that some time during these years, we deemed it necessary to violate the OPA regulations to get additional chocolate or sugar, corn syrup, etcetera, in order to stay in business, and a full disclosure was subsequently made in connection with these matters.

"In June, 1948, a special agent of the Internal Revenue office, Charles Mammel, visited our factory to make an investigation in furtherance of disclosures heretofore
4689 made to them. The executives and employees of the company have been instructed to cooperate in every way with the agent making this investigation, and I believe that these instructions have been carried out.

"I can't help but feel that the time has arrived when this investigation should be completed, and if necessary a tax levied. I am certain that two and a half years of this continuous investigation should be sufficient.

"As I informed you, I not only represent the company, but I am an officer of the company as well. Maybe that old saying applies here, 'He who represents himself has a fool for a client.'

"Be that as it may, I am almost positive that were I

acting only in the capacity of a lawyer, I would have insisted that this matter be brought to a close before now. So maybe I should be criticized. I represented Shotwell for the past twenty years, and it was not until 1942, that I became financially interested in the company. For ten
4690 years previous to that time, to the time that I became associated with the company, the total volume of business done was not in excess of eleven million dollars, without profit, and naturally no tax was paid to the United States Government. Since 1942, up and including the year 1949, the total volume of business done by the company was in excess of $42,000,000. And during that period of time an income tax was levied and paid in the amount of in excess of $2,700,000.

"I just give you these figures to let you know that a considerable amount has been paid in the way of income tax to the Government, and if it were not for the fact that we did certain things that were perhaps in violation of the OPA, the Government never would have collected that amount of money.

"I am hoping for a suggestion as to how to bring this matter to a head.

"Sincerely yours."

4691 *Recross Examination by Mr. Lockley.*

Q. Mr. Sullivan, in this letter you refer to the years 1944, '45 and '46, saying you deemed it necessary to violate the OPA regulations to get additional chocolate, sugar, corn syrup and so forth.

By Mr. Kirby: Now, I wouldn't—

By Mr. Lockley:

Q. The fact of the matter is you did not get additional—

By Mr. Kirby: Wait a minute.

By Mr. Lockley: Let me finish my question, please, Mr. Kirby.

By the Court: Wait till he finishes his question.

By Mr. Lockley:

Q. The fact of the matter is you did not get additional chocolate, sugar and corn syrup in violation of the OPA; isn't that so, to your knowledge?

By Mr. Kirby: Now, I want to make this objection. He reads the years 1944, 1945, and 1946 from one part of the letter. Then he reads the references to the securing of
4692 raw materials from another part of the letter. But he leaves out these words—

By Mr. Lockley: Read it all, if you want.

By Mr. Kirby: "Some time during those years.", And he is posing the question to the witness as if it was the whole three years. He is not reading that letter correctly.

By the Court: Modify it as Mr. Kirby suggests.

By Mr. Lockley: I will modify it by—

By Mr. Kirby: The modification goes to the essence of it.

By Mr. Lockley: I will modify it by reading the full two paragraphs.

By Mr. Lockley:

Q. "You will recall that I talked to you some time ago pertaining to an apparent claim of the Government for income tax due for the years 1944, '45 and '46 from The Shotwell Manufacturing Company. I do not have the figures before me at the present time, but I know that some time during these years we deemed it necessary to violate the OPA regulations to get additional chocolate, corn
4693 syrup, etc., in order to stay in business, and a full disclosure was subsequently made in connection with these matters."

Now, my question is: Did you, to your knowledge, get additional chocolate, sugar and corn syrup in violation of the OPA regulations in 1944, 1945 and 1946, or some time during those years?

A. Certainly.

4694 Q. All right. Tell me one time when you bought some additional chocolate in violation of OPA regulations?

A. Well, I don't know about chocolate. I don't know about sugar.

Q. Tell me one time when you bought sugar then?

A. I don't know about sugar. But I know that there were manipulations made to get sugar and chocolate; from what I have been told,—corn syrup.

Q. You said, "I know that sometime during these years • • •"

A. That's right.

Q. Did you know?

A. Certainly I knew. Certainly I knew.

Q. You knew because somebody else had told you, in other words?

A. By reason of my position in the company, yes.

Redirect Examination by Mr. O'Brien.

Q. One thing, Mr. Sullivan. You said that Mr. Mammel was at the company in 1948. Did you ever see Mammel until 1949?

A. What is that again, Mr. O'Brien?

4695 Q. I am trying to find it here. You say, "In June, '48, a special agent of the Internal Revenue office Charles Mammel, visited our factory to make an investigation."

Did Mr. Mammel come to the factory in '48 or was it Krane?

A. No, it was Krane. I was wrong there.

By Mr. O'Brien: That is all.

By Mr. Kirby: That is all.

By the Court: That is all.

(Witness excused.)

By the Court: I think we will take our morning recess. We will suspend for ten minutes.

By the Marshal: Will the audience please remain standing until the Judge and jury leave the court room.

This Honorable Court will recess for ten minutes.

(Recess taken.)

4696 By Mr. O'Brien: Judge, I have some written exceptions which I should like to file. I have handed counsel a copy.

(Document handed to the Court.)

LAURENCE E. HINES, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your full name, Doctor?

A. Laurence E. Hines.

Q. And what is your profession?

A. Physician.

Q. In Chicago?

A. Yes.

Q. Where do you live, Doctor?

A. 5322 Lakewood Avenue.

Q. Is that on the north side of Chicago?

A. The Edgewater district, north side of Chicago.

Q. And for how long have you been a resident of the north side?

A. Thirty years.

4697 Q. The north side and the environs?

A. Thirty years.

Q. How long have you practiced medicine in the community?

A. About thirty years.

Q. And what hospital or hospitals are you now identified with?

A. St. Joseph's, Passavant and United States Marine.

Q. Do you know the defendant, Byron A. Cain?

A. Yes.

Q. That's the defendant, Byron A. Cain?

A. Yes.

Q. And for how long have you known him?

A. About twenty years.

Q. Mr. Cain also lived on the north side of Chicago?

A. When I first knew him he lived on Pratt Avenue, on the north side of Chicago.

Q. And that too is in the Edgewater district?

A. Yes.

Q. And have you had occasion to attend him as a physician?

A. I have.

4698 Q. And also to visit with him and his family socially?

A. Yes.

Q. So that you know him?

A. Yes.

Q. Did you, during the year 1945 and 1946, and before, know his reputation in the community for truth, honesty and integrity?

A. Yes, I did.

Q. Was that reputation good or bad?

A. Excellent.

By Mr. Kirby: That is all.

By Mr. Lockley: No questions.

By Mr. O'Brien: Thank you, Doctor, that is all.

(Witness excused.)

THOMAS J. BURKE, a witness called herein on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name, Father?
A. Reverend Thomas J. Burke.
4699 Q. And you are a priest of the Catholic Church?
A. That's right.
Q. In what parish?
A. Saints Faith, Hope and Charity in Winnetka, Illinois.
Q. And for how long has that been so, Father?
A. I have been pastor there since—
By the Court: A little louder, please.
By the Witness:
A. I have been pastor there since 1936.
By Mr. O'Brien:
Q. And prior to that, I presume, you have been identified with other parishes in the Chicago or North Shore area?
A. I have been a priest for twenty-seven years. And in that capacity I was assistant pastor at a parish in the northwest side of Chicago, St. Sylvester's, at St. Lucy's on the west side of Chicago, at the Holy Name Cathedral, and in 1935 I was assigned to a parish in Mundelein, Illinois, and was there until November of 1936, at which time I was assigned to establish the parish of Saints Faith, Hope and Charity, in Winnetka, Illinois.
4700 Q. Do you know the defendant, Byron A. Cain?
A. I do.
Q. Is he one of your parishioners at the present time?
A. He is.
Q. And was that true during the years 1945 and 1946?
A. That's right.
Q. Do you know the defendant, Harold E. Sullivan?
A. I do.
Q. Is he likewise one of your parishioners as of this time?
A. He is.
Q. And has he been for some years?
A. I believe for about the past seven or eight years.
Q. Now, do you know the reputation in your community

of the defendant, Byron A. Cain, for truth, honesty and integrity?

A. I do.

Q. Is it good or bad?

A. It is good.

Q. And was it so during the years 1945 and 1946?

A. Yes.

4701 Q. And do you know the reputation in your community of the defendant, Harold E. Sullivan, for truth, honesty and integrity?

A. I do.

Q. And was it during the years 1945 and 1946 good or bad?

A. It was good.

By Mr. O'Brien: You may cross examine.

By Mr. Lockley: No questions, Father.

(Witness excused.)

A. R. GARDNER, a witness called herein in behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?

A. A. R. Gardner.

Q. And where do you live, Mr. Gardner?

A. 2770 Prairie Avenue, Evanston, Illinois.

Q. And for how long have you lived in that area?

A. About eighteen years.

Q. What is your occupation?

4702 A. At the present time I am an executive consultant in the Federal Home Loan Bank of Chicago. Up until September the 1st, this year, I was the managing officer of that institution since its organization in 1932.

Q. Do you know the defendant, Byron A. Cain?

A. I do.

Q. How long have you known him?

A. Since 1940.

Q. Do you know his reputation in the community for truth, honesty and integrity?

A. I do.

4703 Q. And did you know his reputation in the community for those things in the years 1945 and 1946?

A. I did.

Q. And during those years was his reputation for truth, honesty, and integrity good or bad?

A. It was good.

By Mr. O'Brien: You may cross examine.

By Mr. Lockley: No questions.

(Witness excused.)

JOHN M. TUOHY, a witness called herein on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?

A. John M. Tuohy.

Q. You are a Judge of the Appellate Court for the First District of Illinois, are you not?

A. I am, yes.

Q. How long have you been in the Appellate Court, Judge?

A. Since 1948.

4704 Q. Where do you live?

A. I live on a farm between Barrington and Dundee, Illinois.

Q. And prior to that, did you live in the City of Chicago?

A. I did.

Q. How long have you been on the farm?

A. For five years.

Q. Prior to that, where did you live in Chicago?

A. I lived in North Edgewater, on Kenmore Avenue, 6132 Kenmore Avenue.

Q. Do you know the defendant, Byron A. Cain?

A. I do.

Q. And for how long have you known him?

A. Between ten and 15 years.

Q. Was Mr. Cain a resident of the same general area during most of that time?

A. Yes. When I lived on the north side, he lived further north, but in the same general community.

Q. Do you know what Mr. Cain's reputation was in the community for truth, honesty and integrity during the years 1945 and 1946?

A. I do.
4705 Q. Was it good or bad?
A. It was good.
By Mr. O'Brien: That is all.
By Mr. Lockley: No questions, Judge.
(Witness excused.)

JAMES J. McDERMOTT, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?
A. James J. McDermott.
Q. Where do you live?
A. 1106 West Garfield Boulevard, Chicago.
Q. And your present position?
A. Judge of the Superior Court of Cook County.
Q. You have been a lawyer for how many years, Judge?
A. Thirty-three years.
Q. And in those thirty-three years in the practice of law, did you know a Harold Sullivan?
A. I did.
Q. And what opportunities did you have, Judge,
4706 to know Harold Sullivan?
A. I met him quite frequently. I have seen him in the courtrooms of our courts for many years.
Q. And are you familiar with the reputation that Harold Sullivan bore in this community for honesty, and for truth, and for voracity?
A. I am.
Q. For how many years have you known of the reputation that Harold Sullivan bears in the community?
A. I'd say 30, 31 years.
Q. And in all that time, has his reputation for honesty been good or bad, Judge?
A. Good.
By Mr. Kirby: That is all.
By Mr. Lockley: No questions, Judge. Thank you.
(Witness excused.)

4707 BERNARD L. MAJEWSKI, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. My name is Bernard L. Majewski, sometimes called Mayefski.

Q. How do you spell that name?

A. M-a-j-e-w-s-k-i.

Q. What is your business?

A. I am an oil man.

Q. How long have you been in the oil business?

A. Since 1909.

Q. And what positions in that industry have you held?

A. I started out driving a tank wagon in the city of Chicago, hitched to a team of mules, and I stayed at that for four years. Then I went to night school and thought I would go out and be a salesman, became a bulk agent, general sales manager, vice president and a director of a good independent oil company.

Q. What was the name of that?

4708 A. Deep Rock Oil Corporation.

Q. You were vice president of the Deep Rock Oil Corporation?

A. And director.

Q. Have you served on some national committees?

By Mr. Lockley: If your Honor please, I have no objection to Mr. Kirby bringing in character witnesses, but do we have to go into their background and character?

By the Court: I suppose it is proper to bring out his background in the community and his work. I think that is proper.

By Mr. Kirby: I wish for you, Mr. Lockley, if you are ever questioned, that you can get people of this calibre to testify for you.

By Mr. Lockley: I object, if your Honor please, to Mr. Kirby's—

By the Court: Yes.

By Mr. Lockley: —addressing his remarks to me, and to his speeching.

By Mr. Kirby: He should know better.

By the Court: They were improper, Mr. Kirby.
4709 They may be stricken.
By Mr. Kirby: All right.
By Mr. Kirby:
Q. Mr. Majewski, in the city of Chicago here were you on the School Board?
A. I have been on the School Board since January 3rd, 1936.
Q. And you still serve on the Board?
A. Yes, sir; I have served continuously since then.
Q. Where do you live, in what part of the city do you live?
A. On the northwest side of Chicago. And I also am a farmer on the side.
Q. In what part of Chicago were you born?
A. I was born about two blocks from the intersection of Chicago Avenue and Milwaukee Avenue, which was at that time the heart of the Polish colony in Chicago.
Q. Have you lived then in Chicago all your life?
A. 59 years next January 14.
Q. And in those years have you had an occasion to get to know Harold Sullivan?
A. Yes, I have known Harold Sullivan for more than 20 years.
4710 Q. And what occasions have you had to get to know about the man?
A. Oh, many. He has been a close personal friend, he and his family and his brothers. Weddings and social affairs. Real close personal friends.
Q. Have you gotten to know the reputation that Harold Sullivan has borne?
A. Yes, sir.
Q. In those years?
A. Yes, I have.
Q. And do you know how he is regarded, so far as being a man of honesty and integrity, who tells the truth?
A. He is highly regarded in all those respects.
Q. And does he bear, in all those respects, a good or a bad reputation?
A. An excellent reputation, I would say.
By Mr. Kirby: Thank you. That is all.
By Mr. Lockley: No questions.
(Witness excused.)

4711 CORNELIUS J. HARRINGTON, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?
A. Cornelius J. Harrington.
Q. Where do you live?
A. 9821 South Winchester Avenue, Chicago.
Q. And do you occupy a position in this county?
A. Judge of the Circuit Court of Cook County.
Q. How many years have you been a judge?
A. Nineteen years. Twenty in June of next year.
Q. And in what part of the city have you lived?
A. Principally the south side of Chicago.
Q. And have you known Harold Sullivan?
A. Yes, I have.
Q. When did you first meet Harold Sullivan?
A. In July or August of 1917, at Fort Sheridan, Illinois, where we were together in D Battery of the 149th Field Artillery of the Rainbow Division.
Q. And since you first met him at Fort Sheridan in 1919, were you with him for some time then?
A. For eighteen months overseas, through about
4712 eleven engagements. And then it was interrupted at one time. I think it was practically the last engagement that we were in when he was gassed and taken to the hospital.
Q. Other than when he went to the hospital were you with him continuously overseas?
A. Constantly. We were in the same gun section until he was promoted to a sergeant and he took charge of another gun section, and I took over the gun section he was in.
Q. After you both came back and became lawyers did you have some occasion to be with him and to observe his character and his work?
A. Yes. After he was admitted to practice, I think we both tried our first case together, defending one of the men that was in the service with us, in the Criminal Court. And I have known him intimately over the period since about 1922 or '23, when he was admitted to practice and I was admitted to practice. We were associated together in

the Legion work, Rainbow Division Veterans Association activities, and in Catholic Charities work, and other different organizations that we had an interest in.

4713 A. And in the years have you had an opportunity to know the reputation that Harold bears, as to whether he is an honest man, a man of integrity and a man who tells the truth?

A. I certainly have.

Q. And what is that reputation in this community?

A. Excellent.

By Mr. Kirby: Thank you, Judge.

By Mr. Lockley: No questions, Judge.

(Witness excused.)

MARGARET I. ASTE, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as ofllows:

Direct Examination by Mr. Kirby.

Q. Will you give us your name, please?

A. Margaret I. Aste.

By the Court: I am sorry.

By the Witness:

A. Margaret I. Aste.

By Mr. Kirby:

Q. Is it Miss or Mrs.?

4714 A. Mrs.

Q. And, Mrs. Aste, where do you live?

A. 754 Buena Avenue.

Q. That is up on the north side?

A. The north side, yes.

Q. Have you been a resident of Chicago, Mrs. Aste, for all of your life?

A. All of my life.

Q. And you have engaged in various club and public work in the city?

A. That's right.

Q. Charitable work?

A. Yes, I have.

Q. And have you served in some public posts of helping people?

A. At the present time I am Conservator and Public Guardian of Cook County.

By the Court: You will have to speak up a little louder. You can face the jury.
By the Witness:
A. I am sorry. I didn't know there was a jury here. I am Public Guardian and Conservator of Chicago and Cook County.
4715 By Mr. Kirby:
Q. That is for the people who require care of the courts; you are on the supervisors of that?
A. That is true.
Q. Now, have you known Harold Sullivan, Mrs. Aste?
A. I have known him about 15 years.
Q. And what opportunities have you had to know Harold Sullivan?
A. I have met him at many social functions.
Q. And do you know his standing in the legal community?
A. Yes, I do.
Q. And do you know what his reputation has been in the city, as to whether he is a man of honesty and integrity and a man who tells the truth?
A. I have never heard it questioned, in any other way, of what he is, his integrity and his honesty.
Q Is his reputation good or bad?
A. Well, for fifteen years it has been very good, that I know about. That is all I can answer.
By Mr. Kirby: That is all we wanted you to tell us. Because you have had an opportunity to know him and these people have not.
4716 By the Witness: Yes, I have.
By Mr. Kirby: Thank you very much.
(Witness excused.)

4717 CHARLES S. DOUGHERTY, a witness called herein in behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. Please state your name.
A. Charles S. Dougherty.
Q. And where do you live?
A. 2231 East 67th Street.

By the Court: Let's get the name again, please.
By the Witness: D-o-u-g-h-e-r-t-y.
By Mr. Kirby:
Q. And you are a judge in Chicago?
A. Yes, sir.
Q. And for how many years have you been a judge?
A. Eighteen—seventeen years and six months.
Q. On what courts have you served?
A. I have served on the Municipal Court for sixteen years and the Circuit Court for a year and a half.
Q. And in those years have you gotten to know a lawyer by the name of Harold Sullivan?
4718 A. Yes, sir.
Q. And what chance did you have to get to know him, Judge?
A. Well, I have known him from the contacts with him, before I was on the bench and after I was on the bench, in appearances in court and appearances in his court, when he was a Master.
Q. Keep your voice up, Judge, please.
A. I served—frequently have been in contact with him through the Bar Associations and personal contacts in other matters.
Q. And, Judge, are you now the Chief Justice of the Criminal Court of Cook County?
A. Yes, sir.
Q. In the years have you gotten to know the reputation that Harold Sullivan bears for honesty, integrity and telling the truth in this community?
A. Yes, sir.
Q. And is that reputation, Judge, good or is it bad?
A. Very good.
By Mr. Kirby: Thank you, Judge.
By Mr. Lockley: No questions, Judge.
(Witness excused.)

4719 CHARLES E. GREEN, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?
A. Charles E. Green.

Q. And where do you live, Mr. Green?
A. 1223 Park Avenue, River Forest, Illinois.
Q. And what is your profession?
A. Attorney at law.
Q. For how many years?
A. 38 years.
Q. Besides having been a lawyer for 38 years are you also engaged in some other work?
A. Yes, I am, and have been for a long time. General counsel, and secretary for Motorola, Incorporated, and all of its affiliates and subsidiaries.
Q. And what does Motorola, Incorporated, do?
A. Manufactures televisions, radios, communication equipment, military electronics.
Q. And how large an organization is that, Mr. Green?
4720 A. Employs approximately 10,000 people. And they have plants in Chicago, multi-plant operation, Quincy, Illinois, Phoenix, Arizona.
Q. Now, Mr. Green, do you know a Harold Sullivan?
A. Yes, I do.
Q. When was the first time you ever saw Harold Sullivan?
A. I would say over fifty years ago. He and I were boyhood friends in the country, down the farming district.
Q. What farming district?
A. McHenry County, the territory of Woodstock and Franklinville.
4721 Q. What did your people do, Mr. Green?
A. My father operated a small farm.
Q. Close to the Sullivan farm?
A. Within a few miles, yes. Walking distance in those days.
Q. And for your family?
A. That's right. And for the Sullivans.
Q. Mr. Green, after you knew Harold as a boy, did you have any occasion to keep track of him through the years?
A. Yes.
Q. How did that come about?
A. I have always been near Harold. We came to Chicago practically together to go to school. I knew Harold as a soldier, as a lawyer, as a Master, and down through those years, as a very good friend.

Q. By the way, did you ever appear in front of him, as Master?

A. Yes, I had one case before him. I'd say that was about 15 years ago.

Q. Did you win or lose?

A. I lost it.

Q. Mr. Green, have you in those years visited
4722 at his home and do you know his family?

A. Yes, I have, and I do.

Q. And have you been with others that know him, and know him in his practice of law, and his family relationships?

A. Yes, I have. I have been with those others practically my entire life.

Q. You have known Harold your whole life?

A. That's right.

Q. Do you know what his reputation has been all that time?

A. Yes, I do.

Q. What is it?

A. Excellent.

Q. Is he a man who bears a reputation in this community of a person who tells the truth, who is honest, and who is a man of integrity?

A. Very definitely.

By Mr. Kirby: Thank you, Mr. Green.

By Mr. Lockley: No questions, Mr. Green.

(Witness excused.)

4723 BARRE BLUMENTHAL, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?

A. Barre, B-a-r-r-e, Blumenthal—B-l-u-m-e-n-t-h-a-l.

Q. Mr. Blumenthal, where do you live?

A. 2423 Harrison Street, Evanston, Illinois.

Q. And what is your business?

A. I am a lawyer.

Q. For how many years have you been a lawyer?

A. Forty-one years.

Q. Practicing where?

A. In Chicago, Cook County, Illinois.
Q. In all of the courts?
A. All of the courts.
Q. And has your practice also extended to the Supreme Court of the United States?
A. It has, in one instance.
Q. One instance, in which you beat me, I think.
Mr. Blumenthal, have you known Harold Sullivan?
A. Yes, I have known him for a long time.
4724 Q. How long?
A. I think I have known Harold Sullivan since we both got into service in a Regiment during the first World War. That was in June or July, 1917.
Q. Were you in the same outfit with him?
A. I was in the same Regiment. It was the 149th Field Artillery. It was the unit later known as the Rainbow Division.
Q. While you were in service, did you get to know Harold Sullivan?
A. I saw a lot of him during the time we were in service together.
Q. After you came back and went into the law business, he was never a partner of yours, Mr. Blumenthal?
A. No, he was not.
Q. Did you have opportunities to observe him and get to know how he was regarded by the lawyers and judges of this community?
A. I did.
Q. Did you get to know his family, Mr. Blumenthal?
A. Not too well. I have met his family on several occasions.
Q. Then your connection with Harold has been
4725 mostly professional?
A. That is right.
Q. You know what reputation Mr. Sullivan bears in this community as to being a person who tells the truth, who is honest, and who has integrity?
A. Yes.
Q. What is that reputation, is it good or is it bad?
A. It is a fine reputation.
By Mr. Kirby: Thank you, Mr. Blumenthal.
By Mr. Lockley: Thank you, Mr. Blumenthal. No questions.
(Witness excused.)

WILLIAM J. TUOHY, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kirby.

Q. What is your name?
A. William J. Tuohy, T-u-o--h-y.
Q. Where do you live?
A. 1044 Loyola Avenue, Chicago, Illinois.
4726 Q. And you are a lawyer?
A. I am, yes, sir.
Q. You are also a Judge?
A. Yes, sir.
Q. Of what court?
A. The Circuit Court of Illinois, Cook County.
Q. And what post do you hold in that court?
A. I am an associate judge of that court.
Q. And before that, and some years ago, did you hold a post with the County Board?
A. Yes, I was States Attorney of Cook County, and prior to that I was an assistant States Attorney, Attorney for the County Board of Cook County.
Q. When did you get to know a lawyer by the name of Harold Sullivan?
A. Oh, about 1926, some 27 or 28 years ago.
Q. Well, how did you happen to get to know him?
A. Well, he was Commander of the Post of the American Legion to which I was very close, and whose meetings I had attended, Gibbons Post.
Q. In the last 25 years, have you known him well?
A. Intimately.
Q. Do you know of the regard in which he is held 4727 by others in this community?
A. Yes, sir.
Q. And do you know the reputation he has built up over the years, as to whether he is a man who tells the truth, who can be believed, and who is an honest man?
A. Yes, sir.
Q. Is his reputation with respect to his honesty, and truth and integrity in this community good, or is it bad?
A. It is good.
By Mr. Kirby: Thank you, Judge.
By Mr. Lockley: No questions, Judge.
(Witness excused.)

4728 LOUIS J. ROTH, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?
A. Louis J. Roth.
By the Court: Speak up.
By the Witness: R-o-t-h.
By Mr. O'Brien:
Q. Where do you live, Mr. Roth?
A. 12 East 86th Street, New York City, New York.
Q. You are an accountant?
A. I refuse to answer that question on my constitutional rights.
By the Court: Louder, please.
By the Witness:
A. I refuse to answer that question, as it might tend to incriminate me.
By Mr. O'Brien:
Q. Well, will you let me ask this—
By the Court: As to what is your business, is that it?
By the Witness: Yes, sir.
By Mr. O'Brien:
4729 Q. Mr. Roth, have you brought with you the subpoena that was served upon you in this case?
A. No, sir.
Q. You do appear here in response to a subpoena which I served upon you?
A. I do.
Q. Have you brought with you all copies of audits or audit reports and all work sheets or copies of work sheets pertaining to the books, records or accounts of the Eatsum Food Products Company, a co-partnership, which are within your possession or within your control?
A. I refuse to answer that question as it might tend to incriminate me.
Q. Are you a defendant in proceedings pending in the Southern District of New York brought by the United States, a criminal proceeding?
By Mr. Lockley: If your Honor please, I think it is improper for Mr. O'Brien to attempt to impeach his own witness.

By Mr. O'Brien: I am not attempting to impeach him. He isn't my witness, either. I subpoenaed him to bring some papers and that's all.

4730 By the Court: He may answer.

By Mr. O'Brien: I am trying the best I can to get them.

By the Court: He may answer.

By the Witness: Your Honor, I don't know whether, if I answer that question or not, whether I will violate my constitutional rights. I am here without an attorney.

By the Court: Well, the question is whether or not you are a defendant in certain criminal proceedings pending in the Southern District of New York. That is the question you are asked. He is asking you if you are the Louis Roth who is a defendant in a certain criminal proceeding pending in the Southern District of New York.

By the Witness:

A. I am.

By Mr. O'Brien:

Q. And is that the same proceeding in which William Giglio and Howard Lawn are defendants, is that the same case?

A. It is.

Q. Well, I asked if you brought with you the papers

4731 which I have described and you refuse to answer on the ground that it might incriminate you. Do I understand that you do refuse to produce the papers mentioned in the subpoena which I caused to be served upon you because to do so would tend to incriminate or might tend to incriminate you?

A. That is my answer.

By the Court: I don't hear you.

By the Witness: That is my answer.

By Mr. Lockley: No questions, your Honor.

By the Court: All right. That's all.

(Witness excused.)

JAMES C. DOWNS, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name?

A. James C. Downs, Jr.

By the Court: James C. what?

By the Witness: James C. Downs.

4732 D-o-w-n-s.

By Mr. O'Brien:

Q. Where do you live, Mr. Downs?

A. 180 East Delaware Place.

Q. What is your occupation or profession?

A. I am a real estate economist.

Q. And you have been for how long?

A. Well, since all of my business career, since 1925.

Q. Are there different positions which you have held within the real estate field?

A. I have been national president of the Institute—

By the Court: A little louder, please.

By Mr. O'Brien:

Q. Louder. It is hard to hear in here.

By the Witness:

A. I have been national president of the Institute of Real Estate Management. I am president of the Real Estate Research Corporation. I am in the property management business of the mortgage business.

By Mr. O'Brien:

Q. How long have you lived on north side of 4733 Chicago?

A. All my life.

Q. Do you know the defendant, Byron A. Cain?

A. I do.

Q. How long have you known him?

A. Since 1928.

Q. How much opportunity have you had to be associated with and to observe him?

A. Well, I have—I was directly associated with him when we were both in the same firm of Baird & Warner and I have known of his business since he has been in business for himself, known of his Savings and Loan Institution, was for one year, a director of that Savings and Loan Institution.

Q. Mr. Cain was or you?

A. I was.

Q. Can you state for the jury whether Mr. Cain's reputation in the community for truth, honesty and veracity 4734 was good or bad in the years 1945 and 1946?

A. Well, in the wide range of dealings which I had

with his firm and which I knew my associates had, I would say it was never questioned.

Q. To your knowledge, was his reputation generally in the community for those things good or bad?

A. It was good.

Q. Is the same true since those years 1945 and 1946, Mr. Downs?

A. That is correct.

By Mr. O'Brien: I have limited it to those years, Judge, because of the legal limitation, that the reputation afterwards is not admissible, but I do not mean to say that his reputation ceased at that time.

Thank you.

By Mr. Lockley: No questions, Mr. Downs.

By Mr. O'Brien: Will you excuse us just a moment? Will you indulge us just a moment until we see who we have?

(Witness excused.)

4735 By the Court: All right.

Mr. O'Brien, may I see you for just a moment. This is not for the record.

(Discussion off the record.)

By Mr. O'Brien: I have some odds and ends, here, Judge, that I would like to ask you about. There are some things I want to offer.

First, it was not altogether clear to me the other day when you handed back the Penick & Ford exhibits. Those were 79 to 87. It was not clear to me whether there had been any change in the Court's ruling. At the time that those were offered, commencing at record 4226 and down to record 4252, I think that your Honor sustained objections to Exhibits 79, 80 and 81.

By the Court: That is right.

By Mr. O'Brien: Without prejudice to our right to reoffer them later if there should be further material to connect them up.

By the Court: I don't remember that but that may well be that I gave you that right. I wouldn't deny you
4736 that right to offer it again if you desire.

By Mr. O'Brien: Then you said you would look at them and afterwards you handed them back to us without any observation, so I assume the ruling is the same.

By the Court: That is right.

By Mr. O'Brien: There were documents. Perhaps I shouldn't bother you with them now, but at record 1086 and record 1090 we offered Defendants' Exhibits 11 and 12. Those were papers having to do with the inception of the partnership and your Honor reserved a ruling on those.

If you will mark your notes, I will discuss it directly when we talk about the other record matters.

4737 By the Court: Well, supposing we—I take it that there will be a large number of exhibits that we may have to check on, and we can do that before you rest, and straighten out the record insofar as it needs straightening. You have the daily transcript, and I don't, so you can go back and determine better than I can, whether I received those exhibits.

My notation is, however, that I received No. 11, after reconsideration, and that I did not receive 12. But I would like to have you check the transcript on that.

By Mr. Lockley: If your Honor please, the Government record shows that 11 was received.

By the Court: That is my notation on my own record.

By Mr. Lockley: Page 3811 of the record.

No. 12, page 1093 of the record, you reserved your ruling on that, on Exhibit 12, on the question of materiality.

4738 By Mr. O'Brien: I will look for it. There are just too many papers in this case.

I should like to have marked for identification a letter from the Department of State, and the five attached documents having to do with Mr. Lubben's passport.

(Said documents were marked Defendants' Exhibits 95, 95-A, 95-B, 95-C, 95-D, and 95-E, for identification.)

By Mr. O'Brien: If the Court please, pursuant to your order, we have obtained from the Department of State a letter and photostatic copies of documents pertaining to Mr. Lubben's passport, as to which there has been testimony in the case.

I should like to offer those as Defendants' Exhibits 95, and 95-A, B, C, D, and E, respectively.

By the Court: A, B, C, and—

By Mr. O'Brien: It is 95 and 95-A, B, C, D, and E.

Will you please mark these Defendants' Exhibits 96 and 97 for identification?

4739 (Said documents were marked Defendants' Exhibits 96 and 97 for identification.)

By Mr. O'Brien: And will you please mark this Defendants' Exhibit 98 for identification.

(Said document was marked Defendants' Exhibit 98 for identification.)

By the Court: Well, is there any objection?

By Mr. Lockley: I beg your Honor's indulgence. Yes, your Honor, there is objection to at least Defendants' Exhibits 95-E, and 95-D, on the ground that they purport to relate to matters happening in 1953, and in 1950, neither of which is at all involved in the issues of this suit, and to which there has been no testimony.

By the Court: Well, how is that material, Mr. O'Brien?

By Mr. O'Brien: Well, it is not, to me. I just presented it as part of the whole. It makes no difference, if there is objection, it could be removed.

By Mr. Lockley: I object furthermore to Exhibit
4740 95-C, on the ground that it is undated, and that it is impossible to determine with what passport it has any reference. I have no objection to the letter, Exhibit 95, nor to Exhibits 95-A and 95-B, which purport to be the actual applications for the passport in 1948. The balance of it, I question the relevancy and that's all.

By Mr. O'Brien: We needn't argue about that, because I have no particular interest in these three items. I just got them all together from the State Department, and I didn't want to exclude any of them.

By the Court: The Exhibits will be 95, 95-A, and 95-B?

By Mr. O'Brien. Yes.

By Mr. Lockley: As to those, your Honor, we have no objection.

By the Court: They may be received.

(Said documents were received by the Court marked Defendants' Exhibits 95, 95-A, 95-B, 96, 97 and 98.)

By Mr. O'Brien: I also offer, Judge, on behalf of the Defendants, documents marked 54 for identification,
4741 and 55. Those are figures in Mr. Lubben's handwriting, identified by the witness Sproull.

By Mr. Lockley: If your Honor please, the Government objects to Exhibits 54 and 55, on the ground that no proper foundation was laid.

By the Court: Well, what is lacking in foundation?

By Mr. Lockley: The testimony of the witness Sproull was that this was in Mr. Lubben's handwriting, and that Mr. Lubben had given this to him in some period of time after 1945 for preparation of the income tax return.

By the Court: That is right.

By Mr. Lockley: And at that time, if you recall it, defense counsel objected to the Government looking at this document, and therefore, we were unable to use it in cross examination.

By Mr. O'Brien: That is hardly accurate, Mr. Lockley. I attempted to proceed as we would in our common practice here, but the Court ruled that you were entitled
4742 to look at it, and I handed it over at that time for the purpose of cross.

This is the document which I did, however, object to Mr. Krane proceeding to copy at that point, but at that time there was possession for cross.

By the Court: That is my recollection.

By Mr. O'Brien: On the date, Judge—

By the Court: My notes show they were left with Sproull early in 1946.

4743 By Mr. O'Brien: And that the 1945 figures which were up here were told to him by Lubben. They were in the candy cash for that time and that he put those figures on at the time of delivery because Mr. Lubben said they were for the year 1945. They are thoroughly identified.

By the Court: They may be received in evidence.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 54 and 55.)

By Mr. O'Brien: Now, if the Court please, I have a few more items, but the work sheet papers and all, I should like, if you would adjourn at this time, perhaps talk about both matters or at any time you suggest. It would be of some help to us in moving along with the case.

By the Court: Are you about to rest, may I ask?

By Mr. O'Brien: No, Judge. I do have—oh, I don't

know, two or three more witnesses, but some of their
4744 testimony—Some of the testimony pertains to these papers. The testimony of one pertains to these papers.

By the Court: I see. Well, we can adjourn now until 2:00 o'clock this afternoon, members of the jury.

By the Marshall: Will the audience remain standing until the Judge as well as the jury leave the court room. This Honorable Court will recess until 2:00 o'clock this afternoon.

By the Court: I will come back in a few minutes.

(Whereupon the jury was dismissed and the following proceedings were had and taken outside the presence and hearing of the jury, in open court:)

By the Marshal: This Honorable Court will resume.

By Mr. Kirby: Those four documents for which your Honor is reaching—

By the Court: Yes. I will rule on these exhibits now and that pertains to Exhibits 88, 89, 90 and 91. I
4745 will sustain the objection to Exhibits 88, 89 and 91—I will sustain the objections as to being incompetent. I will admit—I am sorry. I misspoke myself. 88, 89 and 90, I sustain the objection to. I will admit 91, which is a Federal Trade Commission report and I admit the pages that Mr. Kirby specially pointed out.

(Said document was received in evidence and marked by the Court Defendants' Exhibit 91.)

By Mr. Lockley: Do you mind if I look at it?

By the Court: All right.

Mr. O'Brien, this might be an appropriate time to complete the record with reference to the pages of Mr. Cain's testimony which was proffered by the defendant and as to certain portions of which I sustained the objection.

The record could disclose that after Mr. O'Brien presented me with a compact transcript of Mr. Cain's testimony, that is, the portion of Mr. Cain's testimony
4746 which were offered by Mr. Lockley and by himself, that I reconsidered my ruling and on Friday, October 9th, at the opening of court, I told Mr. O'Brien that I was going to reconsider my rulings.

At that time, Mr. O'Brien had called Mr. Cain, but Mr.

Cain had not as yet been sworn and I told Mr. O'Brien that I thought he should know that I was going to modify my rulings regarding portions of the testimony offered by the defense and that it might be that he would want to know that before he put Mr. Cain on the stand. And thereupon, Mr. O'Brien told me, as I remember it, that he didn't think it made much difference, or words to that effect. I am not too clear as to the exact words, however, Mr. O'Brien.

By Mr. O'Brien: The matter was called to my attention, as the Court says.

By the Court: Be that as it may, I desire, therefore, as of October 9th at 10:00 o'clock a. m., and before Mr. Cain was sworn, to have the record reflect that counsel were then notified that I was going to modify my 4747 ruling and during the day, when the transcript had been prepared by my secretary, I presented to Mr. Lockley and Mr. O'Brien the portions of Mr. Cain's testimony offered as to which I had modified my rulings and I now deliver that to the Reporter so that she may make a transcript of the statement that I furnished to Mr. O'Brien and Mr. Lockley and I assume that Mr. O'Brien would like at this time to have the record indicate the exception which he has taken and which she likewise may make a part of the transcript, if you desire.

Well, I think that is all I have to say in that regard.

4748

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 Cr. 143) • •

After considering the pages from Mr. Cain's testimony which was submitted to me by Mr. O'Brien, I have reconsidered the rulings that I have made with reference to the portion of the testimony proffered by Mr. O'Brien and have concluded that I should modify my rulings, and I do overrule the Government's objections to the following portions of the testimony offered by the defense:

Page 160—The next to the last question, which reads:

"Following that did you tell Mr. Busby to go back to Sauber and reveal the identity of the company and make this disclosure?

A. I did."

Page 161—The last question and answer, which read:

4749 "Q. What, if anything, did you tell him to say concerning the payment of that tax which you planned to do?

"A. I told him we were ready, willing and able to pay any tax that might be assessed."

Page 162—The question and answer at the top of the page:

"Q. Did you tell him to tell Sauber that?

"A. Yes."

Page 163—The last question on that page and the answer on page 164, as follows:

"Q. When you saw Sauber in March did you ask him—what, if anything, was said between you and him as to the fact of whether any investigation had commenced?

"A. He assured me that there had been no investigation commenced."

Page 165—The portion in the middle paragraph in which Mr. Cain stated to Mr. Sauger as follows:

"I said that the only thing that we could possibly do in dealing with a chap like that chap Lubben would be to take every invoice that we had sent to him

4750 and apply the maximum over ceiling price."

Page 166—The entire page, including the first paragraph on page 167, reading as follows:

"A. I am talking to Mr. Sauber, this conversation. I said, 'We will use the peak price and when we come up with that figure, that would be the best of our recollection.'

He said, 'You can't make an amended return. You just give us—we will have to send a man out there and you will work with him and we will get the best we can.'

I said, 'As to our expenditures I just can't tell you anything. I don't know.'

"Q. What did he say about expenditures?

"A. He said, 'it wouldn't do any good if you did know because we wouldn't allow them anyway. We absolutely won't allow over the ceiling expenditures.' I said, 'O.K., but I hope you will take it into consideration and see that we are treated fairly.'

4751 I think that is the tone on which that particular meeting on March 4th ended.

"Q. What, if anything was said concerning the payment of the tax when and if the tax was determined?

"A. Well, I told him in view of the government situation where they make no allowance, we owe them a lot of money, and we stood ready and able to pay it immediately, and the sooner we would pay it the better I would like it, but I said that wouldn't stop us if at some future time we tried to get our money back or a portion of it for those over ceiling payments."

Page 191—The entire page, reading as follows:

"Q. Mr. Cain, in your conversation or conversations with Mr. Sauber what, if anything, was said by you to him as to your ability to say who the premium payments were paid to?

"A. Well, I told him it would be impossible for us to tell him who the payments were paid to because we didn't know.

"Q. What did he say about premium payments in general?

4752 "A. He said that premium payments regardless of whether we could or could not tell would not be allowed the Government.

"Q. Did Mr. Busby tell you, Sullivan, or Huebner, that is, you or Sullivan in your talk on January 11, 1948, or any of your talks after that that there was any requirement for a disclosure other than those mentioned in the published policy?

"A. No, sir.

"Q. Did you ever know of any other or further requirement?

"A. No, sir.

"Q. Did you know if it is the fact that your ability to say to whom premium payments were made was or might be regarded as a condition precedent to a disclosure?

"A. No, sir.

Page 200—The first question and answer reading as follows:

"Q. Did you tell him to tell the official of the Treasury Department hypothetically otherwise that the Shotwell Corporation owed the Government taxes for those years?

4753 "A. He reported back that the Government told us that we did owe taxes."

Page 201—The two questions at the bottom of that page, and including the answer on the top of page 202, which read as follows:

"Q. Did you at that time tell him to advise Mr. Sauber that the Shotwell Corporation had made false tax returns for the years 1945 and 1946?

"A. I had quite a bit of confidence in Mr. Busby. He knew the case by that time.

"Q. Did you tell him to tell Mr. Sauber that the corporation had made false tax returns for those years?

"A. I don't recall telling him anything. We told him what to do, to go in and disclose the Shotwell Manufacturing Company, period."

Page 202—The first question on that page, reading,

"Q. Do you recall what you did tell him?

"A. We told him to go to whomever had been to before and disclose the identity of the taxpayer."

And the remaining questions and answers on 4754 that page, together with the answer, question, and answer at top of page 203:

"Q. And did you tell him to tell Mr. Sauber that the corporation had made false returns for the years 1945 and 1946?

"A. I don't believe I did. I don't think I had to tell Mr. Busby anything. We certainly told him to go in and do whatever was necessary to get the matter straightened out.

"Q. Did Mr. Busby in the course of informing you about the requirements of the voluntary disclosure doctrine on or about January 11th or 12th of 1948 tell you that it was necessary that the taxpayer make an honest, full disclosure of all the material facts?

"A. Mr. Sauber told us that we couldn't make that.

"Q. No—Mr. Busby.

"A. Mr. Busby reported back to us that Mr. Sauber said we couldn't—

"Q. I am sorry, I mean, in the conference you had with Busby before he went over to Mr. Sauber the first time.

4755 "A. No, he did not.

"Q. He did not?

"A. No."

Page 203—The portion in the middle of the page starting with the question:

"Q. Well, in sending him over to Mr. Sauber you had in mind making a disclosure to avoid criminal prosecution, was that the purpose?

"A. Very definitely."

Page 206—The last question on that page, reading:

"Q. Well, I went into the matter of the over ceiling receipts. He discouraged me on the matter of the over ceiling payments. He said it was out, that they might give it some consideration, but if they did it would be very little, that the Department's rule is they would not consider over ceiling—

Note: Page 207 is missing and therefore I am unable to complete the remaining portion of the question and answer which extends into page 207.

4756 Page 216—The last question, reading:

"Q. Now, at which meeting, the first or the second, was it, that he told you as you testified that it wouldn't make any difference whether you could prove the disbursements of these over ceiling moneys or not?

Top of page 217:

"A. I think at both meetings. He emphasized that to us.

And the remaining questions and answers on page 217, as follows:

"Q. He said to you that it made no difference so far as the Government was concerned?

"A. That is right.

"Q. Whether you proved that you actually made those expenditures or not?

"A. That is right. He said it was the Government's policy that over ceiling payments could not be deducted."

4757

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143), * *

EXCEPTIONS

The defendants hereby except to the action of the Court, as evidenced by its memorandum of October 9, 1953, pertaining to reconsideration and modification of its rulings on the Government's objections to certain testimony proffered by Vincent O'Brien, for the following reasons:

1. It is untimely and therefore insufficient in that it does not remedy the failure to have the material now added by the memorandum read to the jury during the Government's case in chief along with the portions which were then read.

2. It does not include all of the proffered material to which the Government's objections were sustained.

4758 The defendants, Byron A. Cain and The Shotwell Manufacturing Company, specially and additionally except to the foregoing matters, because they say, that if the matters mentioned in the Court's memorandum which were proffered by Vincent O'Brien had not been excluded, but had been read to the jury at the same time as other portions of Byron A. Cain's testimony at the disclosure hearing were read to the jury during the Government's case in chief, the defendant, Byron A. Cain, would not have been compelled to take the witness stand, and would not have been subjected to cross-examination, including cross examination on the memorandum of payouts which on cross-examination he testified about.

The Shotwell Manufacturing Company,
a corporation,

By .....
Its Attorney

Byron A. Cain and Frank J. Huebner,
By .....
Their Attorneys
Harold E. Sullivan,
By .....
His Attorneys.

4759 By Mr. O'Brien: Are these all the sheets?

Judge, coming back to these work sheets which have been identified as to handwriting and preparation by the witness Hausman, at the moment, I have before me those marked 21-B, 21-C, 21-D and 21-E, that series.

By the Court: Will you start over again, please?

By Mr. O'Brien: Yes, sir. 21-B, 21-C, 21-D and 21-E. And I also have before me the 65 series, 65-K and 65-L and 66-W.

Now, although those work sheets stand identified as of the time they were marked, as being in the writing of the witness and actually prepared by him, his testimony also was that the originals had been turned over to Mr. Roth in whose employ he had then been, and it was objected that we did not procure or we had not shown that the originals were unavailable.

Now, I don't know, Judge. I want to be completely candid in this further statements of it: I do not
4760 know the legal effect, but in an attempt to find a basis for the admission of photostatic copies, absent the originals, we asked Roth's attorney to send us an affidavit and he did send an affidavit which said the originals of these papers were left by him with the partnership, with the Eatsum Food Products partnership and which said that they were either in the possession of Giglio or were impounded in the court proceedings down east and he didn't know which.

Now, I was not present when the affidavit—I think it was in chambers between Mr. Kirby and Mr. Lockley, but unless counsel could agree, unless Government counsel would agree that the affidavit might be treated as evidenciary, there was nothing that the Court could do according to what I was afterwards advised. It was just an affidavit and not more. Now, I have insisted that the man come here on the subpoena and have put him on the stand to try to interrogate him with the results

which your Honor observed.

4761 I think that on the record, as it is made by appropriate evidence, the record shows that the originals were delivered to Roth by Messrs. Hausman and Starr, and I have subpoenaed Roth to produce them and he refuses to bring the papers in accordance with that subpoena. Indeed, I subpoenaed him back at the same time that we have subpoenaed Giglio, but until this precise question arose, I saw no need to actually bring him here. And if one offered, that is, the formal record, offered that record, I know through his affidavit, if I am to give it practical significance, that he says that he left those papers with the partnership and that they are now either impounded in the east or they are in possession of Giglio along with the other documents of the partnership.

In that situation, I believe that I have laid all the foundation which we can lay and I desire to reoffer the exhibits which I have described at the outset of this hearing now. Practically, Judge, some of the photostatic copies of the Hausman work sheet have been

4762 turned over to us from time to time, or perhaps at one time under your Honor's orders by the Government. We do have some. There is no doubt but that they are the same handwriting, the same instrument, prepared by the same person as those which we have, but they are not always for the same dates.

In other words, we have some which are not among the papers that the Government gave us. So, I should like to, on that showing, renew our offer of these instruments, with leave to look at the remainder that were identified over the noon hour, to look at them to see if there be any additional which are relevant to the subsequent proof which we want to make.

As I said before, my reason for taking it up at this time is that one of our few remaining witnesses has to testify on a subject which is predicted on these papers, or some of them.

4763 By Mr. Lockley: If your Honor please, as I understand Mr. O'Brien's offer, he now offers Exhibit 21-B, C, D, E, 65-K and L, and 66-W, is that correct?

By Mr. O'Brien: Yes.

By Mr. Lockley: A quick look at the transcript fails to show where Mr. Hausman identified 66-W and I don't believe he was questioned as to that particular document.

By Mr. O'Brein: 66-W is the Starr—

By Mr. Lockley: That was Mr. Starr?

By Mr. O'Brien: Yes.

By Mr. Lockley: I thought that must have been the situation.

By Mr. O'Brien: This is the one (Indicating). This is Starr's handwriting.

By Mr. Lockley: All right. And with respect to the balance of them, while counsel says that the government has turned over certain records to him, they are not the records which he now offers, although perhaps it could be that the handwriting on the documents he offers and the documents the government has turned
4764 over to him is similar. They are not the same, however.

By Mr. O'Brien: No, I didn't mean that they were, Mr. Lockley. I said they merely purport to be the same handwriting and the same type of sheet.

By Mr. Lockley: I want to make that clear on the record, Mr. O'Brien. The government's objection, your Honor, goes far beyond the foundation laid for the absence of the originals themselves.

There is no foundation laid for the accuracy as to these particular papers and even more fundamentally, as to the accuracy of the books and records from which these papers were taken. To the contrary, the only witnesses which have testified here and they have been defense witnesses, have said that they do not know what those books were and when they asked Mr. Roth to explain certain matters to them, they were told to mind their own business.

Now, under those circumstances, I feel there has been an absolute inadequate foundation whatsoever
4765 for the accuracy of these books and records and for the government now to have to try to rebut information which may appear on secondary work papers which came from books and records for which there has been no foundation, it is putting far too great a burden upon us.

Furthermore, as to Mr. Roth's testimony, the defendants did not pursue the remedy they may have had with Mr. Roth. To be sure, they brought him here. He was asked a few very token questions and he claimed his constitutional rights, but the defense did not question as to whether or not his claim of constitutional immunity was well founded in fact. They didn't ask your Honor to go into the matter and determine whether the witness should be ordered to answer the questions. They asked him no questions at all as to the accuracy of the books and records which were maintained by him or as to the identity of these papers themselves,
as to whether they were taken away, taken off of
4766 the books and records or as to whether he had
these particular work papers which they are now offering, or whether he ever had them or where they are today. I mean, the foundation which they attempted to lay through Mr. Roth was completely inadequate. There was absoluetly nothing said about any specific record or document during that testimony. Mr. O'Brien just asked him some general questions as to whether or not he had been subpoenaed to bring work papers and had he brought work papers. He didn't specify what sort of work papers. He didn't specify the type of work papers he was subpoenaing from Mr. Roth.

As to those matters, your Honor, my position is simply that not only is there no foundation laid for these work papers, but there is no foundation made, but that there is no foundation laid for the accuracy of these books and records, where these work papers
were purported to be taken from.
4767 While it may have been possible through the
witness Hausman to have determined whether these books and records and work papers were accurate, you will remember that counsel consistently refused to at least failed to go into any explanation as to what these work papers were. They were merely handed to Mr. Hausman and to Mr. Starr. They were asked if it was their handwriting, and if they had prepared them, but those witnesses who were the best witnesses, as far as being capable of explaining what these records were, were not asked, for the obvious reason that counsel didn't want them to testify from their own knowledge.

They merely wanted to get those work papers into evidence so their own expert witness, basing his answer upon an expert's version of these work papers, could give them the sort of answer they expected to hear or that they wanted to hear.

You remember when I asked Mr. Hausman some questions on Exhibit 136, they objected. They didn't want me to bring out the actual meaning of the 4768 loans and exchange account on the books at all.

All they wanted to do was get it in evidence, get it in evidence alone. Getting it in evidence doesn't mean anything at all unless it is explained. They had an opportunity to have these documents explained but they didn't do that. They just had them identified and put them aside so the Government was unable to cross examine as to the basis of these unless we first agreed to put them in evidence without objecting to the foundation which had been laid for them.

Now, I think counsel have failed to produce the proper remedy with Mr. Roth. They have failed when they had the witnesses on the stand, to establish a proper foundation for the accuracy of these books and records, and the Government had no knowledge as to what sort of books and records these particular work papers are based upon, and we object to them on those grounds.

By Mr. O'Brien: All I want to say is—

By Mr. Lockley: I might point out too that the Government was denied the right to examine these 4769 work papers.

By Mr. O'Brien: All I want to say is first that when I had the papers identified by Mr. Hausman, I expressly tendered him for cross examination, although my foundation was not complete, because of the absence of the originals, but I tendered him for cross with the statement that if there were any questions that Mr. Lockley had to ask while he was on, let him ask them and to some extent he did, and also the documents so identified were available for that purpose.

Indeed, I made the suggestion, because of the ruling which your Honor had made on those two cash sheets at a prior occasion—the ordinary practice is to have them marked, to take them back and wait until they are fully connected up and then reoffer them. Because

of that ruling, I tendered the witness and the papers for any question Mr. Lockley might have.

Now, Hausman and Starr both explicitly stated that they had been retained by Roth. They stated just
4770 what their duties had been at the Eatsum partnership. They said that they took these items from the partnership books. I don't have to show that the books from which they took them are true and correct, under your Federal shop book rules. It is merely that those were books maintained by the partnership and if they think they are not true and correct, that is something that goes to their weight, but not their admissibility.

Now, indeed, the objection that there is no showing that the books from which the auditors made their work sheets, that there is no showing that those books are true and correct, I never heard of such an objection. I mean, I have never heard of such an objection generally. If they are admittedly the books of the company, if the auditor says he correctly took off what appeared on them, I don't have to, under your shop book rule, or the analogy of it—I don't have to show that the books from which he was working were true and correct.
4771 They are the books, whether true and correct or not. So I believe, particularly in the case of those two witnesses, that the only open question was the question as to where were the originals.

4772 By the Court: Well, my recollection is that Mr. Hausman—is that the name?

By Mr. O'Brien: Hausman had the bulk of the sheets.

By the Court: Starr did say that they correctly transcribed what their work sheets—

By Mr. O'Brien: Yes.

By the Court: That is, from the books, but that it appears on the work sheets. I think that was made when you made some statement that that hadn't been brought out.

By Mr. O'Brien: That is right.

By the Court: And then Mr. O'Brien went back and covered that, so I think there is testimony in the record that the work sheets correctly portray the data thereon as they appeared in the books of the Eatsum partnership.

Now then, your objection is that we have no testimony that the Eatsum books themselves were true and correct, is that it?

By Mr. Lockley: Yes, your Honor. As a matter of fact, we have evidence that the partnership return
4773 which was prepared long after Mr. Lubben left the partnership, was itself false and so obviously, the books and records from which that return was prepared must have been false and what the defense is attempting to do here now is to throw on Mr. Lubben's shoulder the responsibility for whatever false entries may have been made in those books and records after he was no longer connected with the company and when they were under the custody and control of Mr. Roth and Mr. Giglio.

By Mr. O'Brien: No, I am talking about the 1945 period. My sheets are in the 1945 period.

By the Court: Have we any testimony at all that the books and records which constitute the underlying data for these exhibits were made by anybody in authority in the Eatsum partnership during the period?

By Mr. O'Brien: Yes. They were made by Bercu, Judge. His testimony is here. He set up and maintained all of the books in the partnership.

4774 I put him on the stand and had him so testify. Roth and his assistants, Hausman and Starr, not only on their testimony, but on Bercu's and also on Miss Feldman's—they were the people whom from time to time would take these items off the records set up and maintained by Bercu.

By Mr. Lockley: Mr. Bercu's testimony was he maintained the records until about December 31, 1945.

By Mr. Kirby: If your Honor please, may I butt in for a second?

By Mr. Lockley: You will recall that one of the principal questions in the case up to now has been the maintenance of the currency boxes, the cash box and the corn box, which were brought out by the defendants. Obviously, those books were not complete and adequate and correct if the entries reflecting the money going through these cash boxes were not put on there, were not put on the books themselves, and we have no testimony as to

whether or not that was being done.

4775 As a matter of fact, Miss Feldman, who had charge of the books and records, says she knew nothing about the corn box. Mr. Bercu, I believe, said something of the same sort. I frankly don't recall too clearly what his testimony was on the existence of the cash boxes during the partnership. I think he said he didn't know much about it.

4776 By the Court: The photostatic copies of the books of the Eatsum partnership, are those here at all by the way of an exhibit?

By Mr. Lockley: The books of the Eatsum partnership, no.

By Mr. O'Brien: No, your Honor.

By Mr. Lockley: Let me explain.

By the Court: You entered into a stipulation that you could use secondary evidence to establish the Eatsum partnership books.

By Mr. O'Brien: That is right.

By the Court: I rather assumed both the Government and the defendants had some photostats of the partnership books.

By Mr. O'Brien: Well, we didn't know—we alluded generally to secondary evidence of their contents, if the Court please, without saying specifically what book, and these papers we are now talking about are part of the secondary evidence.

By Mr. Lockley: If your Honor please, you will recall the only secondary evidence that the Government put in with respect to that partnership period, consisted of carbon copies of invoices which were obtained from the defendant corporation itself, and Recordak copies 4777 of checks which were obtained from the bank. Now, I believe that that is the extent of it.

By Mr. O'Brien: Well, that may be, but the Judge is asking if he knows what the stipulation was. He was refreshing his memory on whether it referred to specific books, or whether it was just general. It was general.

By Mr. Lockley: Our stipulation, your Honor, as I understood it at that time, and as I undertand it today went to the books, not the work papers, and I don't believe work papers are covered by the shop book rule.

By Mr. O'Brien: The work papers made from a book are secondary evidence of the contents of the book.

By the Court: I would like to see the transcript covering the testimony of Hausman and Starr.

By Mr. O'Brien: Judge, suppose we get it out for you over the noon hour, and bring it in. I do not have—

By the Court: You need not make a special transcript of it. If you would merely give me the volume that contains that testimony so that I may find it, I would like to see the exhibit also, the appropriate exhibit.

4778 By Mr. Lockley: Mr. Starr's testimony, your Honor, appears in Volume 33 and 34 of the transcript, and Mr. Hausman's Volume 34 and 35, and Mr. Hausman's also goes over into 36. It is indexed in the front.

By the Court: Now, then, Bercu was auditor of the Eatsum partnership, from the beginning of the partnership until what date?

By Mr. Lockley: I believe it was December 31, 1945.

By the Court: And then he was succeeded by—

By Mr. Lockley: Well, Mr. Roth at that point took over the actual operation of the books.

By the Court: These exhibits cover what part of the—

By Mr. O'Brien: I didn't read the exhibit to you, your Honor, but it was December, 1945, as of December 31, 1945, November, 1945. Here is one as of May 31, 1946. I don't know just what period 66-W does relate to at this minute.

65-K is working papers covering June 1, 1945 to May 31, 1946.

Would your Honor like to see them?

4779 By the Court: I don't know. I can see them later. You can give me the page.

By Mr. Kirby: Your Honor, may I make this observation because I examined Mr. Hausman. I was the one that examined Hausman. Hausman testified that the papers he handed to him were all within the period when he was working with Lubben. He was working for Roth, but these papers are papers prepared during the life of the partnership, while Lubben was there. These are not papers, Hausman papers which were made up at any later, or disputed period because indeed, Hausman did not stay with Roth for the disputed period. He went with General Confections, and Lubben, individual, so that Hausman's papers are within a period when the partnership was in existence, and then when the objection was

made, I tried to cover that he made these concurrently, he made these work papers as a part of his regular work there, and that he transcribed them accurately, indeed, the most important of the papers, the loans and exchanges group.

I then asked him to look at one book on the partnership, which is in apparent existence, and he keyed the dol-
4780 lar amounts which appear on his work papers into the dollar amount for the same month which appear into the book.

By Mr. O'Brien: That book is here.

By Mr. Kirby: That book is in evidence. I just say that to say that as long as I examined Hausman, I remember it quite clearly. Hausman's work papers are unquestionably things that he made in his own handwriting, that he made during the time before there was a split up of the partnership, during the time Lubben was there, and he did say he made it concurrently, and he took off from the books and records what he found.

Now, I think that the proof so far as Hausman, at least on the records—I said, "Who did you give the papers to?" He said, "I gave them to Roth, the originals." And then Roth refused to testify. I think on the Hausman papers the record is quite clear.

By Mr. Lockley: I have just one comment on Mr. Kirby's statement. Although he examined Mr. Hausman, he failed to have him inquired of as to what was the meaning of any of these papers. He objected very
4781 strenuously, you will recall, when I did ask Mr. Hausman what this loans and exchanges account consisted of.

By Mr. O'Brien: Well, the Judge can read it.

By the Court: All right.

(Whereupon a recess was taken in the above case, until 2:00 o'clock p.m. of the same day, being Monday, October 12, 1953.)

4782

* * (Caption—No.—52—CR—143) * *

Chicago, Illinois,
Monday, October 12, 1953,
2:00 o'clock P. M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the jury:—

By the Clerk: No. 52 CR 143, United States of America vs. Shotwell Manufacturing Company, et al. Case on trial.

4783 GEORGE F. THOMPSON, a witness called herein on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr O.'Brien: If your Honor doesn't mind, I will stand a little close, because I think the Doctor is hard of hearing.

By the Witness: A little deaf. I heard all you said then, but—

By Mr. O'Brien:

Q. What is your full name?

A. George F. Thompson.

Q. And you are a physician, licensed to practice in the State of Illinois?

A. I am.

Q. Where do you live, Doctor?

A. 148 North Mason Avenue.

Q. Is that in the city of Chicago?

A. Yes.

Q. In the vicinity of Oak Park?

A. Yes.
Q. How long have you been practicing medicine?
A. Since 1901.
Q. And what hospitals are you identified with?
4784 A. At the present?
Q. Yes, sir.
A. At the present I am identified with St. Anne's and the Oak Park Hospital.
Q. Do you know the defendant, Frank Huebner?
A. I do.
Q. How long have you known him?
A. Approximately 40 years.
Q. And do you know his reputation in the community for honesty, veracity and integrity?
A. I do.
Q. Is his reputation good or bad?
A. Good.
Q. And was that true in the years 1945 and 1946?
A. Yes.
Q. Have you had occasion to attend Mr. Huebner and his family as the family physician?
A. Yes.
Q. And is that the chief way in which you grew acquainted with him?
A. No, socially, also.
Q. Also socially?
A. Yes.
Q. And during those occasions, and others, you
4785 have had a chance to observe him and to become well acquainted with him?
A. I have.
By Mr. O'Brien: You may cross examine.
By Mr. Lockley: No cross examination, Doctor.
(Witness excused.)

4786 JAMES A. MEAGHER, a witness called herein on behalf of the Defendants, having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your name, sir?
A. My name is James A. Meagher, M-e-a-g-h-e-r.
Q. And where do you live, Mr. Meagher?

A. I live in Chicago at 1546 West Farwell Avenue.
Q. And what is your business or occupation?
A. I handle industrial sales for a large producing coal company, the Sterling Midland Coal Company of Chicago.
Q. Do you know the defendant, Frank Huebner?
A. Yes, I do.
Q. For how long have you known him?
A. Well, about thirty or thirty-one years, I believe. Somewhere in there.
A. And what has been the nature of your association with him?
A. Well, for many years I was intimately associated with Mr. Huebner, his wife and his family, his two children. We were more or less very good friends for many years. I also had some business relations with Mr.
4787 Huebner.
Q. And from your acquaintance and experience with him, are you able to state what his reputation in the community is for honesty, integrity, truthfulness, as to whether it is good or bad?
A. From my associations with Mr. Huebner over those many, many years, I always had a great deal of respect for him. I knew he was a fine Catholic gentleman, and certainly a good family man, and a good father and husband.
Q. Well, I am forced to ask you, Mr. Meagher, merely what his reputation in the community is as to whether it is good or bad.
A. As far as I know, I would say very good.
By Mr. O'Brien: You may cross examine.
By Mr. Lockley: No questions, sir.
(Witness excused.)

FRANK J. SMITH, a witness called on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. What is your full name?
4788 A. Frank J. Smith.
Q. A little louder, Mr. Smith, please.

A. Frank J. Smith.
Q. And where do you live?
A. 1228 Columbian Avenue, Oak Park.
Q. What is your business or occupation?
A. I am a bedding manufacturer.
Q. And for how long has that been true?
A. Over forty years.
Q. Do you know the defendant, Frank Huebner or Hubner?
A. I do.
Q. How long have you known him?
A. In the neighborhood of fifteen years.
Q. And how well?
A. Well, very close, from the family angle.
Q. Do you know his entire family?
A. His wife and children and such.
Q. And have you maintained some frequency of contact with his family over the years?
A. Quite a bit, socially.
Q. Do you know what Mr. Huebner's reputation is in the community for honesty, integrity and veracity, as to whether it is good or bad?
4789 A. He is exceptionally well thought of, very good.
By Mr. O'Brien: That is all.
By Mr. Lockley: No questions, Mr. Smith.
By Mr. O'Brien: Thank you, Mr. Smith.
(Witness excused.)
4790 By Mr O'Brien: If the Court please, I have selected from the papers produced by Mr. Schwartz three instruments. One is the Wenchel speech, another is the letter or memorandum circulated to the employees of the Internal Revenue Department concerning that speech, and the third is the certified or official copy of the mimeograph of July 2nd, 1934.
Those I desire to offer in evidence.
By Mr. Lockley: Do they have numbers?
By Mr. O'Brien: They are marked Defendants' 96, 97 and 98, respectively, in the order that I mentioned them.
Mr. Lockley suggests—and I think I should accept the suggestion—that the offer of 98 is limited to paragraphs 17, 18 and 19 of the mimeograph of July 2, 1934, as those paragraphs appear in the certified photostatic copy.

By Mr. Lockley: If your Honor please, I do not object to the foundation for them, but in view of your Honor's ruling I object to the materiality.

By the Court: Well, we could take that up later
4791 and I will defer my ruling.

By Mr. O'Brien: At this point, your Honor, it would be appropriate for me to read the instruments. At least, I should like them read to the jury.

By the Court: You can read it later, if I receive them.

By Mr. O'Brien: All right.

For the record, if the Court please, I should like to offer as Defendants' Exhibit 99 the original of the subpoena duces tecum served upon Penick & Ford. I have been looking through my papers to find it. I don't readily locate it, but I have it. I had it this morning. And I would like to consider that as offered, with leave to bring it here physically later in the day when I do get hold of it.

It is a conventional subpoena, but the original, together with the return of service, and I am interested in showing the documents which it orders brought.

By the Court: We can defer that until you have the original subpoena to be marked and you can formally
4792 offer it at that time.

By Mr. O'Brien: Now, your Honor, we are at a point at which we should like to have your ruling, if possible, on those papers we discussed at the morning adjournment.

By the Court: Well, I haven't had as much opportunity as I would like to look over the transcript. Haven't you other evidence that you can take up?

By Mr. O'Brien: Perhaps we should discuss, very briefly, Judge, where we are at this time, so your Honor understands the situation. You said, if I may suggest, that you did want to discuss some things before we closed. I think it would be an appropriate place to do it now. We could do it in chambers, if you wish.

By the Court: Well, then, we can take a recess, if you suggest that.

By Mr. O'Brien: Yes.

By the Court: We will take a recess for about ten minutes.

By the Marshal: Will the audience please remain
4793 standing while the jury and the Judge leave the court room.

This Honorable Court will recess for ten minutes.

(Recess taken.)

4794 And Thereupon the following proceedings were had herein, in Chambers, outside the presence and hearing of the Jury:

By Mr. O'Brien: Here is the situation, Judge, as far as our case is concerned. We have one witness, and we have these pending matters that are in suspense.

First, the offer of the Hausman-Starr papers. The witness' testimony in part, concerns itself—or would concern itself with an item of $36,148.00, that is in the case here on the Government proof . And part of his testimony is predicated on the papers, if not all of the papers, that are exhibited today.

Second, there is a reserved ruling on our Exhibit 11 or 12. It isn't altogether clear to me.

By the Court: 11 has been received.

By Mr. O'Brien: Then it must be 12

By the Court: 12 was a check, a certified copy of a check.

By Mr. O'Brien: They are the two exhibits that Mr. McConnell proffered. It is in the record at 1086 or 1090. I think I have that transcript here. I will get it.

4795 Now, 12 comes up at page 1090, where McConnell said, "I show you document which is marked for identification—"

By the Court: Who was he examining then?

By Mr. O'Brien: McConnell is examining Lubben.

By the Court: It is a photostatic copy of a check.

By Mr. O'Brien: And he asks if he can identify the signature, and the signatures are identified as Lubben's, and Giglio's. It is a check made out to Eatsum Food Products, and has to do with a new account of the co-partnership, as drawn on their account, and the check says, "For deposit, the account of Eatsum Food Products Company."

4796 Now, the check was one for $67,000.00, as appears at page 1091.

Now, at that time the objection that was made by Mr. Lockley was that "No foundation has been laid for the absence of the original. However, if counsel is willing—if counsel will stipulate, we can put in the photostat that we have here, we will agree to the admission of the photostat of the defense."

And McConnell said, "I called on you to produce the original."

And Mr. Lockley said, "That is the original check that belonged to the partnership, your Honor, and we have had some discussion about the partnership records, outside of the presence of the jury. I think your Honor understands why they aren't here."

Now, we have a photostat of this check. The original checks of the partnership are not available to either one of us.

And that is, in our view of the matter, a rather important item because we say that the proceeds of that check went to Lubben in payment for the net worth of the proprietorship.

4797 So we offered it as No. 12 and the Court reserved its ruling.

By the Court: Have you the exhibits here?

By Mr. O'Brien: Will you get it from young George, Bill? There is a whole envelope of our exhibits there.

4798 By Mr. Lockley: If your Honor please, during the course of that colloquy, concerning that exhibit, I also objected to it on the grounds of its materiality.

By Mr. O'Brien: Well, possibly so.

By Mr. Lockley: Which I think is the more important and more significant objection than the absence of the original.

By Mr. O'Brien: Well, you do on page 1093. The Court says, "Then there can be no objection to the foundation."

By Mr. Lockley: That's right.

By Mr. O'Brien: And you say you object to the materiality and the Court says, "I will reserve my ruling until I have determined whether or not it has any materiality."

And we were directed to proceed with the examination.

By the Court: Is there any evidence as to the application of this check or is that just a surmise on your part?

By Mr. McConnell: No, it went back to the old proprietorship account. The record showed that it did.

By Mr. Lockley: Both the witnesses, Berch and
4799 Feldman, testified that Mr. Lubben received, I believe, about $35,000.00 for his half interest in the partnership and that this method of handling it on the books was one of Mr. Roth's brainstorms, I think.

By Mr. O'Brien: He did say something like that.

By Mr. McConnell: That shows its materiality.

By Mr. O'Brien: That is part of the entire story on materiality.

By the Court: Well, I will receive it in evidence.

By Mr. Lockley: I don't see how it relates to the Shotwell Manufacturing Company.

By the Court: Well, we have gone into many collateral matters, I appreciate, in this lawsuit, but, nevertheless, the arrangement between Lubben and the partnership, and the details of the financial setup has been gone into without any objection, and I suppose I may admit this, in so far as it may relate to other evidence.

(Said document was received in evidence by the Court and marked Defendants' Exhibit 12.)

By Mr. O'Brien: Now, I will find that Penick & Ford subpoena and get it in.

Then I have this, your Honor. I want to remem-
4800 ber—not that I have any additional evidence on the matter, but out of the hearing of the jury I again wish to offer in evidence our Exhibits 79, 80 and 81. Those were three of the documents brought in by Penick & Ford, the witness, Horan.

By the Court: Well, the condition hasn't changed any since the offer was made and the Court ruled. I see no reason for changing my ruling.

By Mr. O'Brien: I don't wish to argue it, Judge, but I want to suggest this, that I don't think I said then—it seemed to me that through those documents we were not only trying to, but we could prove a negative. That is the reason for the peculiarity of the proof.

You see, the witness was asked to bring all of his papers and contracts as to the Shotwell procurement of corn. He did actually select and produce and there are in evidence some five contracts that are marked Shotwell on their face.

4801 Now, if your Honor excludes these exhibits, these three that I am talking about, it leaves the matter before the jury as though those were the only possible Shotwell contracts, whereas, if you admit them, while it does not prove affirmatively that there were more, it leaves the record in a fairer position, because it leaves

the full story there, that the witness cannot say that those he produced are all that there are, or might have been.

By Mr. Lockley: I understand that the witness testified orally and was permitted to testify: I fail to see how these documents can in any way add or detract from the case.

By Mr. O'Brien: The documents corroborate and explain what he meant by that.

By the Court: I will adhere to my prior ruling.

By Mr. O'Brien: Very well.

Now, we are to the point, your Honor, where to go forward with the next witness here we have to have a ruling on the Hausman and Starr papers.

By the Court: I have given it some thought over the noon hour, and I did hurriedly read the transcript
4802 that was left with me, regarding the testimony of Bercu, Starr and Hausman.

Of course, I admitted the Bercu work sheets during the time that he was the accountant, and, I suppose, to be consistent, I must recognize that the foundation is substantially the same for these work sheets as they were for Bercu, except that we have the anomalous situation of Bercu being an auditor, so to speak, for the Lubben side of the controversy, and Roth the auditor for the Giglio side of the controversy. As far as foundation is concerned, I think the same situation prevails.

While it is true that Mr. O'Brien wasn't very complete in his examination of Roth—he might as well have gone further to obtain a ruling of the Court as to whether or not this man was acting under constitutional reservation with sufficient basis—but I don't believe that I would be justified in being too technical about that. I am satisfied that if Mr. O'Brien had asked Roth, or he had been instructed by the Court, he would have taken the same position.

I don't think I should overlook what I feel to be absolutely right in the matter.

4803 By Mr. O'Brien: Judge, I would have done it, if you hadn't heard about the proceeding before, right in the case here. I felt that you knew that.

By the Court: I am confident that Roth would refuse to answer any questions as to the whereabouts of those papers, or whether he ever had them, or anything that would throw any light upon it.

Well, if that is my reaction to it all, it seems to me I would be acting in less than good faith if I didn't rule on the matter in the light of my own reaction to the entire picture.

Now, of course, it may be argued that these work sheets, after all, don't constitute any evidence, but again we are confronted with the unusual situation of having very important papers in the hands of certain parties who were charged with a criminal offense, and were standing on their constitutional rights, and the Court is powerless to obtain results from the documents.

In view of that, it seems to me that I must not adhere too strictly to the foundation that otherwise might be required for these documents. Both Hausman and
4804 Starr testified that to the best of their knowledge these work papers accurately reflected the data on the books and records of the Eatsum partnership at the time they made their audit, and they had merely taken down certain figures in the carying out of their work as auditors. Of course, they may be piece meal data, and they may present a part of the picture rather than the total picture. And I appreciate the difficulty the Government may have under those circumstances in meeting what those work papers may seem to reflect.

But, on the other hand, I would feel hesitant to deny the defendants to avail themselves of those documents insofar as they may constitute competent evidence.

If they are irrelevant, then I take it no harm is done. If they are immaterial, no harm is done. If, perchance,—and I suppose that is what the defendants contend—they do bear on some of the issues of this law suit, I would be inclined to lean over backwards in order to permit secondary evidence to be admitted in order that no injustice might be done to these defendants on trial.
4805 I think, in view of the observations that I have made, that I will receive the exhibits.

I am assuming, and if I am wrong in my assumption, I want to be corrected—all these documents have been identified, either by Hausman or Starr, as work sheets made up by them, in their own handwriting, and that that foundation has been laid.

By Mr. O'Brien: Yes, sir; they have.

By the Court: And with that understanding I will admit them in evidence.

(Said documents were received in evidence by the Court.)

By Mr. Lockley: If your Honor please, I would like to point out that by the device of handling these documents in this particular way, the defense has very effectively prevented the Government from examining the documents, from cross examining any witnesses as to the accuracy of those documents, or from, in any way laying any foundation for the impeachment of these documents. They have refused, and have failed to comply with the Government subpoena served upon them to produce records which they have gotten hold of by some hook or crook,
and they have failed to advise the Government of
4806 the existence of documents which are not in any way
privileged, but which the Government should have as much right to as they do in order that justice is done in the case. And I think that at least the Government should be entitled to under the circumstances is an adequate opportunity for examination of all of these documents before we are required to cross examine any witnesses they may now expect to call, and attempt to
examine as to what these documents purport to mean.
4807 By the Court: Which documents do you now refer to?

By Mr. Lockley: I am referring to the so-called work sheets which were obtained in some manner or other from Giglio or the other—

By Mr. O'Brien: There isn't any "some manner or other" about it. He just gave them to me, to my men.

By the Court: To what sheets now in evidence?

By Mr. Lockley: The ones you just admitted.

By Mr. O'Brien: If I may say—you have said that twice—I would be glad to turn to the record and show you were Hausman and Starr were tendered to you for cross examination after we identified the documents.

By Mr. Lockley: Cross examination on what?

By Mr. O'Brien: On the documents.

By Mr. Lockley: I was given an opportunity to ask them whether or not there was a proper foundation laid for those documents. That was all. The documents weren't in evidence. I couldn't examine from the documents.

By Mr. O'Brien: That was all you were entitled to.

By Mr. Lockley: When I did try to examine them
4808 from one document, which I had no objection to, you complained about that.

By Mr. O'Brien: I did, but the Judge let you. You could have done the same with all those.

By Mr. Lockley: Not the ones not in evidence.

By Mr. O'Brien: You objected to them. I would have been happy to have them in.

By the Court: I don't remember whether you made an attempt to interrogate Hausman or Starr.

By Mr. Lockley: If your Honor please, you recall that when we were given those things to look at Mr. O'Brien objected to Mr. Krane using his photographic eye, or whatever it was he called it.

By Mr. O'Brien: On the cash sheets.

By the Court: That one exhibit that was in Lubben's handwriting.

If my memory serves me right, you had these exhibits to examine for some time.

By Mr. O'Brien: Over the noon recess, the whole Hausman bunch.

By the Court: In order to examine Hausman.

By Mr. O'Brien: That's right. I forgot that, but that is true. The whole package of them.

By the Court: And I think, furthermore, Mr. Lockley,
you were told by counsel that you could make Haus-
4809 man your own witness, if you wanted to, to interrogate as to the verity of these figures, or explain them, or generally go into matters outside the scope of the direct.

Now, all that they did was to establish—not the verity of the figures themselves, or what the figures meant, but merely that the data correctly reflected the information that was on the books and records.

Now, of course, it may be that you could have examined some of these witnesses as to what this means. Maybe there is an entry there that needs explanation, and it might have some bearing on the foundation as to whether or not it is material. I don't know that you did, outside of examining Hausman as to this one exhibit, and I permitted you to do so. And I don't know that you offered to cross examine him on anything else.

By Mr. Lockley: Well, if your Honor please, all I ask

at this time is that we do be given some opportunity to examine the documents before they are required for cross examination.

By the Court: You mean to cross examine whom?

By Mr. Lockley: I presume that Mr. O'Brien is going to call an expert witness in now.

4810 By Mr. O'Brien: Not at any great scope, Mr. Lockley. We have one item we are interrogating about. That is all. There is nothing too extensive.

By Mr. Lockley: O. K.

By the Court: I don't suppose there will be any objection, in view of the examination of this witness.

By Mr. O'Brien: The documents would be rather few. I don't think you have seen it.

By the Court: You should have some time to acquaint yourself further. We will cross that bridge when we come to it. I don't know now what may be in the offing.

This isn't for the record, necessarily.

(Discussion off the record.)

By the Court: I think the record should reflect this. I want it clear in the record that I tendered to Mr. O'Brien an opportunity to read the portion of the transcript of Mr. Cain's testimony as to which I modified my rulings, so that he may know and the defendants may be informed, that before they recess if they desire to read such portions of the record they are afforded an opportunity to do so.

4811 Now, off the record.

(Discussion off the record.)

4812 By the Court: I think I would want defendants to clarify in the record specifically what their position is going to be before I rule on them.

By Mr. McConnell: I am not contending that they are, so far as the corporation is concerned.

By the Court: Not what?

By Mr. McConnell: That they are within the issues. I am not contending that.

By the Court: For any purpose?

By Mr. McConnell: For any purpose.

By Mr. Kirby: So far as the defendant Harold Sullivan is concerned on this question of the disclosure, he had testified that he informed Busby on that January day of 1948 that Busby should go to the government and I think that it is important that proof be in the record.

Now, what did he tell Busby to go to the government about? He told him to go about a disclosure policy and he referred to the fact that it was explained. Busby had testified that he knew in general what a disclosure meant, generally, and therefore, it can be plain to the jury that the defendant Sullivan would like to have the outlines of such a policy shown as a matter of evidence, not for
the purpose of posing to the jury every conceivable
4813 question, but so that the jury would know what he
did, what Sullivan did in that January, 1948, set of circumstances and without some explanation by way of evidence of what that means, the picture is incomplete.

Now, that is my own view of it.

By Mr. O'Brien: So far as I am concerned, Judge, I think it is only fair to say that I know of no legal basis for any of the evidence on disclosure, including these three documents that I am talking about, except the issue of intent, good faith or wilful evasion and for no other purpose that I offer those documents.

By the Court: Well, no—

By Mr. O'Brien: I don't know what your position is going to be on instructions or what may come out of that, but regardless of what comes out, it is for this purpose that the documents are offered.

By the Court: What is your position now, Mr. Lockley, in view of the purposes for which the evidence is offered?

By Mr. Lockley: Well, if your Honor please, the testimony with respect to Mr. Sullivan's conversation with Mr. Busby allegedly in January was gone over completely
during the course of the hearings on the motion to
4814 suppress.

If that sort of thing is going to be brought out on the defense case, then the government has got to rebut it by showing that there was bad faith, that they didn't go in January, as Mr. Sullivan testified, but they went as late as March, as Mr. Sauber testified on the motion to suppress and it means we are going to be trying that issue which has been disposed of once all over again.

By Mr. O'Brien: Oh, no.

4815 By the Court: Counsel have made it very clear, as I understand their statement in the record, that they recognize that there is no issue of a voluntary disclosure as such. They contend, however, that what Mr.

Cain and what Mr. Sullivan did with reference to telling Mr. Busby to go to the government and what Mr. Cain did when he talked to Mr. Sauber, should be interpreted in the light that the so-called disclosure policy prompted them to go to the Government and tell the Government what they did and that unless there is in the record some evidence regarding the so-called disclosure policy, the bearing that their actions may have on intent and good faith will be lost.

By Mr. Lockley: Well, those are self-serving acts on their part as to which there is question as to whether they are admissible in any event, because they transpired subsequent to the commission of the crime.

By Mr. O'Brien: Judge Kennedy admitted them in the Lustig case.

By Mr. Lockley: Judge Kennedy may have done so, but he did it on the question of whether there was a compromise, in that case.

4816 By Mr. O'Brien: No. He expressly said, Mr. Lockley, in his instruction, he put it this way:

"Not on an issue of a plea at bar, nor on a question of compromise, but, l[illegible]ies and gentlemen, on the question of intent and good faith."

By Mr. Kirby: May I interpose that in Balter on tax fraud—

By Mr. Lockley: Don't rely too much on Harry Balter.

By Mr. Kirby: He cites on this question of intent that they even let a man prove he paid his taxes after he was indicted so that the date on which he did something is not controlling.

By Mr. Lockley: That is the Hindell-Rogers case, I suppose you are talking about, but the reason in that case is that the Government first brought in his amended return to show it was an admission that he owed it, that he owed the tax, but then he was permitted to come in and say yes, but I paid it as an offset.

By Mr. Kirby: You brought in the question of didn't Mr. Cain say this and so in connection with it. I think it is clearly admissible.

4817 By Mr. McConnell: Well, there is one question which is clear. When the government brings in statements of the officers of my client, in which they make admissions which are against the interests of the corporation, certainly all the facts and surroundings of that ad-

mission are admissible as evidence to explain the admission and the circumstances under which it is made. That doesn't mean we have to try a disclosure case and I don't want to. I have an antagonistic view of all of that proof.

By the Court: I would like to look over all that exhibit, that is, the Wenchel statement.

By Mr. O'Brien: I have handed them to you.

By the Court: I will look them over. I don't see that you are going to be prejudiced any if I delay my ruling until I am a little more clear as to what portion of the exhibits I will admit, if any, if I defer my ruling. You go ahead with your testimony.

All right.

(Whereupon the following proceedings were had and taken in the presence and hearing of the jury:)

(Said documents were marked Defendants' Exhibits 4818 77-A through 77-W for identification.)

(Said documents were marked Defendants' Exhibits 100 and 101 for identification.)

LEON J. BUSBY, a witness called herein on behalf of the Defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. Mr. Busby, you were sworn and you testified before?

A. Yes, sir.

By the Court: Mr. Busby, your initials are what?

By the Witness: L. J. Leon J. Busby.

By Mr. O'Brien:

Q. You testified during the government's case, did you not?

A. Yes, sir.

Q. I wanted to identify if I could the documents which are marked Defendants' Exhibits 100 and 101 respectively, for identification.

4819 I will ask you first whether in the year 1948 you prepared from the Shotwell Manufacturing Company books and records or papers the work sheets on the syrup purchases during the year 1941, that is, for the year 1941?

A. I believe these were prepared.

By the Court: You will have to speak up a little louder Mr. Busby.

By the Witness:

A. I think the figures were prepared during 1949.

By Mr. O'Brien:

Q. And were they prepared by your auditing firm?

A. Yes, under my supervision.

A. And do they represent correctly and completely in detail the purchases of the items indicated for that year, 1941?

A. Yes, they do.

Q. And is that reflected in Exhibit 101 for identification, the results of that examination?

A. Is this 101?

Q. Yes.

A. Yes, it is reflected in this.

4820 Q. What is Exhibit 100 for identification?

A. 100 is a rearrangement of the same material by vendors, and also by commodity.

Q. Can you tell us what sheets relate to corn syrup and corn products, omitting those which do not?

A. Then I don't know how to identify them. These are the ones (indicating).

Q. These are the ones that relate to the corn products?

A. That is correct

By Mr. O'Brien: Would you mark these—

By the Witness: Corn syrup.

By Mr. O'Brien:

Q. Would that include corn, sugar and starch also?

A. Starch is in a separate section.

Q. The last page here is starch?

A. The last page is starch.

Q. What is the middle one?

A. The middle ones pertain to something else, to cocoa.

Q. No. I mean these (indicating).

A. These are syrup, corn syrup.

4821 Q. These (indicating)?

A. These, the cocoa. That is another product.

By Mr. O'Brien: Will you please mark these sheets?

By the Court: 100 or 101?

By Mr. O'Brien: I am having marked these specific sheets 100-A through 100-M.

(Said documents were marked Defendants' Exhibits 100-A through 100-M, inclusive, for identification.)

By Mr. O'Brien:

Q. Now, Mr. Busby, the ones pertaining to starch I have marked 100-I, J, K, L, and M. Those which you designated pertained to corn syrup, I have had marked 100-A, B, C, D, and so forth through H.

By the Court: Now, am I correct, Mr. O'Brien, in assuming that Exhibits A to H cover corn syrup, and from I to M, cover corn starch?

By Mr. O'Brien: Yes, sir. Those are the two commodities.

By the Witness: That is correct, in that section.

4822 By Mr. O'Brien: You are correct on the numbers, Judge.

By Mr. Kirby: Corn syrup, Mr. O'Brien.

By Mr. O'Brien: Corn starch and corn syrup.

By the Court: All right.

By Mr. O'Brien:

Q. Now, do all of these detail sheets of Exhibit 101 pertain to the same items, or do they include something else?

A. They include other commodities as well as the corn syrup and corn starch.

Q. Could you readily identify those which pertain to the starch or syrup, or are they comingled?

A. No, they are segregated in specific columns for starch and for corn syrup.

Q. But not by page, not separated by page?

A. Each page shows that classification.

Q. It shows a mixed classification?

A. It shows a mixed classification.

Q. So I have to put in all the sheets to get the total of the corn syrup and the corn starch?

4823 A. Correct.

Q. All right.

By Mr. O'Brien: I will offer the documents, Judge, as Defendants' Exhibits 100 and 101, the 100 including only the lettered sheets.

By Mr. Lockley:

Q. This Exhibit 100, Mr. Busby, relates only to '41, does it?

A. Yes. That is my understanding. I would have to look at it again. Yes, 1941.

By Mr. O'Brien: That is what it was intended to do.
By Mr. Lockley: I wanted to make sure.
By the Witness: That is correct. It is on the bottom.
By Mr. Lockley: If your Honor please, with respect to Defendants' Exhibit 100, I object to the inclusion in that document sheets other than those marked for identification, and suggest that those which have been marked for identification be segregated and separated from
4824 the balance of the document.
By Mr. O'Brien: That is agreeable to us, but I will do it afterwards.
By the Court: Let me see if I understand what the exhibits cover. Does the exhibit cover the year of just 1941?
By Mr. O'Brien: Yes, sir.
By the Court: That is, Exhibit 100, A through M, inclusive, covers corn syrup and corn starch?
By Mr. O'Brien: Right.
By the Court: What is 101?
By Mr. O'Brien: The 101 is the detail on the same items. I may say that 100 is according to classified,—according to vendors of those items. 101, as I understand it is the detail on the purchases comingled, inextricably comingled with other data which I can't physically separate.
4825 By Mr. Lockley: I object to 100, your Honor, on the ground that it is immaterial and irrelevant because it relates to the year 1941.
By the Court: Well, what is the purpose of the offer when you limit it to 1941?
By Mr. O'Brien: Because 1941 shows, the evidence shows was the base year.
By the Court: In other words, you contend that is the year upon which the allocation was based?
By Mr. O'Brien: There has been such a contention and I am sure it was in 1941.
By the Court: May it not be material, counsel?
By Mr. Lockley: Your Honor, there has not been that testimony with respect to all of the various companies which are listed in this exhibit. I don't believe that we have had such testimony from A. E. Staley, as I understand it. The vendors listed here are American Maize Products, Anheuser Busch, Corn Products Sales Company,

Penick & Ford, Union Sales Corporation, and Cer-
4826 tified Products Company. We have had no testimony,
as I recall, as to Anheuser-Busch, as to what base period they may have used, whether it was 1941 or not. Hubinger isn't in here.

By the Court: What do you say about it?

By Mr. Lockley: There may be—

By Mr. O'Brien: I am trying to show what their situation was in that year as to the purchase of commodities of that kind.

By the Court: It would be only material in so far as the refiners may have used that as the base period for allocation in 1945 and 1946 and Mr. Lockley says you haven't established that Anheuser-Busch, for instance, used that as their base period. Whether there was any variance among these various refiners, I don't know.

By Mr. Lockley: My recollection of the testimony, your Honor, is only Corn Products Sales Company and Penick & Ford have testified as to the use of 1941 as a base period. The other four vendors who are listed here
have not so testified. If I am wrong, I wish counsel
4827 would correct me.

By Mr. O'Brien: As Mr. McConnell reminds me, his cross examination shows it was general throughout the industry to take 1941 as a base.

By Mr. Lockley: I think there was no general testimony of that sort. I asked specific witnesses representing specific concerns whether they used 1941 as a base. I don't recall that I asked what the practice was.

By the Court: Was it a part of the OPA?

By Mr. O'Brien: No. They had the voluntary basis. The prices were, but the allocation was on a voluntary basis, where it existed at all.

By the Court: You will have to check the record.

4828 By Mr. Lockley: As to those companies which have
actually testified that they used 1941 as a base, I have no objection as to the use of recapitulations as to those companies.

I object to Exhibit 101, your Honor, on the ground that it contains information as to the use of raw materials, including sugar, corn syrup, chocolate, corn sugar, starch, milk, cocoa, and the other items, as to which there has been no testimony other than the corn syrup itself.

As a matter of fact, the testimony has been that there was no corn, that there was no sugar, and chocolate or milk, or cocoa bought in the black market.

By Mr. O'Brien: Well, I am limiting the offer to the corn syrup, and corn starch data in columns, as your Honor can see, and the preparation is a very voluminous effort.

By the Court: What does it purport to cover with 4829 reference to corn syrup and starch?

By Mr. O'Brien: Why, it shows the quantities purchased during the year, does it not?

By the Court: 1945 and 1946?

By Mr. O'Brien: No. 1941.

By the Witness: By date.

By Mr. O'Brien: Sir?

By the Witness: By date.

By Mr. O'Brien: Perhaps I can show your Honor on the sheet. Part of the information contained on the sheet is all I have reference to. I am not interested in having the rest of it.

By the Witness: The rest of it is as to how long they came—

By the Court: Well, it shows the total amount of corn syrup and starch purchased during 1941, from these various companies, is that it?

By the Witness: That is correct.

By Mr. O'Brien: It does show the companies and the quantities and the date. First, all I am doing in 4830 offering this now is to lay a foundation for the testimony of the next witness, because the work is so exhaustive in making this recap, that where Mr. Busby had already done it, I didn't want the other witness to have to do it for those years. It is just a preliminary thing. I am perfectly happy if the balance of the sheet is excluded, and it be confined to the corn syrup as to the corn starch.

By the Court: Well, Mr. Lockley makes the objection, however, that there isn't any evidence that these other companies allocated to Shotwell in the 1941 period.

By Mr. O'Brien: That will become important, I think, only during the testimony of the other witness, but I do what the foundation is as we arrived at it, so I have some identifiable papers.

By the Court: I don't understand how it would only

become important with reference to the other wit-
4831 ness. If these other companies did not allocate Shot-
well on the 1941 purchases, that other testimony is immaterial.

By Mr. Lockley: I would like to point out the testimony of Penick and Ford's representative was that the 1941 allocation base was used whenever possible, but that they also attempted to provide additional material over and above the allocation, and insofar as Hubinger was concerned, there was no—

By the Court: That might go to the weight of it, rather than the competency.

By Mr. Lockley: As to Exhibit 101, furthermore, that also contains the names of various vendors who have not testified here, that they used 1941 as a base period in allocating corn syrup or starch.

By the Court: Well, then, moreover, wouldn't you have to show that Shotwell in 1945 and 1946 bought corn syrup from these various concerns?

4832 By Mr. O'Brien: I intend to, Judge. I tried to express that when I said I have a witness to come on that subject and he has some summaries but I did not want that witness to spend months developing the same information as to 1941 that Mr. Busby already developed years ago.

By the Court: I suppose you can show the amount of corn syrup that Shotwell bought in 1945 and 1946 for the foundation.

By Mr. O'Brien: Through the other witness.

By the Court: Yes, without the reference as to whether or not it was allocation or whether it was just purchases without allocation.

By Mr. O'Brien: Well, some of his testimony relates to 1941 and to the extent it does, I want it to be based on this so far as a foundation is concerned. Now, on materiality, your Honor can deal with it then.

By the Court: I will sustain Mr. Lockley's ob-
4833 jection if you are offering 1941 as a base period for these companies in allocating corn syrup to Shotwell in 1945 and 1946. You haven't laid sufficient foundation.

By Mr. O'Brien: Well, I can't tell you that I am interested in proving allocations. I mean, that isn't it. I am making the evidence available. If Mr. Lockley doesn't want it, it is all right with me.

By the Court: Well, it is all right with me too.
By Mr. O'Brien: O. K.
Do you have any questions or is Mr. Busby through?
By Mr. Lockley: Did your Honor rule on Exhibit No. 100? I had the same objection with respect to it.
By the Court: I understood 100 is a mere classification of 101, isn't that right?
By Mr. Lockley: By companies, yes, sir.
By the Court: I make the same ruling, that I limit
4834 it to those companies you have testified—or rather had their representatives testify that Shotwell was under an allocation on the 1941 base.
As to the other companies, I will sustain the objection.

(Said documents were received in evidence by the Court.)

By Mr. Lockley: I have no questions.
By Mr. O'Brien: That is all.
(Witness excused.)

4835 FREDERICK B. ANDREWS, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Redirect Examination by Mr. Kirby.

Q. What is your name?
A. Frederick B. Andrews.
Q. Mr. Andrews, the acoustics in this room are not very good and you are going to have to speak up.
Where do you live?
A. Glencoe, Illinois.
Q. What is your business?
A. Public accounting.
Q. For how many years have you been in public accounting?
A. Since 1908.
Q. By yourself or with firms, or what?
A. I have been by myself since 1921.
Q. And the name of your firm?
A. F. B. Andrews & Company.
Q. Where is it located?
A. One North LaSalle Street, Chicago, Illinois.

Q. In connection with certain of the accounting
4836 questions in this case, we have retained you to look into them, is that true?

A. Yes, sir.

Q. I want to show you certain of the documents that have already been introduced in evidence and first of all I want to show you a Government's Exhibit 63 and ask you what is that exhibit, generally?

A. It looks like a statement of the bank account of Eatsum Food Products Company, 1841 Broadway, New York, with Manufacturers Trust Company of New York for the month of—or for the period from November 15th to November 30th, 1945.

Q. Do you find a check clearing the bank in the amount of $36,148.35?

A. Yes, sir, on November 27th.

Q. I now show you a document introduced by the Government, which is marked 63-A and that I can describe generally as what has been called a recap sheet here. Do you find on that document an item showing balance due?

A. Yes, sir.

Q. What is the dollar amount stated of that?

A. $36,148.35.

4837 Q. Now that being the same amount as this check that cleared here (indicating)?

A. Yes, sir.

Q. Now I show you another document which is marked Defendants' Exhibit 21-A and ask you—

By the Court: What is that number, please?

By Mr. Kirby: It is 21-A, your Honor.

By Mr. Kirby:

Q. Now, that purports to be a work sheet of the Bernard Bereu & Company, doesn't it?

A. It is a work sheet that has imprinted on it "Bernard Bereu & Co., Certified Public Accountants."

Q. And what period does it purport to cover?

A. It is a statement as at a date, November 30, 1945, and it appears to cover transactions for a period begun June 1, 1945, and ended November 30, 1945.

Q. And on that Bereu work sheet, do you find that item of $36,148.35?

A. There is a debit entry in that amount on this sheet under date of November 27th.

Q. Now, then, I show you Exhibit 21-B for the de-
4838 fense, and that has been identified by the witness Hausman as having been made in his handwriting, and as of what date does that purport to speak?

By the Court: That is Exhibit 21—

By Mr. Kirby: B.

By the Court: Defendants' Exhibit B.

By Mr. Kirby:

Q. What is the latest date on it?

A. It appears to represent receipts and disbursements in the month of November. I don't see a year mentioned here, but some of the figures are the same as appearing in this November 30, 1945 statement which is Exhibit 21-A.

Q. And particularly, does the $36,148.35 item appear on the Hausman work sheet just as it did on the Bercu work sheet?

A. That is on Exhibit 21-B.

Q. Yes.

A. Under date of November 27th, yes, sir.

4839 Q. Now, then, I will show you a sheet which is marked Defendants' Exhibit 21-C, and testimony as to that is it is in the handwriting of the witness Hausman, who identified it, and that purports to be what, Mr. Andrews?

A. That purports to be an analysis of the balance in the loans and exchanges account of Eatsum Food Products Company as of December 31, 1945.

Q. What date?

A. December 31, 1945.

Q. And is there a balance given for charges against David Lubben personally?

A. There is an amount with respect to D. G. Lubben, of $65,570.49, a debit amount.

Q. Is that $65,570.49 charged against Lubben?

A. Yes. It shows here as a debit opposite his name.

Q. Is the detail given on that sheet of what makes up the $65,570.49?

A. No, sir.

Q. I show you another exhibit which is Defendants' Exhibit 21-D, and ask you—or, I will tell you that
4840 the witness Hausman testified that that was in his

handwriting, and I will ask you if that purports to show the detail of 21-C, the preceding sheet?

A. It purports to show the detail of the item of $65,570.49 under the initials "D.G.L."

Q. And is that $65,570.49 the same items as shown on the line, "D. G. Lubben" on the preceding exhibit?

A. The same amount, yes, sir.

Q. Does it show what makes up that total of $65,570.49?

A. Yes, sir.

Q. This $36,148.35, does that appear there?

A. It does.

Q. And against whom is it charged?

A. It is included in the items aggregating a net amount of $65,570.49 under the initials "D.G.L." and under date of November 27th.

Q. And is November 27th the same date as the date that this check cleared the bank, as is shown by Government Exhibit 63?

A. Yes, sir.

Q. Now that sheet there, where it is charged 4841 against David Lubben, is made out how many months —well, it purports to be made out how long after the check went to the bank?

A. It shows a balance of at December 31, 1945, when the check had cleared the bank on November 7th—November 27th, a little over a month.

Q. Now, I show you one which Mr. Hausman testified—it is 21-E, for the defense—that is in his handwriting, and he testified he made it up at the end of February, 1946. Am I correct that that purports to speak as of the end of February, 1946?

A. Yes, sir.

Q. Now is there a charge shown on there against Lubben?

A. There is.

Q. How much—or let me ask it this way: Is that $65,570.49 item or total still charged against Lubben?

A. Yes, sir.

Q. So that that $36,148.35 item as to the end of February, 1946 is still charged against Lubben, is that right?

A. Yes, sir.

Q. I now show you a document which is Exhibit 4842 36 for the defense, and this is a sheet which the evidence says came from the only book of the partnership that remains, that is in existence, and ask if you have examined that? Have you?

A. I have.

Q. Now does that have some balances on the loans and exchange account?

A. This is the loans and exchange account, and it shows a balance at the close of—I would say eight months, although I haven't checked it for every month, but it looks to be every month—it shows a balance in the account.

Q. And on Exhibit 21-E, there is a balance of $105,864.07 shown. Is the same thing shown on Defendants' Exhibit 36?

A. Yes, sir.

Q. So do these two, Mr. Andrews, key together?

A. The Exhibit 21-E appears to be an analysis of the balance of $105,864.07, as of February 28, 1946, which also appears as the balance on Exhibit 36.

4843 Q. Now Exhibits 21-C and D, they give the balance and then the detail as of 12-31-45, do they?

A. 21-C gives the detail of the balance of December 31, 1945 in the amount of $82,915.82, which also appears at that date in Exhibit 36.

21-D shows a balance at October 31, 1945, of $38,002.42 which also appears under that date in Exhibit 36.

Q. Does 21-A also key to the ledger, the one ledger that is in existence so far as the partnership is concerned?

A. 21-A shows a balance of $70,854.21 which also appears in Exhibit 36 as the balance at November 30, 1945.

Q. Mr. Andrews, did I request you to have enlarged some of these exhibits that have been referred to?

A. I think technically, you asked me, sir to examine some that had already been prepared.

Q. All right. I attended to the mechanics of it, that is right, and you have examined these that I have on this easel and you notice the exhibit stamps appearing on the bottom of them, do you, sir?

4844 A. They are the same as those you have been discussing?

Q. Yes.

A. Yes, sir.

Q. And then this (indicating), that is this black one, it is the little page which is Exhibit 36, isn't it?

A. Yes, sir.

Q. Now, Mr. Andrews, will you be good enough to come here, please, and just trace for the Court and the jury where this $36,148.35 item appears through these sheets. I am not sure they have been placed here in the right order.

I notice there is 21-A. Just trace it through pointing out where it appears and explaining, will you, who it is charged against?

A. On Exhibit 21-D—

Q. Will you stand on the other side, so the Court can see it also.

By Mr. O'Brien: Why don't you pull it over?

By Mr. Kirby: Well, then the Court can't see it.

By the Witness:

4845 A. Exhibit 21-D, appears as the fourth item in the little table which is headed by the initials "D. G. L."

By Mr. Kirby:

Q. What appears—

By the Witness: The item of $36,148.35.

Q. Yes.

A. It is a part of a total of $70,218.89 which represents the sum of debits being on the left hand side.

On the right hand side there are some credits that aggregate $4,648.40 which, taken away from the $70,218.89 leaves a net debit of $65,570.49.

Q. And that is under the sub heading "D.G.L."?

A. That is correct.

Q. Now this is the check then that we are talking about, and it is under that sub heading "D.G.L."?

A. It is the same amount and bears the same date.

Q. All right. Now, Mr. Andrews, is the exhibit to which you just referred connected with 21-C?

A. Yes, sir. The net amount of $65,570.49 which appears in this small table in Exhibit 21-D appears also in 21-C as a part of a total of $83,415.82 of debits from

4846 which $500.00 credit is taken away to produce a balance at December 31, 1945, of $82,915.82.

4847 Q. My question really is this: The sub total of $65,570.49 on 21-D, which includes the check for $36,148.35, that is the $65,570.49 sub total, is that right?

A. That is correct.

Q. And then on this exhibit (indicating) against whom is that $65,570.49 charged?

A. D. G. Lubben.

By Mr. O'Brien: Which exhibit?

By Mr. Kirby: 21-C.

By Mr. Kirby:

Q. Now, is that $65,570.49 which is charged against Lubben, and which includes that $36,148.35, shown again in the February, 1946 recapitulation?

A. That recapitulation being Exhibit 21-B, the answer is yes, sir, it does. It is shown.

Q. And who is charged against?

A. D. G. Lubben.

Q. This black sheet here is Exhibit 36, Mr. Andrews.

A. Yes, sir.

Q. Am I correct in believing that there are sub totals in pencil along in this first big column?

4848 A. The figures to which you have been pointing are balances representing the excess of the sub totals in the column headed "debits" over the corresponding sub totals—that is, the totals of the same date in the column headed "credits".

Q. And do those balances in each case agree with the balances on these sheets in the 21 series?

A. As to the ones I have already testified to, yes, sir. I haven't checked any others.

Q. But they do agree with those?

A. Yes, sir.

Q. Now, is there any place—oh, now, the latest balance on this 21 series that we have is $105,864.07.

A. Yes, sir, as of February 28, 1946.

Q. And is that balance of $105,864.07 shown as at the end of February, 1946 on this exhibit 36?

A. Yes, sir.

Q. And up to that point, at least, am I correct that it is charged against Lubben personally?

A. I think so, from the statements that we have been discussing.

4849 Q. By the "statements", you mean exhibits?

A. The exhibits we have been discussing, yes, sir.
4850 Q. Now, during the remaining life, the remaining life of this Exhibit 36, is it ever taken off and charged against anybody other than Lubben?
A. There is not enough taken off at any time after that date to include that $36,000.00.
Q. So that it remains?
A. I would say the answer to your question is no.
Q. That it wasn't taken off and that it remains in there?
A. Yes, sir.
Q. Now will you resume your chair, please.
By Mr. Kirby: I now find, your Honor, that after going to all the trouble of getting it enlarged that I didn't get it enlarged enough so as to make it visible to the Court and the jury at all. I thought that it would be large enough.
By Mr. Kirby:
Q. Now, Mr. Andrews, is there any time from the date the check was cashed, the $36,148.35 check, I mean up
4851 to the end of this record, where it is charged against Shotwell?
A. I haven't seen Shotwell's name on here anywhere, have I? I don't think so.
Q. The only name you have seen it charged against was who?
A. With respect to that thirty-six thousand dollar item?
Q. Yes.
A. It is D. G. Lubben.
Q. And how late a period, what is the latest period shown on Exhibit 36?
A. May 31, 1946.
Q. And that is how many months after the check cleared the bank?
A. Six months.
Q. So that at least for six months it was charged against him and not Shotwell?
A. Yes, sir.
Q. Mr. Andrews, we have had a good deal of discussion in this case about corn and corn products and corn syrup and corn starch and corn sugar.
Did I request that you make certain summaries with

respect to the purchases of corn products by Shotwell?
4852 A. Yes, sir.

Q. Did you do some work and prepare some summaries?

A. Yes, sir.

Q. Will you keep your voice up and tell just exactly how you went about your work. What did you do?

A. I examined some tabulations of those purchases which had been made by another accountant.

Q. That is, Busby's office?

A. Yes, sir. So I was told.

Q. Yes.

A. I compared with those tabulations.

By Mr. Lockley: Well, just a minute, your Honor. I object unless the witness identifies the tabluations that he is referring to.

By Mr. Kirby: These tabulations, these exhibits which have been marked 100 and 101.

By Mr. Kirby:

Q. I am not asking you to read from them, but just so we can identify them, are those the ones you did some work on?

A. These are the among the tabulations, yes,
4853 sir. There were others.

Q. And that is for what year?

A. For 1941.

Q. Well, what did you do? What work did you do with respect to 1941, Mr. Andrews?

A. I compared original invoices against Shotwell by the suppliers of these corn products.

Q. Where did you get those invoices?

A. From the files that are now in the office of the United States Attorney.

Q. Here in the court house?

A. Yes, sir.

Q. In other words, you went and got the invoices from the suppliers to Shotwell?

A. Yes, sir.

Q. And checked? What did you check the original invoices against?

A. Against the tabulations.

By Mr. Lockley: Well, just a moment, please. I object, your Honor, unless we are told what invoices he compared, from what suppliers.

By Mr. Kirby:

Q. Very good. What suppliers?

4854 A. We are talking now about the year 1941.

Q. Yes.

A. American Maize Products Company, Anheuser-Busch, Incorporated, Corn Products Sales Company, Penick & Ford, Ltd., Incorporated, A. E. Staley Manufacturing Company.

By the Court: What is the last one.

By the Witness: A. E. Staley Manufacturing Company.

By the Court: Spell it, please.

By the Witness: S-t-a-l-e-y.

By the Witness:

A. (Continuing) Union Sales Corporation. Certified Products Company. That's all for 1941.

4855 Q. When you checked the invoices, did you also make some running tabulations?

A. Those tabulations had already been made, and I made tick marks on them to indicate that I had examined the invoices which were tabulated there.

Q. Did they check out?

A. Yes, sir.

Q. And then after you confirmed them, did you make some summaries of purchases?

A. I did.

Q. And in what form? That is, were the purchasers, the suppliers, and purchases, by months?

A. There was a line for each month.

There was a pair of columns for each supplier. One of those two columns related to poundage, and the others the dollars and cents.

Q. And what products did you cover?

A. Corn syrup, corn sugar, boiling starch, and molding starch.

Q. Now, did you then make the same type of a summary for various suppliers for the years 1945 and 1946?

A. I did. It was possible that in those years there
4856 was a supplier who had not been named for '41, and possibly for those years a supplier which I named for 1941, who did not appear in 1945 and 1946.

Q. But whomever the suppliers were for the respec-

tive years, you put down the purchase from them by month, and both quantity and pounds and dollars, is that right?

A. Yes, sir.

Q. Now how much of a search against the original invoices did you make for 1945 and 1946?

A. Enough to know that I have seen every invoice for those years which were listed on the tabulations that I referred to.

Q. Every one?

A. Every one. There was one exception in 1945, and six in 1946.

Q. And how many invoices then altogether did you examine, roughly, for the year 1941?

A. Oh, I would say probably between fifty and a hundred, although I made no effort to get the number of cases, and it isn't clear in my mind now.

Q. And then a large number of invoices for 1945 4857 and 1946?

A. Yes, sir.

Q. Did you make a summary also of those tabulations in some fashion, Mr. Andrews?

A. Yes, sir.

Q. Do you have that with you now?

A. Yes, sir.

Q. Will you hand them to me, please?

(Documents handed to counsel.)

By the Witness:

A. Wait. That isn't one of them.

By Mr. Kirby:

Q. No, that isn't one of the total tabulations.

By Mr. Kirby: Will you please mark these exhibits 102, and so forth?

(Said documents were marked Defendants' Exhibits 102 through 109, inclusive, for identification.)

By Mr. Kirby:

Q. I show you documents marked Defendants' Exhibits 102, 103, 104, 105, 106, 107—4 and 5 by inadvertence, were both put on the same—excuse me. Suppose we just have these marked over again. I put them 4858 down in such a fashion that I confused you.

By Mr. Kirby: Your Honor, the way I put them down confused the young lady.

(Said documents were marked Defendants' Exhibits 102, 103, 104, 105, and 106 for identification.)

By Mr. Kirby: I will withdraw that last question.

By Mr. Kirby:

Q. I ask you if Exhibits for identification on the part of the defense, 102, 103, 104, 105, and 106, are those summaries?

A. Yes, sir.

4859 Q. And without reading any of them into the record will you just briefly describe by document number what each of them is.

A. Exhibit 102 is a summary of corn syrup purchases by months and by suppliers for the years 1941, '45 and '46.

Exhibit 103 is a similar summary with respect to corn syrup purchases.

Exhibit 104 is a similar summary with respect to boiling starch purchases.

Exhibit 105 is a similar summary with respect to molding starch purchases.

Exhibit 106 is a summary of the other four.

By Mr. Kirby: Now I am seeking, if the Court please, to proceed without calling the Court's attention to the fact that on 102 we have a name of American Maize Products Company with respect to which there was the witness, Miller; we have the name Anheuser-Busch, but it appears that there was no supplying by Anheuser-Busch in '45 and '46, they only supplied in '41; we have the name of Corn Products Sales Company, as to which 4860 there was the testimony of the witness Adam, the witness Godfrey and the witness Aiger; we have the name of the Hubinger Company as to which there was the testimony of the witness Robinson; we have the name of Penick & Ford, Ltd., as to which there was the testimony of the witness Horan; we have the name of A. E. Staley Manufacturing Company, as to whom there was no testimony, except that—

By Mr. Lockley: I object, your Honor. If there was no testimony, there was no testimony.

By Mr. Kirby: I said—

By Mr. Lockley: There should be no exception.

By the Court: Go ahead.

By Mr. Kirby: Except that the witness Mike Cohen said—

By Mr. Lockley: Well, I object to what the witness Mike Cohen may have said about A. E. Staley, if your Honor please.

By the Court: Let me hear it, anyway.

By Mr. Lockley: It is hearsay, before he starts.

4861 By Mr. Kirby: The witness Mike Cohen testified that the only corn products company in the country that didn't require corn deals was A. E. Staley, so that I would think in the absence of any other testimony, it may be that the Staley portion should not stand. That testimony of Mike Cohen, with respect to his exculpatory remarks as to Staley, is the only thing about Staley, specifically, in the record.

The next name is Union Sales Company. No witness of Union Sales testified. But the testimony of the witness Cohen, of the witness Godfrey, of the witness Adam, of the witness Robinson, of the witness—not Horan, he didn't venture that—but Miller, the witness Cain, the witness Sullivan, all were to the effect that these companies—and I invite the Court's attention that they were named specifically—the whole industry, except Staley always seems to be excluded, these people were names as requiring corn deals. But I will say that that is

4862 my summary of the proof as it rests in my memory.

Now, then, I would say this, that I could omit asking this witness about Staley and we could block out the figures and include the figures as to Staley. There would be no question, I think, as to all the other figures, unless there is an argument about Union Sales. And on Union Sales, no man from Union Sales testified, but the practice, the universality of the practice was testified to repeatedly.

Now, it would go to its weight, and the proof is not as strong on Union sales as it is on the others. But the proof does exist.

4863 By Mr. Lockley: If your Honor please—I am sorry, Mr. Kirby, I thought you were through.

By Mr. Kirby: Well, we have much the same situation as to these other products, your Honor. It was testified

that the boiling starch and molding starch, that they were a corn product, that they were all in short supply, and that they were all used in the confectionery field.

And you will notice, for instance, in the Robinson testimony, he listed the starch purchases, and sugar purchases, just the same as the syrup. And they are all on this difficult supply situation.

So I offer all of these, Mr. Lockley, subject to the exception as to Staley on each one.

By Mr. Lockley: Now, that Mr. Kirby has concluded his testimony, your Honor, I would like to object to the use of these documents on the ground that the testimony which relates to them was limited to Perfick
4864 and Ford, to Corn Products, and to Hubinger, that there were any corn deals whatsoever with Shotwell. None of the others testified as to any of the so-called corn deals, irrespective of what this condition may have been in the trade.

Furthermore, none of these witnesses testified as to 1941 being a base year for allocation purposes. And those who did so testify, as to having base years, also testified that they did not rigidly adhere to such allocations, but that it varied from time to time, depending upon the amount of product they had on hand.

I further object to them on the ground that they are immaterial and irrelevant.

And, may I say further, there was no testimony whatsoever that I can recall about any molding starch, and about any boiling starch. This is the first time I heard that language.

And Hubinger testified that they had no dealings
4865 with the Shotwell Company in 1941, that their base was in 1942, so I recall it.

By Mr. Kirby: That's right. We don't claim purchases from Hubinger in '41, Mr. Lockley. Your memory is right on it.

By Mr. Lockley: So I think an improper foundation has been laid, your Honor, for the admission of these schedules.

By the Court: What do you propose to prove by the comparison of 1941 invoices and the 1945 and '46 invoices of these various products?

By Mr. Kirby: We propose to prove—

By Mr. Lockley: If your Honor please, I believe I would like to have this testimony of Mr.—pardon me, this statement of Mr. Kirby's out of the presence of the jury.

By the Court: I see no objection to it.

By Mr. Lockley: All right, sir.

By Mr. Kirby: I would like to prove the quantities required by this business in '45 and '46.

4866 By the Court: Quantity required?

By Mr. Kirby: Yes.

By the Court: Well, you can show that you bought.

By Mr. Kirby: That is what I should have said. The '45 and '46 figures basically show what we bought, and they show it by months.

By the Court: Well, I take it you have no objection to that, Mr. Lockley?

By Mr. Lockley: Not at all, your Honor, as to 1945 and 1946. We will stipulate as to how much they bought.

By the Court: All right.

By Mr. Lockley: As to what their books show.

4867 By the Court: Now, then, in the absence of some testimony as to the method of allocation, if any, between the 1941 figures and the 1945 and '46 figures, as to the companies to which there has been no reference in the record, it seems to me that you can't draw any such deductions from comparing 1941 figures with 1945 figures.

By Mr. Kirby: Well, if the government doesn't want us to put in evidence—

By Mr. Lockley: If the Court please, the government is only trying to get before the jury the appropriate facts in the case. If we are going into every by-alley, every sideline, every possible diversion, we would be here forever. We have already gone into all sorts of improper, immaterial matters, and this, I believe, is just another one.

By the Court: I think, Mr. Kirby, that I will limit the exhibit to your purchases in 1941, from those companies who stated that your allocation was based on the

4868 1941 sales.

Now, granted that there is some uncertainty in the testimony as to just how much you got, because there was some testimony as to 80 per cent, then it was lowered, but be that as it may, I think that goes to the weight.

But as to the companies with reference to which there has been no testimony as to the 1941 base, I will sustain the objection.

By Mr. Kirby: Well, your Honor, I have at the extreme righthand side—it just so happens that the only two as to which there could be a question, is Staley and Union. Now, there is no testimony as to Staley except Mike—

I can tear that off, on the righthand side, or just have the witness not refer to it, and then tear it off later on, if you would like.

By the Court: I do want to have him examine the exhibit very thoroughly. If that could be done and come
4869 within the scope of my ruling, good and well.

By Mr. O'Brien: I think it ought to be amongst the papers in the record, Mr. Kirby. The Judge is admitting only the part of it that he says.

By Mr. Kirby: Then that would be American Maize, Corn Products—

By Mr. Lockley: If your Honor please, I recall no testimony that American Maize had any corn deals with the Shotwell Manufacturing Company, in '41.

By the Court: We are speaking about the allocations.

By Mr. Lockley: But I assume the allocation in 1945 has some relationship to the amount bought in 1941. And if the amount in 1945 is greater than the amount in 1941, presumably it was necessary for the Shotwell Manufacturing Company to enter into some corn deals.

Now, there has been no testimony that there was any such corn deal. So the presumption just did stand.

By the Court: Well, in any event, I think it is
4870 proper for the defense to show a comparison between the 1941 and 1945 figures as to those companies who allocated Shotwell on the 1941 base.

Your argument goes to the weight of it, Mr. Lockley, not necessarily the competency.

4871 By Mr. Kirby: Then I will offer 102 with respect to American Maize, Corn Products—

By Mr. O'Brien: They are already offered and received, except for that part, Mr. Kirby.

By Mr. Kirby: Thank you, your Honor. I am wasting your time.

By the Court: I think that is my ruling. And you thought you could revamp the exhibit to come within the scope of my ruling. And that is what I left for you to do.

By Mr. Kirby: Does that apply to each of these exhibits, 102, 3, 4, 5 and 6, having in mind that 2 is the syrup, 3 is the sugar, 4 is the starch, 5 is another type of starch and 6 is the summary?

By Mr. Lockley: If your Honor please, I recall no testimony about any boiling starch, no testimony about any molding starch and no testimony about any corn sugar. This was all corn syrup to begin with. Now we
4872 are getting into all the corn by-products.

By the Court: I think there is some subsance to Mr. Lockley's position. I don't remember that there was any testimony, that you had to buy raw corn for the purpose of getting corn sugar. The testimony was exclusively directed to corn syrup.

By Mr. Kirby: The first time that corn sugar question came up was in June of 1945, in connection with—

By the Court: Are you testifying now or are you merely attempting to refer to certain testimony?

By Mr. Kirby: I am referring to the testimony of the witness John Kelly, who testified with respect to an Army Quartermaster contract that involved the use of corn sugar, and the exhibits were introduced in evidence, and they showed—and they are in evidence—that they were having difficulty getting corn sugar and therefore the Army gave them permission to use cane sugar instead
4873 of corn sugar.

Now, Kelly also testified that on the same contract involving pudding there was difficulty on corn starch. The letters show that.

By the Court: Yes.

By Mr. Kirby: Robinson of Hubbinger was asked what was molding starch and he said that is a light starch used in the candy trade. He was asked about corn sugar. He explained that. He said it was also known as dextrose. He was asked whether the problems were the same as to all the products and he said that that was true.

The witness Adam, Corn Products Refining Company, gave the same general testimony.

Now, we didn't go down the litany with everyone of these gentlemen about every one of the products. But certainly the expert proof is plain that the corn products in their entirety were difficult. And they were all difficult

for the same reason. And they were all involved in these corn deals.

4874 By Mr. Lockley: There was no testimony, your Honor, that there was any corn deal necessary in obtaining corn sugar.

By the Court: I don't recollect that testimony.

By Mr. Lockley: That the company was unable to obtain corn sugar certainly doesn't indicate that they had to have a corn deal in order to get it.

Furthermore, with respect to Exhibit No. 106, which is a summary of the other four, I must object to it, your Honor, on the ground that since it is a summary of some portions of those documents which are in themselves inadmissible, that it, in itself, is inadmissible in its present state, until it has been at least recomputed, so as to reflect only the information which your Honor has permitted the defense to introduce.

4875 By Mr. Kirby: Your Honor, 103 is the exhibit tendered with respect to corn sugar purchases.

By the Court: That is right.

By Mr. Kirby: And does your Honor rule on that, sir?

By the Court: Well, I yet haven't been convinced by what you have stated that there was any testimony on the part of the defense that it was necessary to buy raw corn, in order to obtain corn sugar.

By Mr. Kirby: Well, I have called, as best I can, the Court's attention to the fact that we did not ask about corn sugar every time we asked about corn syrup, but it was asked often enough, Judge Nordbye, that I do think that it does clearly show you couldn't get any of these corn products without making corn available. Specifically, it was so testified by certain of the witnesses, of whom I specifically and clearly remember Robinson's explanation about molding starch, and

4876 dextrose—

By the Court: Well, that is Exhibit 103, is it?

By Mr. Kirby: Yes, it is, your Honor.

By the Court: Are you also going to show your total sugar purchases during 1945 and 1946?

By Mr. Kirby: Only corn sugar, your Honor.

By the Court: How about other sugar?

By Mr. Kirby: Well, that other sugar, we are not

offering proof on that. There has been some testimony about isolated deals, like the 535,000 pounds of Turbinato sugar.

The answer is no on cane sugar.

By Mr. Lockley: I would like to remind your Honor that the testimony with respect to that was that there were no overages paid in any way whatsoever in connection with the 535,000 pounds of sugar.

By Mr. Kirby: That is right, it was a trade deal.

4877 By Mr. Lockley: There is no testimony that there was a trade deal, outside of Mr. Kirby's.

By Mr. Kirby: Well, your Honor, I can conceive that the Government may argue that we should have asked each one of these those questions, but that goes to the weight. We have gone to, I think, great effort to prove the status of the corn market. And that would encompass 103 on the corn sugar,, 104 on the starch, and 105.

By Mr. Lockley: I would like to point out to your Honor that the Government has had no opportunity whatsoever of cross examining any witnesses as to the existence of any shortage of corn sugar on the market, or of the existence of any deals for starches, and so forth.

And for counsel to now attempt to summarize by throwing in a lot of material which is entirely unrelated to the testimony which has gone on before leaves us at a complete disadvantage.

4878 By the Court: Yes, I think the Government's position in that regard is well taken. I will sustain the objection.

By Mr. Kirby: You are now referring to?

By the Court: 103.

By Mr. Kirby: Now, 104, your Honor, refers to boiling starch.

By the Court: Well, you referred to starch. I don't know whether you referred to boiling starch or molding starch. And I don't know to what extent boiling starch is used in the candy industry. You haven't brought it out.

By Mr. Kirby: Well, I don't want to shock my brother here, but the totals of what we used of boiling starch in the two years, in the indictment, are indicated

right here, and I will pass them to your Honor, and to me those are awfully big figures.

4879 By Mr. Lockley: They may be big figures, your Honor, but it doesn't mean anything on that document as it stands right now. We have no way of knowing whether there was any sort of a corn deal, or whether there were any premiums paid for the purchase of boiling starch, and we have not had an opportunity to cross examine and find out if that was the situation.

By Mr. Kirby: And I also call the Court's attention to the quantities of molding starch involved.

By the Court: This is 104. Where is the starch column on here?

Can't you offer some evidence as to what extent molding starch and boiling starch were used in the candy industry? It seems to me you could supply that evidence without too much trouble. I would be able to understand more clearly than I do right now what the relevancy might be.

By Mr. Lockley: I think that, standing by itself, it would fail to establish that there was any sort

4880 of a black market deal relative to boiling starch.

By the Court: There was testimony, as I recollect it, that if a manufacturer delivered raw corn to a supplier, the supplier would allocate a certain amount of corn syrup and a certain amount of starch.

By Mr. O'Brien: That's right.

By Mr. Kirby: That's right.

By Mr. O'Brien: In fact, you asked one of the witnesses yourself, Judge, and he pointed out to you that you couldn't get at one time the corn starch and the corn syrup, the full quantity.

By the Court: I think you can supply testimony, without much trouble, so as to indicate more clearly the relevancy of those items.

By Mr. Kirby: And is the offer of them at this time rejected?

By the Court: Yes, I will reserve my ruling on 104 and 105. And I have admitted 102, within the scope

4881 that I have heretofore indicated.

I will sustain the objection to 106 and to 103.

(Said document was received in evidence by the Court and marked Defendants' Exhibit 102.)

By Mr. Kirby: I don't think there would be any particular point in just reading off all these totals. And that is all I have to ask of you. Thank you.

They may want to ask you some questions.

4882 By Mr. Kirby: Before they get into cross, Judge, we might have some questions of Mr. Andrews in the morning, depending upon whether there is any further showing.

By Mr. Lockley: Do you want me to go ahead with my cross examination before you finish your direct examination?

By Mr. O'Brien: Subject to that, surely, in the interest of time.

By Mr. Lockley: I don't care to cross examine on incomplete documentation.

By the Court: Are there going to be any further documents.

By Mr. Kirby: No.

By the Court: At least to the extent that Mr. Andrews has testified with reference to the exhibits that heretofore have been received, you may proceed with the cross, with reference to that phase of his testimony.

Cross Examination by Mr. Lockley.

Q. Mr. Andrews, do you still have the docu-
4883 ments which Mr. Kirby gave you, relating to the $36,000.00 check?

A. Yes, sir.

By Mr. Kirby: Here is one of them.

(Document handed to counsel.)

By Mr. Lockley:

Q. Did you, Mr. Andrews, make the entries on Exhibit No. 36, which is this large document on the bulletin board; did you make those entries?

A. No, sir.

Q. Did you make the entries on Exhibits Nos. 63 or 21A, B, C, D and E?

A. As to 21 I can answer no. As to Exhibit 63, I don't know what you refer to.

Q. Exhibit 63 is an Eatsum bank statement and Exhibit 63-A is a recap sheet.

A. Oh, yes, I remember seeing those exhibits. I did not make any entries on them.

Q. So that your testimony here is not based upon what you know about these particular exhibits, but what you assume they mean, as an accountant, is that correct?

A. Well, of course, I know what I see in front of me and I interpret it on the basis of the knowledge
4884 of accounting that I have.

Q. That's right. That is based upon your interpretation as an accountant of how a loans and exchanges account would normally work; isn't that the way it is?

A. Yes, sir.

Q. And usually when there is a debit amount in a loans and exchanges account, that indicates that somebody owes the company money, doesn't it?

A. When there is a debit—if there is a debit balance, it indicates that; yes, sir.

Q. And a debit is a charge, isn't it?

A. That's correct. But the debit might be a repayment of an amount owed by the company.

Q. Well, was your interpretation of the debit balance on the loans and exchanges account that Mr. Dubben owed that much money to the Eatsum Food Products Company?

A. That is what I would understand from that account; yes, sir.

Q. And that would be the normal way that such a transaction would be handled, wouldn't it?

A. Yes, sir.

Q. That is in accordance with common and ac-
4885 cepted accounting procedure, in other words?

A. Yes, sir.

Q. Now, assume that it was testified to here that the loans and exchanges account was not used to charge loans and exchanges, as such, but that it was used as a holding or a clearing account for checks issued to cash for the purpose of getting money to pay premiums, would your testimony be any different?

4886 By Mr. Kirby: May I object to the question on the ground that the assumption is not supported by the proof?

By Mr. Lockley: It is supported by the testimony of the witness Hausman, your Honor, that that is exactly the way this particular count was handled.

By the Court: That is substantially my recollection.

By Mr. Kirby: I call the Court's attention to this important error. Hausman said that they were taken out each month. And unless he puts that in, that they sometimes put items in there, but they would take them out each month, the question is grievously misleading.

By Mr. Lockley:

Q. Will you answer the question?

A. May I hear the question?

By the Court: He may answer the question.

The loans and exchanges account showing a debit does not indicate that the money was due Eatsum, but rather a clearing for premiums and over-ceiling cash payments.

4887 By Mr. Kirby: That is true, but he went on to explain that they would take it out when it was for that purpose each month.

By the Court: I think what I have stated is fairly in accord with Mr. Lockley's question.

(Question read.)

By the Witness:

A. You are asking me to assume as a fact that the account was used for this other purpose?

By Mr. Lockley:

Q. That is correct.

A. Well, that is so different from ordinary procedure I wouldn't know how to interpret it.

Q. Would you interpret it as meaning that the balance, the debit balance due, reflected an amount owing by the person in whose name that debit balance was charged.

A. Well, Mr. Counsel, when entries are made admittedly at variance with the method followed by competent and honest people, for whatever purpose may be sought to be served by the person that is making the entries, then there isn't any basis for interpret-

4888 ing them. It is his own system and whatever he means by it, he says he means by it.

Q. These entries were made by an accountant whom you have not seen or talked to, you do not know exactly

what he had in mind at the time he made the entries, and you are only assuming that this was a loan which had been made by the partnership to Mr. Lubben, and which he, in turn, owed to them, on the basis of the general accounting practice?

A. Sometimes, sir, people agree that when they say black they mean white. They agree that amongst themselves, but—

Q. Go ahead.

A. Under those circumstances, if I see something written down and it says black, I can only assume that it has the generally accepted meaning for the word black.

4889 Q. All right, sir. Don't you think that the accountants who actually made those entries were in the best position to know what they were intended to reflect?

A. If they were competent accountants, sir, they would know what they would reflect to other accountants. Now, whether they intended them to reflect that or not, is another matter.

Q. All right.

Now, will you take a look at this Exhibit 36, and tell me, was that account closed?

A. No, sir.

Q. It was never closed out?

A. That's correct.

Q. So you don't know how the balance of—what is it; a hundred thousand dollars, or something? You don't know how that balance of $105,864.07 was actually distributed on the books?

A. It doesn't appear to have been distributed.

Q. Could it have been distributed by journal entry?

A. It could have been.

Q. Without ever closing the books?

4890 A. No.

Q. But otherwise it would require closing the books, is that correct?

A. You wouldn't have a completed entry.

By Mr. Lockley: If your Honor please, that is all I have to ask him on the loans and exchanges account, and I would prefer to withhold the rest of my cross examination.

By the Court: We will be in recess until tomorrow morning at ten o'clock.

By the Marshal: Will the audience please remain standing until the Judge and the Jury leave the courtroom.

This Honorable Court will recess until ten o'clock tomorrow morning.

(Whereupon the hearing in the above entitled cause was adjourned until 10:00 o'clock a.m. Tuesday, October 13, 1953.)

4891

(Caption—No. 52 CR 143)

Before Nordbye, J. and J.
Chicago, Illinois,
Tuesday, October 13, 1953
10:00 o'clock a.m.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien
Mr. Thomas C. McConnell.
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:

By the Clerk: No. 52 CR 143, United States versus The Shotwell Manufacturing Company, et al. Case on trial.

4892 By Mr. Lockley: May I state, your Honor, that the reporters have called to my attention the Exhibit 100 series of the defense, and have advised me that the record is not entirely clear as to which portions of that exhibit have been objected to, and which portions have been admitted; and so, to correct the record, I would like to express my objection to any portion of Exhibit 100—let me start at the beginning. 100-A, which relates to Union Sales Compnay, 100-B, Union Sales Company, 100-C, A. E. Staley Manufacturing Company. I have no objection to 100-D, which relates to Penick and Ford, nor to 100-E which relates to Corn Products.

I object to 100-F, which is Anhaueser Busch. I do not object to 100-G, which is American Maize.

I object to 100-H, which is a recapitulation of corn syrup purchases in 1941.

I do not object to the Penick and Ford, Corn Products, or American Maize, on the theory that there has been at least some evidence that there was a 1941 quota base system employed by those companies, but they are
4893 the only ones for which any such testimony is appropriate.

By Mr. O'Brien: I think that is in accord with your Honor's ruling yesterday, Judge.

By the Court: That is my recollection.

By Mr. O'Brien: And it merely specifies the companies. I think that is correct.

By Mr. Lockley: That is what my intention was, Mr. O'Brien.

FREDERICK B. ANDREWS, a witness heretofore called as on behalf of the Defendants, having been heretofore previously duly sworn, resumed the stand and further testified as follows:

Redirect Examination.

By the Court: You are Mr. Andrews?

By the Witness: Yes, sir.

By Mr. Kirby: Will you please mark this Defendants' Exhibit 107 for identification?

(Said document was marked Defendants' Exhibit 107 for identification.)

By Mr. Kirby:

Q. Mr. Andrews, have you prepared an exhibit which is Defendants' Exhibit 107 for the defense, with respect to corn syrup purchases alone, and only from certain companies for the year 1941?

4894 A. Yes, sir.

Q. And what companies?

A. American Maize Company, Corn Products Sales Company, and Penick and Ford, Ltd., Incorporated.

Q. And you have not included any other companies there?

A. No, sir.

By Mr. Kirby: Your Honor, I now offer in evidence, Defendants' Exhibit 107. We did redraw it to only put in the year 1943, those three companies.

By the Court: Does it include 1941, 1945, and 1946?

By Mr. Kirby: No, just 1941. That particular exhibit is limited.

By the Court: It may be received.

(Said document was received in evidence by the court, and marked Defendants' Exhibit 107.)

By Mr. Kirby: Will you please mark this Defendant's Exhibit 108 for identification?

4895 (Said document was marked Defendants' Exhibit 108 for identification.)

By Mr. Kirby:

Q. And did you also prepare an exhibit, Defendants' Exhibit 108 for identification?

By the Court: 108?

By Mr. Kirby: Yes, 108.

By Mr. Kirby:

Q. Did you?

A. Yes.

Q. And does that show the corn syrup purchases of the company in 1945 and 1946?

A. The answer to both questions is yes, I did, and it does show that.

By Mr. Kirby: I will offer in evidence Defendants' Exhibit 108.

By the Court: The same three companies?

By Mr. Kirby: Oh, no, no. With respect to 1945, and 1946.

By the Court: I was just inquiring. This is—

By Mr. Kirby: The purchases of corn syrup.

By the Court: From all companies?

4896 By Mr. Kirby: In 1945 and 1946.

By the Court: All right. It may be received.

(Said document was received in evidence by the Court, and marked Defendants' Exhibit 108.)

By Mr. Lockley: I would like to see it.

By Mr. Kirby: Oh, indeed. I am sorry.

That is all, Mr. Andrews, that I have of you. Wait and see what these gentlemen have.

By Mr. Lockley: Just one moment, your Honor.

By the Court: I take it there is no objection, Mr. Lockley.

By Mr. Lockley: No objection, your Honor.

By the Court: Is there any examination of Mr. Andrews?

By Mr. Lockley: Just one moment, please, if your Honor please.

No cross examination.

By the Court: Very well.

(Witness excused.)

4897 By Mr. O'Brien: Will you excuse us just a moment? Maybe I can proceed with some odds and ends which you can always find.

By Mr. Kirby: Mr. O'Brien, maybe I can get this out of the way.

By Mr. O'Brien: Go ahead.

By Mr. Kirby: Your Honor will recall when the witness Alger was here from the Corn Products Refining Company, he had a number of exhibits in the 76 series and it was suggested that we make an exhibit of those letters so that we would only have on our excerpt the name of Shotwell, having in mind that there were many other people named on each letter. Now, I have done that and I have had them marked in the 77 series and have already shown them to the Government people and I think they agree that I have done my abstracting correctly so I now offer Exhibit 77-A through W, inclusive.

By Mr. Lockley: No objection, your Honor.

By the Court: It may be received.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 77-A through 77-W, inclusive.)

4898 By Mr. O'Brien: During Mr. Cain's cross examination, your Honor, at record 4478, there was exhibited to him by Mr. Lockley Government's Exhibit 185 for identification, at that point. Then following that there was an examination, a series of questions on that exhibit which follows through the balance of that volume, except that at page 4482, Government's Exhibit 186 for identification was also shown to the witness and he was interrogated about that.

The questions throughout the balance of this section, namely pages 4478 to page 4498, have to do with those exhibits, and continuing over to Section 40 of the transcript, at page 4533—no, I am sorry. I picked up this volume because the cross was continued, but it does not deal with that same subject.

Now, my motion, for the record, at this point is to strike Government's Exhibits 185 and 186, and the testi-
mony to which I have expressly referred relating to
4899 those two exhibits, on the basis of the objections
which were urged to your Honor a long time ago and which I am now renewing.

In other words, the Court recalls that it is my position that none of those documents are properly in evidence.

Well, I suppose your Honor should rule on the motion and then I will proceed.

By the Court: I will deny the motion.

My records are not clear. Has Government's Exhibit 186 been received?

By Mr. Lockley: It has not, your Honor. It was merely identified and not offered as yet.

By the Court: All right. I will deny the motion.

By Mr. O'Brien: I wasn't sure that they had been received, Judge, either.

By the Court: 185 has been received.

By Mr. Lockley: Yes.

By the Court: But not 186.

By Mr. O'Brien: Right. Whatever was said about them I am moving to strike.

Now, just for your record there I had identified as
4900 Defendants' Exhibit 78 this report of the sub-com-
mittee of the Ways and Means Committee, while Commissioner Dunlap was testifying.

By the Court: Which exhibit is that, please?

By Mr. O'Brien: It is Defendants' Exhibit 78.

By the Court: Yes.

By Mr. O'Brien: The matter to which we were referring in that is included in the documents which I left with your Honor yesterday. I think they are numbered 96, 97, and 98, on which you were to later rule.

So that I withdraw 78.

By the Court: All right. It may be withdrawn.

By Mr. O'Brien: I will call to your Honor's attention, without further comment, the motion which we have

pending in respect of Paragraph 4, a somewhat voluminous motion which the Court is holding, and which the Court indicated could be taken care of at some time.

4901 By the Court: I don't remember it. Paragraph 4 of what?

4902 By Mr. O'Brien: Of a motion to dismiss, originally made. Let me exhibit it to your Honor, just to identify it.

By the Court: Haven't I ruled on it?

By Mr. O'Brien: No, you said that you could take care of it any time, and I wanted to come to it before we are finished.

(Document handed to the Court.)

By the Court: I remember it. Well, I was going to give Mr. Lockley an opportunity to look over this rather voluminous exhibit, as I remember it, and to indicate to me whether or not he had any objection. I don't know that I have heard—

By Mr. O'Brien: It is not necessary to take the time before the jury on it, Judge, because it isn't that type of matter, as you know. But I did want to, for reasons of coherence—

By the Court: I think the record can indicate that I deny the motion.

By Mr. O'Brien: All right, sir. I will leave this in the file.

By the Court: Leave it in the file with the clerk, unless you want to have the record more definitely indicate

4903 which motion I am ruling on, you may show it to the reporter and he may make a suitable—

By Mr. O'Brien: Suppose it is marked Exhibit A of this date, for purposes of identification, as tying in or if the—

By the Court: I wouldn't suggest that you mark it as an exhibit. It is filed with the clerk and that is sufficient identification. The reporter can make such notations on his record to indicate that I am ruling on that motion.

By Mr. O'Brien: Very well.

I think I had No. 99 saved for the Penick & Ford subpoena, the original subpoena, together with the return of service. I exhibit it now and ask that it be marked with that number.

(Said document was marked Defendants' Exhibit 99 for identification.)

By Mr. O'Brien: Now, I would like to have marked as 99-A, B, C, and D, respectively, original subpoenas and returns of service thereon, in the order mentioned,
4904 Judge. A is American Maize, B is Corn Products Refining, C is the Hubinger Company, and D is Union Sales Corporation.

By the Court: Have witnesses been here with respect to Union Sales?

By Mr. Lockley: No, your Honor.

By the Court: Than I can't see—

By Mr. O'Brien: Then I don't need that. I see. Union Sales was D and we will omit that and make them A, B and C.

(Said documents were marked Defendants' Exhibits 99-A, 99-B and 99-C, for identification.)

4905 By Mr. O'Brien: I offer all four, that is, 99, 99-A, B and C.

By Mr. Lockley: If your Honor please, these are subpoenas duces tecum which are already a part of the official records of this Court.

The mere fact that they have been issued sometime in 1953 asking for certain documents doesn't in any way make them evidentiary or competent. It doesn't in any way establish that the documents they ask for may have ever been in existence. I think that it is entirely immaterial. A subpoena can have been issued on anyone, but that doesn't make it necessary to the determination of the issues in the case.

By the Court: Yes, I will sustain the objection.

By Mr. O'Brien: Let me say, Judge, that, to begin with, they are not part of the records in the case. They have not been logged in the Clerk's office as subpoenas which are served by the Marshal.

4906 By the Court: You called the witnesses. They stated they had searched their records in response to the subpoena and they could not find any other documents than those produced.

By Mr. O'Brien: Well, the purpose is to show more precisely what it is that they were asked to search for.

By the Court: That doesn't establish that the record were ever in existence.

By Mr. O'Brien: No, their testimony would have to do with that.

By the Court: No, I will adhere to my ruling. I will sustain the objection.

By Mr. O'Brien: All right, sir.

Now, Judge, in addition to the three documents which I gave you—

By the Court: I will rule on those now and I state for the record that I am receiving in evidence Defendants' Exhibits 96, 97 and 98. But I am receiving them for the limited purpose of the Court's perusal and in order that the Court may have a basis for a charge to the jury which covers the matters set forth in the documents. They
4907 are not evidence before the jury as such, and my reception is limited, as I have indicated, so that the Court may have before it the material you are submitting and upon which the Court will attempt to give to the jury an appropriate charge with respect thereto.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 96, 97 and 98.)

By Mr. O'Brien: Does that mean, if the Court please, that they are not available for discussion?

By the Court: Not as matters of evidence for the jury. Yes, that is my ruling.

By Mr. O'Brien: Very well.

When I say "Very well," Judge, I am not acquiescing in the matter, but I am not excepting to it.

By the Court: I have given the matter consideration and that is my best judgment in the matter.

By Mr. O'Brien: In addition to those papers there is one other from the files of the Treasury which I
4908 should like to have marked for identification and to offer in evidence.

Will you mark this Defendants' Exhibit No. 109 for identification?

(Said document was marked Defendants' Exhibit No. 109 for identification.)

4909 By Mr. Lockley: If your Honor please, I object on the ground it is immaterial and irrelevant. It has no bearing on the issues of the case.

By the Court: Yes, I will sustain the objection.

By Mr. O'Brien: Judge, if I may say, this document is not on the issue we were last talking about.

By the Court: Until I am informed, I don't know what issue—

By Mr. O'Brien: That is what I am trying to do.

By the Court: All right.

By Mr. O'Brien: There was some misunderstanding in some other evidence as to who was at the place at a certain date, and there were considerable conversations about that come up in the evidence. This instrument shows—

By the Court: Well, Mr. Lockley, Mr. O'Brien is now explaining to you the relevancy of this exhibit. He said it pertains to a question as to when Mr. Mammel first
4910 came to the Shotwell Company. I didn't think there was any issue on that.

By Mr. O'Brien: There was some misunderstanding in the testimony about it, yes, Judge.

By the Court: I confess I don't remember that there was any controversy as to when Mr. Mammel first went to the Shotwell plant.

By Mr. Lockley: We will stipulate as to when Mr. Mammel first went to the Shotwell plant. I think it is entirely immaterial when he went there.

By Mr. O'Brien: We can stipulate as to a certain date.

By the Court: Perhaps you can agree as to when Mr. Mammel first visited the Shotwell plant.

By Mr. O'Brien: February 7th, 1949. At least, that is when he was told to go. That is the first time he was told to go. That is the assignment, Mr. Lockley.

By Mr. Lockley: I fail to see the relevancy in any way whatsoever, your Honor, as to when any particular
4911 agent of the Bureau of Internal Revenue went into the Shotwell Manufacturing Company plant. To be sure, I will stipulate that Charles Mammel went there on February 7, 1949, but that doesn't indicate that he was the first man to be there. There had been others before him.

By Mr. O'Brien: There is no contention that he was the first to be there.

By Mr. Lockley: To the extent that only the date upon which Mammel arrived was February 7, 1949, I will agree to that.

By the Court: All right.

By Mr. Lockley: But I think it is entirely immaterial.

By Mr. O'Brien: That will take care of it. So, we won't disregard the Exhibit No. 15, or rather—is it 115? I see.

There are two exhibit numbers, it is 109.

By the Court: It may be withdrawn, I take it?

By Mr. O'Brien: Yes.

Now, I have some exhibits which have been identi-
4912 fied, Judge. These are Defendants' Exhibits, but they have not, as yet, been formally offered.

They are Defendants' Exhibits 18-A, and 18-B. I think I am one ahead here. The first is 17-A, B, and C, and then Nos. 18-A, and B.

Now, the 17 series were marked at page 1333 of the transcript. The 18 series were marked at page 1337 of the transcript.

4913 By the Court: Well, these are invoices.

By Mr. O'Brien: That is right. They are accounting invoices, that is, Shotwell.

By the Court: Ask Mr. Lockley if he has any objection.

By Mr. Lockley: I don't recall any testimony, your Honor, relating to these particular shipments, and that is the only objection that I would have to them, that they are not material and that they are not within the issues of the case.

By the Court: Well, they were identified during the testimony of Mr. Lubben.

By Mr. Lockley: These defense exhibits were, yes, your Honor.

By the Court: I don't remember the testimony regarding them, but—

By Mr. Kirby: It was during my cross examination of Mr. Lubben.

By the Court: Yes, that is right.

By Mr. Kirby: It relates to—he had testified that there were certain shipments which were unfilled and these are the bills for those shipments.

4914 By Mr. Lockley: I believe, Mr. Kirby, that these particular shipments were not a part of the Government's case on the unbilled shipments. However, if there is any question about it, your Honor, I would have no objection.

By the Court: Well, I will receive them in evidence.

By Mr. Lockley: I would have no objection except to the materiality of them.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 17-A, 17-B, 17-C, 18-A and 18-B, respectively.)

By Mr. O'Brien: Now, we have Defendants' Exhibits 38-A through 38-M. Those are bank statements or photostatic copies of bank statements of the Manufacturers Trust Company pertaining to the account of General Confections, Inc., and identified at record 2395 and 2396 which we offer in evidence under those numbers.

By Mr. Lockley: I have no objection, your Honor.

4915 By the Court: It may be received.

(Said documents were received in evidence by the Court and marked Defendants' Exhibits 38A through 38-M, inclusive.)

By Mr. O'Brien: There is also a bank statement of the same bank pertaining to Eatsum Food Products Company and its account, Defendants' Exhibit 13. It was marked at record 1095 for identification, and it pertains to the check for $66,000.00, which I believe is Exhibit 12, which your Honor yesterday admitted in our discussion. Those are connected exhibits.

By the Court: I had it just the other way around. I thought I had admitted 11.

By Mr. O'Brien: Well, you had before, Judge, at a prior time, I think you had admitted 11.

By the Court: Oh.

By Mr. O'Brien: But yesterday in the colloquy in chambers you also admitted 12.

By the Court: You are now offering what?

By Mr. O'Brien: I am now offering 13.

4916 By the Court: Oh, I see. I am sorry.

By Mr. O'Brien: Which is a connective exhibit. I will be through with these presently. I don't like to bore everybody with them but we have to put them in.

By Mr. Lockley: Well, if your Honor please, my objection to this is merely to the materiality.

By the Court: Well, I will receive it.

(Said document was received in evidence by the Court and marked Defendants' Exhibit 13.)

4917 By Mr. O'Brien: There is a document, Defendants' Exhibit 5 identified at page 937 of the record. That document is a release, or rather it is labeled an agreement and it is executed by Burry Biscuit, L. M. Peterson & Co., and Mr. Lubben.

By Mr. Lockley: Your Honor, I object to it on the

ground that it is entirely immaterial as to what arrangements may have been entered into by the Burry Biscuit Company and David Lubben.

By the Court: How does it throw any light on the issues in this lawsuit?

By Mr. O'Brien: It is part of the same $67,000.00 item, if the Court please, and it is an item that enters preliminarily into the net worth value of the proprietorship.

By Mr. Lockley: If your Honor please, there has been no testimony of that sort whatsoever, that I recall. There is no relationship.

By Mr. O'Brien: That page in the record is page 937.

By Mr. Lockley: I mean, there has been no tes-
4918 timony that there was any relationship between this particular release and the $67,000.00 check. As I recall, that check was in June of 1945, was it not?

By Mr. O'Brien: I say it relates to it preliminarily.

By Mr. Lockley: This is January, 1945.

By Mr. O'Brien: Well, that is true.

By Mr. Lockley: I object anyway, your Honor. It is immaterial.

By the Court: You mean the balance of the $75,000.00 loan?

By Mr. O'Brien: No, Judge. This has to do with the proprietorship and the setup of it and the values as of the time of this agreement, January, 1945. Then later, in following this through and with this as a foundation, they arrive at the situation which marked the value of the $67,000.00 that was paid by the partnership for the net worth of the proprietorship as was evidenced by that $67,000.00 check and the bank statement that accompanies it.

By the Court: So what? So what?

4919 By Mr. O'Brien: Well, I think they are all in a package. I think, to be utterly candid with the Court, I can't say it adds too much, so what.

By the Court: I will sustain the objection.

By Mr. McConnell: If your Honor please, it has some relevance here, because on cross examination of Mr. Lubben, he denied that he received the net worth of that business when he went into the partnership, and he made that specific denial on my cross examination.

Now, this shows that he did receive the net worth of the business, and to show the net worth of this business, this document was offered. It goes directly to the question of the credibility of the testimony of Mr. Lubben.

By Mr. Lockley: Your Honor, I questioned that in the first place, but even assuming in the first place it is true, it is attempting an impeachment on an immaterial, collateral issue. We are trying the issues whether The
4920 Shotwell Manufacturing Company and its officers evaded its income tax, and yet we get back into 1944 and 1945, and as to whether Mr. Lubben bought the Eatsum Food Products from Burry. It is so far removed from the issues of the case, I can't see where it has the slightest materiality.

By the Court: I will sustain the objection.

By Mr. O'Brien: If the Court please, at record 2369, and at record 2396, we had Defendants' Exhibits 29-A through 29-H. Those are ledger sheets of National Process Foods, or ledger sheets relating to National Process Foods, and National Process Foods was one of the companies—let me say we have a series of ledger sheets here. I will have to not confine it to National Process Foods, but there is that company, Joseph Eiger, Two Star Confectionery Company, and Gum Products Company.

The relevancy of the exhibits when so identified in the record was that Mr. Lubben, and later Mr. Lubben
4921 testified to overages, supposedly paid to those people which really went into a box, and these are the foundation sheets showing what the transactions were on which we were interrogating Mr. Lubben, and later interrogating Miss Feldman.

They were identified, but since that was on the Government case, they were not offered, and so are now offered.

By Mr. Lockley: If your Honor please, I recall no testimony at all tying this up with the issues of the case. Whatever relations there may have been between the Eatsum Food Products, and National Process Foods, Joseph Eigher, and Two Star—

By the Court: What page is that?

By Mr. Lockley: This covers the period of the sole proprietorship, some of it going back to October, 1944, and

extending through May of 1945, on National Process Foods. That is Exhibit 29-A.

29-B begins in September, 1944, and relates to Joseph Eiger.

By the Court: When were 29-A through 29-H iden-
4922 tified?

By Mr. Lockley: I believe it was through Miss Feldman, was it not?

By the Court: 29 was, but I have no record of any other.

By Mr. O'Brien: At record 2369 and 2396.

4923 By Mr. Lockley: I am afraid, Mr. O'Brien, I will have to refer to the record and it will show that as to 29, Mr. Kirby merely asked the Reporter to mark 29-A to H, and then his questioning went on to something else. At 2396 he refers to Exhibit 29, a sheet from the accounts payable ledger.

By the Court: That is the Blue Ribbon Trading Company.

By Mr. Lockley: It doesn't refer to any of these other sheets.

By Mr. Kirby: If the Court please, I was examining Miss Feldman with respect to checks which were made out to these.

By the Court: The record will speak for itself as to what identification has been made of the 29-A to 29-H.

By Mr. Lockley: It appears they were marked but never shown to the witness Feldman.

In any event, whether there was a foundation laid as to them or not, my objection would go to the relevancy of them. I think it is entirely immaterial. What
4924 Mr. Lubben may have done with another concern has no bearing whatsoever on what he did with the Shotwell Manufacturing Company and whether they evaded their taxes. We have to keep in mind we are trying Shotwell Manufacturing Company and not Mr. Lubben.

By the Court: I am trying to do that to the best of my ability.

By Mr. O'Brien: I would feel sure whatever the Court has gone into, it regards as relevant to the issues and within the scope of the case and I am talking only of matters we went into.

Now, at page 2369, or rather at page 2368, Mr. Lockley produced these ledger sheets from records already identified in the proprietorship. They are all here.

By the Court: What questions were—

By Mr. O'Brien: I will go on to that. And then Mr. Kirby had them identified as Exhibits 29-A to 29-H, at page 2369.

By the Court: Yes.

By Mr. O'Brien: I will move over to page 2396 where there was some interrogation of the witness Feldman
4923 about one of those sheets. That would really be on A, B, C and D of those sheets, which is misdescribed as—

By Mr. Lockley: It appears in the record as Exhibit 28.

By Mr. O'Brien: It does, but I do not believe that there is any 28-A, B, C and D.

By the Court: 28-A.

By Mr. O'Brien: But not A, B, C and D.

By the Court: You look at the record. I don't think we should take the time now.

By Mr. O'Brien: (Continuing) Which I think were the ledger sheets on Two Star and on those other companies.

"Those were all records regularly kept and maintained by the proprietorship, were they not?"

And Miss Feldman said:

"Yes, sir."

By the Court: You are referring to what now?

By Mr. O'Brien: I am referring to the sheets which at that point are 28-A, B, C, and D.

4926 By the Court: We are talking about 29. We are not talking about 28.

By Mr. O'Brien: Yes, but it should be 29.

By the Court: Well, we have 28-A which is the sheet in the cash disbursements book.

By Mr. O'Brien: That is a different thing. This context shows—see, it may well be that the error is mine. Here is the way it reads:

"Miss Feldman, all of these exhibits which Mr. Kirby had identified this morning, that is, Defendants' Exhibits 28-A, B, C and D, that series."

By the Court: We have that series. Those have been marked. Those are cash disbursements sheets from the Eatsum Food Products.

4927 By Mr. O'Brien: Judge, do they not only run as far as A?

By the Court: They run through A, B, C and D.

By Mr. O'Brien: Going on, however, I think they were the ledger sheets on Two-Star and on those other companies. I am talking about these ledger sheets.

By the Court: Well, I will sustain the objection.

By Mr. O'Brien: Which were all records regularly kept and maintained by the proprietorship.

By the Court: I will sustain the objection.

By Mr. O'Brien: All. I know, Judge, is these were identified as records regularly kept and maintained by the proprietorship and they are—

By the Court: Well, you haven't been able to point out any identification as yet. Moreover, I have great doubt as to any relevancy of them and at least, you haven't identified them in the record.

4928 By Mr. O'Brien: Well, I have some—without going into the early part, we offer, if the Court please, as Defendants' Exhibits 2 and Defendants' Exhibits 3, a letter and a copy of the Lubben 1943 tax return.

By the Court: Which is the tax return, Exhibit 3?

By Mr. O'Brien: It is 3 and 4.

By the Court: The tax return?

By Mr. O'Brien: Yes, sir. And the letter is No. 2. Your Honor did not rule on those, according to the record.

By the Court: Has it been offered?

By Mr. O'Brien: I can't answer that directly. Have they been offered?

By Mr. Kirby: No, sir.

By Mr. O'Brien: I now offer them.

By Mr. Lockley: If your Honor please, I now object to Exhibit No. 2 on the ground that it is immaterial. It is irrelevant. It is a letter dated March 13, 1944, from a man named Brewster, to Mr. Lubben. I don't recall that anyone has inquired about this record. There

4929 has been no foundation laid for the absence of the original itself and it has no bearing on the issues in the case. It doesn't appear in any way to relate to The Shotwell Manufacturing Company, your Honor.

By the Court: Let me see it.

(Handing document to the Court.)

By the Court: Yes. I will sustain the objection as to Defendants' Exhibit 2.

By Mr. Lockley: And as to Exhibit No. 4, apparently there are two of them here, Mr. O'Brien.

By Mr. O'Brien: 3 and 4.

By Mr. Lockley: 3 and 4 are the 1943 income tax returns of Mr. Lubben. That again—

By Mr. O'Brien: Let's see if that is all that is there.

By Mr. Lockley: It is immaterial. It is irrelevant to the issues. Whatever happened was in 1943. And it had no bearing—

By the Court: Did you say Exhibit 3?

By Mr. Lockley: It is Exhibits 3 and 4.

By the Court: What is No. 4?

4930 By Mr. Lockley: Defendants' Exhibit 3 appears to be a schedule which is a part of Exhibit 4.

By the Court: Well, they all pertain to 1943 income taxes?

By Mr. Lockley: Yes, your Honor.

By the Court: I will sustain the objection.

By Mr. O'Brien: Now, if the Court please, it isn't altogether clear to me whether your ruling of yesterday is clear on the record. We had a question on the Hausman and Starr work sheets which your Honor, after discussion and so on, admitted, but for the purposes of the Andrews testimony, we physically presented at that time only a limited number of those work sheets which I yesterday identified.

By the Court: Well, I ruled on whatever you offered, did I not?

By Mr. O'Brien: Oh, yes, you certainly—

By the Court: What more can I do?

By Mr. O'Brien: There is no question about that. You certainly ruled on those and I did not raise any

4931 question about those, but I said that I had others which I would search for over the recess, or which were also identified by Hausman and Starr, and I would like to bring those in.

I have done that and I am referring now to instruments, this is a Starr instrument, 65-J which I offer. It has to do, as your Honor's notes may already show, with the period May 31, 1945.

4932 By the Court: What other exhibits are you going to offer of that series, if any?

By Mr. O'Brien: I tell you, Judge, the next batch is a number of Hausman work sheets which are identified as Defendants' 66-A, through 66-S.

By Mr. Lockley: If your Honor please, without me stating the objections that I had to all of these documents yesterday, I object to them.

By the Court: I will receive them in evidence.

Now, you are offering 65-J, and 66-A to S.

By Mr. O'Brien: Correct.

(Said documents were received in evidence by the Court, and marked Defendants' Exhibits 65-J, and 66-A to 66-S, inclusive.)

By Mr. O'Brien: Then there is a break, Judge, and they go to 66-Y, X, and Y. I don't even know the alphabet this morning—66-V, X, and Y.

4933 By Mr. Lockley: If your Honor please, I object to them for the same reasons that I stated yesterday.

By the Court: I will receive them in evidence.

(Said documents were received in evidence by the Court, and marked Defendants' Exhibits 66-V, 66-X and 66-Y.)

By Mr. O'Brien: Then I just have four more, Judge. They are Defendants' 15-A to E, inclusive, and H, I, and J.

They are identified at record 1111. These are records which Mr. Lubben testified that he directed be kept. They are cash box records.

By Mr. Lockley: If your Honor please, I object to 15-A through G, inclusive, on the grounds that there has been no proper foundation laid for them. Mr. Hausman identified them as probobly being in Mr. Loperfido's handwriting.

By Mr. O'Brien: That's true, but Lubben also testified, at record 1111, that he directed that those be kept. Tl y are cash box records on the partner-
4934 ship. The handwriting is identified.

By Mr. Lockley: And, furthermore, I object to it on the grounds that it is entirely immaterial. Whatever records may have been kept, of course, of corn syrup deals that Mr. Lubben had outside of those with The Shotwell Manufacturing Company, are immaterial.

By Mr. O'Brien: Well, we were permitted to go into the subject of the cash box in the partnership, and we identified the papers.

By the Court: I will receive them in evidence.

(Said documents were received in evidence by the court, and marked Defendants' Exhibits 15-A, 15-B, 15-C, 15-D, 15-E, 15-H, 15-I, and 15-J.)

4935 By Mr. O'Brien: Then I have Defendants' 31, which was identified by Miss Feldman at record page 2354. That's Exhibit No. 31.

By the Court: It was never identified by Hausman.

By Mr. O'Brien: No. No, by Miss Feldman.

By the Court: She just said that it was Hausman's handwriting.

By Mr. O'Brien: That's true.

By Mr. Lockley: I object to that, your Honor. No proper foundation has been laid for it.

By the Court: Yes, I will sustain the objection.

By Mr. O'Brien: Defendants' Exhibit 27, identified at record 2316, cash box sheet, pertaining to the August, 1945, receipts.

By Mr. Lockley: I object to that, your Honor, on the ground that no proper foundation has been laid. It was shown to Miss Feldman and she identified it as Mr. Hausman's handwriting, but she also said she didn't know
4936 anything about the cash box. If that purports to be some record relating to the cash box there has been no proper foundation laid for it.

By the Court: If that is the only foundation, I will sustain the objection.

By Mr. O'Brien: Finally, Judge, I have Defendants'—

By Mr. Kirby: Excuse me. Judge, when Mr. Hausman was here I asked him about these exhibits. It is true, initially they were called to Miss Feldman's attention, but then—

By the Court: Perhaps you can indicate the portion of the record where that appears.

By Mr. Kirby: I will look that up, your Honor. Because I remember specifically having Hausman's papers together and I went right down the list.

By Mr. Lockley: If your Honor please, the defendants, at 3978 of the record, said they didn't offer 31 because, by the witness's testimony, it is a duplicate of 23. Are you changing your mind now?

By Mr. Kirby: Well, the point I was seeking to make
4937 to the Court was that I did have this identified by Mr. Hausman and that certainly is sustained by that.

When it appeared that both 24 and 31 were duplicates—

By the Court: Go forward with your offers, Mr. O'Brien.

By Mr. O'Brien: Yes. The only two I have are 27 and 37. These are both Hausman's work sheets, and Mr. Kirby says—

If you don't have it now, Mr. Kirby, would you look it up, 27 and 37?

By Mr. Kirby: 27 is referred to on page 3977.

By Mr. O'Brien: Of Hausman's testimony?

By Mr. Kirby: Yes.

By Mr. O'Brien: How about 37?

By Mr. Kirby: 37 is referred to on page 3977, Hausman's testimony.

By Mr. O'Brien: They are both identified by Hausman, too, Judge, as well as by Miss Feldman. I had only the Feldman reference. So I reoffer them.

4938 By the Court: Is that 27 and 37?

By Mr. O'Brien: Yes.

By Mr. Lockley: If your Honor please, at record 3967 Exhibit No. 27 was shown to Mr. Hausman and he stated that it related to cash received and paid out for the month of August through September 8, 1945, and is in his handwriting. But there was no further testimony relating to that document and it was not offered at that time.

By Mr. Kirby: It was offered at 3977.

By Mr. Lockley: So we were unable to cross examine on it.

By Mr. O'Brien: It just isn't so, as we said yesterday, that Mr. Lockley was unable to cross examine on it. I think the Court has so ruled.

By the Court: Well, what about 37?

By Mr. Lockley: Well, your Honor, except for the fact that it is included in the offer with numerous other exhibits, I don't find anything in the record relating to that exhibit at all. That is the record of Mr. Hausman's testimony.

By Mr. O'Brien: Is it identified?

4939 By Mr. Kirby: Yes.

By Mr. O'Brien: At page 3977 he identified it. That's the point.

By Mr. Lockley: I believe not.

By Mr. O'Brien: I am told it was.

By Mr. Lockley: At 3977 Mr. Kirby offered it in evidence. But I have gone through the pages preceding that and I find no reference to that exhibit.

By Mr. O'Brien: Do you want to check it?

By Mr. Kirby: I will check it.

By the Court: Check that up later. I don't think we should take the time now to explore the record further. Is that all you have now, Mr. O'Brien?

By Mr. O'Brien: I should like to read in this matter.

By the Court: Oh, yes. Shall I make any statement about it?

By Mr. O'Brien: I will appreciate it if you would say something.

By the Court: Yes, I will.

By Mr. O'Brien: You may have this copy, if you wish.

4940 By the Court: The jury will remember that during the Government's case Mr. Lockley read certain portions of Mr. Cain's testimony on a motion that was made, and he read a considerable portion of that transcript. At the time Mr. O'Brien made an offer also of portions of the transcript, and as to some of the transcript I sustained Mr. Lockley's motion, as to the relevancy of some of that offered by Mr. O'Brien.

Upon further consideration I have determined that as to some of the offered testimony that I should overrule Mr. Lockley's objection. And I have done so. And that occasions the need now, for Mr. O'Brien to read into the record, and for your information, the additional portions of Mr. Cain's testimony that were given on this day, when there was a hearing before the Court, and which relates to the same time that Mr. Lockley referred to when he read the portions of the transcript offered by him and by Mr. O'Brien.

By Mr. O'Brien: I think I may omit the pages, if the Court please.

By the Court: Yes.

4941 By Mr. O'Brien: Some of this may be a little disconnected, because the jurors understand, from what the Court said, it is out of context. But going to it directly, these questions and answers were asked and made with Mr. Cain on the stand, at the same time:

4942 "Q. Following that, did you tell Mr. Busby to go

back to Sauber and reveal the identity of the company and make this disclosure?

"A. I did.

"Q. What, if anything, did you tell him to say concerning the payment of that tax which you planned to do?

"A. I told him we were ready, willing and able to pay any tax that might be assessed.

"Q. Did you tell him to tell Sauber that?

A. Yes.

Q. When you saw Sauber in March, did you ask him—what, if anything, was said between you and him as to the fact of whether any investigation had commenced?

"A. He assured me that there had been no investigation commenced."

Now, this goes to a somewhat different subject, as you can see, but is a part of Mr. Cain's answer, or the further part of that was not read.

4943 "I said that the only thing that we could possibly do in dealing with a chap like this chap Lubben, would be to take every invoice that we had sent to him and apply the maximum over ceiling price."

Then, going on, Mr. Cain, in answering says:

"I am talking to Mr. Sauber, this conversation.

"I said, 'We will use the peak price and when we come up with that figure, that would be the best of our recollection.'

"He said, 'You can't make an amended return. You just give us—we will have to send a man out there and you will work with him, and we will get the best we can.'

"I said, 'As to our expenditures, I just can't tell you anything, I don't know.'

"Q. What did he say about expenditures?

"A. He said, 'It wouldn't do any good if you did know, because we wouldn't allow them anyway. We absolutely won't allow over the ceiling expenditures.'

"I said, 'Okay, but I hope you will take it into consideration and see that we are treated fairly.'

4944 "I think that is the tone on which that particular meeting of March 4th ended.

"Q. What, if anything, was said concerning the payment of the tax when and if the tax was determined?

"A. Well, I told him in view of the Government situation where they make no allowance, we owe them a lot of money, and we stood ready and able to pay it immediately, and the sooner we would pay it, the better I would like it, but I said that wouldn't stop us if at some future time we tried to get our money back, or a portion of it for these over ceiling payments.

"Q. Mr. Cain, in your conversation or conversations with Mr. Sauber, what, if anything, was said by you to him as to your ability to say who the premium payments were paid to?

"A. Well, I told him it would be impossible for us to tell him who the payments were paid to, because we didn't know.

4945 "Q. What did he say about premium payments in general?

"A. He said that premium payments regardless of whether we could or could not tell would not be allowed by the government.

"Q. Did Mr. Busby tell you, Sullivan or Huebner, that is, you or Sullivan in your talk on January 11, 1948, or any of your talks after that that there was any requirements for a disclosure other than those mentioned in the published policy?

"A. No, sir.

"Q. Did you ever know of any other or further requirement?

"A. No, sir.

"Q. Did you know if it is the fact that your ability to say to whom premium payments were made was or might be regarded as a condition precedent to a disclosure?

"A. No, sir.

"Q. Did you tell him to tell the official of the
4946 Treasury Department hypothetically or otherwise that the Shotwell Corporation owed the government taxes for those years?

"A. He reported back that the government told us that we did owe taxes."

At this point I think it is admissible to say that the witness is speaking of Mr. Busby.

By the Court: Very well.

By Mr. O'Brien: (Reading):

"A. He reported back that the government told us that we did owe taxes.

"Q. Did you at that time tell him to advise Mr. Sauber that the Shotwell Corporation had made false tax returns for the years 1945 and 1946?

"A. I had quite a bit of confidence in Mr. Busby. He knew the case by that time.

"Q. Did you tell him to tell Mr. Sauber that the corporation had made false returns for those years?

"A. I don't recall telling him anything. We told him what to do, to go in and disclose the Shotwell
4947 Manufacturing Company, period.

"Q. Do you recall what you did tell him?

"A. We told him to go to whomever he had been to before and disclose the identity of the taxpayer.

"Q. And did you tell him to tell Mr. Sauber that the corporation had made false returns for the years 1945 and 1946?

"A. I don't believe I did. I don't think I had to tell Mr. Busby anything. We certainly told him to go in and do whatever was necessary to get the matter straightened out.

"Q. Did Mr. Busby in the course of informing you about the requirements of the voluntary disclosure doctrine on or about January 11th or 12th of 1948 tell you that it was necessary that the taxpayer make an honest, full disclosure of all the material facts?

"A. Mr. Sauber told us that we couldn't make that.

"Q. No—Mr. Busby.

4948 "A. Mr. Busby reported back to us that Mr. Sauber said we couldn't—

"Q. I am sorry. I mean in the conference you had with Busby before he went over to Mr. Sauber the first time.

"A. No, he did not.

"Q. He did not?

"A. No.

"Q. Well, in addition to sending him over to Mr.

Sauber you had in mind making a disclosure to avoid criminal prosecution, was that the purpose?

"A. Very definitely.

Well, I went into the matter of the over-ceiling receipts. He discouraged me on the matter of the over-ceiling payments. He said it was out, that they might give it some consideration, but if they did it would be very little, that the department's role is they would not consider over-ceiling—"

Now, going to the other record:

By the Court: I take it you are now referring to the page which was missing from the transcript you furnished me.

4949 By Mr. O'Brien: There was a break in it, at least, Judge, and I am trying to pick it up there.

By the Court: Yes.

By Mr. O'Brien: You say it is 207 that is missing?

By the Court: That's right.

By Mr. O'Brien: It goes on this way in the original transcript, at the bottom of 206:

"—the department's role is that they would not consider over-ceiling payments by us."

Then:

"Q. Now, at which meeting, the first or the second, was it that he told you as you testified that it wouldn't make any difference whether you could prove the disbursements of these over-ceiling moneys or not?

"A. I think at both meetings. He emphasized that to us.

"Q. He said to you that it made no difference so far as the government was concerned?

"A. That is right.

4950 "Q. Whether you proved that you actually made those expenditures or not?

"A. That is right. He said it was the government's policy that over-ceiling payments could not be deducted."

By the Court: We will take our morning recess now. We will suspend for ten minutes.

By the Marshall: Will the audience please remain while the jury and the Judge leave the court room.

This Honorable Court will recess for ten minutes.

(Recess taken.)

4951 By Mr Kirby: On Exhibit 37, which is in Hausman's handwriting, we did locate at page 3961, the presentation and identification of that by Hausman, so we reoffer it.

By Mr Lockley: I object to it on the same ground as I objected to the other Hausman papers, your Honor.

By the Court: Well, I will receive it.

(Said document was received in evidence by the Court and marked Defendants' Exhibit 37.)

By Mr. O'Brien: If the Court please, the Defendants rest.

Thereupon the Defendants rested their case in chief.

By Mr. O'Brien: I want to give your Honor this original.

(Handing document to the Court.)

By the Court: Mr. Lockley, have you some rebuttal?

By Mr. Lockley: A little, if your Honor please.

4952 Prior to that, however, I would like to call your Honor's attention to defense Exhibit No. 68, which is a book from the Hubbinger Company relating to their corn syrup deals with the Shotwell Manufacturing Company.

I have had an opportunity to examine that and I have no objection to three pages which are dated February 6th and 7th, February 8th and 9th and February 10th and 11th respectively and which appear to contain all of the matter relating to the Shotwell Manufacturing Company. The balance of the book contains no entries of the Shotwell Manufacturing Company. Therefore, I would like your Honor to reconsider the ruling admitting the whole book and admit just those three pages which I have referred to on the grounds that the balance of the book is immaterial and irrelevant.

I see they have once been detached and put back in the book by scotch tape and I think they can be detached again without difficulty.

4953 By the Court: I assume only the pages referring to Shotwell are material. I don't know just what took place when it was offered.

By Mr. O'Brien: It was offered and received, Judge.

By the Court: I will modify my ruling and receive only the pages that refer to the Shotwell Manufacturing Company.

(Said document, so modified, was received in evidence by the Court being Defendants' Exhibit 68, being three pages dated February 6th and 7th, February 8th and 9th and February 10th and 11th.)

By Mr. Kirby: I would make the same observation with respect to wanting the record in its entirety as I made in connection with wanting all of the Corn Products records, those being in the 76 series.

By Mr. O'Brien: If I may say, Judge, on the document that I just handed you, there are two or three more to come, but I didn't think that I should de-
4954 lay until they arrived.

By the Court: All right. Well, that refers to the request for instruction.

And thereupon the Government, to further maintain the issues on its part, introduced the following evidence, in rebuttal, to wit:

By Mr. Lockley: Miss Frazier.

EUNICE FRAZIER, a witness called on behalf of the Government, in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lockley.

Q. Will you please give your name, Miss Frazier?

A. Eunice Frazier, F-r-a-z-i-e-r.

By the Court: Now, you have to raise your voice if the jury is going to hear you.

By the Witness:

A. Eunice Frazier.

By Mr. Lockley:

4955 Q. Where do you live?

A. Hicksville, New York.

Q. And where were you employed in the year 1948?

A. With the Intelligence Unit of the United States Treasury in New York City.

By the Court: You will have to raise your voice and speak louder, Miss Frazier. The jury can't hear you.

By the Witness: I am sorry.

By the Witness:

A. The Intelligence Unit of the United States Treasury in New York City.

By Mr. Lockley:

Q. Where was that located?

A. At 253 Broadway.

4956 Q. What was your business at that time?

A. I was receptionist with that office.

Q. And who were the persons for whom you received callers?

A. I received anyone who came to the office to see any of the officials, or the employees of the United States Treasury of the Intelligence Unit.

Q. And who was the Chief of the Intelligence Unit in New York City at that time?

A. Mr. Daniel Bolick was a special agent in charge of the office.

Q. Now in your capacity as receptionist, did you make a record of callers?

A. Yes, I did.

By Mr. Lockley: Will you please mark this Government's Exhibit 188 for identification?

(Said document was marked Government's Exhibit 188 for identification.)

By Mr. Lockley:

Q. I show you Exhibit 188 and ask you if that is the record that you referred to?

A. Yes, sir, that is right.

4957 Q. And is that in your handwriting?

A. Yes, it is.

Q. And for what year is it?

A. 1948.

Q. Now was that a record made in the ordinary course of business?

A. Yes, it was.

Q. Was it your practice to enter the names of all callers?

A. That is right, anyone who came into the office was entered in this book.

Q. So far as you know, it is true and correct?

A. That is right, sir.

By Mr. Lockley: I offer in evidence Government's Exhibit 188.

By Mr. McConnell: I object to the materiality of it so far as the corporation is concerned. I don't see that it makes any difference who went to 253 Broadway.

By Mr. O'Brien: What are you doing, offering the whole book, Mr. Lockley?

By Mr. Lockley: I will limit my offer to three
4958 pages which I will subsequently identify but I tender it at this time to show the whole book.

By Mr. O'Brien: Maybe you better show us the three pages that you want to offer.

By Mr. Lockley: All right, sir.

By the Court: Well, perhaps you had better identify it.

By Mr. Lockley: I will have the pages marked separately, your Honor.

Will you please mark this page Government's Exhibit 188-A. That is the page beginning with the date, 5/27, and will you mark the next page, 188-B, which is the page beginning with the date 6/25, and mark this Government's Exhibit 188-C, the page beginning with the date 7/9.

(Said documents were marked Government's Exhibits 188-A, B, and C, for identification.)

By Mr. Lockley: Those are the pages, if you want them.

By Mr. Kirby: Pass that down here.

4959 By Mr. McConnell: Are you offering these?

By Mr. Lockley: If you have no objection I will substitute the photostats. Otherwise, I will offer the book.

By the Court: Is there any objection?

By Mr. McConnell: I object to it, it shows no connection at all with The Shotwell Manufacturing Company.

By Mr. Kirby: I object to it. It shows no matters binding on the defendant Sullivan.

By Mr. O'Brien: Certainly there is nothing material in it.

By the Court: I am sorry?

By Mr. O'Brien: There is nothing that I have seen, Judge, that would disclose its materiality.

By the Court: I don't know what it is.

(Document handed to the Court.)

By Mr. McConnell: Those are the photostats, your Honor. The purpose of this is to impeach the witness Grace, who testified—

4960 By the Court: Grace?

By Mr. Lockley: Yes. Grace, who testified he had not been in Bolick's office.

4961 By the Court: It may be received as to Defendants' Cain and The Shotwell Manufacturing Company.

(Said documents were received in evidence by the Court and marked Government's Exhibits 188-A, 188-B, 188-C, respectively.)

By Mr. O'Brien: Well, I don't see how it identifies what Mr. Lockley says.

By the Court: Mr. Grace said he met Bolick on the street in a casual meeting.

By Mr. O'Brien: He doesn't say that that is the only time he met him. He said he met him a number of times.

By the Court: It is for the jury to determine the weight of it. This record would indicate Grace called to see Bolick rather than—

By Mr. O'Brien: There is nothing in that book that says he called on this man. I object.

By Mr. Lockley: Grace's testimony, if your Honor please, is he had never been in Bolick's office until

4962 the year 1951, as I recall it.

By the Court: It may be Bolick was written after the name Grace.

By Mr. O'Brien: What of it?

By the Court: Perhaps Mr. Lockley can bring that out from the witness as to what that means, if anything.

By Mr. McConnell: I renew my objection unless there is some discussion about Shotwell matters. There is no showing of that.

By Mr. Lockley:

Q. Miss Frazier, when you were receptionist at the Intelligence Unit, was it your practice to mark down the name of an individual calling upon one of your superiors?

A. Yes, sir, that is right.

Q. And were those names recorded in the book that you hold in your hand, Exhibit 188?

A. Yes, sir.

Q. And was the name of anyone placed in that book on a telephone call alone?

A. No, sir. This was when they came into the office in person.

Q. That was only on personal visits?

4963 A. That is right, sir.

Q. Now does your record show on June 1, 1948, that a Mr. Grace called on Mr. Bolick?

A. Yes, sir.

Q. And that indicates that Mr. Grace actually came to the office at 253 Broadway?

A. And that he had an appointment, sir.

Q. And that he had an appointment. Does your record show the purpose for which that visit was made?

A. No, sir.

Q. Do you know the purpose?

A. No, I do not.

Q. Your job was merely to receive them and take them into the office of the person upon whom they were calling, is that correct?

A. Yes, sir, that is right.

Q. Does your record show that Mr. Grace called on Mr. Bolick on June 28, 1948?

A. Yes, it does, sir.

Q. And what does the record actually show?

A. That he came in the office in person and that he had an appointment to see Mr. Bolick.

Q. Does your record likewise show that he made

4964 a call, that Mr. Grace made a call on Mr. Bolick on July 12, 1948?

A. Yes, sir, it does.

Q. And does that record likewise indicate that he came personally to the office?

A. Yes, sir.

Q. Do you have any knowledge as to the purpose of those visits?

A. No, sir, I do not.

Q. Did you attempt to search the records of the Intelligence Unit to find if there was any memoranda as to the reason for those visits?

A. No, sir.

By Mr. Lockley: All right.

By Mr. McConnell: I move to strike the testimony on the ground that this witness doesn't know that it has anything to do with any conversation concerning Shotwell Manufacturing Company, and for the further reason that the only item is that a man by the name of Grace called. I believe the witness testified that he had brothers who were lawyers, besides himself. It doesn't identify the item with the particular witness
4965 who testified in this case.

By the Court: I will deny the motion.

By Mr. O'Brien: May I ask a question?

By the Court: All right.

4966 *Cross Examination by Mr. O'Brien.*

Q. Is there a first name shown for the caller?

A. No, sir.

Q. What is the name to which you have been referring?

A. Mr. Grace.

Q. Just Mr. Grace?

A. That is right, sir.

By Mr. O'Brien: I make the same motion.

By Mr. Lockley: That's all, your Honor.

By Mr. Kirby: I would like to ask the young lady a question.

By the Court: I haven't received it as to the defendant Sullivan but if you want to inquire—I think that was made clear.

By Mr. Kirby: I appreciate it is not received as against the defendant Sullivan.

Cross Examination by Mr. Kirby.

Q. I hope that I don't impose upon the young lady by asking her, do you know that the Grace family is a large family in Brooklyn?

4967 A. No, sir, I do not.

Q. Do you know that there are several Grace brothers that practice law?

A. No, sir.

Q. Do you know that the Grace family and the Bolick family have been friendly in Brooklyn for 35 years?

A. No, sir.

Q. Do you know which of the Grace family did come to see this Mr. Bolick?

A. No, sir.

By Mr. Kirby: Thank you, ma'am.

By Mr. Lockley: That is all, Miss Frazier.

If your Honor please, I ask leave to substitute photostatic copies for the originals.

By the Court: Very well.

(Witness excused.)

JOSEPH MICHAEL LIMA, a witness called on behalf of the Government, in rebuttal, having been first duly sworn, was examined and testified as follows:

4968 *Direct Examination by Mr. Lockley.*

Q. Mr. Lima, will you speak up and give us your full name?

A. Joseph Michael Lima, L-i-m-a.

By the Court: L-y-m-a?

By the Witness: L-i-m-a.

By Mr. Lockley:

Q. Where do you live?

A. 1700 Rainbow Drive, Clearwater, Florida.

Q. What is your occupation?

A. Internal Revenue agent.

Q. How long have you been an Internal Revenue agent?

A. Since August of 1942.

Q. Where were you stationed in 1948?

A. In Chicago, Illinois.

Q. And were you assigned in 1948 to conduct an audit of the returns of the Shotwell Manufacturing Company for the year 1946?

A. That is right.

Q. Did you at that time call at the office of the Shotwell Manufacturing Company?

A. I did.

4969 Q. Do you know when that was?

A. Sometime subsequent to July 30, 1948.

Q. Was that pursuant to an appointment?

A. That is right.

Q. Do you recall?

A. That is right.

Q. A telephone appointment?

By Mr. O'Brien: What was that date, Mr. Lima?

By the Witness: The date that I called at the Shotwell Company?

By Mr. O'Brien: Yes.

By the Witness: Sometime after July 30, 1948.

By Mr. O'Brien: July 3rd?

By the Witness: No. After July 30th.

By Mr. O'Brien: Oh, 30th.

By Mr. Lockley:

Q. And who did you meet when you went to the office of the Shotwell Manufacturing Company?

A. I met Mr. Frank Huebner, Mr. Leon Busby, and Miss Morrill. I believe that is her name.

Q. And at that time, did you have any conversation with Mr. Huebner?

4970 A. The first day, other than getting acquainted, Mr. Huebner, I believe directed me—

By the Court: A little louder, Mr. Lima.

By the Witness:

A. Just getting acquainted with the officials of the company. Mr. Huebner introduced me to Mr. Busby, the accountant, and the rest of the time I had spent with him.

4971 Q. I show you Government's Exhibit No. 186 and ask if you have seen that before.

A. Yes, I have.

Q. Where did you get it?

A. I received this exhibit from Mr. Busby.

Q. When?

A. The first day that I was at the plant, at the company offices.

Q. That would be some time after July 30, 1946?

A. That is right.

Q. 1948, I mean.

A. 1948.

By Mr. Lockley: I offer in evidence Government's Exhibit 186.

By Mr. Kirby: Your Honor has already ruled, I believe, with respect to 185, that it was not binding on the defendant Sullivan and I ask that the same ruling be made with respect to Government's Exhibit 186. Sullivan had been shown that on the stand and he said he had never seen it before.

By Mr. McConnell: I object to it as not binding on the corporation, under the facts and circumstances
4972 in this case.

By Mr. O'Brien: I make the same objection and for the same reasons as I did this morning, Judge, to 185 and 186.

By the Court: Is this proper by way of rebuttal?

By Mr. O'Brien: I can't see that it is any part of rebuttal, to begin with.

By the Court: I am not clear on it.

By Mr. Lockley: If your Honor please, the purpose of that document is to establish that the defendant, in making the document available to the Bureau of Internal Revenue, also misled the Bureau of Internal Revenue as to the amounts of overages, charges which they had paid out. It also is rebuttal to their statements that there were no payments received by them or overages until the latter part of 1945 because, as your Honor will see, that document reflects payments at a much earlier time, or receipts by Shotwell at an earlier date.

By Mr. McConnell: I object to it as not being proper rebuttal. He should have put it in his main case and
4973 given us a chance to meet it. It is an admission against interest, and all the facts and circumstances surrounding it.

By the Court: I am not clear. Did you identify this with Mr. Busby?

By Mr. Lockley: Yes, your Honor. He said he prepared it.

By Mr. O'Brien: The first time I saw it was when Mr. Cain was being cross examined.

By Mr. Lockley: Is that correct? Perhaps I can correct it, your Honor. It was shown to Mr. Cain.

By Mr. O'Brien: On cross. It was exhibited for the first time to Mr. Cain then.

By the Court: What identification has been made of it?

By Mr. Lockley: Mr. Lima identified it as a document received by him in the office of The Shotwell Manufacturing Company from the accountant employed by The Shotwell Manufacturing Company during the course of his audit of The Shotwell Manufacturing Company return for the year 1946.

4974 By the Court: Well, who was present when this was delivered to you?

By the Witness: Mr. Busby and myself.

By Mr. O'Brien: You never asked Busby anything about it.

By Mr. Lockley: I intend, if your Honor please, to call Mr. Busby.

By Mr. O'Brien: Maybe so, but it isn't rebuttal.

By the Court: What?

By Mr. Lockley: I intend to call Mr. Busby about that particular record. It is rebuttal to this extent: The defendants claimed that they didn't receive—

By Mr. Kirby: I object to these statements.

By the Court: My query is directed as to the foundation.

By Mr. Lockley: Mr. Lima identified it as a record received by him from Mr. Busby.

By the Court: Well, even so, I don't think you have laid sufficient foundation for it. That is what concerns me.

By Mr. Lockley: All right, sir. I will withhold
4975 my offer until Mr. Busby is on the stand then.

By the Court: All right.

4976 By Mr. Lockley:

Q. Mr. Lima, at the time you were in the office of The Shotwell Manufacturing Company, were you given a record showing the amount allegedly paid out for such items as sugar, corn syrup, milk, chocolate, and so forth in the black market?

A. Yes.

By Mr. O'Brien: I object to the form of the question.

By Mr. McConnell: I object to the nature of the question.

By Mr. O'Brien: If you have a record, let us have it.

By the Court: If there is a document, I suppose the document would be the best evidence, and in the absence of the document, I will sustain the objection.

By Mr. Lockley: That is all, if your Honor please.

By the Court: Is there any cross examination?

By Mr. O'Brien: No.

By the Court: That's all, Mr. Lima.

(Witness excused.)

4977 By Mr. Lockley: Mr. Busby, please.

LEON BUSBY, a witness heretofore called on behalf of of the Government, having been heretofore previously duly sworn, resumed the stand and testified further in rebuttal as follows:

Direct Examination by Mr. Lockley.

Q. Mr. Busby—

By the Court: You have been sworn, Mr. Busby, so you can just take the stand.

By the Witness: Thank you.

By Mr. Lockley:

Q. Mr. Busby, on or about the 30th day of July, or shortly thereafter, 1948, did you have a meeting with Revenue Agent Joseph Lima?

A. Yes, sir.

Q. At that time, did you give to him Exhibit 186 which I now show you?

A. Along with other papers, yes, and this was among them.

Q. And did you prepare Exhibit 186?

A. Yes, sir.

Q. And at whose direction was it prepared?

A. My own.

4978 Q. At your—

A. At my own direction. That is a sheet that I prepared for my convenience in accumulating the over ceiling receipts of The Shotwell Manufacturing Company.

Q. And who employed you to perform that service?

A. Mr. Cain.

Q. And was that on behalf of The Shotwell Manufacturing Company, your employment?

A. Yes.

By Mr. Lockley: I offer in evidence Government's Exhibit 186.

By Mr. O'Brien: I would like to cross examine the witness on it.

By the Court: Very well.

Cross Examination by Mr. O'Brien.

Q. Mr. Busby, you had been retained to get up some summary of receipts, you say?

A. Yes, sir.

Q. Some recap of transactions with Lubbens' companies, and Shotwell?

A. Yes.

Q. Those sheets have not, as yet, been exhibited
4979 to you, have they?

By Mr. Lockley: Well, if your Honor please, I haven't finished my examination of Mr. Busby yet.

By Mr. O'Brien: I know, but I will come to it.

By the Court: Have you reoffered it?

By Mr. Lockley: I have offered this exhibit, yes, but I haven't released Mr. Busby for cross examination.

By the Court: I suppose Mr. O'Brien has a right to examine as to the foundation.

By Mr. O'Brien: That is right. That is all I am doing.

By Mr. O'Brien:

Q. Did you understand the question, Mr. Busby, or shall we have it read?

A. They have not been exhibited to me here.

Q. In the courtroom?

A. In the courtroom, if that's what you mean.

Q. What has been shown to you is a sheet marked Government Exhibit 186?

A. Yes, sir.

Q. And you can identify it even from there,
4980 can you not?

A. Yes. I think that is a copy of the original.

Q. Did Shotwell, or anyone connected with Shotwell ask you to make this sheet for delivery to the Government?

A. No.

Q. Did Shotwell, or anyone at Shotwell know at the time that this was among the other sheets that were turned over to the Government?

A. No.

Q. When Mr. Lima arrived at the plant on or about July 30, 1948, is it true that Huebner brought him in to you, and that you and Lima sat down and talked about the matter?

A. I don't recall.

By the Court: Speak up, Mr. Busby.

By the Witness:

A. I don't recall whether it was Mr. Huebner or Mr. Graflund. We sat down, anyway.

By Mr. O'Brien:

Q. At any rate, you were talking there to Lima?

A. Yes, sir.

Q. And you had quite a series of sheets?

4981 A. Yes, sir.

Q. Were those sheets pertaining to premium receipts of some kind?

A. Yes. They pertained to the date I had collected, and I assume they covered the premiums.

Q. I didn't want to go into it in detail now, because that will come later, but they were in quite some detail, were they not?

A. Yes, sir.

4982 Q. Now, where was this sheet physically at the time?

A. It was on the top of a stack of papers that I had, instead of a folder.

Q. And did you deliver that whole stack to Lima?

A. Yes, I put them on the desk and explained to them what they were.

Q. And in the process of doing that you handed him Government's Exhibit 186?

A. Yes, as being an aid to the work that we were undertaking.

By the Court:

Q. Did what?

A. I handed it to him as being an aid for the work we were undertaking.

Q. What work were you undertaking?

A. To determine how much the over-ceiling corrections amounted to.

By Mr. O'Brien:

Q. Mr. Lima was the agent who was sent out to audit the books?

A. Yes.

Q. Following the visit of you, and later of Mr. Cain, to see Mr. Sauber?

4983 A. That is correct.

Q. That had been back in January, as far as you are concerned, and March 4th, as far as Cain is concerned, of the same year, 1948?

A. That is my recollection, sir.

By Mr. O'Brien: I think, your Honor, on that basis

I object to the document. There is nothing in this that we told Mr. Busby to turn over to the Government.

By the Court: He was acting for the corporation, wasn't he, in doing that which he did do.

By Mr. McConnell: I take serious exception to that, if your Honor please. He was acting for the corporation under the circumstances of this disclosure.

By the Court: Be that as it may, he still was trying to make some sort of an audit of the books at the behest of the Shotwell Company, is that right, in connection with this tax matter?

By Mr. McConnell: I don't understand that he was auditing any books at all. I understand he was mak-
4984 ing some sort of a statement for Mr. Cain, to turn over on the disclosure. That's what he said.

By the Court: I will receive it in evidence.

(Said document was received in evidence by the Court and marked Government's Exhibit 186.)

By Mr. O'Brien: In addition to the objection I made, I make the objection of this morning to both 185 and 186. In other words, you know my position as to all these documents based on the hearing we had before, that they are inadmissible.

By the Court: Very well. I will overrule the objection.

4985 By Mr. Lockley: Will you mark these Government Exhibits 189-A, B, C, D, and E.

(Said documents were marked Government Exhibits 189-A, 189-B, 189-C, 189-D, and 189-E for identification.)

Direct Examination (Continued) by Mr. Lockley.

Q. Mr. Busby, do you have the originals of the work papers, Exhibits 189-A, B, C, D, and E?

A. I have. Not in the court, however. They are at my office.

By Mr. O'Brien: I don't object on the ground that they are photostats, Mr. Lockley.

By Mr. Lockley: All right, sir.

By the Witness: You better let me look at them.

(Documents handed to the witness.)

By Mr. Lockley:

Q. And did you prepare a portion of Exhibits 189-A, B, C, D, and E?

A. Yes.

4986 Q. And when was that prepared?

A. The data was collected over a period of time, from the first of February, through—

By the Court: February of what year?

By the Witness: 1948.

By the Witness:

A. —through June of '48, I would say, the first part of June, or thereabouts.

By Mr. Lockley:

Q. And is a portion of it in your handwriting?

A. Yes.

Q. Was that prepared as part of your employment as accountant for The Shotwell Manufacturing Company?

A. It was a special assignment by Shotwell.

Q. And was the information contained on this taken in part from the records of The Shotwell Manufacturing Company?

A. Some of it came from duplicate copies of invoices that I had selected.

By Mr. Lockley: I offer Government's Exhibits 189-A, B, C, D, and E in evidence.

By Mr. Kirby: I object, and I ask that the Jury be instructed that neither 186, nor this, if it were to be
4987 received, would be binding on the defendant, Sullivan, or any evidence against him at all.

By the Court: Yes, it may be so understood, and the record may indicate that 186 was not received as to the defendant Sullivan.

By Mr. McConnell: I object to the document as not binding on the corporation under the circumstances in this case, and that no proper foundation has been laid as to what books and records and so forth were used in the making up of Exhibits.

By Mr. O'Brien: If the Court please, I make a general objection, that I made to all papers growing out of that matter, because of the Court's rulings on that subject.

I make also the objection that this is not properly rebuttal. All of these things, if they were to come into evidence here should have gone in during the Government's opening case.

Number three, I, of course, would—rather than in-
4988 terrupt again, since we are going into matters to this extent—would rather cross examine at the time that I cross examine generally, if the document is received.

4989 By the Court: I think you should outline—or, rather, question the witness somewhat further as to where this information came from and what it purports to reflect.

By Mr. O'Brien: I would like to have a ruling on those objections now, your Honor.

By the Court: I haven't yet ruled one way or the other, have I?

By Mr. O'Brien: All right, sir.

By the Court: I assume I will rule ultimately.

By Mr. O'Brien: I see.

By Mr. Lockley:

Q. Mr. Busby, I call your attention to Exhibit 189-A and ask you where did you obtain the information under the column headed "Invoice number"?

A. From carbon copies of invoices that the Shotwell Manufacturing Company had on file representing sales to Mr. Lubben's companies, either General Confections, Eatsum Products or others. I can't say now.

Q. And with respect to the columns headed "In-
4990 voice number" on each of the other exhibits, 189 series, would your answer be the same?

A. Yes.

Q. Where did you get the information under the column headed "Date"?

A. The same source.

Q. From the carbon copies of the invoices, is that correct?

A. Yes.

Q. Where did you get the information from the column headed "Invoice amount"?

A. From the same source.

Q. And "Net weight"?

A. The same source.

Q. And under the column "Description", where did you get that information?

A. From the same source.

Q. And under the column headed "Shotwell Unrecorded per pound", where did you get that information?

A. Mr. Huebner gave me that information as being his understanding as to Mr. Lubben's claim on each pound of overage, claim for overages on each pound of commodity.

By Mr. O'Brien: What is that column?

4991 By Mr. Lockley: "Shotwell unrecorded per pound."

By Mr. Lockley:

Q. And does that information, or explanation, remain the same for the columns headed "Shotwell unrecorded per pound" on each of the remaining sheets of Exhibit 189?

A. Yes, that is Mr. Huebner's memory of Mr. Lubben's claim.

Q. And in whose handwriting do the figures 10 and 18 and ⅔ appear on this record?

4992 By Mr. O'Brien: Is that a column?

By Mr. Lockley: It is a column.

By Mr. O'Brien: What was the heading of it again?

By Mr. Lockley: The heading is "Shotwell unrecorded per pound."

By the Court: I can't hear a word, Mr. Busby.

By the Witness: I was explaining to him. I will tell you.

By Mr. Lockley:

Q. Well, now, in whose handwriting are the figures 10 and 18⅔?

A. Some of these figures are Mr. Huebner's. Some of them are mine.

Q. And the next column is headed "Computation of price adjustment, total."

A. Those computations were made by me.

Q. Is that an extension of the net weight times the unrecorded per pound figure?

A. Yes.

Q. And where did you obtain the information on the columns under the general heading, "Memo taken from

4993 Lubben record," the first column being his record.

A. The memo taken from Lubben's record is my memorandum of identification. It has no basis of authenticity.

Q. Where did you obtain the figures?

A. The figures underneath came from memorandums that I had gathered from Shotwell's office.

Q. Were they Shotwell's records?

A. Well, they represent records that Shotwell had accumulated from other sources, I understand.

Q. They were not a part of the Shotwell Manufacturing Company records, is that correct?

A. No, they were not.

Q. They had been accumulated from Mr. Lubben, for example?

A. I understand some of them came from Mr. Lubben, Mr. Sproull.

Q. And where did you obtain the column—figure under the heading "He added"?

A. The same source.

Q. And where did you obtain the figures under the column headed "Paid to Shotwell and others"?

A. The same source.

Q. And where did you get the information for
4994 the column "Shipped to Eatsum"?

A. The same source. The photostatic copies of memorandums that were available.

Q. And are the headings on the other exhibits in the 189 series similar to those on the one that I have been showing you, 189-A?

A. Yes.

Q. And would your answer, as to each of those columns, and the information obtained therein, be the same?

A. Yes.

By Mr. Lockley: If your Honor please, I now reoffer the exhibit as based upon the records of The Shotwell Manufacturing Company, upon the statements of the defendant Huebner to Mr. Busby, and upon such other records which Mr. Busby had at that time in his possession and which are now in the possession of the defendants and are unavailable to the Government.

By Mr. McConnell: I object on behalf of the corporation to such part of it as not represented by recap of
Shotwell's records. So far as the invoices are con-
4995 cerned, I have no objection. But the additional data
which was apparently put on from sources obtained from Mr. Lubben, I object as not binding on this corporation.

By the Court:

Q. Well, am I correct, Mr. Busby, that this exhibit was made up from various books and records that were made available to you by Mr. Huebner?

A. The availability cannot be classified as books. As records, yes.

Q. Well, miscellaneous records.

A. Miscellaneous records were made available to me, primarily by Graflund. Mr. Huebner had very little to do with making available any documents. Mr. Graflund was the comptroller.

Q. I see. And have you correctly reflected in this exhibit the data that you otbained from these various papers and documents that were made available to you by Graflund and Huebner?

A. All information that I could obtain from the documents that were presented, and hearsay, are reflected in that recapitulation there, for the purpose.

Q. When you say hearsay, you mean that which
4996 Graflund told you and that which Huebner told you?

A. Yes, sir. Anyone that I could ask, any of the employees of Shotwell.

4997 Q. What was the purpose of making up this document?

A. It was an attempt to have a working basis to determine, if possible, the amount of cash that had been received as over-ceiling prices. The Shotwell Manufacturing Company advised me that they had no formal records of these transactions and instructed me to gather the information the best way I could. And this was the attempt that I made to get a starting point to accumulate this data.

Q. And did you deliver that document, or documents, to some agent of the Government?

A. Incidentally to the verification of this work it was delivered, along with my regular audit working papers, the formal books of the company, the memorandums of which we had been talking, and everything else was put on the desk.

Mr. Lima was seated beside the desk and I sat at the end. And we were going to begin, and did begin, to verify each and everyone of these items that are put on there. None of them were presented as authentic or final. It was merely a starting point.

Q. Were they presented to Mr. Lima for his use?

4998 A. Not alone. They were presented along with all of the other information that I had. Yes, for his use.

By Mr. McConnell: May I ask a question?
By the Court: Yes.
By Mr. McConnell: Were you instructed by Mr. Cain to obtain a work sheet or a summary which would show the highest amount of overage claimed by Mr. Lubben?
By the Witness: Definitely.
By Mr. McConnell: And that is what you were working on?
By the Witness: Definitely.
By Mr. McConnell: Without any attempt to determine whether or not it was true or false, isn't that right?
By the Witness: That's correct, at that time.
By the Court: It may be received in evidence. And I understand that you make your objection, Mr. Kirby, to its competency as to Mr. Sullivan.
By Mr. Kirby: Yes.
4999 By the Court: I will sustain that objection.
By Mr. Kirby: And will you instruct the jury with respect to that?

(Said documents were received in evidence by the Court and marked Government's Exhibits 189-A, 189-B, 189-C, 189-D and 189 E.)

By Mr. O'Brien: I again make the objection, Judge—
By the Court: I am sorry.
By Mr. O'Brien: I again make the objection that it is not properly part of the rebuttal and should have been brought in the case in chief.
By the Court: Well, in what way, Mr. Lockley, does it constitute rebuttal material?
By Mr. Lockley: Well, if your Honor please, you will recall that Mr. Cain testified that the first time that the corporation received any overages was in the latter part of 1945, at which time it was set at 3 cents and 5 cents
5000 on the gum work and the chocolate, and that it went up to progressive rates till it got to 10 and 18⅔ cents. This document shows that as early as 1944 there was 10 cents overage.
5001 By Mr. O'Brien: No, it doesn't show that.
By Mr. McConnell: It doesn't show that at all. It shows Lubben claimed that.
By Mr. O'Brien: The witness just said he took those figures from what Huebner said Lubben was claiming. And he next said, in answer to Mr. McConnell's question that he took the very maximum of Lubben's claim.

By the Court: Will you connect it as to that?

By Mr. Lockley: Yes, your Honor.

By the Court: I will receive it in evidence.

By Mr. Lockley:

Q. I call your attention, Mr. Busby, to this column headed "Shotwell Unrecorded Per Pound" and the amounts, ten cents, opposite the description, "spice buttons", and ask you who wrote in that ten cent figure?

A. Mr. Huebner.

Q. And did he tell you at that time what that ten cents was intended to represent?

5002 A. He said he didn't know what the amount was. Mr. Lubben has claimed that the over ceiling price paid was ten cents a pound, and he said you will have to verify it, Busby, for yourself, the best way you can.

Q. And did he tell you at that time that over ceiling prices in the amount of ten cents a pound on such spice buttons had been received in 1944?

A. No, he did not. As a matter of fact, he said he didn't know whether any payments such as indicated here had been received.

Q. Did he acknowledge having received the amount represented by ten cents a pound on the over ceiling price times the poundage of spice buttons shown on those particular invoices?

A. He said he had received ten cents a pound on specific items. He couldn't identify the ones.

Q. Did he say he had received ten cents a pound on those items in 1944?

A. I don't recall that he did.

Q. Did you ever talk to Mr. Cain about it?

A. Yes, I talked to Mr. Cain about—

5003 Q. Did you talk to him about the preparation of that particular document?

A. Only in general. That was my assignment, uninstructed, to prepare the document.

Q. Did he tell you at that time that rather than ten cents a pound, there was only three cents a pound being charged?

A. He said that ten cents a pound was the highest priced. He didn't know which ones were ten cents, and which ones were at other prices.

Q. Did he mention any amount other than ten cents a pound for gum work?

A. No, he didn't go into it at all in detail.

Q. Did he mention any amount having been—not having been received in 1944; did he mention when the first payments were received?

A. No, he did not. He mentioned that some of these items represented trade deals, if that is what you have reference to, that they didn't represent cash, but he wanted them put in anyway.

By Mr. Lockley: May I call your Honor's attention to the fact that it is twelve thirty.

By the Court: All right.

5004 We will take a recess, Members of the Jury until two o'clock.

By the Marshal: Will the audience remain standing while the Judge and the Jury leave the courtroom, please. This Honorable Court will recess until two o'clock this afternoon.

(Whereupon a recess was taken at 12:30 p.m. until 2:00 o'clock p.m. of the same day, being Tuesday, October 13, 1953.)

5005

(Caption—No. 52 CR 143)

Chicago, Illinois,
Tuesday, October 13, 1953,
2:00 o'clock P. M.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the jury:

By the Marshal: This Honorable Court will now resume its session.

By the Court: Mr. Busby, I think you were on
5006 the stand.

By Mr. Lockley: Mr. Busby, will you resume the stand, please.

LEON J. BUSBY, a witness called herein on behalf of the Government, in rebuttal, heretofore having been first duly sworn, resumed the stand and testified further as follows:

Direct Examination (Ctd.) by Mr. Lockley.

Q. Mr. Busby, did you bring with you the originals of your work papers, Exhibits 189-A to E?

A. I think so.

Q. Well, will you get them for convenience so we can both have a sheet to work from.

That is the analysis of transactions between Shotwell and Dave Lubben.

A. Do you want to separate them?

Q. You just take them up there.

Now, Mr. Busby, to what period of time does Exhibit 189-A refer?

A. 19—the year 1944, including the month—one transaction in May, one in April, several in November and several in December.

5007 By the Court: 1944?

By the Witness: 1944.

By Mr. Lockley:

Q. What is the meaning of the term "price adjustment" shown on that exhibit?

A. That was my descriptive terminology for the over-ceiling cash that had been received or at least tentatively put down as possibly received.

Q. And what is the first or earliest date for which the price adjustment is recorded on Exhibit 189-A?

A. November 20th.

By Mr. O'Brien: Mr. Lockley, which is 189-A, those large sheets?

By Mr. Lockley: Yes, indeed, sir.

By Mr. O'Brien: And where does the price adjustment come?

Oh, I see.

By the Witness: The first one that is recorded here is November 20, 1944.

By Mr. Lockley:

Q. Are there other recordings for the month of November and December?

A. Yes, there are several for each month.

5008 Q. And what is the amount under the column "Unrecorded per pound" during the months of November and December?

A. 10 cents per pound.

Q. And what are the items for which that 10 cents applies?

A. It is shown here: Spice buttons, citrus drops, gum drops.

5009 Q. What is the total computation of the price adjustment for 1944?

A. The total that I made was $16,940.20.

Q. Now I show you Government's Exhibit 186 and I ask you if there is any relationship between that and Government's Exhibit 189-A.

A. No, I don't think that figure was carried into—I don't know this number, this exhibit.

Q. That is Exhibit 186.

A. Following out the general instructions from Mr. Cain to use the highest amount available, I used figures that I had gathered from other sources.

Q. Well, let me call your attention to the entry on Government's Exhibit 189-A, a total at the bottom of the page of $29,837.00.

A. That is correct.

Q. Does that figure also appear on Government's Exhibit 186?

A. Is this Exhibit 186?

Q. Yes.

A. Yes, that figure appears. I think it does. Yes.

Q. What does that figure purport to be, that 5010 $29,836.00?

A. That figure purported to be the amount that Mr. Lubben claimed had been paid to Shotwell for the year 1944, as I gathered it.

Q. Does it say that that is the amount Mr. Lubben claimed on Exhibit 186?

A. Is this 186?

Q. Mr. Busby, the numbers are contained on the exhibit itself.

A. Oh, I see. I see. I beg your pardon. No, it doesn't say that, but this sheet was made up for my convenience in gathering this data.

Q. Well, just—

A. It is not all-inclusive.

Q. Just what is the description on 186 of the figure $29,837.00?

A. Sales from 11-9-44 to 12-31-44, price adjustment in parenthesis.

Q. And is the meaning of price adjustment on Exhibit 186 the same as you have previously testified that it means on Exhibit 189-A, namely, that it was your terminology for the overages?

A. It was my tentative computation and it means the same, from a descriptive standpoint, as far as
5011 I am concerned.

Q. Now is there also a figure on Government's Exhibit 186 with the description "Net Sales"?

A. Yes, there is.

Q. And what is that intended to represent?

A. That is a theoretical sales figure beginning with the $29,837.00 less certain assumed adjustments that I thought were proper.

5012 Q. Well, by "sales figures," do you mean the total sales to Mr. Lubben's company during that year?

A. No, that is the excess of cash received. That is the black market portion of the sales figure.

Q. And how much is that figure on Government Exhibit 186?

A. The adjustment?

Q. Yes.

A. $8,826.40.

Q. And there is also an entry below that with the terminology, "Collections, 1944." What does that term represent?

A. That was my estimate on calculation at that time of the cash received against those theoretical price adjustment sales.

Q. And what is the amount collected, according to your computation, in 1944?

A. $11,700.00.

Q. And is there a balance due?

A. Yes, shown here (indicating).

Q. How much?

A. $9,310.60.

5013 Q. All right. Now, will you please turn to the next two pages of Government Exhibit 189. That is the large analysis sheet.

A. I have it straight now.

Q. Which are Exhibits 189-B and 189-C. Is 189-C a continuation of 189-B?

A. I guess—yes, it is. I don't see those markings.

Q. And to what period of time do Exhibits 189-B and C relate?

A. 1945, and—1945.

Q. And what period of 1945? What are the earliest and latest dates?

A. January 5, 1945 is the earliest listed, and December 21, 1945, is the last item listed.

Q. And from where did you get the information contained on the column, "Shotwell Unreported Per Pound", and the figures "ten cents" and "18-1/3".

A. Mr. Huebner gave me that figure as his best recollection of the highest price that Mr. Lubben had claimed as paid in connection with these over ceiling items.

Q. Did Mr. Huebner tell you at what period 5014 of time he had conferred with Mr. Lubben, and Mr. Lubben had made these claims?

A. No, he did not.

Q. On some of those items of ten, and 18-1/3 cents, are they in Mr. Huebner's handwriting?

A. Yes.

Q. And to what type of item does the ten cent unrecorded per pound relate?

A. Gum drops, spice buttons—I believe those are the principal—the only two I see here.

Q. And there are some citrus drops, too, are there not? There is one entry on May 4th?

A. Yes.

Q. And to what does the 18-1/3 cent item unrecorded per pound relate? To what type of product does it relate?

A. Cardinal chocolates.

5015 Q. Now what is the total of the price adjustment column shown on Exhibits 189-B and C in 1945?

A. I don't believe it is totaled here.

Q. Well, turn to Exhibit No. 186, will you please?

A. Yes. All right.

Q. Now on Exhibit No. 186, what is the total price adjustment for the year 1945?

A. $204,105.10.

Q. What is the total of collections for 1945?

A. $198,429.84.

Q. And does the term "price adjustments" on Exhibit 186 refer again to the overages as you computed them?

A. That is my terminology for it, yes.

Q. And the term "collections", the $198,429.84 figure, what does that relate to?

A. That relates to my tentative computation of the collections for that year.

Q. And how were you able to determine the amount collected during that year?

A. From memoranda sheets that had come into my possession through The Shotwell Manufacturing Company.

5016 By Mr. O'Brien: Memorandum sheets of whom?

By the Witness: Most of them were unidentified.

By Mr. Lockley:

Q. Were you told what they represented?

A. Yes.

Q. By whom?

A. I believe Mr. Graflund told me most of them were sheets that had come in from Mr. Lubben. Some of them from Mr. Lubben's auditor, Mr. Sproull.

Q. And what is the item of balance due, 12-31-45?

A. $14,985.86.

Q. And what does that represent?

A. At that time I thought it represented the balance due from Lubben for uncollected over-ceiling prices.

Q. You mean the difference between the total over-ceiling charges during 1945 and the amount collected during 1945, is that it?

A. Plus the carry-over from any other year, which in this case is 1944. In other words, I attempted to

construct an accounts receivable merely for my own control purposes.

5017 Q. All right. Now, will you please refer to the next two pages on the large work sheet, which are Exhibits 189-D and 189-E. To what period of time do Exhibits 189-D and E relate?

A. 1946. I assume this is the same exhibit. I don't see any identification here. It's all right. I guess it is the same.

All right. Yes, it is the same.

Q. That relates to 1946. And what months of 1946?

A. Started on January 10. There are some items—the last item listed on the sheet is October 10—October 11.

Q. I call your attention to the items, the second and third item on that sheet. What dates are those, on Exhibit 189-E?

A. November 26 and December 12.

Q. And the next one?

A. December 16.

Q. Now, did you use the same system of computing the net weight times 10 cents per pound for gum drops for the year 1946?

A. Yes.

Q. And other gum drops?

A. Yes.

5018 Q. And 18-1/3 cents on chocolate — Cardinal chocolates?

A. Yes, I think that's correct. I intended to, anyway.

Q. Did you get the information as to those overages from the same source?

A. Yes.

5019 Q. And who was that?

A. It all came from Mr. Huebner's memory of what Mr. Lubben claimed.

Q. Is any of that column showing the ten cents and 18-1/3 cents unrecorded per pound in Mr. Huebner's handwriting?

A. Yes, some of it is in his handwriting, especially the ten cents.

Q. Now, what is the total unrecorded price adjustment for the year 1946, without regard for the moment to the unbilled shipments?

A. The two figures are not totaled.

Q. Let me call your attention to the total on the right hand side of the page.

A. That's something else. This is the total you are asking for.

Q. I see. That particular figure is not totaled?

A. That's right. It is approximately $138,000.

By the Court: Did I understand that the total of the so-called price adjustment for 1946, is $138,000?

By the Witness: Yes, sir, approximately.

5020 By Mr. Lockley:

Q. Now, I call your attention to the first page of the 1946 record, Mr. Busby, which is Exhibit 189-D. There is a figure there of $131,287.05.

A. Yes.

Q. Does that represent the total through November 21st; and there is a total for the balance of the year on the next page, is there not?

A. That's correct.

Q. And how much is that?

A. $7,732.00.

Q. Now, directing your attention to the heading, "Shipments Not Billed", on Exhibit 189-E, from what source did you obtain this information?

A. That information was handed to me by Mr. Graflund.

Q. And in what form did he give it to you?

A. I don't recall whether he gave me—he gave me a slip of paper with that information on it.

Q. Did he give you the bills of lading at that

5021 time?

A. The bills of lading were there, but they had no amounts on it, as I can recall.

5022 Q. Do you recall from what source you obtained the dollar amounts which appear on Exhibit 189-E. per unit?

A. That was given to me by either Mr. Graflund or Mr. Huebner. I can't recall.

Q. And you made the extensions, did you?

A. Yes.

Q. To show the total?

A. Yes.

Q. What is your computation then of the totals on shipments not billed for 1946?

By the Court: The total of what? The total of the shipments?

By Mr. Lockley: I am going to have to ask the witness that, your Honor.

By the Court: All right.

By Mr. Lockley:

Q. What does the figure represent, first?

A. In the first place, the figure is erroneous. But put down at that time it represented shipments that had not been billed.

Q. For which no invoices had been issued.

A. But it includes, since—I found out later that it includes some items that had been billed.

5023 Q. And what item or items does it include in error?

A. Well, I am not—I don't know the extent of all them. But the one item is July 24, 1946, for Cardinal chocolates, $14,758.00. I think that item has been billed, among others.

Q. So that amount should be deducted, is that correct, from your total as shown on Exhibit 189-E?

A. At least that amount.

Q. Is that correct?

A. Yes, at least that amount.

Q. Do you know of any others?

A. No, I don't. Hearsay.

Q. Well, will you deduct the $14,758.00 from the total now shown and give me the total of the shipments not billed?

A. Fifty thousand—

By the Court: How much?

By the Witness:

A. $50,976.64.

By Mr. Lockley:

Q. Now, will you please turn to Exhibit No. 186 and tell me if it bears any relationship to these two sheets, 189-D and 189-E?

5024 A. Well, not the columns you have been talking about.

Q. Well, does it bear any relationship to this exhibit in any way whatsoever?

A. Yes, the unbilled shipments are listed there. And a part of the items representing price adjustments that were computed by me have been carried over and added to those claimed by—or those taken from Mr. Lubben's figures to arrive at the highest amount that could possibly be involved, and that highest total is what is put into this exhibit 186.

Q. And what is the total of the amount of overages for 1946 as shown by that record?

A. Exclusive of the overages, $135,923.80.

Q. And did you add to that the unbilled shipments?

A. Yes.

Q. And the correct amount of the unbilled shipments is $50,976.64, is that not so?

A. That is as I computed it here.

5025 Q. So what is the total of the two corrected amounts?

By Mr. O'Brien: That is deducting only the $14,758.00, Mr. Busby, is it not?

By the Witness: Sir?

By Mr. O'Brien: I mean the so-called correct balance of unbilled shipments is arrived at only after deducting the $14,758.00.

By the Witness: That is correct. I know of no other. I have heard of some others.

By Mr. Lockley: If your Honor please, may the witness's statement, as it was hearsay, be stricken?

By the Court: Sorry?

By Mr. Lockley: May the witness's statement, as it was hearsay, be stricken?

By Mr. O'Brien: I didn't even hear it.

By the Court: I didn't hear what you said nor what the witness said.

By Mr. Lockley: I asked that the witness's statement, as to what he had heard, be stricken from the record.

By the Court: In fact, I didn't listen to that. You may read it.

5026 (Record read.)

By the Court: Do you want the statement, "I heard of some others" to be stricken?

By Mr. Lockley: Yes, your Honor.

By the Court: Very well.

By the Witness:

A. In answer to your question as to the total of price—so-called price adjustments, plus the corrected figure for unbilled shipments, that total amount is $186,900.44.

By Mr. Lockley:

Q. And there is another item, less items uncollected due to financial difficulties, of $48,614.90. From where did you obtain that information?

A. Mr. Cain told me there was some items that were not collected because of Mr. Lubben's financial difficulties. And Mr. Huebner approximated the figure by selecting what he thought might be the period from which these items were not collected.

Q. Then you deducted that, did you, from the total of the unbilled shipments and the over-ceiling premiums received in 1946?

A. That is correct.

5027 Q. So what is the total collections as shown by your computation for 1946?

A. $168,029.40.

Q. And that should be decreased, should it not, by the amount of this $14,758.00?

A. I don't know.

Q. Well, the original item of $14,758.00 was included in that total, wasn't it?

A. Yes, it was. So it should be decreased.

Q. So it should be deducted from it now?

A. Yes.

Q. All right. I now call your attention to the bottom part of Exhibit No. 186, under the heading "Cash account" and ask you if the term receipts—collections in parenthesis—and the figures under years 1944, '45 and '46 bear any relation to the top portion of the exhibit?

A. Yes, they are as a result of the computations at the top.

Q. What do those figures represent, the receipts figures?

A. To the extent that the figures at the top are correct, which I have to assume include trade deals, the receipts are from those over-ceiling items.

5028 Q. Now, I call your attention to the heading "Disbursements" and beneath it the items "Choco-

late, 45,000 milk, 30,000, corn syrup, 12,000, cocoa beans, 22,000, cocoa bean deal, 30,000, sugar deal, 37,000, sales expense, unallocated, 18,000, 1945", and for 1946, "Milk, 15,000, corn syrup, 87,775, sugar deal, 54,825 and sales expense, and unallocated, 27,661.24," and ask you what those figures represent?

A. Well, that is an approximation made to be used in accounting for the disbursements for these funds for raw materials.

Q. And from what source did you obtain the information to include those disbursements on Government's Exhibit 186?

A. I believe Mr. Cain gave me a sheet showing just a rough approximation of what those items might have been.

Q. I show you Government's Exhibit 185 and ask you if that is a photostat of the sheet which Mr. Cain gave you for that purpose?

A. Yes, this is a sheet that he gave me for use in trying to determine the outgo of the money.

Q. Did Mr. Cain tell you at that time that those amounts had actually been expended?

5029 A. No.

Q. For corn syrup, sugar or cocoa or the other items listed here?

A. No. He only told me that the entire amount had been expended for raw materials.

Q. Did he tell you it had not been used for the purchases shown on Exhibit 185?

A. He said a lot of it included trade deals and to that extent, that it didn't represent money. Otherwise, the money had been spent.

Q. Did Mr. Cain have any records from which he obtained the information as to the trade deals?

A. I don't know of any.

Q. Well, what is the cash balance shown at the bottom of Government's Exhibit 186 for the end of 1946?

A. $5,898.00.

Q. And what does that figure represent?

A. Just what it says, a balance, thast was put in the bank, 7-25-46.

By the Court: How much, please?

By the Witness: The amount was $5,898.00 deposited in the bank on 7-25-46.

5030 By Mr. Lockley:

Q. And does that purport to be the amount left over from the over ceiling collections and unbilled shipments after the disbursements had been made?

A. At the time I made this sheet, I thought it did, but it has no relation to it.

Q. And was that amount of $5,898.00, actually deposited in the bank account on that date?

A. Yes.

Q. And was it included in the company's taxable income for the year 1946?

A. From the way they kept the books, you might say it was included.

Q. Now, it either was, or it wasn't. You prepared the return, didn't you, Mr. Busby?

A. Yes, I prepared the return.

Q. Well, was it included in the return for 1946 as taxable income?

A. It was included in the corporation's books as a credit to a miscellaneous account receivable, which I find, or was told, was an offset against excessives which were charged into that account to the extent that

5031 the mixed account can be considered a return of this item into income which was so returned, but in the common regular accounting procedure, it was not included in a regular income account.

Q. That is all I wanted to know. Was it included in the 1948 return, at which time these documents, 186—

A. No.

Q. (Continuing)—and 189 were prepared?

By Mr. O'Brien: That is objected to.

By the Witness: I don't know about that.

By the Court: He may answer.

By Mr. O'Brien: The 1948 tax return?

By the Court: I assume the disposition that was made of it may be material.

By Mr. Lockley:

Q. Did you answer the question?

By Mr. McConnell: If the Court please, the witness said he charged it out, and satisfactorily credited it to a previous charge. That closes it right there.

By the Court: If that closes it, that closes
5032 it.

By the Witness: No, there wasn't any special entry, to my knowledge, in 1948.

By Mr. Lockley:

Q. Now what did you do with Government Exhibit 186 after it had been prepared?

A. I—Mr. Lima came out, and I turned it over to Mr. Lima in conjunction with other papers to be used in a follow up of our disclosure to determine how much over ceiling money had been received, and in determining how much tax, if any, was due, so that it could be paid.

By Mr. Lockley: All right, Mr. Busby, thank you.

Cross Examination by Mr. O'Brien.

Q. Mr. Busby, when you were last on the stand, I asked you on cross examination about a conversation which you had at Mr. Cain's home upon your return from the east in January of 1948. Do you recall?

A. Yes, sir.

Q. Following that conversation, did you go in to see Mr. Sauber?

A. Yes, I did.

5033 Q. Who is Mr. Sauber?

A. He is the district director of Internal Revenue Service. At that time he was chief field deputy collector.

Q. And how long after that conversation, approximately, did you so go to see him?

A. It was within the week after January 11, 1948.

Q. Were you alone?

A. Yes, I went alone.

Q. And was he alone at that meeting?

A. Yes, he was.

Q. Will you tell us in substance what you said to him at the time?

By Mr. Lockley: If your Honor please, I object to the cross examination along these lines on the grounds it is beyond the scope of the direct examination.

By the Court: Well, I assume you contend it has some relation with the making up of the exhibit?

By Mr. O'Brien: Indeed, your Honor. That is my sole interest in it.

By the Court: He may answer.

5034 By the Witness:

A. I told him that I had a client that was involved in the receipt of over-ceiling prices resulting from the sale of candy to one of its customers, and that these over-ceiling amounts had not been included in the tax return; that this client had advised me that the amount so received had been paid out for raw materials needed in the production of its candy, and that I had advised this client that by not having included these items, by having omitted both the receipts and the pay-outs, if any, that they probably were in violation of the income tax law; the client thought he was only in violation of the OPA law, and I told him that the client, after being advised that he might be in violation of the income tax law, wanted to make the correction in their return and clear up the matter, and I asked him whether or not the proper procedure would be to file amended corporate returns.

By Mr. O'Brien:

Q. What did Mr. Sauber say?

A. He told me that it would not be advisable to

5035 file amended returns.

Q. Let me ask you this question: Did you say anything to Mr. Sauber at the time as to the amount of money involved?

A. He asked me how much money was involved and I told him that Mr. Graflund had told me that it probably wouldn't exceed one hundred thousand dollars but I did not have any idea of what was involved.

Q. What did he say about the amended returns?

A. He said that since they didn't know how much was involved, he would not advise filing amended returns; that I should go back and talk to the client about it, and if I wanted to come in or the client wanted to come in and disclose their name, which I did not do at the first meeting, then I should proceed to find out how much was involved.

Q. Did you thereafter go in with the client?

A. Yes, I went in with the client.

Q. About when was that?

A. Well, to my best recollection, I went in with the

client about January 23rd for the first time. I went again—

5036 Q. Who was it that was with you?

A. Mr. Cain.

Q. And you went again with Mr. Cain?

A. March 3rd or 4th—the 4th.

Q. That visit you are sure of?

A. Yes.

Q. And is it true that substantially the same conversation was had at that time between you and Mr. Cain and Mr. Sauber on March 4th or 3rd?

A. Yes, substantially the same.

Q. What if anything was said about an audit of the books and records by a revenue agent and by whom was it said?

A. Mr. Sauber suggested that I go back and try to work out these over-ceiling receipts and disbursements if possible and in the meanwhile he would have a revenue agent come out and work to determine for himself how much was involved and that I should work along with him in furtherance of this disclosure.

5037 Q. When was it, to your knowledge, that a Revenue agent arrived for that purpose?

A. The latter part of July, 1948.

Q. Was that Mr. Lima?

A. Yes.

Q. Prior to his arrival, did you visit with Mr. Huebner, Mr. Graflund, Mr. Roeser, Mrs. Morrill, concerning the matter of the premium receipts?

A. Yes, perhaps with the exception of Mrs. Morrill. I don't know whether she was in on it or not.

Q. And you did have some papers available which had been procured from Lubben or his companies?

A. I had some papers that were given me as having been procured, yes.

Q. And did you also, before the completion of this so-called Government's Exhibit 186, have some papers from Mr. Sproull's office?

A. Yes.

Q. Did you talk to the people with whom you met at Shotwell concerning the probable amount involved?

A. Yes. I talked to both Mr. Graflund and Mr. Huebner and I talked to Mr. Cain also. Mr. Graflund—

Q. I just wanted to know if you talked to them.
5038 A. Yes, I talked to them.
Q. What, if anything did Graflund say?
A. Well, Graflund again said he thought the amount involved was around $100,000.00. That was the best of his recollection.
Q. What did Huebner say?
A. Huebner thought it couldn't exceed somewhere between 150 and 160 thousand dollars, including the trade deals.
Q. What, if any, instructions did Mr. Cain give you?
A. Well, Mr. Cain merely gave me general instructions.
Q. By the way, was Mr. Cain present during these discussions you had at the plant—
A. Yes.
Q. —as to the probable amount due?
A. Sir?
Q. Was Mr. Cain present at the plant during these discussions as to the probable amount due?
A. Oh, yes, Mr. Cain was there.
Q. What did he say?
A. He said—
Q. As to your mode of procedure—
5039 A. He said—
Q. Tell us what he said.
A. Mr. Cain told me to proceed the best that I knew how from whatever records that I had, to gather this over-ceiling data together and if there was any question as to amounts, an item that should or should not be included, that it should be included; that he was interested in getting the thing done quickly and getting the tax matter cleared up and if he paid more than was—more than he thought was due, why, he wanted to get it over with.
Q. Did Mr. Cain tell you to try to ascertain the figures actually received by Shotwell or to ascertain the maximum of Lubben's claim?
A. He told me to take Lubben's claim where it was in excess of anything—any other information I had.
5040 Q. Now, one of the methods by which you proceeded to work was the one you described to Mr. Lockley of recapping of the Shotwell invoices over the

whole period whether they said there were overages or not?

A. That is correct. I took the overall possibility.

Q. And then you took the poundage of the items involved on those invoices, and applied the maximum overage rates as procured or established by Mr. Huebner's recollection of what Lubben claimed?

A. That is correct, yes.

Q. And that is the items set down in the unrecorded per pound column?

A. That is correct.

Q. And then you extended those figures, those horizontal figures to arrive at the total shown?

A. That is right.

Q. Now, on the right hand side of the sheet, or these sheets, 186, are one, two, three, four, five columns, all bracketed under the general heading, "Memo Taken from Lubben Record". Is that right?

5041 A. That is what is there, but that is my terminology, my method of identification.

Q. I appreciate that, but that is there?

A. That is correct. That is the information that I had, that it was Lubben's record.

Q. And then you set down in those columns the data or such of the information as you were able to procure from the Lubben papers that were available?

A. That is correct.

Q. Including the Sproull figures?

A. That is correct.

Q. Do you remember, Mr. Busby, whether there were any other figures available besides those from Lubben and Sproull, any other set of figures which entered into these sheets? Do you remember that offhand?

A. I can't segregate Lubben and Sproull from other memoranda that I had. I don't recall of any other outside—

Q. For example, do you know—or let me ask you this: Did you have available at the time any book or record of General Confections, any book or record as such?

5042 A. No.

Q. As to General Confections, is it true that the figures you had from Sproull, related to General Confections?

A. They were reported to—I don't know.

Q. Where did you get the figures relating to Eatsum partnership, do you know?

A. It all came from the same source, from Lubben's papers, or Sproull's papers. The headings that I have used were taken from their work papers.

Q. But none of those were part of the Shotwell records?

A. None at all.

Q. Now, about how long would you say did it take you to work up and complete in the manner that you described, this Government Exhibit 186, having to do with the subject of receipts?

By the Court: Isn't that 189?

By Mr. O'Brien: Perhaps it is, Judge.

By the Court: It isn't 186.

By Mr. O'Brien: Yes, it is 189.

By the Witness:

A. The compilations on that sheet ran over a period of three or four, five, months, begining in January,
5043 after I had made the disclosure.

By the Court: January of what year?

By the Witness: January, 1948, down through June. Part of the time I didn't work on it. I was on vacation, but the work covered that span of time.

By Mr. O'Brien:

Q. Now, Mr. Busby, did you make any comparable study of the alleged premium payouts?

A. Well, I made considerable study, but I couldn't draw any conclusions.

5044 Q. I mean, did you arrive at any figures of your own?

A. No conclusions, no.

Q. And I was asking Mr. Cain or Mr. Lockley was asking Mr. Cain about this Government's Exhibit 185, the longhand figures in his handwriting, I think, in which, as I recall it, he said the figures were to be worked back. Do you recall some conversation with Mr. Cain having to do with the work-back of figures?

A. Well, he just gave me the slip of paper and told me to use as a basis to go into the Shotwell production record and see if I could determine how much raw materials had otherwise been consumed as to whether or

not such consumption was in excess of the quotas and by—

Q. And now—excuse me.

By the Witness:

A. (Continuing) By analysis or analogy determine whether any of these estimated pay-out figures could be substantiated.

Q. Do I correctly understand that the longhand sheet, Government's Exhibit 185, was handed by Mr. Cain to you for your own use?

5045 A. That is correct.

Q. Did Mr. Cain say that that was to be given to the Government?

A. Oh, no.

Q. Did you ever make an analysis or written analysis of premium pay-outs and hand it—that is, comparable to the one on receipts—

A. No.

Q. —and hand it to the Government?

A. No.

Q. Now when Mr. Lima was visiting with you, did you, in handing him this Government's Exhibit 189, tell him that these were the figures which represented overages actually received by Shotwell?

A. Oh, no. That was impossible.

Q. What did you tell Mr. Lima about them?

A. I told him these were work sheets that I had gotten together as a guide to working with him and determining if possible what these receipts amounted to.

Q. And he was to make an audit of everything available for that purpose?

A. Oh, yes. This whole thing was—

Q. Did Mr. Cain tell you to assist him in making

5046 that audit?

A. Yes.

Q. And were you especially retained and paid to do that?

A. Yes.

Q. And after Mr. Lima left and Mr. Mammel came in February of 1949, did you continue to work with him?

A. Yes.

Q. In every way that they directed?

A. Yes.

Q. Did you assist in determining the precise amount?
A. Yes, indeed.
Q. And when I say you, I mean you and your staff.
A. Well, I worked pretty well on it myself.
Q. Yes.
A. With Mr. Mammel.
Q. Now I would like to know again about this Government's Exhibit 186 which I understand to be this typewritten item that is clipped to Government's Exhibit 189.
A. Yes.
Q. At least in the copy which I have here.
5047 A. Yes. That is the copy.
Q. In the first place, I am not clear how Lima came by this paper, 185. Would you restate that.
A. Well, I handed him the entire work papers that I had, which was a stack of papers probably two or three inches thick, and told him what they were, and I pointed —this sheet happened to be on the top and I explained to him it was my first tentative recapitulation and that it was not designed to be correct but it might be a guide in going about the work.
5048 Q. Did you tell Lima that any such amounts had actually been expended for these items?
A. No, I did not.
Q. Did you tell him that you had even studied it to find out on the payouts?
A. No, I had not at that time. No, I did not.
Q. Did you tell Lima?
A. Yes, sure.
Q. That you had not?
A. Yes, definitely.
Q. Now, I notice, Mr. Busby, again calling your attention to the right side of the sheet here headed "Memo taken from Lubben records" is it? I haven't got my glasses.
A. It is "record".
Q. Will you look at the two corn syrup items which seem to be the last two items described under the column "Description" and they are apparently shipments of corn syrup made by Shotwell in October of 1945. Do you see those?
A. Yes, I see them.
Q. According to the memoranda or papers available

from Lubben, did Lubben ascribe any overage to those corn shipment items?

5049 A. No.

By Mr. Lockley: There wasn't any testimony that he had in 1945.

By the Court: I didn't hear.

By Mr. Lockley: Your Honor, there was no testimony that he had ascribed to such a thing in 1945.

By Mr. O'Brien: If I said 1945, I should have said in 1946, Mr. Lockley. I don't say 1945. I mean to take only what is on the sheet.

By Mr. O'Brien:

Q. These October dates are 1946, are they not?

A. Yes. You said the last sheet and that is how I could tell.

Q. Correct.

A. No, I didn't look at the year.

Q. Now, the items below those are collected under a heading of "Shipments not billed", is that right?

A. Yes.

Q. What, if anything, did the Shotwell people say about overages on unbilled shipments?

A. They told me there were no overages on unbilled shipments.

5050 Q. And when you say "they"—

A. Mr. Graflund, Mr. Huebner.

Q. —to whom are you referring, the same people you mentioned before?

A. Yes, Mr. Graflund, Huebner. Cain, I think, was in on the conversation.

Q. You are not certain whether Mrs. Morrill was there or not?

A. I doubt it.

Q. Did they likewise say at the time that there were no overages on the corn syrup?

A. Yes, on these—on the corn syrup, yes.

Q. I am not sure that I asked you, but going back to the conversation with Mr. Sauber, I think you said to us here this afternoon that Mr. Sauber—that you told Mr. Sauber that the plant had thought these payments to be deductible but that you had informed the plant that they were not. Is that what you said?

A. Yes. I informed him.

Q. Now, what did Mr. Sauber say to you and Cain about it when you were both in there around March 3rd or 4th of 1948 as to whether they could or could not be deducted?

5051 A. Well, Mr. Sauber told us that they could not be deducted.

5052 Q. Is it fair to say, Mr. Busby, that your concern then was in providing Mr. Sauber and the agents with a full statement of the receipts against which a tax might be assessed?

A. That is correct.

By Mr. O'Brien: That is all.

By Mr. McConnell: I want to ask just one question.

Cross Examination by Mr. McConnell.

Q. You say "full receipts". Didn't I understand you to say this morning that you were basing your receipts not upon what Shotwell told you but what Lubben claimed as the receipts by the Shotwell Company, is that correct?

A. A large part of this summary is based upon what Lubben claimed, yes. The whole crux of the computation is based upon what Lubben claimed, because it is—

By the Court: When you say "claimed", you mean the papers you had before you that had been obtained from Lubben's records.

By the Witness: That is correct. Plus the per
5053 pound rate which Mr. Huebner had given me as his recollection of what Lubben claimed was the going rate.

By Mr. McConnell:

Q. Well, these papers that you are referring to, which you say you had before you, were these the papers that Mr. Huebner had obtained from Mr. Lubben?

A. I believe so.

By Mr. Lockley: Well, do you know? I object to any hearsay on the part of this witness.

By Mr. McConnell:

Q. What did Huebner say about it?

A. That's what he said.

By the Court: Well, all right, it may stand.

By Mr. Lockley: It doesn't change it.

By Mr. McConnell: Well, it is cross examination of your witness.

Redirect Examination by Mr. Lockley.

Q. Mr. Busby, without regard to any of these records, whatever they may be, of Mr. Lubben's, which were
5054 in your possession, and which I believe are not in the court room, you could have arrived at the same conclusions that you did arrive at by merely taking the invoices which were in the possession of The Shotwell Manufacturing Company, the amount or the weight of those invoices, and a simple multiplication of ten cents, isn't that so, for the gum items, and eighteen and one-third, or two-thirds cents, whatever it was, for the chocolate items?

A. I couldn't have arrived at any reliable figure. That was just a starting point.

5055 Q. But that is what you did do, isn't it?

A. Yes, of course.

By Mr. Lockley: That is all.

By Mr. O'Brien: That is all.

(Witness excused.)

By Mr. Lockley: If your Honor please, at this time I would like to renew my motion to strike the testimony of the witness Rubinson on the ground that there has been no connection, or no relationship whatsoever to the subject-matter of the issues in this case. Mr. O'Brien said that he could connect it up and there has been no further testimony along those lines.

By Mr. Kirby: If the Court please, the question about Rubinson was whether he turned over cash for candy and put it in a cash candy box, or Lubben put it in a cash candy box. You will recall that Lubben denied on the stand that there was a candy cash box.

By the Court: Well, it may stand for whatever weight it may have.

5056 By Mr. Lockley: At this time, your Honor, I would like to reoffer Exhibits No. 156-A, which is a cash authorization slip for $7500.00, dated August 29, 1946, and 156, which is a check of the same date for $7500.00, and on which your Honor had reserved ruling, I believe, at a previous date.

By the Court: Well, I don't remember, I confess, what the situation was, or why.

By Mr. Lockley: Mr. O'Brien wanted to check on

those items, if your Honor please, to ascertain whether, to his satisfaction, the government was exceeding the bill of particulars.

By Mr. O'Brien: No, not in '46 I wasn't.

By Mr. Lockley: Well, those are the '46 items. Then I presume you have no further objection to them.

By Mr. O'Brien: To be honest about it, Mr. Lockley, I don't remember what the connection was. Do you have the record reference, where they come up?

If I can have the record reference, Judge, I would like to look at it.

5057 By Mr. McConnell: If the Court please, I made objection to that, I believe, because there was no showing that it had ever been paid. Lubben didn't testify about it, Miss Feldman didn't testify that she paid it. There was no proof at all that that money was ever paid to anybody.

By Mr. Lockley: If your Honor please, that relates to one of the so-called unbilled shipments.

By the Court: And identified by whom?

By Mr. Lockley: By the witness Meyer, as one of the documents which he saw.

By Mr. O'Brien: Now, which one is that?

By Mr. Lockley: 156 and 156-A. Identified by the witness Meyer.

At that time Mr. O'Brien said he had no objection to the items, that is, he didn't question the documents, but before responding to the offer he would like to check them against the prior government proof.

5058 By Mr. O'Brien: Well, that does begin to sound right. I would like to read it.

(Record handed to counsel.)

By Mr. O'Brien: That's a seventy-five hundred dollar check?

By Mr. Lockley: That's right.

By Mr. O'Brien: Mr. Meyer referred to it on his examination, so you offered the check and the cash authorization slip.

By Mr. Lockley: That's right.

By Mr. O'Brien: Well, that part I remember, but I can't remember that anybody said he paid us that money.

By Mr. Lockley: It was one of the unbilled shipments.

Mr. Lubben testified he paid all that money.

By the Court: I think Mr. Meyer said that Government Exhibit 156 was reflected on his work sheet, and it was charged to merchandise for Shotwell. And 156-A, is a cash authorization slip for that expenditure.

By Mr. Lockley: Yes, your Honor.

By Mr. O'Brien: The only thing open, then, Judge, is the testimony that that was paid, the testimony
5059 that it was paid to someone at Shotwell. I don't recall what that was.

By Mr. Lockley: Mr. Lubben testified as to all of the unbilled shipments, that he paid the money. Now, he didn't testify as to this particular check, to be sure.

By Mr. O'Brien: I would like a chance to look that up.

By the Court: All right. We will defer the matter.

By Mr. Lockley: At this time, your Honor, the Government rests.

And Thereupon the Government rests in rebuttal.

By Mr. O'Brien: We have nothing more, your Honor.

By the Court: Well, then, I think that it would hardly be advisable to proceed with the arguments this afternoon, would it?

By Mr. O'Brien: No.

By the Court: I think I will let the Jury go, and we will thrash out whatever details we have, preliminary
5060 to the commencement of the arguments, and the Jury may be at recess until ten o'clock tomorrow morning.

By the Marshal: The Jury will be at recess until ten o'clock tomorrow morning.

By the Court: I might see counsel for a few minutes if you come in.

5061 (And thereupon the following further proceedings were had herein, in chambers, outside the hearing and presence of the jury:)

(Discussion off the record.)

By Mr. Kirby: I would like to go on the record for this, your Honor.

At the close of the Government's case, and the close of the defense, I file a motion in writing of Harold E. Sullivan for an acquittal. And I wish to point out the reasons that are stated in writing in the motion to the Court.

I want to point out, too, to the Court that the situation

with respect to the proof as to the defendant Sullivan is—at this moment I conceive it to be plain that there is a complete absence of proof that this defendant knew that the returns themselves were false. Certainly there is a complete absence of proof that the defendant Sullivan had a wilful intent to file a false return.

Each of the people who worked at the factory and
5062 who had anything to do with the handling of these transactions, has specifically now testified, and every single one of them has excluded Sullivan from knowledge of how this money was being handled.

The defendant Sullivan testified and he specifically explained that he did not know how these moneys were being handled; he did know that there were transactions in the black market, he knew only from what these people had told him; and that his knowledge of it was that—he assumed that the bookkeepers and the accountants of the corporation were keeping it in whatever manner would have been proper for tax purposes.

The courts have held, your Honor, that in the case of a question of specific intent, where there is a negativing of the intent by the defendant, and he may so negative it in an income tax, it has been held so by the courts, and where there is nothing but a circumstantial link, if any, to that wilful intent to defraud the Government of its tax revenue, that the rule then is that if there is any reasonable hypothesis of innocence there must be an acquittal, even though there may be other and equally
5063 reasonable hypotheses of guilt. The question is not whether there is one hypothesis, but whether there are two, or more. And if there be two or more, and one of those hypotheses is a hypothesis that the defendant Sullivan, although an officer after July 1st of 1946, nevertheless did not personally direct acts knowingly and wilfully intending to see to the filing of a false income tax return, there is the hypothesis that he was innocent of any such acts and guilty knowledge, then I submit he must be acquitted.

5064 Now, there is an enormous amount of evidence in this case which your Honor has quite properly ruled is not binding or competent as against the defendant Sullivan. So you strike that from your mind. You get to the specific evidence with respect to the defendant

Sullivan. He has now testified. His evidence is to be considered along with all the other evidence. It is true, you consider the evidence in the light most favorable to the Government on a motion of this type, but taking it even in the light most favorable to the Government, there still is a reasonable hypothesis that the defendant Sullivan, although knowing of the black operations, did assume that they were being properly handled, so far as taxes were concerned.

And the only proof in the record as to what he knew is that the quantity being taken in was equal to the quantity taken out. That is exactly the same testimony as to the knowledge of Graflund. That is exactly
5065 the same testimony as to the knowledge of Morrill.

Now, would your Honor say that Graflund and Morrill, with the knowledge which has been testified with respect to them, knew that there was more, if there was more—knew that there was money in excess of the amount that was paid out? Surely, you cannot say that.

And it cannot be said, either, as to Sullivan.

So that I am urging with as much force as I can upon the Court, that this is certainly the appropriate time for a dismissal of the defendant Sullivan. The case is not stronger against him, it is weaker, than it was earlier.

Now, your Honor is familiar with the rule that a corporate officer is not responsible where the crime charged involves guilty knowledge, or criminal intent, unless the officer of the corporation actually and personally does the acts which constitute the offense, or that they be done by his direction or permission.

5066 Now, the offense here is what? Preparing a false income tax return. Now, is there any proof that he did it, actually? Indeed not. That he did it personally? Indeed not.

The testimony is uncontradicted that the first time he ever saw those returns was in this court, and that he hasn't examined them fully to this day.

5067 Now, then, does the proof show that the false return, the preparation of a false return, if such an offense be committed here at all, was done by his direction? Indeed it does not. As a matter of fact, the people that prepared the returns, and worked on the returns, were explicitly asked by me, did they cal' it to

the attention of Sullivan, and in each instance they said they did not.

So that, if the Court please, in the case of a corporate officer, no matter how responsible his general title, I think the rule is plain that where the crime charged involves guilty knowledge, and criminal intent, then, as I read the language from 13 American Jurisprudence, it is essential to the criminal liability of an officer of the corporation that he actually and personally do the acts which constitute the offense, or that they be done by his direction or permission.

Now, there is an absolute absence of proof of that. At the most extreme, there is certainly an hypothesis, 5068 which your Honor can certainly see, that it was not done by his express direction. He did not do it personally. He did not have that personal knowledge which is essential to guilt.

And if there be that reasonable hypothesis, then even though there could conceivably be others, then since it is based on circumstantial evidence as to his intent, he would need to be acquitted.

By Mr. Lockley: Well, as to the reasonable hypothesis rule, I believe your Honor is well aware that that has been rejected in many of the Circuits expressly, and by the Supreme Court, at least by implication, that the better rules is the substantial evidence rule.

And there certainly is substantial evidence in this case that Mr. Sullivan was aware of the activities of the corporation, and himself, as one of the officers, in dealing in the black market.

Now, he cannot avoid the natural consequences of 5069 his own acts by delegating to somebody else the actual performance of the preparation of the income tax returns, and the keeping of the books.

If there is any substantial evidence that he knew there was this type of transaction being carried on, and he has admitted they knew it, and that there was any duty on his part to determine whether or not the income tax returns of the corporation were being properly prepared, and the books were being properly kept, then he can't avoid it by simply saying that "I delegated that to somebody else."

Furthermore, even though he wasn't an officer until July of 1946, I want to call your attention to the fact that he was a Director during all of the years involved. And he was the lawyer for the corporation, who was charged with the responsibility, a greater responsibility than Mr. Grathund, or Mr. Roeser, or Mrs. Morrill, who were merely employees, performing administrative or clerical duties, and who in no way directly or indi-
5070 rectly, are alleged to have benefitted any from the crime charged, the evasion of the income taxes.

To be sure, we have not traced directly into Mr. Sullivan's hands any of the money which was received, but I don't think that that is necessary. We are not charging him with having received the money. What we are charging him with is having attempted to evade the taxes of the corporation.

And when he participated in the activities, along with the other officers of the corporation, in black market transactions, whereby those transactions were kept off the books of the company, he is just as liable for evasion of income taxes, as if he had prepared the return by his own hand.

5071 And as to 1946, particularly, there is evidence that he knew that there were certain specific unbilled shipments which were not going on the books of the company, which could not by their very nature have been recorded on the books, and which obviously could not have been recorded on the income tax returns.

By merely attempting to insulate himself by putting these clerical, administrative duties, in the hands of somebody else he isn't now able to say that "I didn't know the natural consequences of my acts and therefore I shouldn't be penalized for them."

By Mr. Kirby: If the Court please, to respond shortly to Mr. Lockley: This is not a charge of nonfeasance. This is a charge of wilful act.

In Lurling vs. The United States, 179 F. 2d. 419, the Court speaks of the offense of filing an unlawful—I mean a false income tax report. The Court says:

"Such filing is unlawful, however, only if made
5072 wilfully, with knowledge of its falseness and intent to evade taxes. There is no presumption that may

be drawn from the act itself. Both knowledge and wilfulness must be established by independent proof, direct or circumstantial."

And our Seventh Circuit, in the Tinkoff case, 86 F. 2d, 868, has made it plain that you cannot convict a man connected with the corporation for what, as Mr. Lockley said, he should know, he ought to know what the others did. They say in here:

"There could be no criminal liability upon the part of appellant for negligence or for anything of which he did not have actual knowledge; that appellant was not responsible for what his employees knew, unless such knowledge was actually brought home to him; and that the indictment required proof of actual knowledge and wilfulness upon his part."

5073 Now, there is an absolute failure of proof to show that actual knowledge and wilfulness upon the part of Harold Sullivan with respect to these income tax returns. And it does not follow that because he knew there were some transactions explained to him, as balancing out, so there was no tax liability, that he could be said to have had actual knowledge of the falsity of the return. The proof as to the unbilled shipments, your Honor, is that he first learned of them in 1948.

5074 By the Court: Well, I will deny the motion, and allow the exception.

By Mr. Kirby: Will your Honor be good enough, as the rule permits, to reserve your ruling until after the jury has returned its verdict?

By the Court: Well, I assumed that would be the necessary implication of such a ruling, that where a motion for acquittal has been made, and the Court denies it, that you have a right to renew your motion, in the event of an adverse verdict.

But I haven't any objection, if you prefer me to reserve my ruling until after the jury has returned a verdict. I haven't any objection to that practice, if you want me to handle it that way.

By Mr. Kirby: I would, because of the language in the rule. We would be strictly within it then, your Honor.

By the Court: Well, then, you suggest that I reserve my ruling.

By Mr. Kirby: Yes, so that you can pass on it after the verdict.

By the Court: That may be entered in the record,
5075 that the ruling on Mr. Kirby's motion is reserved.

By Mr. McConnell: I think, your Honor, in order to preserve my record on the motion that I made for acquittal of the corporation that I must at this time renew it. And I do so renew it at this time.

By the Court: Have you any suggestions as to how you want me to rule, in the event it is adverse? Do you want me to reserve my ruling?

By Mr. McConnell: I would just as soon you rule on it now, as far as I am concerned.

By the Court: I will deny the motion.

By Mr. O'Brien: I want to renew the motion of the remaining defendants, made under Count 1, for an acquittal, now, at the close of all the evidence.

By the Court: I will deny the motion.

By Mr. O'Brien: So much for the motions.

(Discussion off the record.)

(And thereupon Count and counsel retired to chambers, without the presence of the reporter.)

(And thereupon an adjournment herein was taken until the following day, Wednesday, October 14, 1953, at the hour of 9:00 o'clock a.m.)

* * (Caption—No. 52 CR 143) * *

5076 Chicago, Illinois, Wednesday, October 14, 1953, 10:00 A.M.

Court met pursuant to adjournment.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien,
Mr. Thomas C. McConnell,
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the jury:—

By the Clerk: No. 52 CR 143, United States v. Shotwell Manufacturing Company, et al. Case on trial.

5077 By the Court: Now, members of the jury, I thought I would outline to you just what our plans are

so that you may know. As I told you at the close of the session yesterday we are going to go today to the summations of counsel, and it is figured that we will take all day and maybe crowd us a little bit on the noon hour.

The case has taken a long time to try, as you well know, and there are many matters that counsel necessarily will want to touch on in their closing arguments. And I trust you will be patient and give due attention to the summations and arguments that counsel may make in behalf of their clients.

As I stated, I assume it will take the greater share of the day. Mr. Kirby will open for the Government. He then will be followed by Mr. McConnell—

By Mr. O'Brien: We would like that.

By the Court: I am sorry. A faux pas on my part. Mr. Lockley will open for the Government. He will be followed by Mr. McConnell, and then Mr. Kirby and then Mr. O'Brien. And then Mr. Lockley will make a closing or rebuttal argument on behalf of the Government.

5078 Unfortunately, and I have told counsel, many months ago I made a commitment to be back home tomorrow, and it distresses me that we have to interrupt, but I made a promise and I don't feel that I can break it, and they are depending on me. Therefore, I am leaving for Minneapolis and will return again tomorrow night so that I can charge you Friday morning and have the case in your hands, I hope, sometime Friday morning. That means we will be in recess tomorrow.

Well, with those preliminary remarks, Mr. Lockley will open for the Government.

Thereupon Mr. Lockley addressed the court and jury in argument on behalf of the Government:

By Mr. Lockley: If your Honor please, ladies and gentlemen of the jury: We have been here together for a month now. In that length of time I have noticed particularly the close attention and the interest that you have shown to the testimony that has been given by the witnesses. And I know that I speak not only for the Government, but for the defense, when I say at the outset that I want to thank you for your interest and for your at-
5079 tention. It is a pleasure, actually, to try a case before a jury that you feel has some interest in what is going on and is actually paying attention to what is doing, and

you realize that when they do bring in a verdict it is going to be a verdict based on the full facts in the case as they have heard them in the court room.

So I say again thank you, both for the Government and I am sure also for the defense. We want to thank you for that.

Now, a month ago when I made my opening statement to you I told you some of the things that the Government expected at that time to prove. What I want to do now is to go over and sum up for you the things that the Government believes it has proved beyond a reasonable doubt which establish the commission of the crime charged by these defendants.

5080 A month ago I told you that the Government expected to prove that they had evaded their income taxes—or, rather, the income taxes of the corporation, by filing a false and fraudulent income tax return. And I told you that we expected to prove that income tax return was fraudulent because it failed to contain or to include certain premium payments which had been received from the defendant Lubben, or from the witness Lubben in his various companies.

I told you then that the issue was a fairly simple one, although it wouldn't seem so at times. I am sure that at least the latter part of that prediction came true. It has seemed complicated. There has been a fog, a cloud of confusion has been created about the really simple issues of this case.

It isn't a question of whether or not Mr. Lubben sold the Haberkorn Candy Company to The Shotwell Manufacturing Company. It isn't a question of what Mr. Lubben did with any of his other customers. It isn't a question of what the grain or the corn market was in 1945 and 1946. That is just smoke screen. That is all it amounts to.

5081 The simple issue in this case is: Did Lubben pay this money over to the defendants, in behalf of the corporation; was it reported; and, if not, was it left off the returns wilfully? Now, that is really all the case is about.

Now, I am going to try to summarize some of the Government's evidence to show for you—factually, not theoretically—by means of documentary evidence and by a resume of the actual testimony of some of the witnesses what the Government has attempted to prove for you.

Now, we started out to prove that there had been a false return filed by the corporation, or on behalf of the corporation.

You heard the lady from the Director's office identify the returns of the corporation in evidence. She identified them as having been filed with the Collector's office in Chicago from the stamps which appeared on them. She identified the amount of money which was reported in the returns and which had been paid over at that time.

Subsequently, Mrs. Morrill, the defendant corporation's office manager—and I believe its only remaining em-
5082 ployee—also identified the 1946 return which she had filed, and she stated that she knew at the time she signed it that it did not contain all of the receipts from the corporation.

Stanley Graflund and Howard Roeser, who were the comptrollers at different times in the corporation, also identified the 1945 and 1946 returns and they testified that they did not contain the premium payments which had been received from Lubben. They testified that those premium payments were not contained on the books and therefore they could not have been in the corporate returns.

Mr. Busby, the CPA who returned those returns, also identified them as having been prepared by his office from the books and records of the corporation. And he said that at the time they were prepared he had asked specifically whether there was any other income from the corporation and he had been told that there was not.

You will recall that there were letters read into the record to Mr. Busby by Mr. Huebner, and I think in
5083 one case Mr. Roeser and in the other case Mr. Graf-lund signed it, saying that there had not been any OPA violations, either. That is in direct contradiction of some of the testimony which the defendants have subsequently attempted to bring forth.

5084 Now, Gladys Morrill, in addition to identifying the return, told you how the bookkeeping system was kept in The Shotwell Manufacturing Company. You will recall that there was a billing system where ten or eleven or twelve copies of the bill were prepared at one time. The original of that became an invoice which went to the cus-

tomer, another copy went to the salesman, another one went to the accounting department, and another one went to the shipping department, together with three bills of lading which were prepared at the same time, all as a part of this ten or twelve folio from the billing machine.

Those bills of lading were used to make the shipments, and then they went back with the shipping copy to the accounting department where the proper record was made to show the sale of that particular commodity against the individual customer who had purchased it. It was then picked up from there into the books of the company, and shown as a part of the total gross sales, and from there into the income tax returns.

Obviously, if that bookkeeping system was not followed, if, as subsequently happened with those unbilled shipments, instead of using the regular bills of lading
5085 which contained the Shotwell Manufacturing Company name imprinted right on it, they had used these stationery store copies, so to speak, as the bills of lading, why, the whole bookkeeping system was by-passed.

There was no way for the accounting department to know that those sales had been made, and without that information, of course, there was no billing, no part of those receipts, either accrued or actual, shown on the books and none of it went into the income tax returns.

Mrs. Morrill stated she knew there were some shipments which did not go into the income tax returns, speaking particularly of those so-called unbilled shipments which happened in 1946, and she stated that she knew they were not on the books.

Now, the Government's principal witness was Mr. Lubben, who was on the stand from Tuesday to Tuesday. You saw him and you heard him. You had an opportunity to observe his demeanor during all that period of time. I suppose the best way of going over his testimony is more or less to begin at the beginning, and give you a re-
5086 sume as to how I recollect it.

Of course, your recollection of what the testimony is, is what governs, and not what I tell you I remember it to be.

Remember that Mr. Lubben was working for the Burry Biscuit Company, of which the Eatsum Food Products

Company was a subsidiary, handling sales of candy.
5087 He bought the company, the Eatsum Food Products Company, in early 1944 and at that time he also hired Mr. Bercu to set up a set of books for him.

Mr. Bercu, in turn, hired Miss Beatrice Feldman to be the bookkeeper. Lubben said he was introduced to the Shotwell people by John Bond, who was their sales representative out on the West Coast and that he was anxious to become a broker for candy and he made an arrangement with Mr. Huebner whereby he would get a couple of carloads of chocolate that he was able to obtain through his quotas from the Eatsum Food Products Company and from other sources.

In return, for supplying them that chocolate at ceiling price, they were going to give him a certain quota of candy which meant he could sell the candy to the Shotwell Company and he got five per cent as a broker.

That went along for a few months. Mr. Lubben kept asking for more candy. The demand was great. He wanted to sell a greater amount. The more he sold, the greater his five percentage was to amount to and he wanted to buy some candy on his own and not as a broker, but to
5088 sell as a jobber.

Mr. Huebner said, "It isn't worth our while. We are caught with a low ceiling on these items and besides that, we are short on the candy itself. We can't supply our present existing trade."

So, whether Mr. Lubben suggested to Mr. Huebner, as the defendants claim, or whether Mr. Huebner suggested to Mr. Lubben, as Mr. Lubben claims, in any event, they arrived at an agreement that Mr. Lubben would pay in addition to the amount of the invoice, an amount in cash over ceiling.

Now, the invoice amounts on these candies were around 7 and 8 cents. According to Mr. Lubben, in the beginning of this agreement, there was to be a 10 cent overage. Now, you recall that when Mr. Cain got on the stand, he said it was 3 cents to begin with. That is the first testimony you heard about that. All of Mr. Lubben's books show that from the very beginning, he was paying 10 cents.

Furthermore, this resume, which Mr. Busby went through yesterday, shows that from the very beginning

there was a 10 cent overage rather than a 3 cent one those so-called gum products.

5089 Now, both Mr. Lubben and Miss Feldman and Mr. Bercu testified that the bookkeeping system in the Eatsum Company was to take the invoice as it was received from the Shotwell Manufacturing Company and to extend on that, as Mr. McConnell calls it "mark up" those invoices by picking the 10 cent a pound amount, multiplying it by the weight, and adding that to the invoice amount to arrive at the sum total.

5090 Here are some examples of that. Here are some exhibits. The first group of exhibits that the Government used are these. You will see on them that there is 20,490 pounds on this particular exhibit. They have multiplied it by ten cents and they come up with $2,049.00, and that is the amount added to the printed amount on the invoice of $1,587.98 which is arrived at by multiplying this 20,490 pounds by the actual invoice ceiling price of seven and three-quarters cents. Then the invoice price is added to the overage, and you get the total of $3,636.98. Now, from that figure, Mr. Lubben and Mr. Bercu said that was what Mr. Lubben paid. That was his cost. That was his purchase price.

So then he took their purchase book and he added, he entered into the purchase book the figure of thirty-six hundred dollars. He did it with every one of these invoices, because that is what it was costing him. That is what he put in this book and you will find it in here when you go through. Maybe I better go through one of them. It shows that it is on page 36 of the purchase book. The amount is $3,636.98. I am not a very good book-

5091 keeper, so I have to—I better get the right page. There you find it (indicating). The Shotwell Manufacturing Company, $3,636.98, invoice 60254—(indicating) 60254.

So getting back in—this actually was 1944. It was December. It was a December item but it wasn't paid, the cash overage wasn't paid until 1945. So that shows you that at the very beginning Mr. Lubben was keeping in this purchase book a complete record of what it was costing him, both for the invoice price and over-ceiling price on this commodity.

The next thing Mr. Lubben did was to pay for the in-

voice price itself. He didn't do that all at once. Every time he got a bill, he didn't just send a check. When you go to a department store and make purchases and you get a bill, you don't pay it all at once, and that is exactly what Mr. Lubben did. He waited until there were several bills and then he paid them.

He wrote about four of them, and they all add up to $5,018.00. That was paid to The Shotwell Manufacturing Company on the amount and listed on the check too
5092 by the invoice number less the two per cent discount.

5093 Now, you find in the accounts payable that that item is listed as having been paid to The Shotwell Manufacturing Company. Let us see, that date is January 26, $5,000.00, and then when he went to pay the overage amount, he had this group—in this particular instance, he had this whole group of invoices. He had Miss Feldman make up one of these so-called recap sheets. He had her keep a record from time to time. He made these recap sheets up.

She made these recap sheets up from that particular record. Here is one. It says: "Paid, January, 1945, C.D. 46".

If you want to go to the trouble to check this, you can do so. This shows on January 10th there was a shipment of spice buttons in the amount of 15,000 pounds, and so forth, and the next amount, on January 12, of 17,000 pounds. Multiply it by ten cents, and you come out with 32,000 pounds, and $3,255.00.

Gum drops, the same way: Add them all up. This is the date of the invoice (indicating). This is the
5094 amount of poundage (indicating). It comes to 142,053 pounds. It gives you $14,253.00. There was advanced an eight thousand dollar advance, some time or other, leaving this six thousand dollar balance, and $9,508.00 to pay on cash overages.

Well, you won't find any $9,508.00 check to cash, for the reason that after this was made up—look at it rather closely here. In pencil is the date, January 17, and another amount showing another purchase of spice buttons, and someone has added down here in pencil, the weight of that and the amount, $1341.00, bringing the total to $10,849.00, which was owing at the time this particular payment was made.

You recall also, Mr. Lubben testified that this particular payment was made at the Pennsylvania Hotel in New York City, and at that particular time, Mr. Huebner told him that he didn't want any more five hundred dollar bills. That is why he recalled it specifically. He said he wanted them in smaller bills from then on. Here is the check for the $10,849.00, which ties in specifically
5095 with this settlement sheet, which ties in specifically with each and every one of these invoices.

5096 Now, how did Mr. Lubben handle this $10,000.00? He handled it on his cash disbursements book as a payment to The Shotwell Manufacturing Company. You see if you can find that. The date of the check is January 19, 1945. Well, I will show that to you in just a minute. He also showed it as having paid that particular amount on the account of The Shotwell Manufacturing Company. Let's see how good an accountant I am. Let's see if I can locate it for you. All right, here we are. January 19th, cash, Shotwell, $10,849.00.

I am not going to go through this procedure on every one of these particular checks, but I wanted you to see just exactly how these documents all tie into each other, how the checks to cash tie into the invoices, how the invoices tie into the purchase book, how they all tie into the cash disbursements book, and then The Shotwell Manufacturing Company accounts payable ledger card is likewise—it is shown on there as a reduction in the amount due The Shotwell Manufacturing Company and that is true all the way through the period of the sole proprietorship.

5097 Now, I ask you, as reasonable human beings, whether Mr. Lubben back in January of 1945 could have set up a system of books which would anticipate that as late as October or so of 1945, he was going to enter into some sort of black market arrangement with The Shotwell Manufacturing Company, whether at that time he was enough of a crystal ball gazer that he knew that he was going to pay ten cents a pound on spice buttons and gum drops. And Mr. Cain says they didn't raise the price to that until eighteen months later, about June of 1946. There is no question about the authenticity of the records—not the purchase book, no question at all.

You heard Miss Feldman testify that she kept them.

She kept them from the very beginning, almost, of the sole proprietorship, at least the middle of 1944 when she worked there, and she made those record contemporaneously. She made them at the time they happened.

Mr. Bercu set this set of records up and he audited them regularly. He audited them once a month. He
5098 was a man that worked out this system. When Mr. Lubben had to pay cash, Mr. Bercu suggested to him that he handle it in this particular way. Bercu knew about cash checks, checks to cash, all the way through. Is it reasonable to assume that this set of books is false or in any way fictitious or might be long after the transactions happened? It just doesn't stand close scrutiny. Well, there is another thing about that set of books, too.

Do you recall that Mr. Lubben turned them over to Sproull, Scholz? I believe it was in late 1945. Mr. Sproull was going to do some work on them. It was after the partnership had been formed and he had no further use for the sole proprietorship books. Mr. Sproull didn't give them back to him. The Bureau of Internal Revenue had to serve a subpoena on Mr. Sproull to get these books back in 1948, and since that time, the Bureau of Internal Revenue has had them, so it was impossible for Mr. Lubben to have made up a false or fictitious set of books.

These were in the hands of Mr. Bercu and of Miss
5099 Feldman during the sole proprietorship and then they were turned over to Sproull, Scholz and then they were turned over to the agents. We can trace them all the way through. Nobody has had the slightest opportunity to tamper with them. You will find too that the checks to cash tie in with these cash authorization slips which tie in with the invoices and all are dated, like this one, for example (indicating) February 6, 1945. It was cashed February 6, 1945, and so you have to start out with the premise that this happened at the time Mr. Lubben said it happened.

5100 You can't take a check to cash like this, and that was dated February 6, 1945, and work backwards to set up all this elaborate set of records that you want at that time.

So, that is just the first one of those transactions. I hope that that shows that the records in the case here are —at least in so far as the sole proprietorship records are

concerned—that they simply cannot be successfully attacked as being in any way fictitious or false. They are an accurate set of records kept by a competent bookkeeper.

You saw Miss Feldman. They were kept by a certified public accountant, and the certified public accountant is a man with high professional ethics, whose duty it is to see to it that books are kept properly. When he puts his name on a document, it, in a sense, guarantees that that document is a correct one.

Now, the next set of invoices that Mr. Lubben mentioned, he said he paid $6,183.00 in check on February 7th, and Mr. Lubben said that Mr. Huebner told him at that
5101 time to keep the money rolling, and he could get him a lot of merchandise. That again will check all the way through the cash disbursements books, in the accounts payable book, the purchase book, every one of those documents. Every one of those documents will tie in with each and every one of the other documents.

5102 The next group was checks for $18,000.00—or three checks actually—one for 15,000, one for $18,000 and one for twenty-two.

Mr. Lubben said, with respect to the check for $18,000.00, that that was the one when Mr. Huebner, at the Gotham Hotel, split the money into three piles and said, "This one is for Harold. This one is for Byron. This one is for me. And this one is for the horses."

And Byron Cain said he was in New York at the time, although he was not at the meeting when the money was actually split up.

I would like to point out, too, with respect to this earlier payment that I mentioned, on January 19th, that is the time when Mr. Lubben testified that he sent some flowers, I believe, to Mrs. Cain and Mrs. Sullivan. That is the time he took them to the Bowery, and to the Diamond Horseshoe and to Toots Shor's. That is all recorded on his expense account. Those expense accounts were kept by him in the ordinary course of business.

Here is one of them right here. You can see by the very appearance of that, that it was made up when
5103 it was supposed to have been made up. Here, January 18th. "Fruit basket, Mrs. S., Mrs. Cain, miscellaneous expense, $20.00."

On the 19th, "Dinner, Huebners, Sullivans,"—and I don't know what that name is, but it looks like Kerns, or something—"Berry, Hank, et cetera, Toots Shor's, Sammy's Bowery, above crowd; Diamond Horseshoe, above crowd." And the cost, $165.00 for the evening.

Mr. Sullivan said that he was there, that he had gone to the Bowery and to the Diamond Horseshoe.

I just point this out to show that the opportunity was there. Mr. Lubben said that he made that payment in New York City. The defendants were in New York City. This shows conclusively that not only were they there, they were with him. The opportunity was there for him to make the payment, and these expense accounts all show exactly where he was at all of these periods of time. It shows that he was in New York on the days he said he was in New York, that he was in Chicago when he said he was in Chicago.

And you can check each one of these against the
5104 dates of the checks which were made out to cash, and you will find that when a check was made to cash on one particular day, Mr. Lubben left that day for Chicago, or that there was some party with the defendants in New York. So that there was always the opportunity for the payment to be made.

5105 Now, on this check for $15,000.00—here are three of them which go together to pay up a series of invoices. Here is a group of invoices running from Exhibit 29 to Exhibit 39. The checks which pay those invoices, on the invoice price, are right along with them. Here again, you will see all the markings, the marked up invoices—as Mr. McConnell liked to call them, that he didn't give any permission to Mr. Lubben to mark up—are all here, showing that they were marked up at the time, printed and stamped on the invoices themselves.

Now, here we have a little different type of evidence to support the payment of those cash premiums. You have heard a lot about the so-called cash authorization slips. Well, here is one. Here is one, "Cash, Shotwell, 3-28-45, $15,000.00".

Here is a check, "3-28-45, $15,000.00."

Here is another one, "March 6, 1945, cash, Shotwell, $18,000.00."

Here is a check—"March 6, 1945, $18,000.00."

5106 Now, if you check these particular checks through the cash disbursements book, you will find that they are checks listed as cash, drawn to Shotwell. Thumb through the accounts payable of the Shotwell Manufacturing Company and you will find that they are shown as payments to Shotwell.

Here they are. Here is the eighteen thousand dollar one, March 6. There is the fifteen thousand dollar one, March 28. They show here as a payment to The Shotwell Manufacturing Company.

And here is the so-called recap or settlement sheet for those, or for part of these particular shipments. We don't have all of them. We don't have all of the cash authorization slips. We don't have all the recap sheets. The amazing thing is that we have as many of these as we do, after this number of years, that we have been able to come up with.

But you will find here—you can check each one of these dates, these invoice numbers against the invoices here,

5107 and you will find that they are in complete accord for a period of time. Where the settlement sheet is for the balance of it, we don't know.

But this shows a part of a recapitulation of amounts due and owing in cash at this particular period of time.

As a matter of fact, when that $22,000.00 check—which I believe is right here in front of you, $22,143.13—when that was drawn Mr. Lubben said he paid that money in Chicago, and he also drew another check on the same date. That one is dated May 3rd, I believe. There is another check on the same date for $2,403.00, also dated May 3rd. And he said when he paid these, that these two shipments, which I hold in my hand here, had just come in at that time.

This one is dated April 28th, and this one is dated April 27th.

5108 So they had come in after he had drawn the check for $22,000.00. But he still owed the premium on these. So at that time he drew the check for $2,403.00, which is the amount of the premium shown on these two invoices, the amount of the overage. And at that time he became all even-Stephen, he became all evened up.

He owed no more from that point on. He started accruing new debts, of course, but I mean at that particular point he was all evened up with them.

And you will see here that these shipments are both for Cardinal chocolates. And you will find that on both of them the extensions are 18-3/4 cents. There seems to have been a lot of confusion as to whether it is 18-1/3, 18-2/3, or 18-3/4. But it was 18 and something. That's for sure.

And we have the figure here, 18-3/4, on both of these invoices, and the amounts of the overages. There is $594.00, $1,809.00. If you are good at mental arithmetic you will find that it comes to $2,403.00.

Here again is an example of invoices back in May, 1945, where the amounts are eighteen and a fraction cents on Cardinal chocolates. Mr. Cain said they didn't even put the price on the overages until eighteen—not eighteen months later, it was about thirteen, fourteen months later—it was June of '46, according to him, that they even put this price on Cardinal chocolates. According to Mr. Cain they weren't even selling for premiums at this particular part of the year, and that when they did begin to sell chocolates at a premium it was only five cents, to begin with.

Well, I ask you whether this documentary evidence isn't convincing enough that it was eighteen cents at this particular period of time.

The next payment was $6,459.00. That was made a few days later, on May 9th. Again in Chicago. Mr. Lubben said that at that time Mr. Huebner had a copy of a recap sheet, as he usually did, and that they compared them and put the money into the piles and so forth.

5110 Then there was a payment on or about May 25th. And this can be checked easily, also, against the invoices. Now, it happens that for this particular transaction we have neither a settlement sheet nor a cash authorization slip. But here you have 8,250 pounds of spice buttons. The amount is $825.00. Here are spice buttons and gum drops. The total overage on that is $3,885.23.

And here is 14,610 pounds of gum drops at 10 cents, which is $1,461.00.

You add those figures together, at the 10 cent premium, and you will come up with the amount of $4,455.00. Even though there isn't any cash authorization slip for this particular transaction, even though there isn't any settlement sheet, the mere fact that, on the face of it, this check for cash is for the identical amount as the overages marked on these three invoices. In view of the other circumstances, the practice which Mr. Lubben testified to, that is a strong indication in itself that this check was used for the purpose he said it was, namely, to pay this cash overage. And he said he paid it.

5111 You notice that the check was cashed on or about the date that is shown. Here is the cashier's stamp showing it was paid May 5, 1945.

And at this point of time you can still check all of these transactions through the sole proprietorship books. A complete double entry set of books is in no way questioned or questionable.

Perhaps I should explain what a double entry set of books is. It is not a double set of books in the sense that you are keeping one for yourself and one for the tax collector, or your partner, or somebody. A double entry set of books, of course, is one where you have debits and credits, where for every entry of a debt you have an offsetting entry of a credit. Where you have two columns, like this—two columns, here is the debit column and the credit column, as opposed to a single entry set of books where you have just one column and you show everything in that one column.

5112 Now, we leave the period of the sole proprietorship, and you recall that at this point Mr. Lubben got into partnership with Mr. Giglio. That is when some of his troubles began.

When he left, he left the books and records at the partnership. The result is that we do not have them. Instead of that, we have the carbon copies of the invoices which were prepared at The Shotwell Manufacturing Company plant, at the same time these originals were prepared.

This was a part of that bookkeeping system which Miss Morrill testified about. This is the so-called accounting copy. This is the copy that the accounting department used in making its billings.

And we didn't have the canceled checks. So, you will recall that the young man from the Manufacturers Trust Company brought all of these Recordak copies of the checks with him from New York. You will find that those checks, those Recordak checks, are matched up in 5113 each case to the invoice to which it applies, and is in payment of the invoice amount.

Now, in addition to those, there were, of course, also checks to cash. The first one was the check for $35,536.00.

Now, here is a group of invoices which go to February 28, 1946. You remember that the partnership broke up on or around July 9. Mr. Lubben wanted to pay for these particular transactions with a check. This was after the conclusion of the partnership. He wanted to pay for these transactions by check.

And that is when we come into this period where we have the three checks with the holes cut into them. He said that the checks were refused. You note that those three checks with the holes cut in them are recorded on the back of this settlement sheet, number 3017 for Cain, 3018 for Sullivan, and 3019 for Huebner. There is 3017, 3018, 3019.

And in amounts, he has taken the face amount of the settlement sheet, which is $41,682.10, and it relates to shipments from November through January, and divided that figure on the back, by three, coming up with 5114 eighteen thousand—or $13,894.03.

These checks are for $13,894.03. They were not used to pay this particular set of overages which was due at that particular time. Instead, Mr. Lubben subsequently paid it by this check, which is for $35,536.00. And you will note that the items shown on this settlement sheet, are also shown on this one, except there is an additional one here which increases the amount from $41,000 to $43,000.

See, these items here are duplicated here on this, with the exception that there is a February 28 purchase of 13,892 pounds, which would mean an additional $1,389.00. That, added to $41,000.00, brings it up to $43,000.00.

Now, somebody—we don't know who—has made an adjustment on that. They have deducted $7,535.30. What that means, I have no idea. It may mean that that pay-

ment was made. It may just mean that there was a loss in shipments, or some adjustment made.

5115 In any event, the balance is $35,536.00. There is the check to cash for $35,536.00. That again ties in perfectly with the series of invoices dated from November through February. And these are, as we know, Shotwell products—Cardinals, spice buttons, and chocolate covered nuts.

I overlooked, during the period of the partnership—I realized there, after I started to talk to you about that particular transaction, that I had jumped from the beginning of the partnership to the end, without telling you what had happened in the middle.

Well, in November, 1945, there was a payment of $36,148.35 for which the check could not be found. The only thing that could be located was the Manufacturers Trust Company ledger sheet which shows that on that day a check in that amount was cleared through the bank. In other words, it was paid. There is the amount, $36,148.35. We don't know who it was paid out to. Mr. Lubben said it was made out to cash.

But here again is a settlement sheet dated Novem-

5116 ber 27, 1945, and showing chocolate nut meats, Cardinals and spice buttons, in Mr. Lubben's handwriting, the word "Shotwell". All of those amounts, computed on the basis of the overages given, add up to $66,000.00 less an advance of thirty thousand. You will recall that that $30,000.00 advance was what Mr. Lubben said he had taken out of the corn box, that cash box which was kept during the period of the partnership, and it had been paid with that money. So there is no check for that $30,000.00.

The partnership obviously was in the black market. They were in the black market in corn. They were probably in the black market in sugar and many other things. But that is entirely beside the point. To be sure, Lubben was in it. He candidly told you that himself.

But Lubben is not being prosecuted for black market activities. It is entirely beside the point. Whether he paid the money to The Shotwell Manufacturing Company officers is the only thing you have to worry about, not whether Mr. Lubben was breaking the law in so doing

5117 it. He is no plaster saint. But I would like to remind you of this, too—that without people like The

Shotwell Manufacturing Company Lubben couldn't have been in the black market. It takes two for black marketing, as well as for other things.

5118 So, anyway, on this settlement sheet there is a balance due on November 27th of $36,148.35. Here is a check, $36,148.35. It may be circumstantial evidence, but it is pretty convincing that that check was drawn to pay this amount of money on this settlement sheet which, in turn, was drawn up to pay the overages shown on this group of invoices. You can check it all through, if you would like to do so.

And here is the settlement sheet—Mr. Lubben called it— that he picked up from Mr. Huebner. It is on the Shotwell Manufacturing Company stationery. You recall that he said Mr. Huebner always had a settlement sheet. Whenever they split up the money Huebner always had a record so that he could check against Mr. Lubben's record how much was being owed at any particular time. And this Mr. Lubben has written on the back of—or on the bottom—"Miss Feldman, these were Huebner's last figures."

Well, now, the defense makes much of the fact that there are no amounts on here, no figures, only weights.

Well, putting a decimal point alongside of a weight 5119 to arrive at a 10 per cent coverage isn't a very difficult proposition, and that is all you need to do with these figures. Spice buttons, for example, 41,970 pounds. You know without looking that it is $4,197.00 on that particular amount.

And then, too, here are figures written here—15,000, 18,000. I don't know whether they have any relationship to the 15,000 and 18,000 dollar checks I have shown you or not. There is no way of telling that. But that is something you may consider, drawing your own conclusions as to whether or not this particular settlement sheet has any relationship to the black market activities which were being carried on, and whether the Shotwell Manufacturing Company didn't keep some sort of a record of that, because here is at least a part of such a record.

They have said that they had none, except for one record. And that was the record that was kept, you recall, by Mr. Graflund, and Mrs. Morrill and Roeser,

the records of the amount being put into the cash box. And what happened to it? After Mr. Krane, who was the Intelligence Unit agent who investigated this case, went to the Shotwell Manufacturing Company, Mr. Gra-
5120 lund testified that Mr. Cain twice ordered that that be destroyed. Mr. Cain said that Mr. Gratlund must have been mistaken. Miss Morrill said that she asked him if it was any good any more and he said no.

Well, if it had been any good, if it had actually proven the things that Mr. Cain has claimed here, and that Mr. Sullivan has claimed, if it had established that there had been payouts in the amounts which they claim had been paid out, and if there had only been receipts in the lesser amounts that they claim were received, don't you think that that was the best possible piece of evidence that they had that would prove their point? If they didn't have something to conceal, if that was in any way valuable to them, they wouldn't have permitted the destruction of that record for one minute. They would have been waving it under Mr. Krane's nose the minute he got there to show him that they had a record that was as reliable as the records which I have shown you from Mr. Lubben. But instead of that, they destroyed it. There is only one conclusion to be drawn from that, and that is that it didn't prove the things that they want you to believe.
5121 Now, there has been a lot of discussion about that $35,000.00 check, too, you recall. The invoices to which it applies go back to the period of the partnership. But Mr. Lubben said that when he took over the inventory of the partnership he also took it over at the price which included both the over-ceiling and the regular invoice price. And the defense brought forward a document, a work sheet made by the witness Meyer, I believe it was, who had written on there that that $35,000.00 check was to apply on inventory payment to Eatsum.

Now, if he was paying that check, or the proceeds of that check, to The Shotwell Manufacturing Company, and was thereby reducing the liability that the Eatsum partnership had, it was a perfectly appropriate accounting entry to be made to show that he was paying this on the Eatsum inventory, to reduce the amount of the Eatsum inventory.

If three of us owe each other—I owe you, and you owe me, and you owe me, and two of us adjust the account to the satisfaction of the third one, as long as it is
5122 shown on the record that the account has been properly paid, the actual physical means of completing the transaction are immaterial.

What Mr. Lubben did here, he said, was to pay the $35,000.00 to Shotwell, but since the partnership owed it, he showed it on the books as if it were being paid to the partnership. That is the substance of what the testimony about that particular $35,000.00 has been, from the Government's point of view.

There are a great many more of these various payments. I don't like to bore you by going through them all, one at a time, but there is another one that I think is particularly significant, and that is this particular payment of the March 25th to April 27th date.

Now, this particular settlement sheet is in Mr. Lubben's handwriting, with the exception of the figures along the side, which the witness Strum identified as hers. Lubben did do the ten-cent extension, but when he got down to the 18-¾-cent extension—which, incidentally, is 18-¾ cents a pound—he left it to her. So that particular
5123 settlement sheet was made up by Lubben, in his handwriting. And then the same thing was subsequently typed up.

5124 It compares. Compare it by totals, if nothing else. 19,518—19,518; 14,049—14,049; total 33,567 on that particular settlement sheet.

Now, here is the significant thing about it. It says, "Less payments paid to Frank on way to farm $1488.00."

Now, that is the first payment to Frank, Frank Huebner. Mr. Lubben said it was on the way to his farm in New Jersey.

Now, I want to show you the first invoice I pick up for gum drops, 14,880 pounds. And what is the overage at 10 cents a pound? $1,488.00. So the $1,488.00 paid to Frank on the way to the farm was in payment of this particular invoice.

The next one, "Paid to Frank in Chicago, $14,000.00."

The next, "Paid to Mr. Krasne for Mr. Cain, $1,450.00."

You remember Mrs. Krasne, who said that she received a telephone call from Mr. Cain, and he asked her to pick

up some jewelry, and that some money would be brought over. I don't remember whether she said Mr. Lubben would bring it or not, but, in any event, she testified that Lubben did bring it, and that she went to the jeweler's,
5125 picked up the jewelry, paid the jeweler the $1400.00 in cash, and brought the jewelry out here and turned it over to Mr. or Mrs. Cain here in Chicago.

Now, that happened around April, as I recall, she said, the early part of 1946, in any event. She was on her way to Palm Springs at the time. This particular settlement sheet reflects payments in March and April and May.

Now, does that indicate to you that this was made up near the time when Mrs. Krasne was paid that $1450.00? Isn't it too much of a coincidence to think that Mr. Lubben would falsify a record like this and put into it an item, "Paid to Mr. Krasne for Mr. Cain $1,450.00," when we can get Mr. Krasne—or Mrs. Krasne it was in this case—to testify that she did actually receive the money at or about that time for the purpose it says on this document she received it.

5126 Here, also, "Paid to Frank by Hankermeyer, $8,450."

And finally, "The balance $8,179, paid to Frank by Heitmann."

Mr. Heitmann was here, too. Mr. Hankermeyer, you remember, is dead. But Mr. Heitmann was here. He worked for Lubben. He testified that he came out to Chicago, and he made two trips to The Shotwell Manufacturing Company plant. He had this instruction sheet with him at the time, which explains what he has to do. It says, "First pick up $13,037.25 at Youngstown."

You remember Lubben had a customer at Youngstown. He was selling him black market. This was a part of the black market overage Lubben was supposed to collect.

"They owe us $3,037.25. $10,000 is an advance. You will now have $13,037.25, plus two checks for $4,600, or a total of $17,637.25."

Here are the three checks for $2,300, and I will get back to those in just a moment.

5127 "You owe Frank Huebner, $8,179. Pay him."

Mr. Heitmann testified that when he got into town, he took a cab out to the Shotwell Manufacturing plant, because it was a Friday, and he didn't want to carry that much money around with him. So he paid Mr. Huebner the $8,179.

Now, he also owed Eddie Urban, who was another candy manufacturer in town, $2,408, "April advertising allowance". Advertising allowance in this particular case doesn't mean exactly what it says.

"This leaves $7,050.25. Letter of March 25 to Ed Urban. Pay Ed Urban $1,012.50. This leaves $6,038.05. Now pay Frank Huebner the balance of the money, and make him understand that this is partial payment on the West Coast car of chocolates."

And you find that the $8,179 balance here ties in with the $8,179 instruction that he pay—that Mr. Heitmann was to pay Mr. Huebner, and which he paid him on a Friday.

You recall that he went to the bank on Saturday
5128 with Mr. Urban, he got these checks cashed, which then gave him enough money to pay Mr. Urban what he owed him, and he took the balance of it out to The Shotwell Manufacturing Company plant and he paid it at that time to Mr. Huebner.

"Make him understand this is a partial payment on the West Coast car of chocolates"—which is one of the so-called unbilled shipments.

Now, we come to the checks for $2,300. They are endorsed by Heitmann and by Urban.

Now, you remember there was some defense testimony to the effect that these two checks were shown on the work sheets made by the witness Meyer, as having been used for 25 barrels of syrup—I believe that was it— 25 barrels of chocolate syrup, or something of that sort. And therefore, they could not have been used to pay any overages.

Well, in the first place the Government doesn't contend that this specific $4,600 went to Mr. Huebner. It was a part of the pot, that's all.

5129 You remember at this point he had $17,000.00. He owed Huebner $8,179.00. This was just a part of the money which made up that $17,000.00. This wasn't earmarked for the purpose of paying the overages to Shotwell.

And furthermore, there were five different checks on that work sheet all for $2300.00, all of them described as used for 25 barrels of liquid chocolate or liquid syrup. In the absence of the original records themselves, it is impossible to tell whether the accountant may have made a mistake at the time he made up his work sheets. Those were some of the sheets which were questioned. He could

have gone to Miss Feldman and said, "What are these checks for," and she could have said, "$2300.00, that is what we usually pay for 25 barrels of liquid syrup." I don't know, but in any event, no matter how they were recorded on that work sheet, it doesn't change the situation.

Heitmann testified that he paid $8,179.00 to Huebner at this time on a Friday and the next day he went back after he had gotten some checks cashed and he paid him the balance of $6,038.05, which is on one of the cars of
5130 chocolate to the west coast.

And then there was one other piece of corroboration to Lubben's story of these payments. Do you remember, Jimmie Moran who was Lubben's brother-in-law? Moran testified that on one occasion he made a payment of $17,190.25. Do you recall, he said he took that home to his wife because he wanted her to see how big a stack of money $17,000.00 was all in one piece, and that subsequently he took it to Mr. Huebner at the plant office.

I think it was at that time that Mr. Huebner offered him a ten-cent package of marshmallows. There was also some testimony by Mr. Moran that he had cashed four checks for $5,000.00. Where those four checks are, we don't know. You have his testimony to go by.

In any event, that $20,000.00 is not added to the amount of the overage which the Government claims was paid to The Shotwell Manufacturing Company for this period. In other words, that is a piece of evidence which merely tends to corroborate Mr. Lubben's story that such payments
5131 were being made and that it was being made by checks to cash. The fact that we don't have the checks maybe lessens its weight somewhat, but it is still something that you can consider in determining whether Lubben on the whole is telling the truth to you or whether his story isn't the one that ought to be believed.

5132 You also recall that there is further credibility from Mr. Lubben's story and further corroboration in that Mr. Graflund testified that he received money, or that he knew money was being received, Mrs. Morrill, Mr. Roeser—all of them stated that they knew about cash money coming in.

Lubben testified that he gave money to Graflund, and I think there was some disagreement as to the period of

time in which that money was given. Lubben said that he was told by Mr. Huebner to take it down to Graflund, and to tell him it was for the corn syrup, and to keep his mouth shut, and not to say anything about the candy overages. Graflund, I believe, said maybe there were sixty or seventy thousand dollars. That's all he knew about it. If there was $450,000, as the Government now contends, the balance of it, Graflund never heard of.

But in any event, the fact that payments were being made at all is corroborated, not only by Lubben's invoices, Lubben's books, Lubben's checks, and Lubben's testi-
5133 mony, it is corroborated by Heitmann. It is corroborated by Moran. It is corroborated by Krasne, and it is corroborated by the witnesses who were employees of the defendants themselves, Mr. Roeser, Mr. Graflund, Mrs. Morrill.

And finally, both Mr. Cain and Mr. Sullivan got on the stand and they admitted that such payments were being received, so I hardly see how it can be doubted that payments were being received, and in view of the evidence which you have seen, I hardly see how it can be doubted that they were being received in the amounts Mr. Lubben says they were being paid over. The corroborative evidence which supports him in every material circumstance is so great that you almost have to conclude that it is absolute fact.

Now, you remember, too, there were some statements—some testimony about those so-called unbilled shipments. When Mr. Lubben went to Mr. Huebner in the early part of 1946 he was just about ready to break up with the partnership, and he wanted to continue doing business,
5134 so Huebner told him he could get him a lot of merchandise; but it would have to be on a cash and no invoice basis.

As a result of that, he got the shipments shown on the bills of lading dated March through August.

Sam—well, I have found that. I have got them. These are not the ordinary bills of lading of the corporation. The ordinary bills of lading for The Shotwell Manufacturing Company have the name printed right in here (indicating), instead of the ABC Candy Shippers, or in some instances, there is the name of the General Confections, Mr. Lubben's outfit.

5135 Now, you will see, too, that here is an item, a cash authorization slip on one of these unbilled ship-

ments showing chocolate sold to McDonald Candy Company, Bill Barron. McDonald, 1,989 cases, and Barron, 70 cases, and there is a cash authorization slip for $27,322.67 and here is the check dated the same day or the next day, rather. That is dated June 17th and the check is dated June 18th for $27,000.00. The difference of $322.67 is shown on here by an accountant's symbol, meaning that there was a journal entry on page 37 of the journal which we don't have and which reflects an adjustment of some sort.

You remember, too, that Mr. Heitmann's testimony was that he paid money to Frank Huebner and this was part of the shipment on the West Coast car of chocolates. And here are numerous West Coast cars of chocolates, McDonald Candy Company, Medford, Oregon—William Barron at Oakland, California.

Here again is another bit of corroboration for Mr. Lubben's testimony. Here is an item showing candy sent from Shotwell. Here is Eatsum receiving ticket showing
that the amount was received and that it had to be
5136 Shotwell merchandise that was being shipped.

Now, during this period of time, in the spring of 1946, Lubben was short of cash, so he had to borrow money and you remember, he tried to pay these overages with those checks which had the names cut out. So, he didn't have much money to pay all of the overages plus the amount of the invoice price for these unbilled shipments by cash, so he had to borrow the money and he borrowed it from Urban and you will see that there are checks here which show that amounts were paid in that way.

Stanley Graflund testified that he knew about these shipments, because they kept a perpetual inventory at the plant. A perpetual inventory is a book inventory. It shows how much you manufacture and how much you sell and how much you have on hand at the beginning and at the end of the month. And then, each month they took a physical inventory which was supposed to correspond with the amount of the book inventory and when the man who kept those records came to Graflund and said there is something wrong, the physical inventory is
short some carloads of merchandise that we should
5137 have according to the book inventory," why, Graflund took it up with Huebner and Huebner told him

at that time the shipments had been made without bills on the orders of Byron Cain. Yet, Cain later testified that he didn't even know about those shipments until he got back from California which was in April. Yet, these shipments were begun in March.

5138 Now, who is telling the truth? Huebner and Cain—or rather, Mr. Cain also says Huebner told him that he had become so desperate for money for corn that he had to make this sort of deal. The defense claims it was without overages. Well, whether it was without overages or not, the shipments were not put on the books. They weren't put on the income tax returns so at least, to the extent of those particular shipments, all of those unbilled shipments shown by the bills of lading, the books and records of the corporation were false in the year 1946. They knew they were false. They knew that what was on the books or what was not on the books would not go on the income tax returns and they could have had only one purpose and that was to evade their income taxes. There could have been no other purpose. There was no conceivable reason for leaving those shipments off the books of the company for any other purpose whatsoever. There was no OPA involved in those shipments, none in the slightest. There was nothing in the world to pre-

5139 vent them from putting it on the books, collecting the money, if they wanted to, by cash or by check. It would have made their income tax returns correct, but they didn't want to do it that way, and I submit, that there was only one purpose that they didn't want to do it and there could only be one purpose. They had cash in the bank at that time. You remember Mr. Busby—no, I guess it was Mr. Sullivan yesterday was saying that—when I showed him the bank statements, he said that there was an average anywhere from three hundred to four hundred thousand dollars on deposit. There was plenty of money. If they wanted to go in the corn market to buy corn, there was plenty of money. They didn't have to get it from Lubben. They weren't forced to go into the black market, if they wanted to do it in an honest way. If they had actually wanted to buy this corn, if there was such a circumstance ever in existence, there were all sorts of means at their disposal, without having

to go into the black market with Lubben for that particular purpose and without having to falsify their books by keeping these bills of lading which are different from
5140 those which they usually keep, and by not running those bills through their accounting department so they didn't show up on the books.

5141 And you will also note that Byron Cain testified that the overages of these particular transactions were only three cents, or five cents, to begin with, and then they went up to five, and ten, and finally to 18-3/4 and that they were forced up to 18-3/4 and ten cents, in June, 1946, when the corn situation got so tight that they had to have more money.

Well, I pointed out to you before, but I would like to call it to your attention again; how in the world did Mr. Lubben know that the corn was going to get short in June, 1946, so that he is going to have to pay ten cents, and 18-3/4 cent overages, so that he could get on his records back in January, 1945?

Well, that is not reasonable. The only reasonable answer is that Cain is lying. That is not true about putting a three cent and a five cent overage, and not starting until the fall of 1945. This whole deal began in 1944, just the way Lubben said it began, and it began at ten cents a pound, gum work, and eighteen cents
5142 and a fraction on chocolate; and it started that way.

It stayed that way all the way through. And what the defense is trying to do now is to show you that there was not as much money collected as the Government said was collected, and was collected—was paid out, so that no income—no income tax. That is their whole defense. And I say, it doesn't hold water, because in the first place, this money was being collected during the whole of the two years, 1945 and 1946. It was being collected in the full amount that Mr. Lubben testified he paid to them, and which his books, which we have here, show was paid to them.

And as for the corn market, we are going to hear a great deal about that in just a few minutes, from the defendants, but I am going to ask you one question: You heard a lot of witnesses, and they told you what the market was like in corn, and how short it was, and how

the whole candy industry, and everybody else had to go into the black market to buy raw corn in order to get corn syrup. Did you hear one witness testify that one single red cent had been paid by The Shotwell Manu-
5143 facturing Company to get such corn? There may be an inference that such a thing was necessary. Maybe such payments were made, but I would also like to bring this to your attention then:

There was something like ninety-three carloads of corn purchased through the efforts of Shotwell by these various corn syrup refiners. I believe it was ninety-three—ninety-six. That is fairly close, anyway. But, assuming that there was an amount paid in overages for ninety-six cars of corn, it would have to amount to a tremendous sum to overcome the $450,000 approximately that the Government claims was paid during this two years. If any of it went out for corn, a much greater amount stayed with the corporation, and its officers.

By the Court: You have about five minutes left.

By Mr. Lockley: Thank you, sir.

Well, the defense would like to have it appear, in any event, that this is a question of Lubben's credibility and the truthfulness of his books. It isn't a mere question of that. It isn't a question of one man's word, as I have
5144 already pointed out, but that one man's word is corroborated in every material circumstance by somebody else's word, and by the books that he kept. The bookkeeping is corroborated by Lubben's statement, and not only by that, but by the statements of Mr. Berch and Miss Feldman, by Miss Krasne—well, Miss Krasne corroborated not the books, but at least that one particular settlement sheet I showed you.

Heitmann also corroborated them. He corroborated other portions of the settlement sheet I have shown you. Jimmy Moran corroborated them.

5145 Well, let us look at one other indication of guilty conduct or guilty knowledge on the part of Cain and I bring you now to that meeting at the Club Riviera that was testified to fully by Lubben and corroborated in almost every material respect by Davidson and I believe you know that none of the witnesses were permitted in the court room while any of the other wit-

nesses were testifying, so it was impossible for Davidson to have known what Lubben said on the stand. The only reasonable conclusion is that Davidson was telling his story as he knew it. Lubben was telling his story as he knew it and the two of them together were telling the truth.

Mr. Cain and his attorney, Mr. Grace, have to admit that such a meeting was held. But they tried to show that it was of no significance, that Mr. Lubben just wanted to borrow some money and nothing was ever said about Lubben leaving the country.

I ask you, who has the greater reason to lie? Lubben and Davidson, or Cain? For that matter, Grace, who is a lawyer and who would be subject to severe censorship if it were known that he were a party to
5146 such a deal.

As to the blackmail, well, I think that has been so completely discredited that it is hardly worthwhile to mention it. If Mr. Lubben was a blackmailer, he was one of the most unsuccessful in history. He gave 35—he got $75,000.00 for which he gave a mortgage on everything that he had. Mr. Cain admitted that he was well protected, the mortgage was enough to protect his $75,000.00 investment. So, what is blackmail in that?

Lubben next wanted $50,000.00. Cain sent his bookkeeper and his auditor to New Jersey to look over Lubben's books. If you are going to blackmail somebody, are you going to let them audit your books beforehand and decide whether or not you are a good risk? Of course not.

And Cain testified if there had been an indication from Busby that the books showed Lubben was in good financial condition, he might have given him the $50,000.00. He was a free agent. What in the world is blackmail about that?

As for the story that Lubben called up Morley Cramer's office and said, "You are going to give
5147 me $135,000.00", and then Cramer said when he wouldn't take $135,000.00, he went on down, oh, to a lower sum, I believe it was $20,000.00. And when Cramer wouldn't give him $20,000.00, he said, "Let me have two thousand so I can get my books back from Sproull-Scholz." When he said he wouldn't give him

two thousand, he said, "Will you make it one thousand then?"

5148 I tell you, I hope he never turns to blackmail for a profession, because he will starve to death, if that is the way he is going to do it.

Well, I have taken a good deal of your time. There are a great many more things that ought to be said, but I have tried to show you what the evidence is as it relates to the issues of the case. We have tried to give you the facts, and not any inferences, not anything fancy. What you have heard from the stand on the Government's side has been the testimony of disinterested third party witnesses, who have nothing to gain or lose in this controversy. What you have seen are the records which were kept by competent, honest people, back in the days before there was ever any thought that this case would come up.

I fail to see how they can be attacked in any way by some subsequent papers which were made by some accountant, from some records which we don't even have in existence here today.

5149 I submit to you, ladies and gentlemen, that the Government has shown you beyond a question of a doubt that this money was paid, that it was paid to The Shotwell Manufacturing Company through its officers, that it was income to them, to The Shotwell Manufacturing Company, and that when they failed to put it on their books, and failed to put it on their returns, they had only one purpose in mind, and that was to defraud the United States Government, and to cheat and evade the income taxes, and I hope that when you leave, you are going to carry that thought with you.

I know you are going to do your duty, and bring back a verdict of guilty.

Thank you very much.

By the Court: We will take a recess now for ten minutes, members of the jury.

By the Marshal: Will the audience remain standing, please, while the Judge and the Jury leave the courtroom?

This Honorable Court will recess for ten minutes.

(Short recess.)

5150 By the Marshal: This Honorable Court will now resume its session.

By the Court: I think, members of the Jury, that Mr. McConnell is alloted an hour, so if we go over the twelve thirty time, I trust you will be patient with him. He may finish before, but if he has to go over that time, he has been allotted an hour.

By Mr. McConnell: I thought it was an hour and a quarter, your Honor.

By the Court: It may be that it was. I stand corrected, if that was the arrangement.

Thereupon Mr. McConnell addressed the Court and Jury in argument on behalf of the Defendants:

By Mr. McConnell: May it please the Court, and Ladies and Gentlemen of the Jury:

I agree with what Mr. Lockley said about your attentiveness to this case, and the courtesy that we have received in this hearing. And I think we all do.

A lawyer can't say much about a Judge, but I do want to say that I have appreciated appearing before Judge Nordbye. His handling of this case to
5151 me has been almost an inspiration, and I have never appeared in a case in which I could so wholeheartedly say that the whole handling of the proceeding has been simply admirable. I have enjoyed the case, and I have enjoyed being here.

5152 I am not a criminal lawyer and I approach my task with a good deal of responsibility and a feeling of responsibility that perhaps, in handling a case which is out of my line, that maybe I have done something or said something or taken some attitude with reference to the proofs that the jury might not like or might hold against my client. I hope that is not so. If it is so, I hope that you will not hold it against any of the defendants in this case.

I may have passed some of you in the corridor or not spoken to you or perhaps might have been abrupt. If so, I want you to remember that that is because we are all under the injunction of treating you people absolutely as completely and utterly unapproachable in your deliberations of this case and that is the way it ought to be.

Now, Mr. Lockley has taken the position here that this is a simple, a very simple case, free from any

extraneous circumstance and that we should just look at some books and records and what we see on those books and records ends the case. I think he said
5153 that the attempt to weigh that evidence—or the effect of what he said was—to cast doubt upon it or to question the motives of those who made the entries in the books, was a smoke screen and outside the issues of this case.

Now, I think we should bear in mind in a case of this kind, and I am not speaking of any legal principles but just principles that you and I as ordinary individuals know, and after all we are dealing here with a task case, and while there is no issue presented here of the civil liability of these defendants, or of the corporation or whether or not they owe or do not owe money on the civil side of the case, nevertheless—and the Government can never get away from it—nevertheless the Government is a creditor and the Government has a tax claim and we are engaged in a criminal prosecution arising out of that alleged liability.

Now, I represent the corporation, as I pointed out at the beginning of this case in my opening statement, and I said there might be some differences when we got through with the proof as between my position and
5154 the other defendants, but as we have gone through these proofs and as we have reached the end of this case, I want the members of this jury to know and I want the prosecution to know—I want everybody in this case to know that I take my stand and stand or fall on the testimony and the evidence of the individual defendants that you heard in this case.

There is no difference from my point of view. There is no difference in my point of view from these individual defendants and I say that with full knowledge that Mr. Lubben has made it appear and has tried to make it appear that the officers of this corporation were lining their pockets with over-ceiling money, dividing the money up into three piles, and I am going to show you why he said that and it follows logically that it is not a Government idea, not at all—it is Mr. Lubben's idea.

You must have seen from the way this case has fallen into a certain posture. You could not have escaped it in the course of these proofs, that in the center of all

the proofs going in this direction and that direction
5155 and the other direction, we find the activities of Mr. Lubben in the black market during the OPA days in this country. He was handling large sums of money everywhere. He was handling those sums of money in cash and the question inherent, lying at the bottom of the case—it can't be escaped, it can't be missed, nobody can miss it, nobody can fail to see it—is the question of the credibility of that witness as against the defendants in this case.

5156 These men are threatened with their freedom, these individual defendants. The government is asking that their freedom be taken away and they be put behind prison bars and I have a perfect right and I will not be deterred by any kind of smoke screens, I have a perfect right to stand here before you people and question the credibility of the witness who is going to do that to the defendants.

I have the right under the Constitution of the United States to confront and to cross examine the accuser who wants to take away a person's liberty and confine that person in the penitentiary. And that is no smoke screen.

Mr. Lubben has a set of books. There is no question about that. Mr. Lubben has a set of books, but what do the books show? Where is the proof of the payments that are on those books except by Mr. Lubben? I cross examined Miss Feldman, the bookkeeper. She didn't know of any payments of her own knowledge. She took Mr. Lubben's word for it. She had to. Cash authorization mumbo-jumbo. This document, that document, the other document—I say mumbo-jumbo be-
5157 cause it all comes back to Lubben.

I had Mr. Bercu on the stand here. That eulogy about certified public accountants that we heard from Mr. Lockley—their great public spirit, or whatever it was. Well, you took one look at that fellow and you wondered if you had all your money in the right place. Just one look at the fellow, and he was there. Why? He said why. At the very beginning of this thing he saw and Mr. Lubben saw that handling this amount of cash, he was going to be called into account either one, by the United States government as to what he did with

it on his own income taxes, or by his partner in partnership, and he was making up what he admitted on cross examination was a self-serving set of books. It was self-serving and he admitted it. You will recall I objected throughout this proceeding to these books and entries on the ground that they were self-serving. You only have a rule that somebody testifies bookkeeping entries were made in the regular course of business and they are accurate and so forth and they may go into evidence, but the weight of those documents, the weight of those records is always for you people on the
5158 jury. Self-serving—why? In an ordinary set of books, you have statements back and forth, transactions on the books, statements, settlements month by month, which automatically check the accuracy of those books. Here we have nothing except Mr. Lubben's word, Mr. Lubben's word that he made these payments. You approach it, as you come at it from this direction, that direction, the other direction. You come back and you can't escape it. You come back to Lubben. And Lubben is corroborated—Lubben is corroborated, counsel says, in all respects Lubben is corroborated. How? By his own record, those that he makes himself. Why shouldn't they corroborate him? And it is pertinent to ask at this time, what records does he have?
5159 Here is General Confections and they come in here with a lot of memoranda, little memoranda typed up, supposedly representing transactions with Shotwell, and there are three books that can check the accuracy of those records, just three books of original entry made at the time—cash payable accounts, I believe it was, purchases account, and there was another one that I can't remember the technical word for.

But, I got Miss Feldman to admit that those three books would check the accuracy of those recap sheets. Where are they? The receiver took the place over from Lubben. The Government had access to anything by subpoena. Where are they? I am going to ask that question again. I am going to ask it in a more pertinent way, a more direct way later on.

Those are the books of original entry which can show whether or not these memoranda sheets are fabricated and whether or not one of the greatest hoaxes that has

ever been put over on a jury has been put on in this case, and I am not charging the Government. They have got a witness who sold them something, who sold
5160 them something and sold it right and they have got it. And they are going to try to send our people to the penitentiary with that sort of evidence.

Now, let us see what it is. He is in the black market. Why is he making records of overages? He gets the money out of the bank on cash checks. Now, what does he do with it? Well, always in these cases when you are trying to get at the truth, some little straw falls which shows the way the wind blows. On cross examination of Mr. Lubben, I got an admission from him which he didn't realize at the time was important and I don't think anybody else did either. He was trying to take the position on those three checks that counsel just got through talking about that the reason he was offering those checks was that he had trouble with his partners and he lost access to the corn box but he was telling you people by a slip of the tongue that the money he was talking about didn't come out of his bank account that he was claiming he made these payments with, but is came out of his corn box and he replenished his corn box with these withdrawals, and what hap-
5161 pened? There was $400,000.00 in that corn box and Lubben claims he walked off and left the $400,000.00 with the partnership. I don't care whether he did or didn't. If he walked off and left it, that is where it is, with Giglio, his partner, and if he got it, he got it. $85,000.00 went out of that place on the farm. We had testimony here that fake invoices were sent in covering no goods and money was paid out on them. There was no impeachment of that testimony. What kind of a bookkeeping record is that? What kind of a record is that where they put on the books and records of a company transactions which never occur and they give the money back to the company and a man takes out a commission for cash in a check. Now, what kind of a bookkeeping record is that?

5162 And we had Mr. Meyer come in here who worked on these books seven years ago when the records were intact, when nobody had a chance to do anything to those bookkeeping records. He worked on them and

he saw them at that time and he asked for explanations for those cash entries and no recap sheet showed up then, not one, and he showed by entries which were made on the books, that the recap sheets were wrong, that the money went somewhere else, and he gave the exact statement of the account from his work sheet made seven years ago, when it had the accuracy of having the documents available at that time. I don't know how you could impeach a man's proof any better than that, and we haven't any books, we have no books from the partnership. You have the little recap sheets. Anybody could make them up overnight. You don't need a bookkeeping system. You don't need anything. All you need is a typewriter and a piece of paper and that's all, and anybody can make their books correspond to events that he wants to assert.

If he wants to account for cash checks, he can account for them with that kind of a bookkeeping sys-
5163 tem. Anybody can do it that can write, anybody can do it that can type. And when you get all through analyzing and talking about the recap sheets and cash authorizations and this and that and the other thing and the books are gone and we can't check them—that is, the partnership books can't be produced here because his partners are under criminal indictment down there—they are his partners, they are not ours. That little fellow that came in here that Mr. Lockley showed had been convicted of perjury, who was he? Ronald Stone, a partner of Lubben. Not our people. He was his playmate down there in that concern. A fine situation. He said Lubben is no plaster saint. That is the understatement of this trial.

Now, I want to come to something a little more intimate and I want you people to understand when I say this that I am saying it in all sincerity and that I am not attacking anybody's religious beliefs because I have lived in a Methodist parsonage all during my up-bringing—Lubben came in here and he said that he had a conversation with Mr. Sullivan and that he had a con-
versaion with Mr. Cain and he had a conversation
5164 with Mr. Huebner about those three checks which Mr. Lockley just showed you with the names cut out and he told him that he hadn't any access to the

corn box any more because of a row he had with his partners and he tendered the checks and I think he said that Mr. Sullivan told him that he wanted the cash because he didn't want to pay the taxes and he wanted to use the money on his driveway, or words to that effect.

5165 Now, at the time the Government had in its possession the expense account of these defendants, which show their traveling allowance. And those expense accounts show that Mr. Cain at that time was out on the Pacific Coast, and couldn't possibly have had that conversation.

And Mr. Lubben comes into this courtroom the next day, after giving that testimony, and he says that he had asked the guidance of the deity in changing his testimony, and he changed the date. He changed the date which unimpeachable evidence would have shown to be false.

Now, I can draw inferences, too. I say that that testimony was not only perjury, I say it was blasphemy, bringing into the deliberations the jury room, the inference that he was in communion with the diety over the testimony he is giving in this case, and correcting a date which he knows he will be impeached on if he comes back here with it, and we have a chance to cross examine on it.

It is the only inference you can draw. The man 5166 was reaching into the jury box, attempting to reach the most sacred attitudes and views of the Jury, in dealing with this situation, to prejudice your deliberations in his favor, and make it appear that his testimony was blessed of God.

And I say that with all sincerity. I wouldn't say a word against a man's religious belief of any kind, character, or description, if I had any thought that it was sincere. But if you think back on that incident you must know in your hearts that it was not sincere, that it was meant to muddy up the very well springs of your consideration of this matter.

Another instance—when he turned and referred to Mr. Cain as many times a millionnaire, in an attempt to prejudice you because of wealth, or his assertion of wealth.

We were faced in this case with a consummate witness, if you take the view that a man has to be destroyed on the witness stand in order for you people to judge whether or not he is telling the truth. We were faced in this case by a confidence man, and a blackmailer.
5167 And I will show you why, and how.

Let's go to that incident down there in Hillsdale, on the porch, where poor Mr. Huebner comes in there, and he wants to get the records. And it was the basis of the Haberkorn deal. Nobody can view and remember that testimony and come to any other consideration, that they were selling him a sealed envelope, sealed and written on. The old confidence game property.

And either he had or he did later make photostats, so he could sell the same documents again. And the documents were turned over to our people, when they got back the mortgage that Mr. Lubben had given on his property.

And Mr. Lockley said if he was a blackmailer, he would starve to death. He wouldn't starve to death as a blackmailer. He got $75,000.00. He gave a mortgage. He got the mortgage back. He didn't give anything to get the mortgage back.

His company went through receivership. His man Dane came in and told how he bought it back for $10,000, turned it over to Nubbel, Lubben's com-
5168 pany, for a share of qualifying stock. Back it goes into his corporation, free of his creditors, free of the mortgage, the mortgage in the hands of his sister. That is pretty good. I think he did all right. He didn't pay any tax on that transaction, I am sure. It looked to me like he was doing all right in that deal.

5169 Anyway, I am not concerned about whether or not he was a good or bad blackmailer in that case. I am concerned, and only concerned in that proof, about the attitude of mind that he put the people that were in control of my company in, in dealing with this situation. And I am going to say at the outset, if they had gone to a competent, able, civil lawyer, not a tax lawyer, or anything else, they never would have been in this mess and they never would have made any disclosures, and they never would have had any of this situation that they are

confronted with now, in my opinion.

What did they do? Mr. Sullivan went down there in response to a blackmail claim, and he was shown these recap sheets, which he knew were false, he said were faked, and the evidence now shows were faked. They had to be faked because they aren't on the original books. And they were faked, and he knew they were faked, and he knew he was up against one of the best con men in the country. And he knew, and he had enough imagination to know, that the man would make a wonderful
5170 witness, as he has in this court, and he would have his documents and the Government would believe him.

And Lubben talked himself right out of any tax claim against himself. Everybody else is indicted that ever dealt with him. And he knows it. And we were.

And Mr. Sullivan saw that, and Mr. Sullivan saw that discretion might be the better part of valor. And the Haberkorn deal was made, as he said, to try and get him out of his hair.

Now, I am not justifying—and I don't say he should have done it. I don't believe he should have done it, and I think it was a very foolish thing to have done, but I am trying to get across to you the state of mind of my people in dealing with the situation, and in dealing with Lubben, and in dealing, in subsequent dealings, with the United States Government, under blackmail, under coercion of blackmail.

5171 It shows it. He says they made loans. Surplus security. They weren't in the banking business. Anybody listening to that testimony—bring to the jury room here the common sense you have in ordinary affairs—must know that that was a coerced transaction.

And these men were men of standing in the community. Their reputations were involved. Tax investigation men going to all the customers, 16,000 customers, and ruining their business. It wasn't a question of guilt or innocence. It was a question of dealing with a problem, a practical problem which they had before them to deal with.

And I might have done differently. You might have done differently. But that is what they did. And I am interested in it only to show that the things that they did were not the things that a person not under that sort of coercion would have done.

Now, let's go back for a moment. Mr. Lockley says, "Oh, it is all corroborated, back to the very beginning."

This is the funniest tax evasion case I ever saw.
5172 Everybody out at Shotwell knew about this. Graflund, Roeser, Morrill, Ericson. Everybody in the plant.

Now he is going to have you believe that there was something secretive, that nobody knew anything about. But the corroboration of the defense testimony is this, that nobody knew a single thing about it until October of 1945 when the corn shortage started. That is the only time they knew anything about it. Graflund didn't know anything about it prior to that time. When I asked if it was two, three, four hundred thousand dollars that was involved, he thought it was ridiculous. Morrill said seventy or eighty thousand dollars, Graflund said seventy or eighty thousand, during that period of time, spent to buy corn.

And I am not going to spend any time developing the theme. The other lawyers will. You have heard enough about corn. But those were Government witnesses, brought here by the Government itself. And they corroborate exactly the period of time in which these transactions took place. And Mr. Lubben has tacked onto the accounts of
these people hundred of thousands of dollars, of
5173 which there is no corroboration whatever out there at the plant of the Shotwell Manufacturing Company. The Government's witnesses destroy that corroboration when they limit the period of time to the time that Mr. Cain testified to in this case.

5174 Now Mr. Graflund, a Government witness was accused by Lubben of receiving payments in 1946, after this period of time. Now, Mr. Lubben was quite specific about that, and one of the tests of whether or not a witness tells the truth is the little flourishes, and little furbishings that they put upon a story. A true story needs none of that.

And Mr. Lubben testified that every single payment he made, he made in cash, and he made it to Uhlmer, and it was divided into three piles, and one was taken off for the horses, and the rest—oh, he had the money all over him there, at one time, in different pockets.

But the one transaction that he said didn't happen that way was with Graflund; out at the plant, in 1946. And

there was some—$49,000. He was quite specific about it. You remember.

He was told by Huebner to go down and not say anything about the candy, keep that quiet, but to tell him the payment was on corn syrup.

5175 Now, this is the man that the Government is relying on in this case. And Mr. Graflund said he only had one conversation—took one payment in 1945, and he had no such conversation. And Mr. Graflund is a Government witness, sponsored by the Government, brought here as part of their case.

Now, both those men are not telling the truth. One had to lie about it. And I don't think there is any question at all but what the testimony of Mr. Lubben is false.

Counsel sloughed off those four $5,000 checks—a little occurrence he wished he never had heard of. And I think he is well advised, that he never heard of that one. Four $5,000 cash checks out to the Mid City Bank. And we brought the officers in, and if they had a record of the checks, and if they had been cashed, they would have been there on the records—it wasn't there. It didn't happen. It just didn't happen.

But Moran said that it happened. Moran gave you details of how it happened. I think he went out and

5176 got a box of candy. Little flourishes on the testimony. And it never happened.

Now, if those things didn't happen, and that proof is not necessary in this case, why is it here? Why do we have to have that kind of testimony? Why do we have to have that testimony, if it isn't true? And we can prove it, and show you that it isn't true.

Why do we have to have it, to put these people in the penitentiary? And you should ask yourself that question: If none of this testimony is necessary, why is it here? We didn't bring it in. The Government brought it in to sustain this claim.

5177 Well, what other corroboration is there that Mr. Lubben paid the money, except his own word? That is all.

And he had the motive, exactly the same motive, as any defendant in this case would have, to distort the truth. If he couldn't show it went somewhere else, he was accountable for it on his income tax and accountable to his partnership for it. And he had worked out this

arrangement with Bercu in order to give the apparent appearance of a bookkeeping record, which Bercu himself said was self-serving. Self-serving to whom, I ask. To the corporation? No, to Lubben. That was who was interested in it, Lubben.

Well, there was $400,000.00 that went out somewhere on these cash checks, that went into the cash box, that got back to Giglio, according to him. We haven't got the books. We can't show where it goes.

Now, what does all this lead up to? What it leads up to is this: This is a criminal case. In a civil case we have the right to trace all these funds and find out
where all this money went to determine whether or
5178 not this money did go to him. We can't go and get
those records. We are under criminal indictment. Our hands are tied with reference to it.

The issues are narrow. We are not trying Mr. Lubben. No, we are not trying Mr. Lubben, but we are questioning his credibility, the accuracy of his records, and the accuracy of his testimony in this case. And we have a perfect right to so do.

Now, Mrs. Morrill was produced here as a witness in this case. And Mrs. Morrill kept thi. corn box out there at the plant. And Mrs. Morrill testified—and she was a Government witness—Mrs. Morrill testified unequivocally, in no uncertain terms, that every cent of money that came in to that box, which she handled, went out for corn or raw materials.

And the testimony was, too, from Mr. Cain, that Mr. Lubben set this thing up in a manner whereby these overages could be used in this period of time with which to buy corn.

And I am talking now about the intent of the people
who were dealing with that out there. If they had
5179 known that, and we could assume that they did—
and Mr. Roeser testified here, he is an accountant, he was comptroller, he testified here that he wouldn't have put it on the books in the company. Why? Because it was money coming in from Lubben and going out for Lubben's purposes. It bought corn with which to buy corn syrup with which to supply Lubben's account.

And that is why I said in the first instance, if they had gone to competent counsel in the first place, been able

to get the facts, and so forth, properly analyzed, there wouldn't have been even an OPA violation, in the context in which Lubben was operating and in which Mr. Cain testified.

5180 Now, counsel says, "Why, they had all this money in the bank. Why not take it out of the bank?"

Well, officers who take money out of the bank, without charging it to an account, or having an account to take it from, they go to jail.

That is one reason.

You don't take money out of a corporation's trust funds. That money belonged to the stockholders of this corporation. And you have got to have an account to charge it to. And you can't just take money out of a corporation and apply it anywhere you please, particularly in black marketing transactions, if that was a transaction, and charge it against your other stockholders.

Further, the books and records show that they paid, also, $300,000 in taxes to the Federal Government, for which reserves had to be set up.

The mere fact that they have got cash in the bank without taking into account the liability and the charges
5181 against it, doesn't show any such thing as counsel would have you people believe.

Now, we get to something that is very close to me, in my view of this case, and a thing that I feel very deeply and very seriously about. And I think it raises the problem—and I think it raises a question probably that goes beyond, 'way beyond the rights of these litigants, and the particular single issue that is involved in this case.

There is evidence here that there was a disclosure policy of the United States Government which invited those who thought they had done wrong to come in and make a disclosure.

And pursuant to that, Cain, as an officer of this company, came in with statements which we have shown were not true, and couldn't have been true, and were taken upon the largest possible claim that Mr. Lubben could possibly make in this situation.

The old jingle—"Come into my parlor, said the spider to the fly"—enticing you into a situation like that, where you are helpless.

5182 This case is tried after these people have come in, in good faith, and bared everything that they could

possibly claim against them, and admitting things that weren't true in order to get a tax difficulty settled, and then to have the Government turn around and say, "No, you are indicted. We will take everything you gave us. We will take all your disclosures. We will take your proofs, and we will turn around and send you to the penitentiary on them."

Now, I say that it is something that weighs deeply with me, because I am ashamed to see my Government take that position with reference to anybody. And if they can do it here, the implications are tremendous. We have Constitutional rights in this country. We have rights against unlawful searches and seizures. We have gone to great lengths to work those things out, to protect litigants. And then the Government invites you in on a promise of immunity, to take your evidence, to take everything you could claim against yourself, and against your corporation, and against the people, and then turns around
5183 and uses it against you.

I say that that is not American, and I say that is a very, very, very real issue in this case, as to whether or not this Jury is going to take that kind of proof and give it any consideration whatever in this situation.

If that isn't an issue, if that isn't a real issue, if that isn't a big issue, if that isn't an issue where the Government stands thus, using that thing, I say it is a shame. I say it shouldn't be.

And the only persons that can stop it is a Jury. That is all.

5184 When these things happen—the genius of our law, the genius of it, that a jury stands between the ordinary citizen and his Government, and I, as a lawyer, have a right to stand here and charge the Government before the jury, and assert these things in favor of the humblest citizen in this land, and the jury is the one that stands between that sort of thing and the result of it. And that is the only difference between what happens in this country and what happens in other countries.

My corporation is not a sinner. Sinned against, yes. Saddled with $101,000.00 in the Haberkorn deal, had admissions made against us under this immunity thing which we find difficult to meet, no chance to readily litigate our civil tax liability, standing here with a threat of criminal

prosecution over our officers' heads, I say that is not the way to collect the taxes in this country, no matter how much this Government needs money. That is not the way to do it.

And you are not going to get away from that issue by coming in here with a little act of bookkeeping entries and saying, "A, B, C, D, E—there it is," on Lubben's work papers.

5185 Now, I want to say one thing for one of these defendants and then I am through. I haven't used my hour and fifteen minutes.

I don't represent Harold Sullivan. But I am a lawyer and I know what lawyers have to meet. There is more prejudice against the legal profession, I suppose, than any other profession in the world. And, it may be justified. I don't know.

But a lawyer in a lawsuit has a terrific disadvantage. It is almost impossible for a lawyer to receive the treatment that an ordinary litigant receives in litigation.

There is nothing that Harold Sullivan has done in this case, as I have sat here and listened to this evidence, that any lawyer in the city of Chicago might not have done just as well. And the Government is not only seeking a tax claim. If the Government wins this case that man is defrocked, he has lost his license to practice, he has lost the most precious thing in this world. He has lost the right to practice law. And there is nothing more precious, nothing. No money can buy that right.

Maybe he was foolish. Maybe he should have done
5186 this or done that. He is our officer. He is our corporate officer. We have independent stockholders and we stand behind him. We don't think he did anything criminal at all here, not one thing.

And I can't believe when the scales of justice are viewed by you, where you are weighing guilt and innocence of these individual defendants, as well as of the corporation, where you are taking them from their families—you are destroying the man's reputation, his life, this is a death sentence for Mr. Sullivan, if he is convicted—when you are weighing the evidence in the scales of justice, remember we have in one scale a preponderance, the presumption of innocence, and they must prove this case beyond a reasonable doubt, that weight should go in the scale.

And another thing should go in the scale. The old picture of justice is that of the Goddess of Justice holding scales in her hand, with a blindfold.

And if you have seen perjury going into one of these scales, if you have seen it, if you have seen it here, you can adjust these scales, in the measure of your justice,
5187 in your jury room.

And in leaving this case I want to leave this thought with you. You have seen Lubben. You have seen his compatriots. You have seen the people he dealt with. You have seen the nature of his business.

5188 I just want to leave this thought with you. With all your responsibilities here, you are going to have to live with this case the rest of your lives, and you have got to live with yourselves, and your own conscience. And I will just say this, I would hate to go to my little child's bed with the idea that I had sent Harold Sullivan, or Byron Cain or Frank Huebner to the penitentiary on the testimony of David G. Lubben.

I submit, while it is impossible to demonstrate it to a legal certainty, mathematical certainty in an argument of this kind. I submit that on all the evidence there is no evidence that these people deliberately, with wilful intent set out to defraud the Government of income tax. They didn't do it. They did foolish things. Sometimes, as I see what they have done, I think maybe they should have been tried on a lunacy charge, but not with the intent to evade Federal income tax.

And I submit, on this record, that not only the corporation, but all of these defendants should be acquitted.

Thank you very much.

5189 By the Court: We will be in recess now, members of the jury, until two o'clock this afternoon.

By the Marshal: Will the audience please remain seated while the Judge and the jury leave the court room.

This Honorable Court will recess until two o'clock this afternoon.

(Whereupon a recess was taken to 2:00 o'clock p.m. of the same day, being Wednesday, October 14, 1953.)

5190

(Caption—No. 52 CR 143)

Chicago, Illinois,
Wednesday, October 14, 1953
2:00 o'clock p.m.

Court met pursuant to recess.

Present:

Mr. Edward J. Calihan, Jr.,
Mr. John Lockley.

Mr. Vincent O'Brien
Mr. Thomas C. McConnell
Mr. William T. Kirby.

And Thereupon the following further proceedings were had herein, in the presence and hearing of the Jury:

By the Marshal: This Honorable Court will now resume its session.

By Mr. Kirby: As I am to understand it, I am to go one hour. I may run over a little, in which case, Mr.
5191 O'Brien will relinquish his time.

And thereupon Mr. Kirby addressed the Court and jury in argument on behalf of the defendants:

By Mr. Kirby: May it please the Court, and Ladies and Gentlemen of the Jury:

Today we are having the arguments of counsel on the case. Tomorrow we will have a day off, and then Friday, the Judge from his experience, and from his impartial position in the case, will give you instructions.

I want to confine myself to precisely within the bounds of what I consider to be the instructions which you will be given by the Court, and in no instance do I plan to go beyond the exact and the precise rules of law which you will hear from the Judge on Friday.

Now, one of the first instructions that I want to call to your attention, will be given to you substantially as follows:

The question of the civil liability of the Shotwell corporation for taxes, is not in this case at all. You will be
5192 instructed that what you find by way of your verdict will not have the slightest effect one way or another,

on whether the Government will or will not collect one dollar.

You will be instructed that the only thing you are concerned with is whether the defendants had a personal, and a malicious and a criminal intent. That is to say, you aren't concerned with the collection of the revenue of the Government at all. You are only concerned with a tentative proceeding, only a tentative proceeding.

Now, that the Court will instruct you.

I might say in passing, that on the question of a civil collection of its cases, the truth is plain, that the corporation has offered to pay whatever amount is submitted to it by way of a bill, and pay it in advance, and then pursue the normal course of litigation with respect to the propriety of the charges against them, and deductions against them, and I will tell you that this corporation certainly has the money to pay any bill that could be presented to it.

5193 So that that question of the collection of the taxes is not in the case. What you have in this case is a question of whether you can find that these defendants had a criminal, a knowing, a wilful intent to be criminals with respect to the tax laws, and the Court will instruct you and I beg your closest attention to this when you hear the Court read it to you, that before you can convict, you have to find, as a matter of fact, and beyond all reasonable doubt, not that there is a dispute about the collection of taxes at all, but that these men knowingly set out and planned and intentionally schemed to defraud the Government of taxes due to it with the malicious, with the malignant, with the wilful purpose—and if you don't believe that, and if you don't believe that beyond all reasonable doubt and if you don't believe that to the exclusion of every possible hypothesis, that what they did maybe they did in the course of business without a malignant intent to defeat the Government's revenue, you must acquit and the Court will tell you that.

Now, viewed in that light, the issue you must decide
5194 here—I want to pass now to what I conceive will be the instruction given to you by the Court as to how you should weigh and how you should charge the evidence. Whom are you to believe? Whom may you disbelieve?

What are the rules that will be given to you? Well, one of the rules that will be given to you, in substance, is this: That if you believe that any witness in this case has wilfully told a lie on the stand about any matter material to the issues, you may disregard that witness's testimony in its entirety, except as you may find it corroborated by others.

Now, applied to Lubben, for example—you could apply it to other witnesses, but I am going to key it to him for a moment. That instruction of the Court is going to mean this to you: That if I can demonstrate to you here or if you already have a conviction in your mind that Lubben lied on any material matter in the case, you don't have to send these people to prison simply because Lubben got up and said many things. You can say, "We will not believe
that man at all except in so far as he is corrobor-
5195 ated."

On the search for corroboration, I have my brother Lockley's word about where I may look. I may look at Jimmie Moran and Heitmann and I am going to look at them, but absent corroboration that convinces you, you may disregard Lubben's entire testimony if you think it
is false.

5196 Another thing which the Court will tell you, which is a part of our great tradition of the law, is that so far as documents or books or memoranda are concerned, you can apply the same test there.

The Court will instruct you that if you believe any of these books and records have been falsified or are untrue, you may disregard the memoranda in their entirety except as there is other corroboration. And cross examination after cross examination proved there is no corroboration for those books whatever, except Lubben's word.

So, to take an example, they have some pieces of papers here that I am going to talk about and if you think we have been able by the evidence to demonstrate to you the falsity in any material respect of any of those documents, the Court will instruct you that you are at liberty to disregard all of them as false—all of them as false, and this is a criminal trial. This is a punitive proceeding. This is not a tax collection proceeding and you must be

satisfied beyond all reasonable doubt and to the exclu-
5197 sion of every reasonable hypothesis that these people are guilty of precisely what they are charged with or—I don't demand it of you, but I tell you that the Court will instruct you you must find them innocent.

We lawyers live the heartbreaks of a court room, We know the cruelty inherent in a criminal trial when we stand and fight for your life. But we also know that a day comes when a judge will tell you those rules of law and we also know that a day comes when we can go down the evidence with you and ask your judgment as to whether we have not shown there are instances of falsity which require you to give the defendants that presumption of innocence and acquittal.

5198 I would like the jury to appreciate that this is a case which involves claims by Mr. Lubben of some four hundred thousand or more undefined dollars, and I would like the Jury to notice that I hold in my hand the documents on which he must stand or fall, because those are the pieces of paper, those pieces of paper, on which his whole story depends.

My brother Lockley fled in his argument from strength, and he went over here and with quite marked charm, opened these books. These are from the proprietorship, and he would take a check and he would say, "It is in the book". He would say, "Because he put it in the book, he was trying to be honest; because it is in a book like that, and because I can show it to you, you can believe it."

The inference, I assume, is that if it wasn't in the book, you shouldn't believe it. That is the inference.

My brother Lockley stopped walking up to here, in his talk, as he ran out of books. For all the rest of the case, after a short period in the first few months, there are
5199 no books. There is nothing more, this is all there is. There is nothing but this kind of stuff.

Now, what about the books in the first period, the proprietorship period?

Mr. Lockley pointed out to you, he took these invoices and he said, "You see this invoice, you see they marked it up."

Let me tell you that in the partnership period, and in the General Confections period, which are the important periods here, that type of proof does not exist because

Feldman, Lubben, Berch, Hausman, they all testified they didn't do that.

If doing that is an indication they are trying to keep books, I submit, their failure to do it in the critical periods of this case is an indication that you cannot rely in those periods.

Another thing Mr. Lockley said was: "Here it is in the accounts payable book." Where is the accounts payable book of General Confections? Lubben had it. He had it. Nobody else had it. It was just Lubben, and
5200 he had the power to throw it away, burn it up, or hide it. It would prove or disprove, but it isn't here.

My brother Lockley walked up and showed you cash purchases. That was for just a little while. Where are the rest of them? Where are they for General Confections? They aren't there.

Lockley showed you the accounts payable—I mean, the cash disbursements book for just a little while. Where is the rest of it? It isn't here. No, it isn't here, but the affirmative proof is that they did not post any Shotwell matters to those books when they did have the books.

Now, the question is asked whether Mr. Lubben would have posted a given amount to the books at an early stage, when that is the same amount which appears later on, when he is talking about the difference in rates per pound. Well, Mr. Lubben gave an affidavit to the Government, and we asked about them—we asked him about it, at page
1412 of the record, and he admitted that he gave an
5201 affidavit to the Government, in which he said the price was this, at the beginning, and he named the same five and eight cents a pound. He said that. It is right in the record at page 1412. They can open the same books I can. Why has he got it marked up some other way?

5202 Well, let me go back for a second to these books in the proprietorship period. When Miss Feldman was a witness on the stand, I asked her whether the effect of doing what Mr. Lockley outlined, the marking up of the invoice and putting it in the accounts—in the purchases book and then in the accounts payable book and then in the disbursements book at the larger figure, whether that didn't have the effect of building up higher charges on the books than could otherwise have been put

there, and she said, "Yes." I said, "So when you got that amount of money piled up on the books, you could take out not the smaller amount which is invoiced, but the larger amount?" And she said, "Yes, you can take out more out of your business. You can get more money out of it by posting more than you could if you posted the invoice amount."

And I asked her, "How did you take it out?" And she said, "This went to the supplier and this was the check to Lubben to cash."

In other words, he says, "Why would he post his books up like that?" Why would he? I asked Miss Feldman the effect of it and she said the effect of it was just
5203 as I described, that he was building up a large amount on his books so he could take it out in two checks, one to himself in cash. Now, that would be a simple thing.

Let us just take an example. One of you jurors works for Western Electric. Suppose Western Electric was shipping to Mr. Lubben in San Juan, Puerto Rico—not today because he is around here, but suppose they were shipping down to him and an invoice came down to him. He could take that invoice of Western Electric and mark it up. It is the easiest thing in the world to do. He has a purchase book there. He could tell the girl to put it in for the marked up amount. It is not difficult at all. Is there anybody from Western Electric standing and seeing him do it? He is a completely independent agent. He can do anything he wants. He says, "Now charge it against them in that larger amount." He can do that. There is nothing difficult about that at all. Then he can draw two checks. One of them he will mail to Western Electric for the smaller amount, the other one he will take to a bank
5204 in San Juan, Puerto Rico, get the money and put it in his pocket and then insist from then on he gave that money to somebody at Western Electric and he can do it.

5205 Now, Western Electric, let us say, is too big to touch, but you people on the jury aren't all too big to touch and your people's people aren't all too big to touch and God help you if they ever have to come and defend themselves at a time like that, and when they have to defend

themselves, the lawyer is weak but the jury is strong. And they could do that. Some of you people have families in business. It could be done to you time after time after time.

And what did Bercu say about it? Bercu said, and he is the fellow that was telling about how they had this system all built up, Bercu said even that early—and I will read what he said. He was very much concerned with the question of his, that is, Lubben's ability of being able to prove to the Revenue Department in case of an examination that he, that is, Lubben, had actually paid out the amounts and hadn't merrily pocketed them, so he was worrying about who he could say was pocketing them and he was taking steps to protect himself.

Now, in that period, when he was posting every single item as if he had paid an overage on it, there was an
5206 interesting transaction which took place about which Mr. Lubben was caught, I think, in a demonsfrable falsehood. Lubben had testified that he had paid a certain $20,000.00 and he said he paid it to get Cardinal chocolates started coming to him. It was a pump priming $20,000.00 because he said Cardinal chocolates were very desirable and he wanted to get them started to him.

I took some invoices and an adding machine tape and on cross examination made him admit that in the spring of 1945 before he ever paid that $20,000.00 at all, he had secured 60 tons of Cardinal chocolates already from Shotwell.

Now, that means if the first payment he made to get Cardinal chocolates was that $20,000.00 payment and if that 60 tons of Cardinal chocolates came before he made that payment, that he was not paying overage on Cardinal chocolates before that twenty thousand, but he had every pound of it posted up on that sacred 18⅔ cents a pound, every pound of it, and that is false too, and I will tell you why.

There is a United Chocolate Refiners Company
5207 in Mansfield, Massachusetts, and Lubben took Cain and Huebner to see Augie Nelson, their sales manager, and made arrangements under which United Chocolate Refiners shipped two cars of 55,000 pounds chocolate each, or 110,000 pounds of chocolate to Shotwell early in

1945 and it was one of those trade deals. United was a subsidiary of the United Drug Company, United Cigars. The deal was 110,000 pounds of solid chocolate to go to Shotwell. Shotwell would ship at ceiling, that they got the ceiling and Shotwell would ship to Lubben at ceiling 120,000 pounds of coated chocolate

That isn't a solid chocolate. It has a filling. They aren't giving him back all the chocolate, of course. They are just giving him back a part of it. And then Lubben was in a position to sell that to United Cigar Stores.

Now, when chocolate was hard to get, Lubben had testified he did make trade deals for Shotwell on chocolate. He had testified that he got it and there was no overage at all, and this is the biggest one of all put on those books—he charged Shotwell an overage as if it was paid out in cash.

5208 Now, I don't know whether he had to pay any overage out in cash to anybody else, Angie Nelson, or anybody else, I can't tell you, but he himself testified he never paid any overage on chocolates to Shotwell before that twenty thousand pump priming operation, and he already had 60 tons which now on his books he claims he paid 18⅔ cents a pound on. How can you believe him?

And there was a witness by the name of Wellington Cramer—Morley. Cramer, a great big, honorable fellow, and Morley Cramer came here and testified that Lubben told him that in the early '45 days, when they were up in Boston, Lubben came and said, "I just got two cars of chocolate from Angie Nelson for the Shotwell people." Now, it ties in just as tight as can be that he admitted, himself, Lubben did, that he took these fellows to Angie Nelson. He testified to that, Cramer testified Lubben told him, "I got two cars of chocolate from Angie Nelson." Cain testified about what the deal was. Lubben testified the first overage he paid on chocolate was the twenty
5209 thousand dollars which he paid in June. All this other is in March, April and May.

Now, that twenty thousand dollar check, incidentally, is one of the items which Mr. Lockley called to your attention this morning as being such unimpeachable verity, as it would sustain a conviction.

Now, one of the things that we tried to do here in the case, and I personally am not too sure we have succeeded very well, we have tried to show you by such evidence as we

can get from the accountant's work papers, having in mind that when accountants are working on books, they transcribe a lot of things that they see, so they are not too pretty a paper—they are handwritten, and so on—but they are made up at the time, and they show what was seen at the time, see?

Now, one of the papers that did go into evidence, and it is from a period when these books were showing that these checks were going to suppliers, and not to Lubben, not to his pocket, and not to a cash box at all—one of them was a currency income account which is Exhibit 5210 31 for the defense, and it shows, one, two, three, four, five, six suppliers, as against whom there are charges on the books that they got the money; but you can see that the checks went right straight into the cash box—the cash box being another word for Lubben's pocket.

Now, while we are on the subject of that cash box, and while we have been shown the sheets that indicate there was such a cash box, let me remind you that Lubben testified there was no such thing as a cash box, in the proprietorship period, no, sir. So, we brought in a little fellow by the name of Stone, Ronny Stone. The Government brought out that Ronny who was anything but an attractive character in my book, was a man who had pled guilty to perjury, and they did not cross examine Stone about a single word of his testimony. It apparently was sufficient to them that Stone was a bad character by reason of something that happened on a bail bond, some years ago.

Well, whose bad character is he? He is Lubben's. 5211 Lubben testified here that Stone, in the partnership deal was on his side. He was his fellow. Stone testified he was with Lubben for a period of two years.

And we had sheet after sheet in Lubben's own handwriting, with Ronny Stone's name written out as handling this money in the cash box. So, whose fellow is he? He is Lubben's.

5212 And I am reminded of a little story. I ran into a fellow here in town. I never did represent him but I met him and I said to him, "For God's sake, how did you happen to hire that lawyer?"

"Well," he said, "I have always been in kind of bad businesses and when I came to Chicago and I hooked up with this partner of mine, he said to me, 'Well, this is going

to be a crooked business so the first thing we need is a kinky lawyer.'"

Stone may be a kinky lawyer, but he is Lubben's kinky lawyer. He is the kind of fellow Lubben wanted around and kept around.

By Mr. Lockley: I object to Mr. Kirby's statement. Mr. Stone is not Mr. Lubben's lawyer and you are misstating the testimony.

By Mr. Kirby: Well, he was disbarred by that time so I guess that he wasn't formally acting as a lawyer. He testified he was buying sugar ration certificates without the sugar—or rather, he testified that he was buying sugar without the sugar rationing stamps. Incidentally, Lub-
5213 ben denied that that happened. First he said it happened once and then I showed him sheets in his own handwriting and he admitted it happened several times, and finally he said, "Well, maybe several times."

So that Stone came in here and gave the lie to Lubben from his own knowledge of what took place. Now then, I want to go to certain of the specific transactions as to which Mr. Lockley went into when he got down to this type of proof, and this is the type of proof that exists for the greater, greater portion of the trial, and it is the only type of proof that exists for the critical period between the fall of 1945 and the summer of 1946.

5214 Now, the first item that he talked about was a check for $35,536.00. Lubben testified that that money went to Shotwell. We put on Meyer, the accountant, and Meyer had a notation as to that $35,536.00 and he said it was charged to Fatsum.

There was an argument between Mr. Lockley and himself, but Meyer insisted that the story that Lubben is telling here from the stand today was not told to him then. And if Lubben had told him that story then it would have been posted differently than it was.

Now, Mr. Lubben now comes in and he says it was paid on some overages in connection with Shotwell deals. And what is his proof? This is his proof. He has got a sheet—let me go through this, and back up just a little more, because these two connect together—this is the sheet, this exhibit here, 14-C, which Mr. Lockley said tied into those three checks with the holes in them.

Then he said, "Well, they didn't pay that forty-one thousand, so they carried it forward on to this, and they

added some more to it, and they got a total of $43,071.30."

So then what does that fit? Now, what they are
5215 trying to fit is this check for $35,536.00, the one that is in such serious disrepute. I don't find it here right now.

Now, $35,536.00 doesn't fit $43,071.30 at all. So what does Lockley say? He says, "They subtracted $7,535.30." He said, "For what reason, I do not know." He said he didn't know. They subtracted it to get $35,536.00.

Now, as far as I am concerned, it is just as reasonable to say that they wanted to lay this $35,536.00 off on Shotwell. So they took this sheet and they just subtracted until they got an even figure and said, "That is money that went to Shotwell."

But the trouble is that when they were trying to explain these checks to their accountants they didn't have that piece of paper. It didn't exist. He was asking them for it and he said it did not exist.

So he posted it to Eatsum, which is where it belonged.

By Mr. Lockley: Well, Mr. Kirby, I am afraid I have to correct you again on your recollection of the facts.

It was not that it did not exist, it was that he did not
5216 see it. There is a considerable difference.

By Mr. Kirby: Well, that poses an interesting question in the case. If he asks for it ten times and they didn't show it to him, Mr. Lockley wants to argue it existed—if he plagued the man about $35,536.00—a not inconsiderable sum—Mr. Lockley wants us to believe Lubben could have given an explanation, because it existed, but he didn't want to. And he doesn't want to argue that this didn't exist.

Well, you argue that it exists and you tell the jury a good sound reason, when this man is being asked about that $35,536.00 why he didn't produce this.

So Mr. Lockley pulls out a certified audit of Sproull-Scholz and he said, "Well, you certified this, didn't you?"

Meyer said, "I did."

Lockley said, "You are a reputable man. You wouldn't put anything in there that isn't right, isn't that right?"

And the fellow said, "Yes."

5217 So Mr. Lockley put it in evidence without objection on my part, because right in the back of it is a study of this whole Eatsum accounts receivable situation. It gives a review of the whole thing. It shows that the bal-

ance at the time of the audit was $20,777.67, and that's with the $35,536.00 charged just exactly the way Meyer on the stand said it was and not against Shotwell.

So what do we face today? Today we face a situation where they say these fellows should go to prison because they got that $35,536.00 which until now has been a secret.

By Mr. Lockley: If your Honor please, I am going to have to object to counsel's continuous reference to the defendants in this case having to go to prison. I made no objection to Mr. McConnell's saying it, because he is a state court practitioner—

By the Court: That isn't a matter that is subject for argument. The Court will determine what the disposition should be, by way of any punishment, in the event the jury finds these defendants guilty. The jury is not to
5218 be concerned with that matter. That is the responsibility that the Court has.

By Mr. Kirby: Let me point out that these two—the three checks made out with the holes in them, as to which the testimony was so surprising, and this $35,536.00 tie together. If one is bad, the other is bad.

Now, another payment, and the next one that was talked about by Mr. Lockley was the one that relates to this Exhibit 63-A, and it shows on it two payments, one is thirty thousand and the other $36,148.35.

Lubben said he got the thirty thousand from the cash box. We had the cash box sheets, the corn box sheets, and I handed Lubben the corn box sheets, and I said, "Show me where you got the thirty thousand," and he couldn't do it. And those sheets showed the "ins" and "outs" and it did not show the thirty thousand out. He was caught flat-footed with those sheets.

So what is the next item on that sheet? $36,148.35. And that is an interesting figure. We have had a lot of testimony about that. And one reason why I took as much
5219 time on it as I did is this. The only book of the whole partnership that is turned up at all is the one that has that loans and exchanges item in it. And I put witness after witness on the stand here and I ran that down until I think that it is in absolutely solid. And I am just going to go through it real quickly.

That $36,148.35, Mr. Lockley said they don't have the check. So he said he doesn't know who the check was made to, but Lubben said it was to cash and that it went to Shotwell.

Now, here is the November 30th account by Bernard Bercu. It shows the $36,148.35, just below the line "Lubben".

5220 Then on the recapitulation of that same thing, made by the accountant Hausman, it shows the $36,148.35 again. It shows a total against Lubben, charged against Lubben personally, mind you, of sixty-five thousand. And then under the checks which are charged against Lubben for that is $36,148.35. It marches on right straight through the books, and it is always charged against Lubben right on up here until the end of February, 1946.

He has an explanation for it. His explanation is, "Well, they would have taken it out of the books." But Hausman said they made those entries, taking it off the books and charging it against the supplier, if that was the right thing to do, every month. And this is on for six months, and it is never taken off and charged against Shotwell. It is always charged against Lubben.

And then what happens to it? Here is a sheet, 66-W, and in that money charged against Lubben is included this $36,000.

The balance on that loans and exchanges account is $113,150.17.

5221 So what is the accountant's question way in the next year? What is the question he asks? Loans and exchanges—"what shall we do with this amount? Charge it off against the capital?" That would mean against Lubben. "Or charge the purchase account? Slough it off onto a supplier?"

At six months later, before they even had a question of where to slough that off, and they finally sloughed it off against Shotwell.

So that this sixty-six thousand—the thirty thousand he could not find from his own cash box sheets—the thirty-six is charged against him personally, and it stays on his books against him personally, and it never comes off. An accountant asked later on whether it should be sloughed off or not, not knowing what to do with it six months later.

Now, then, another item is two checks for $2,300 each. This is an instance of the Court's instruction—and if you find that a document or a part of it is false, you may disregard it in its entirety.

5222 Lubben felt, and Heitmann testified specifically, to two checks for $2,300 each, which they said they cashed, and gave to Shotwell. And they are right in here,

to cash. The checks, two of them, total forty-six hundred. He said it is part of a pot; I don't care whether it is part of a pot or not. That is what they testified, those checks, they said that money went to Shotwell.

5223 But when you look at the accountant's work papers for those two checks, they didn't go to Shotwell at all. He says, "Maybe there is some confusion." If there is some confusion, if there is doubt about it, why were Feldman and Heitmann and Lubben so insistent that there was no question at all about it.

Now, then, there is a $12,235.00 payment that they testified about, too. Now, that payment is another example—I don't find the sheet here now, but I will tell you about it. That $12,235.00, if it is to be handled the way they say it should be handled, is on the books twice, because they have got it on the books in anther instance, according to the work papers of Meyer, in a different way. So it is a duplication. It is false, one way or the other.

Now, then, we come to the four checks for $5,000.00 each. And that is Jimmy Moran, to whom you were referred for corroboration of Lubben. Jimmy Moran is his brother-in-law. Lubben was explicit, positive, and so was Moran, that he took four checks, that he went in this bank, that he cashed all four at one time, that he took the

5224 cash, and that he took it out and he gave it to Huebner. There just couldn't be any doubt about that at all.

But the bank, as Mr. McConnell has told you, testified that no such transaction took place. And they checked their sheets.

And another thing, the bank in those days had to give statements to the Federal Reserve Bank of any unusual check transactions like that, large checks, for cash They made a record of it. And there was no such record made.

Well, the bank might be mistaken. Maybe they cleared General Confection's books here. I gave Feldman the bank statement and she couldn't find them. I showed Meyer, who examined them, and he couldn't find the four. Those four checks don't exist.

And this Jimmy Moran, to whom we were referred for corroboration, is a convicted liar.

By Mr. Lockley: Well, I object to the statement that Mr. Moran is a convicted liar. I don't know what you mean by it. In any event, it is misleading.

By Mr. Kirby: I think it is misleading. What I meant to say—

5225 By the Court: I suppose it is a matter of argument. But the word "convicted"—

By Mr. Kirby: On this record he is convicted of it.

So then what is the next payment they say was made. That's the $17,190.25 check. That check is dated December 4, 1946. Lubben went to a great deal of description as to how he was being pressed for money, and so on, in December of 1946. So he came out and gave this to Jimmy Moran and he said to Jimmy to cash it when he let him know he had the money in the bank.

5226 So Jimmie Moran waited around until December 20th. And of all the preposterous stories I ever heard, this is it. Here is a check for $17,190.00 which is sixteen days stale, made on a New York bank, presented by a man who is a complete stranger to the bank, and he said he got the money.

How did he get the money? He couldn't get it from the first fellow, so he went away. He packed up a five-pound box of candy. He came back and he hid behind a post until he could see a different teller come in. He went in and he slipped him the five-pound box of candy, and he walked out with the $17,190.25.

Now, that is just unbelievable. What is the key to it? The key to it is that this fellow Urban's and Lubben's names are on the back of that check. And they are the fellows that got the money. This Jimmie Moran never saw that $17,190.25. And he was just trying to help out Dave Lubben.

But he lied. And he lied with Lubben's knowledge. And his lie is Lubben's lie.

5227 Now, what are the next payments they talk about? The next ones are payments which total, supposedly for corn syrup, some $49,000.00. And supposedly he gave that money to Graflund in late 1946.

Well, Graflund denied that flatly. Graflund had already testified that he knew nothing of any transactions, except candy transactions. No corn sugar at all. No corn syrup at all.

Now, then, that testimony is unbelievable. It is flatly contradicted and it never did happen.

There are other instances of the falsity of the Lubben books and the Lubben story. Take this fellow, Bert Rock,

who testified, as McConnell said, about how all that money was paid to him and how he just got two per cent so he could pay the check cashing costs.

5228 Now, let me go—and I am going to have to ask your indulgence to let me run a few minutes over my time, because I want to get to some other matters. Those matters that I have just talked to you about relate to this—as I have said, you will have an instruction from the Court, that if you believe a person has lied, has told you an untruth, or if you believe that the books are false in any respect, that his memoranda can't be believed all the way down the road, then you may disregard them in their entirety. That's the instruction the Court will give you. And I think after you have listened to my explanation, and your own listening on the jury of what happened with respect to these transactions, they just are not believable.

Now, what is unbelievable about them? What is unbelievable about them is simply this: Here is a fellow who is doing some business with these people, but he is loading everything on them—everything on them, everything on them, and why? Because he doesn't want to get stuck for the money himself.

5229 One of the exhibits that they put in was this final audit report of General Confections. General Confections supposedly gave Shotwell hundreds and hundreds of thousands of dollars. But according to the way Lubben ran his business, according to his own audit reports, which the Government put in evidence, his total profit—his total profit was $11,312.32. Do you believe that? That he gave hundreds of thousands of dollars to Shotwell, out of the cash that was in his pocket, and he only kept $11,312.32?

And let me say this: These things here, and these memoranda, they are not on General Confections books. That was testified to by Mr. Meyer, the man that made this up. If they were, if they are to be believed, General Confections lost more than a hundred thousand dollars. That would wipe out all this profit and another hundred thousand dollars more.

How fantastic a story can they give to a Jury? It is incredible. But he has got the chance to do it, because our people did some business with him.

5230 Now, they did business on account of the corn syrup market, which Mr. Lockley is critical of.

I am going to read, to shorten the discussion about that, what the Government said about it:

"Shortage of corn became very evident when free corn could not be accumulated in deliverable position to satisfy July and September, 1945, futures in Chicago,"—and so on.

"The ceiling price value of corn per 100 pounds was low in comparison with that of other grains."

And I will skip a sentence, and they get to this—the Government, mind you:

"The basis for a black market was laid in the fact***" Not that Shotwell's men were malignant, not that they were criminals. Let me read it over to you again:

"The basis for a black market was laid in the fact that the ceiling price undervalued corn both in relation to other grains and livestock."

5231 That black market wasn't caused by the malignancy of these men. The Government itself says it was caused by the undervaluing on their own price ceilings. Then it goes on, and they talk about the corn, and they say:

5232 "These measures made it practically impossible to obtain free corn or wheat in regular marketing channels."

Then again the government says:

"The black market in corn, which it was claimed as early as January, 1946, made supplies short in regular channels of trade, still continued. In addition, the Commodity Credit Corporation"—that's a governmental agency—"began paying premiums"—we have heard about premiums here—"of 30 cents per bushel for corn on April 22nd and for wheat on May 3, 1946. Board of Trade of Chicago representatives visited Washington, arguing that in effect the government was conducting a black market in these grains."

So the proof with respect to Shotwell and the corn syrup purchases I think has satisfied you that they did make purchases. These, for example, are invoices all marked up with corn charged against corn purchases, the company that sent the corn products to us. And they testified repeatedly.

Now, the quantity of corn syrup that Shotwell bought and used in 1945 and 1946 was in excess of sixteen
5233 million pounds. Now, Mike Cohen said that if you figured out what the corn cost you, in getting corn on these corn deals, it ran to about three cents a pound.

Now, let's winnow it down to the smallest possible amount that Shotwell would have had to have spent for corn, the absolute minimum amount they would have had to spend for corn alone. In the ten months from September till June, '45 to '46, Shotwell purchased 7,400,000 pounds of corn syrup. Now, suppose they got half of that quota free. Although everybody testified quotas meant nothing in that period, suppose that Robinson, Adam, all those people who said that quotas meant nothing in that period, are wrong. Suppose that half of what they used in that period they got in that way. It still would leave three and a half million pounds that they would have had to buy—

By Mr. Lockley: If your Honor please,—

By Mr. Kirby: —one hundred and five thousand—

By Mr. Lockley: I am going to object to this testimony on the ground that there is nothing in the record which supports any of the suppositions counsel has just indulged in. His argument is not based in any way—

5234 By the Court: I am unable to pass on that. I don't know. I assume if there is no basis for the statement as to what the record discloses you can point that out on your rebuttal.

By Mr. Kirby: I believe on this question of the corn products that that would be the minimum that they could possibly have spent. Why, that is only a quarter of their purchases in those two years, and that would be over a hundred thousand dollars. And the Court will give you an instruction to the general effect that in deciding whether or not the Shotwell Company did pay out this money in the purchase of corn, or other raw materials, you can consider evidence, which would be called circumstantial evidence, that is to say, if they had to get it, and if everybody had to pay in order to get it, that they did, too.

5235 Now, everybody that worked on the matter, everybody that testified about it, said this, the total amount of money that came in was paid out.

The Court will instruct you that so far as an income

tax case like this is concerned, if you believe that the money which came in was paid out to acquire raw materials, at least to the point that there was no substantial amount left, you must acquit, because there is no tax due.

And the Court will go further and the Court will instruct you that the individuals must be judged by what they individually knew, and that if anyone of these individuals honestly and in good faith believed that the money that was coming in was coming in necessarily for these raw material deals, and was going out in all those raw material deals, if that person honestly believed that to be true, then even if it wasn't true, he cannot be convicted and he must be acquitted.

If a person believes that these moneys were coming in to buy corn, and that they went out to buy corn, and he believes that in good faith, he must be acquitted. And you will be so instructed by the Court.

5236 Now, I am going to now turn myself to the specific questions that relate to the defendant Harold Sullivan. The first thing that they talked about with respect to Harold Sullivan was a weekly expense account of Lubben. And there is a reference there about going to dinner, and a fruit basket for Mrs. Cain, but the entry that has moment—having in mind that the question is who was doing what with cash—is this Bowery bank, safety deposit. Lubben was renting a safety deposit box. I don't care about this candy for Mrs. Cain. You look at that safety deposit box that that thief was renting.

The next thing he said about Sullivan, besides that he took him to dinner, was when he said he took these checks with the holes cut out of them up to Sullivan's office. He abandoned that. That was in February. He said finally, when he got back after his consultation with the Lord, that it didn't happen. But he said he was there in August and September of '46. And he said Sullivan was talking to him about the driveway, and he was spending money for the driveway.

5237 Well, there shouldn't be the slightest question in your mind who was telling the truth about that, Sullivan or Lubben, because the driveway on that old Sullivan homestead is the same as it was when Harold could first see, and he didn't spend a dollar on it. And that is that trimming to give credence that stamps the liar Lubben.

He wants you to believe he is a reasonable fellow. He wants you to believe his story. He says, "Oh, Harold said, 'I don't want checks, I want cash. I need it for that driveway.'"

Well, sometimes little things in a fellow's background stand him in good stead, and that homestead, in its very age, stands Harold Sullivan in good stead, to put the lie to Lubben.

Now, Lubben never mentioned seeing Harold Sullivan again, never once. Harold had to come and tell you the truth about the shakedown and the blackmail and the things of that sort. And he wanted him out of his hair. And he got him out of his hair.

As soon as Busby saw and came back and reported to
Harold Sullivan that this immense list of charges
5238 had been built up, as soon as Harold Sullivan real-
ized that there were these charges, he did not wait to get a jury to pass on those charges, no. He had his people go right straight to the Government then and there. And they offered to pay whatever this liar Lubben said he had ever given them. They said, "We don't believe it. He is a liar. You can't trust him. But we will pay you now on the front end. We spent money on corn. But you say you won't deduct it. Well, we think you are wrong and we are going to litigate it, but we will pay you and in the civil courts we will have our remedy."

And finally they are offended because after two and a half years of pleading with the Government to get a bill he writes a letter to Jim McCahey, one of his old friends.

And what does he say in the letter? Trying to dirty a man up.

He said, "We had been violating the OPA and we did business that we regret, and we have been trying to get a bill out of the government for two and a half years, and I think it is high time we get a bill. As far as the
Shotwell Company is concerned, I have been connec-
5239 ted with it for twenty years, and they were always
a loser until '42, and since then we have paid four—"
or two million, how much was that, Harold, of tax?

By Mr. Sullivan: Two million seven hundred thousand.

By Mr. Kirby: Thank you. "—two million seven hundred thousand in taxes to the government."

And do you think a letter like that, dragged out of a man, indicates he is a tax dodger? Quite the contrary.

He wants a bill. And he has paid $2,700,000.00 already.

5240 As a matter of fact, for the years in question, '45 and '46, Shotwell Company paid almost $900,000 in taxes, already.

Now, the Court will instruct you that the fact that Harold Sullivan, or anyone of these other people, were officers of the Shotwell Manufacturing Company—and Harold was not Vice President until the middle of '46—the Court will instruct you that that alone is not enough to convict.

The Court will instruct you that before a person can be held, simply because they are an officer, it must be shown that he affirmatively knew that there was a false return being prepared and filed, and that if he didn't have that direct personal knowledge, or supervision of it, he must be acquitted.

And what is the fact with respect to the knowledge of the defendant Sullivan, on that issue? Morrill, an estimable and fine lady, she testified that she signed one of the returns. She said Sullivan did not handle the return or have anything to do with it. She said that as far

5241 as she was concerned, all the money that came in was paid out for raw materials, and there was no net taxable income.

And the Court will instruct you that if it was all paid out, there is no net taxable income, and that Morrill was right.

Graflund, who signed the return, said he never talked to Sullivan about either return. Graflund also testified that there was no net taxable income to the corporation, and that he had so told Harold Sullivan.

Roeser said that he had never talked to Sullivan about the income tax return.

Busby, the CPA, said that he had first talked to Harold Sullivan about the income tax return in January of 1948, a year and a half after the '45 return was filed, and almost a year after the '46 return was filed.

Now, Sullivan's own testimony is uncontradicted, and he is entitled to credence, and there is no dispute of this whatever, first, that he never saw these returns before he saw them here in Court; second, that although he knew there were some transactions in the black mar-

5242 ket, he had checked with people in the corn field, and

in the confectionery field, and he found that you had to go into the black market. Like the book from the Government says, the Government was creating the black market, and was in it. He found that out, and therefore, he assumed it had to be done.

But as to the precise handling of the money one way or the other, he did not handle the books. So far as he was concerned, he was confident that those people at the plant, who had been there when he came in there, were handling the things, and could handle them right. So far as he is concerned, that is true today. He has confidence in them, and he believes they did handle it right.

And there is no knowledge on his part but what every penny of the money that came into that plant was spent for corn. And if he believes that in good faith, he must be acquitted. And you will be so instructed by the Court.

5243 He not only believes it, but you have heard Graflund say he believed it, Roeser believed it, Morrill believed it. Everybody that had anything to do with it, except Lubben.

Well, I have taken a few minutes more than the time to which I had originally intended to address myself. I don't know about these kinds of cases, folks. You all have to have a lot of respect for your Government. You have got to start out with a lot of feeling of confidence in them.

But, you know, that isn't the issue here. The issue is: Have they proven beyond all reasonable doubt that these men, and my client particularly, Harold Sullivan, that they had a malignant intent—not to violate the OPA law; the Court will instruct you that an intention to violate the OPA law is not equivalent to intent to violate the tax law at all; the Court will instruct you on that—the question isn't whether they were forced into it, and had gone into it with one out of their many customers, the question isn't whether they picked a bum one to have
5244 anything to do with—because they surely did—the question is really whether they were people with a criminal intent to do wrong.

Now, you can't conclude that they did, unless you first conclude that everything Lubben is telling is the truth.

Now, as I said, you have got to respect your Govern-

ment. And you come to a thing like this with some kind of an initial feeling of respect for the Government in the case. But there is one thing happened in this case that I wish you people would keep in your mind. You will be told by the Court that if you have any reasonable doubt as to the truth of any of the essential elements of this case, you must acquit.

5245 Now, can you have a reasonable doubt? Well, the man who has worked more on this case, I think, than anybody else, is this fellow, Charley Mammel. He is a career man in the Internal Revenue Department.

And I asked him on the stand, I said—what did I say? Imagine, this fellow has been working on this for years. You people in the Jury have got to decide what you should believe and what you shouldn't believe. Let me tell you what this fellow, who has worked on it for years, said, at page 2850. I put the question to him, just as bluntly as I could. I said:

"You don't say to me that Lubben told the truth, or that Lubben lied?"

And what was his answer:

"Well, I don't know."

And no man conscientiously looking into this attempted proof could give you any other answer than that. That is, you cannot believe, you can't have confidence in this man Lubben.

You can't say to yourself when you pass on the guilt or innocence of these people, "I know, I know 5246 beyond a reasonable doubt." You have got to say, "I don't know."

And our system of law, under our system of law, if you say that, you must acquit,—that acquittal which is more valuable than anything in the world to these defendants.

They can't beg you for it. I am not ashamed to beg you for it.

Thank you.

By the Court: We will take our recess now, members of the Jury. We will suspend for ten minutes.

By the Marshal: Will the audience please remain standing while the Judge and Jury leave the courtroom? This Honorable Court will recess for ten minutes.

(Short recess.)

By the Court: Will you remind me, Mr. O'Brien, what time I allotted you?

By Mr. O'Brien: Well, it was an hour, but I will try to do better than that.

5247 Thereupon Mr. O'Brien addressed the Court and Jury in argument on behalf of the Defendants:

By Mr. O'Brien: May it please the Court, Ladies and Gentlemen of the Jury?

I, too, like Mr. McConnell, am unused to and am wholly unexperienced in criminal cases. My experience has been confined to civil cases, in which rights of property and civil rights of people, and companies, are involved.

5248 There have been some of those, of course, which involve money, great and small, but I have never had the experience of being in a matter in which penal charges and sanctions are invoked and I don't mind saying to you and to the people of the court room that it scares me somewhat and I hope I am able to overcome that so as to be able to be of some assistance in the relatively brief time that is allotted preliminary to your deliberations in this case. Although I have not been in such matters, I have some feeling and thought about criminal cases in general. We have matters which by the unanimous opinion of all civilized men are regarded as wrong in themselves. They do not depend upon the enactment of some legislative body to make them wrong. Rather, those enactments are a recognition of the views entertained by all men as to their wrong. Murder, for example. We have other things, however, which do not involve matters wrong in themselves but which are declared by statute to be wrong and are provided for punishment in the same way as if they were in themselves crimes.

Among such matters we had the prohibition law,
5249 we had, more recently, the Price Enforcement Act, and we have here and now and have had for some time the provisions of the Internal Revenue Code for the violation of which there are, as you know, severe penalties.

So, while offenses may differ in their nature as to whether they are good or bad in themselves, they may have in common the punishment or severity of sanction,

and that is the thing which makes a hearing of this sort one of particular concern.

In such a proceeding there is a constitutional right to a trial by jury. Every man accused of a crime, whether in one sense or the other, is entitled to that trial and under the rules in effect in this court, he can't even waive a jury trial without the consent of the Government and the consent of the court as well.

When the Government is the plaintiff in cases of this sort, as it always necessarily must be, you know and I know that it is common to hear the plaintiff referred to as the Government, meaning the United States, but in my humble opinion, the United States as plain-
5250 tiff in this action is just another party to another piece of litigation, no different than that between any plaintiff and any defendant and the only branch of the Government that makes any difference at all is the judicial branch as constituted by the Court and by you members of this jury, to which the executive branch here, plaintiff and the defendants alike, appeal and rely for the determination of justice in this case.

5251 Now, of course, I know that we have been here, an even month, or more, during which time you folks have been confined and taken away from your everyday affairs, and I quite agree with the Court, that while that deprivation is in no way compensable in a monetary way, that a great service and duty is being performed, and I, too, have observed the close and patient consideration which you have given to the testimony in this somewhat complex, and very much prolonged case.

We are here then, all of the defendants, accused of an attempt wilfully to evade and defeat taxes due from The Shotwell Manufacturing Company as claimed by the United States.

I think of the addresses that have been made in the case. I know that you have heard the evidence. I know that all I can do at this time is to remind you all of some of the parts of that evidence which I consider important on particular points, but I would like to start at the other end of the thing, if I may, and remind the Jury of the situation in January, 1948,
5252 when Mr. Busby returned from his trip east with Mr. Graflund, and met with Mr. Cain at his home,

having learned during that trip, that which he did not know before, namely, that there had been overages payments, and having inquired about that of Mr. Cain.

It was admitted that there had been some overage payments. Mr. Busby inquired as to why he had not been informed, and he was told, and you know what he was told. But when he was told that, he told Cain and Sullivan both that contrary to their past opinion, and to their then impression, there would be a tax due to the Government, because it was the law, and it was the holding of the Commissioner, as he understood it, that they could not deduct, that they could not offset against those premium receipts, the premium payments which they had made to acquire goods used in the manufacture of material. That was known. That presented a different situation. It was only shortly before that that Mr. Sullivan, I believe, had rejected the demands for a fifty thousand dollar loan. That was
5253 one thing. It was one thing to be exposed as a dealer, or a participant in any black market, but the notion that these folks would owe a tax, and did owe a tax to the Government was something of another nature, and they didn't tarry on that.

They told Mr. Busby to go in, but only after Mr. Busby explained to them this voluntary disclosure policy, which was briefly stated from the stand by the former Commissioner of the Internal Revenue, Mr. Dunlap, as being substantially this:

That the Treasury held out an invitation to all people who had filed erroneous returns, or fraudulent returns; that if they would come in and tell the Department about it, before the commencement of an investigation, that then they would be immune from criminal prosecution, but would be liable to pay such additional assessments as might properly be determined, after investigation by the agents, the Treasury agents, of the books.

Having been told of that, they sent Busby immediately.

No time was lost. He first went in on a hypothetical
5254 basis, without naming names, and assured himself that the policy was still in effect. He came back and told them it was, and then he went in and revealed the name, and later—they were not certain whether it was in January that Mr. Cain went back with him. The thought was that he did. But in any

event, and it is a certainty that they both went in on March 3rd or 4th of 1948, and they sat down and talked to Mr. Sauber, who was the present Director in that area—at that time, the Deputy Collector—and they told him, repeated to him, with Mr. Cain there, what Mr. Busby had said.

Mr. Busby and Mr. Cain together on this last visit, told Mr. Sauber the nature of the transactions. They told him that they did not know at the time the amount of money involved in order to be able to prepare an amended tax return.

Mr. Sauber said that it was unnecessary, indeed inadvisable, to put in an amended tax return, under those circumstances.

5255 Mr. Sauber told them also, and correctly, according to the then ruling, that they could not deduct any premium payments. They had said that they didn't know what that amounted to nor could they tell precisely to whom they were paid. Mr. Sauber said it made no difference, even if they had receipts, even if they could prove it to a penny and name the people, they couldn't have one dime of credit for it.

So he said he would send, or the agent in charge would send a field agent to examine their books, to make an audit, to determine what the amount involved was and to assess a tax.

Now, I ask the jury to bear in mind that at that time, although Cain and the other folks did not regard that as fair, it didn't seem either fair or logical, nevertheless, from the Government's point of view, for which they had to take the word both of their auditor and the tax authorities, the agents, they did owe a tax.

But, I want to call this to your attention: In the 5256 interval of time that elapsed between then and the time of the indictment or shortly after, every court in the land which had occasion to pass upon the question, agreed that such premium payments could be offset and could be deducted and the result was that by September of 1952, the Commissioner himself acquiesced in that. What is meant by that: whereas theretofore he had compelled each taxpayer who claimed such deduction to litigate it out, by his acquiescence he no longer compelled any taxpayer to litigate it out but

disposed of it on that basis, wherever such payments and to the extent that such payments could be shown to have been made.

I mention that particularly so that you will know that there is no inconsistency in the position of the defendants here in telling you on the one hand that at the time they went in to Sauber and admitted there was a tax—there was no inconsistency in doing that—and saying now as they said in the beginning that when those items are offset, there is no additional income, there is no additional taxable income and they do not now owe a tax. And I believe that the Court will
5257 have occasion to instruct you according to its views on that subject and if the Court does, I ask you to relate it to what I have just said.

Now, that isn't all. Remember Mr. Dunlap's description of the policy is just as simple as I put it: "Go in and tell them and you have immunity. "He said, "Go in and disclose yourself as one of those who owes a tax, whose return is incorrect."—at least from their viewpoint. That is the disclosure. You disclose yourself as one in that group and that is precisely what they did but they didn't see an agent for six months after or until the agent came out July 30th.

5258 Indeed, it was Mr. Lima who took the stand for a short time here. He came out, but in the meantime, in an effort to be of such preliminary assistance to him as they could, they retained, especially aside from his regular auditing work, they retained Mr. Busby, to get up figures on receipts.

Now, that is an operation which took some time. Their attention was focused on receipts—not on disbursements or payouts, which were completely irrelevant anyhow. If you could give the Government an adequate picture of the receipts it would afford them a basis for levying, or assessing an additional tax, and you would put yourself in a position where, as they say, you could get a bill and pay it, and end the matter.

Now, what to tell them? What to do, and how to approach it?

By that time, as the Jury knows, they had acquired information as to Mr. Lubben's actions. They knew

what Lubben's claims were. They had seen some of those papers in February of 1948, and indeed, had
5259 picked up a package of them, at the time the Haberkorn deal was concluded, so that they knew. They got other figures, as they say, from Mr. Lubben's accountant, or his then accountant, Sproull-Scholz, that further revealed the claims which Mr. Lubben was making.

Now, they had two alternatives. Maybe there were more. They had no lawyers, still had no representation. They were ashamed of this situation, as I believe Mr. Cain testified, and as you can see of everyone who had anything to do with these dealings. Even the people from the refineries are, or were, hesitant about talking about them. But, they could take, or try to ascertain the true and correct figures, limited in the way that the people from the company had mentioned. They could put those in, and they could have a controversy with the Revenue, which would last, I assure you just as long, and longer than the one here has; or they could take, if they didn't care about the money, they could take the greatest possible amount that Lubben could claim, according to the information they had before
5260 them, as to what his claims were, and they could assemble the data on that basis, and turn it in to the agent, or give it to him when he arrived there, as a starting point from which to investigate. And that is precisely what Mr. Cain instructed Mr. Busby to do.

It was heard, as Mr. Busby said,—although Mrs. Morrill may not have been at that conference, I think he said—but Graflund, and Roeser and Huebner approximated, or estimated what the amount was. But Mr. Cain said, "Now, put them all in. Take the whole thing. Set it down at the very utmost that that dangerous man can claim."

And that, Busby proceeded to do. Indeed, if you look at that exhibit, Government Exhibit 189, I believe it to be, those sheets, as you could see when I was examining Mr. Busby, the column on the right hand side is headed, "Lubben's figures." It is not "Shotwell's figures." It is "Lubben's figures." And it is those figures on that right hand column, which are carried into the totals that the witness was interrogated about.

5261 So, they took those figures, the top on receipts. When Mr. Lima came out, they gave them to him

and then the audit of the books was supposed to start.

5262 Now look at it this way: When they handed or when Mr. Busby handed Lima the figures on those receipts, did he say to him, "These are the true and correct figures?" He did not. Rather, he told him and indeed the documents on their face showed the fact to be that they were the over-all of the figures. Did anybody at Shotwell say to the Government, "Look, please take these figures. Don't bother about the audits. Settle up on those?" No, there was nothing of that kind. On the contrary, they importuned the agents to get a field man out there and to get started, and when he came, they not only gave him the figures to form the basis for that start, but they cooperated with him and supplied the agents with everything that was available.

Now, they talk about these figures which Mrs. Morrill and Roeser kept in the cash box, of the ins and outs of the box. They say unless there was some sinister purpose, those would not have been destroyed. Well, the situation was as you can clearly see from the testimony, that the amounts on those papers and in the minds

5263 of those people bore such little relationship to the total that Lubben claimed that there would have been no point. They formed no factor in the situation, they were so far below.

Now, if you took the true figures, as I said, and handed them to the Government and said, "That is it," you would be litigating with them for years to come. That was the reason they took the high amount and the figures that these people had bearing no relationship to it.

Here are all these people—Mrs. Morrill is still with the company. Graflund has his own business. Mr. Roeser is with another company and Hogan and the other people who are ex-employees of the company are no longer working for this company, but they take the stand and they tell you what those sheets contained. They tell you what Roeser did, that here were the ins, the date, and the amount, here is an amount paid out and underneath that is a balance and the amount paid out also carries a date. In no instance did those figures

show who the money was paid to. They didn't name
5264 people. There were no names whatsoever.

Mrs. Morrill, Roeser and Graflund all say that. So I see nothing of significance in the fact that once the disclosure was made and it was made on that basis, when Mrs. Morrill inquired of Mr. Cain as to whether there was any point in keeping these memoranda on her own, he said, "No. Do with them what you will." He never asked her to keep them. He never asked Roeser to keep them. He never looked at them. Neither did anyone else.

5265 But in those figures that they did give Mr. Lima, that they gave to the Government, they gave them sufficient receipts on which to assess a tax that would be equal from anywhere to two to three times the amount that was really due, if they had taken the figures and assessed the tax and ended the whole matter. I have never been able to find out and I have heard no testimony to explain why it was that they didn't do just that. So much for the disclosure situation as such, except this: As Mr. McConnell said, now that the indictment comes that is the first news that any of the defendants had as to the claim or amount of the claim that the Government was asserting—not that it is asserting a civil claim either—but it says that is the amount of the tax these people sought to evade. The first information of that came in the indictment and then as we come to trial, these sheets prepared in reliance on the voluntary disclosure policy, prepared on the basis which I have stated and which has been testified to by Mr. Busby, are put in evidence here as an admission on the part of the company, not as to what was the total of Lubben's claim but an admission that these
5266 were amounts actually received by Shotwell and those are amounts that we are trying to evade and were trying to evade tax on.

Now, that, as Mr. McConnell says, is not fair. Those documents cannot be used for purposes of such an admission unless the jury is willing to take them that way and in my judgment when you take the basis on which they were arrived at, the circumstances under which they were taken, I believe that in all fair play the jury will not accept those papers as any such admission.

Now, then, we come to the claim—I may say that dur-

ing our opening statements I think all of us made it clear or tried to to the jury that the corporation did receive overages and did have unbilled shipments through the period of October, 1945, to July of 1946. There was no denial of that. The question here, as far as those moneys are concerned, is whether what admittedly so came in, went out. Because, if it went out, if it had to be expended for corn syrup or for raw corn, according to what has been shown and argued, then the amount spent to procure
those items, they being all the amounts that cleared
5267 through the box, that is a deduction and offset against the receipts themselves.

Now, the jury will remember that in the early days of the box, in order to refurnish the money, they had to get from the corporation some $14,550.00 which was done, the cash was put in the box. I think Mr. Roeser so testified. And the charge was made to this miscellaneous officers and employees account where the item hung in suspense. When the box was closed in July of 1946, the balance in the box was taken out, deposited to the corporation bank account and then it was credited to that miscellaneous officers and employees account, enough to substantially wash out the advancements which had initially been made. All I am trying to say is that the sum of $14,000.00 or $15,000.00, whatever it was that remained in the box at the time it was closed or was in there at the close, was not a profit on the box operation but was an amount that had to go back to reimburse the company for the money originally advanced from its own bank account.

5268 So that we have got a situation in which the moneys that admittedly came in, went out for the cost of goods and do not represent taxable money either, whether they were included in the books or reflected in the returns or not. Had they been put in there on that basis, it would not have made one dollar of difference taxwise, the tax would have been precisely the same. But Mr. Lubben says he paid more money and he paid money over a greater period, and there is where the dispute centers.

Our people say "No". He says, "Yes". And therefore it is necessary to get down to some of the factors to which you will want to give consideration in deciding whether Mr. Lubben told the truth.

In the first place, Mr. Kirby has reviewed some of the items and has reminded you of the evidence which caused us to say that Mr. Lubben's testimony as to the payment of those items is untrue. There is no need for us to repeat those. Mr. Lubben's motive was has been referred to on the cash checks or the cash that he was taking
5269 out of his companies. He has got to have some place to charge them. He either retained it in whole or in part or he paid it out in whole or in part, so naturally, he says he paid it out. That is the only position he could take unless he filed an income tax return and paid tax on it and there is no showing in this case that that is a fact. We did try to show the income tax returns but there was objection to them and it was sustained.

The self-serving system has been alluded to by Mr. McConnell and I don't know that it would be too helpful to the jury for me to dwell on it much further here except there are a couple of things I remember about it that I think you would remember.

They did establish the system. Bercu and Miss Feldman and Lubben and the general idea, or the specific idea of that system was that they were to pay the invoice at the printed amount, there would be a check for that, and, then, as Mr. Bercu has testified, simultaneously they would draw a check for the supposed amount of the overage,
5270 Mr. Lubben would get that cashed, get the money and he was supposed to pay overage in that amount. Now, in the instances where they actually did that, in the early days of the proprietorship, if you were to take that same book that Mr. Lockley called your attention to, when it comes to the pay-outs, the charges to purchases, you will find under the names of Gum Products, Two Star, and other suppliers, you will always find two entries—as he put it, Mr. Bercu, in dual form, one following the other, evidencing a simultaneous payment, a check with a printed amount for the invoice, a check for the cash, both right together, and that follows all through up and down the line on those suppliers.

In the case of Shotwell, you won't find it that way. When you look at that ledger, you never see those simultaneous entries according to the system. You find, as Mr. Kirby said, when they got an invoice in, they charged

purchases, entered it up in the purchase book, entered it up in the accounts payable book, built up a sum, but
5271 when they paid, they paid the Shotwell invoice in the printed amount and charged Shotwell accounts payable, but you will never find hooked into that invoice the amount for the cash overage on that invoice simultaneously made as was contained here. Rather, when those checks were drawn to cash, they were carried in suspense in the different companies, and every once in a while when they got around to it they would charge them off to a supplier putting a good round sum in there and then when it became necessary for Lubben to do it, he got up this memoranda, marshalled all this memoranda, tried to get enough of them, put enough of them together to closely approximate the amount of a check and prove it out on a pound basis.

The trouble with those memoranda—when you take them to the jury room and look at them as they are now made, you will see they won't fit. They won't even do that. Not only are they not separate and in a dual form as I mentioned, but if you try to get any aggregate of the amounts of those invoices, you will never come out even with any check charged to Shotwell right on the books except
5272 in the very instance of that $10,869.00 check in the proprietorship.

5273 Now, Mr. McConnell has spoken of Miss Feldman's position, her lack of knowledge of what really occurred, with respect to payments. Everything she did was done at Mr. Lubben's direction. Neither did she acquire any accounting or receipts from Lubben.

That brings me to another thing. This partnership with Giglio-Stone, et al. There was some dispute here as to why Lubben left that partnership. The difference in the operation of the partnership was that it had a cash box, and that whenever Lubben ever wanted to take cash out of that box, to make these payments, it will be plain, I think, to the Jury that there was a strong likelihood that he would be accompanied by Mr. Loperfido, or Mr. Livorsi, or someone else who didn't want any receipts, but he just wanted to see what was being done. That is a lot different than sitting there and having the girl draw you a check going to the bank, and getting the money, or

taking off and saying what you did with it. The dif-
5274 ference is between those operations and the effect of those different modes of operations on Lubben, would be quite apparent. He didn't like that system. He says that he would like to do with it as Mr. Bercu said, and he pulled out.

What did he do? He went back to General Confections where he was all on his own. He had nobody compelling him to do it in any particular way. He kept a cash box. He drew cash checks. He did not change the invoices. He did the thing exactly in the way it had been done in the partnership while he was there, keeping no record.

In other words, it just can't be true that he left Eatsum, and left that partnership to have freedom of action in doing the thing in the way that his accountants thought best. He did no such thing. Indeed, the records, I should say, that are available here for General Confections are almost as bad, or as deficient as in the case of the partnership itself.

Now, there has been some reference to items in the pro-
prietorship. I will speak about that, and of the cash
5275 box. There I interrogated witnesses, different witnesses, including Lubben, confronting them with the cash box sheets, made them admit that he had—that there were dual entries for Two Star, Commodity Trade, Mike Cohen, Eiger, on the ledgers in double the invoice price, and the cash price, and then the cash box sheets, those are the amounts supposedly paid out as overage to these people—the cash box sheets would show that really the money went—it not only went into the cash box, but whatever came out of the cash box for payment to Two Star, Eiger, Commodity, Mike Cohen, or anyone else whose name was shown, was a fiction and device. The fact that the money was in there showed the entry on the books was untrue, that it had not been paid out for overage.

Now, over there at General Confections, when they took off for the first few months, from March to August, Miss Feldman was not there. Frieda Seiderer was there, and Mr. Lubben testified when he was identifying these various cash authorization slips, and memoranda, he just testified
generally that while Miss Feldman was away, Frieda
5276 Seiderer took care of these things.

Well, Frieda Seiderer, obviously, had nothing to

do with it. Whatever was done, if anything was done at the time, was done by Mr. Lubben, with the extension of a couple of figures which Mr. Lockley called attention to this morning.

Now, that reminds me, that even during the partnership time, and all these times when Miss Feldman was supposed to be making memoranda, Miss Feldman testified that she would keep track of each shipment in a little handwritten memoranda that she made. She would accumulate those until she had a batch, and then she would type them all up on a sheet, throw the original memoranda away, use the sheet with a cash authorization slip, to get the amount of cash required, and that was the end of the transaction.

But, when you look at these papers, you don't find typewritten sheets for great parts of this period. You
5277 don't find longhand memoranda either, of Miss Feldman. You find, by and large, memoranda made in the handwriting of Lubben, which is entirely contrary to what their testimony has been as to the method and form, but that is the proof which is here, not hers, but his.

5278 Now, Mr. Cain testified that in June of 1948, at or about the time of the candy convention this chap Tobias who had been the last of the auditors at General Confections told him that Lubben had been doctoring his books, had been charging large amounts of money to Shotwell and that he thought that Cain ought to know about it. Cain so testified.

Mr. Tobias was here. He was here under subpoena. The Government did not put him on the stand to refute that statement of Mr. Cain's. I can only assume, and I think the jury too is entitled to assume that Mr. Tobias, had he been able to refute it, would have been placed on the stand and would have done so.

By the Court: Are you watching the time, Mr. O'Brien?

By Mr. O'Brien: Yes, Judge, I am.

Now, there is also memoranda and other papers which Lubben had with him when he met with Harold Sullivan and Huebner in New York and on one of which occasions he had Carry with him. Carry was the chap from the

Blue Ribbon Trucking Company and Carry was also
5279 connected with the Budget Factors who did the factoring after the General Commercial Acceptance outfit finished, where they left off.

Carry and Lubben exhibited these papers to Sullivan in connection with the demand for the $50,000.00 additional loan, and following that, as he said, they made the Haberkorn deal and then some of these papers were turned over, these slips and things of which the Government has photostats here, but that is along about February or March of 1948 and then when it gets into August of 1948, according to Lubben, but late in June of 1948, according to Mr. Grace and Mr. Cramer, Lubben is trying to get $135,000.00. He is going to leave the country. He is going to take Dane with him. They had already made this trip to Haiti. Mr. Cramer tells about it, and Carry, Davidson and Lubben all came up to see Cramer in that connection. Davidson did not sit in on the conference, but the other two did.

That demand was made. Cramer thought it was a lot of money. Lubben got Cain on the telephone and made
5280 the demand for his participation, whereupon Mr. Cain had told him that they had made a disclosure and they were not interested. Then Lubben turned to Cramer and said, "Boss, you are in."

Now, Morley Cramer came here from Boston to testify that. He has no connection with Shotwell or any of the defendants. His situation must be well understood by the Government, since he too had dealings with Lubben. No one contends—neither Davidson nor Lubben come back or are brought back to tell you that what Cramer said was untrue and yet they were available and that could have been done, had they been able truthfully so to assert.

Neither is anyone brought by the Government to contradict Mr. Cain's testimony pertaining to the chocolate transaction, the two cars obtained from the concern at Mansfield, Massachusetts, which Mr. Kirby reminded you of not long ago. Now that, it seems to me, and I agree with McConnell on this, but it really is the province of the jury—Mr. Lubben goes so far in his statements as to what transpired not only as to amounts but the substantial
5281 matter, the matter of dividing, having Huebner divide money into three piles on every occasion, not once

but all the time—having himself sent by Huebner down to the company comptroller Graflund, to give him moneys which he is to tell him are for corn syrup but "For heavens sake, don't let them know about the candy because Graflund knows nothing about that."

And Graflund is the chap who had charge of the candy, or the overage box from the time that Howard Roeser left early in February down to the time that the corn box was closed out. Now, it is just not conceivable that any such thing happened and a series of those incidents, I agree with Mr. McConnell, would tend to make anyone distrustful of Lubben's testimony, quite aside from the solid items to which Mr. Kirby referred and quite aside from his mode of proceeding, his motives, and the way he kept his books.

I think; coming back to the receipts which came to the corporation for overages and unbilled shipments, when
5282 you get right down to it, the collection of corn syrup invoices is the best objective evidence there is as to what it cost the company to procure the syrup. There is one thing in this whole complex record which is undisputed and that is that over that period of time you could not get corn syrup unless you procured the corn. Lubben himself said that, although he left room for argument.

By Mr. Lockley: I am sorry, Mr. O'Brien, but I am going to have to object to your misstating the evidence. There is no evidence whatsoever that the only way you could get corn syrup was by obtaining corn because during that period of time you are referring to the Shotwell Manufacturing Company got corn syrup without obtaining corn.

5283 By Mr. O'Brien: Judge, I think I am entitled to my recollection as evidence, without interruption.

By Mr. Lockley: But not to misstate the evidence, if your Honor please.

By Mr. O'Brien: I am not misstating it.

By the Court: The Jury will have to determine the accuracy of Mr. O'Brien's statements.

By Mr. O'Brien: Surely.

Neither am I undertaking then to tell the Jury what the evidence is. The Jury heard the evidence, and I am merely reminding them at this point of it, and I think I can do it accurately.

Lubben testified there was no corn syrup procurable, unless you procured the corn, except in the cases of those who had allocations. That is number one.

Mike Cohen said the same thing, and Mike told how much money you had to pay to get the corn, what the market was, what the overage was. Indeed, it is in his testimony that you find the basis of that cost. Everybody, the refiners, everybody who was produced here to
5284 testify, said they could not buy corn at ceiling. Somebody had to pay a premium to procure corn, and they weren't going to pay it, because that would be a violation. Therefore, somebody had to send it in to them, someone that was willing to pay for it. They said during that period, allocation didn't mean a thing. You couldn't get your allocation. Even if you did, it was only 80 percent of what you got in 1941.

I tried to prove in this record through the witness Andrews, what amount of corn syrup we had bought in 1941, so you folks could figure out what allocations, if any, you thought we had in 1945 and 1946.

Mr. Lockley objected to that, so you don't have all those figures, but you can allow up to a full 80 percent allocation. You could assume that, and you can take the quantity of corn syrup that these people have during the years 1945 and 1946, and you have to find that it cost them—that they had to procure the corn for that, and that the amount was at least twice what Mr Kirby contended
5285 on the basis of the testimony of Mike Cohen, of Earl Pratt, and of Mr. Godfrey, as to what the going prices were, to say nothing of Lubben's testimony, and the testimony of the other people.

Now, finally, I would like to say this: I don't see how there can be the slightest question about those two things: That to get corn syrup, there being no free corn, you had to provide the corn; and second, it cost money to do that at the very minimum—and the very minimum would be the amount that Mr. Kirby said. That would easily use up the money, the receipts that came to that corporation from October to July of 1946.

But now, finally, I think of this because we don't make the evidence, we just listen to it. And we listened to Mr. Lubben describe several ways something different than

what the Government is contending here. Bear in mind that this is not even a tax case against Mr. Cain, Mr. Huebner, or Mr. Sullivan. Their personal returns are not involved here. The charge is that they aided and
5286 abetted with willful intent, they aided and abetted this corporation in escaping or evading the payment of taxes which the corporation owed. It is the corporate returns only that are involved.

Now, if Lubben said that he came to these people and said he gave them the money and he just left it there, that would be one thing, that might be compatible, or consistent with the claim that Mr. Lockley and the Government is making; but Lubben is never content to let anything rest in any such simple way. Lubben said that he intended this money for these men. Every time he gave Huebner, whether in New York or in Chicago, the money was divided into three piles, one for Frank, one for Harold, one for Byron—skimmed some off the top which went into his pocket—that was for the races, that was for the horses—but the plain meaning that Lubben intended to be conveyed by that was that these men were getting the money, and Huebner was getting a third, although his stock holdings were quite nominal—he was getting a third of the money.

5287 If you are to believe what the man said, it isn't only that. That might be treated as a joke. Maybe he was just having fun, but when he sends out three checks each in the sum of $13,000.00 specifically payable to Cain, Sullivan and Huebner respectively, what does he mean by that? Doesn't that evidence intention on his part of something? Does he mean by that that he thinks the men ought to have the money rather than the corporation or is it that he is trying to get an endorsed check back with their names on it? What is it? He certainly didn't make a check out to the corporation. Did he think the money was going to them? Again, he made a statement to the Government, a sworn statement, on which I cross examined him and on which he testified from in large part on direct, but he left out a few things in there and so I asked him, well, why? Well, he forgot. I said, "Well, is it true that when you learned about this disclosure you said to the people who told you of it, 'Well, what does the Shotwell Company make a disclosure for? I gave the money to these men first.'" And Lubben said, "Yes."

He did say it. That was what he said.

5288 Now, in spite of what the Government contends, if in the face of all the things that appear through Lubben's testimony, the improbabilities, the untruths, the impeachments, if this jury was really going to believe what Lubben said and you believe it all, then I say you will not and neither will Mr. Lockley be able to predicate additional income to this corporation on that testimony because that testimony, if believed and literally taken and by some stretch of the imagination if any one or more of you believe that, it would represent income to these individuals and not to that company, as I think the Court will direct, and if you find that the income which did come to this corporation was spent not only as the defendants say but as all those people, Roeser, Morrill, Graflund and the rest have said, then this corporation would owe no tax, there is nothing before you on anything else and the defendants would be acquitted.

Thank you.

By the Court: Members of the jury, I think Mr. Lockley is to have a half an hour. All right, Mr. Lockley.

5289 By Mr. Lockley: That was the time which has been allotted to me.

By the Court: I thought the jury would like to know that we will hold them over.

All right.

And Thereupon Mr. Lockley Addressed The Court And Jury In Closing Argument On Behalf Of The Government.

By Mr. Lockley: I will try not to take all of the time if it is at all possible to do so because I know sitting there and listening to somebody else doing the talking is not entirely the easiest job in the world.

There are a few comments I want to make, though, on the closing statements of the three counsel for the defense. Half an hour, of course, is nowhere near enough to try to show to you the utter falsity of the premises upon which a good many of their inferences have been based. They accept, in part, the testimony of the Government's witnesses. They reject in part the testimony of the Government's witnesses. They feel that all of the witnesses who have testified favorably for the defense, even though they were called by the Government are hon-

5290 orable people; that those people who have testified unfavorably are liars and blackmailers and dangerous

men and they speak specifically of David Lubben.
5291 Mr. Kirby demonstrated very strikingly the whole practice of the defense in this case, when he was making his closing address. He had just one defense, and that was to be as offensive as possible about David Lubben. He called him every name in the book. And not one of them is deserving.

I will tell you who David Lubben is. He is an honest, honorable American citizen, who is down here doing his duty, just the way you people are doing your duty. And he said from the stand here, "I am getting nine dollars a day for doing this." And that is what he is getting paid as a witness, and that's all he gets, and not another single solid cent. He is no informer in this case. He has nothing at all at stake. His taxes are settled. He has nothing to gain, and nothing to lose, no matter what happens to these people.

He was the fair haired boy, you remember, back in 1945, when they were giving him a lot of candy, and he was giving them a lot of cash. But today, he is called upon to do his duty as a citizen, and sit on the stand under oath,
5292 and tell the truth, he is every kind of a liar and blackguard they can think of.

Well, he is no such thing. David Lubben, you saw him, you heard him.

You heard Mr. McConnell struggle with him for about four days and try to shake him in any material way in his testimony. Was he successful? Not in the slightest. And I will tell you why.

Because, Lubben is telling the truth, and you can't shake a story when a man is telling the truth. He didn't have to fabricate. These weren't just amplifications, and little details that he added on. My God, the man would have to have an imagination that would make him one of the finest novelists of all time, if he could sit up here and think up stories as he went along.

By Mr. Kirby: Mr. Lockley and I for once in the case are in agreement.

By Mr. Lockley: That is not so. People who are actually lying on the stand and who are caught in their lies—well, Byron Cain and Harold Sullivan, and the
5293 people who they also thought were very fine, honorable people, and who testified for the defense, who are they? Ronald Stone? A disbarred lawyer, convicted of

perjury. Are you going to believe anything that that man says?

Louie Roth? He is under indictment himself, and he refused to testify on his constitutional rights. This man Meyer, his accountant—you heard Mr. Meyer sit here on Friday afternoon and tell you about all the checks to cash that had been drawn by Mr. Lubben, and which were questioned, questioned on his books—Mr. Meyer wanted to know all about those checks to cash, because there was something improper about it.

You recall I came back here Monday morning, after I had an opportunity to look over these documents, and what do we find? About 75 percent of them aren't checks to cash at all, although that was the inference he left with you. He did deliberately mislead this jury, to try to have you think these were all checks to cash. They didn't
5294 know what had happened to them. Here they are.

They are not checks to cash. They are checks to Myron Roth, to David Lubben, and to Our Lady of Bethlehem Academy. You can go down the whole list of them, and what happened to them? Here it is on the other side. It tells you "Start of petty cash fund."

Here is a charge to the payroll account.

Here is a charge to the inventory.

Here is a charge to donations.

There is an explanation for every one of those checks.

5295 If you can believe that man Meyer, you can believe David Lubben on anything he tells you. Meyer is not only a liar, he is a paid liar.

And that fine fellow—I think that is what Mr. Kirby called him—that fine fellow Morley Cramer, that fine fellow Morley Cramer was also a great black marketeer.

You look through there and you will find as many payments to him as to Shotwell. You look through the books.

He had nothing to lose—I think that was what Kirby said, or perhaps it was O'Brien—he had nothing to gain by coming here. Of course he did. Morley Cramer could help to tear down David Lubben. He is going to make himself look that much better. Maybe he can get his income tax problem settled, too.

By Mr. Kirby: I understand you have accepted a settlement from him.

By Mr. Lockley: Perhaps they have.

How about Mr. Sullivan? They want to talk about liars.

You caught him redhanded on the stand, lying about that Gotham Hotel occasion when Lubben was supposed to
5296 have gone up with these marked up invoices. You just heard Mr. O'Brien tell you that there was no marked up invoices during the period of the partnership. There were no marked up invoices during the period of General Confections. What period is left? The sole proprietorship period. It is the only time when they used that system of marking up the invoices.

And just where were the invoices of the sole proprietorship at that time? Sproull-Scholz had them. They had them because Lubben owed them a bill for accounting and they were holding them in hock. I don't know just how proper that is, for an accountant to do it, but Sproull-Scholz—that fine man who testified for the defendants, he was holding them.

Obviously then if Sproull-Scholz had them Lubben couldn't have had them. And if Lubben didn't have them, Harold Sullivan was lying. And he knows it. And there is no way of checking it, because it is Sullivan's word against Lubben's word.

Sullivan quite conveniently made a long distance call to Cain so that Cain could get in on the act and testify to.

5297 And Cain? Well, somebody is certainly lying—there is no question about that—about the Club Riviera. Cain either has an awfully short memory or else he is lying about that one. You recall that Mr. Grace in large part corroborted what Mr. Cain had to say. And we proved to you that Grace is a liar. He said he had never been to Dan Bolick's office. And we showed you three sheets from this record which was kept in the office of Dan Bolick and they are dated right at this time, June and July, 1948, when Cain and Grace and Lubben were talking over these matters at the Club Riviera. Why else would Grace go to Bolick's office, except to talk about settlement of the Shotwell case? And why would Grace go to Bolick's office? Bolick is the head of the Intelligence Division in New York. This is a Chicago case.

For only one reason, because he expected to use political influence. That is the same reason that Sullivan wrote a letter to McCahey. Did he think McCahey was going to give him a bill so he could settle his cases? What possible reason could he have had? That is the only one.

Now, they also talked to you about this so-called
5298 voluntary disclosure. Well, the Court will give you an instruction on what the voluntary disclosure policy is. And he will tell you that there are certain elements to that policy, one of which is timeliness. The taxpayer has to make his disclosure before the Government finds out about it, before the Government starts making an investigation.

And, secondly, it has to be a bona fide disclosure which admits liability.

Well, what did these defendants say? They said, "Yes, we got some of it in, but we paid all of it out." So what were they attempting to accomplish by making one of these so-called disclosures? It was going through a useless gesture. They were trying to do just exactly this. They were trying to save themselves from criminal prosecution by making an admission that they had received the money. And then they were trying to save themselves from getting taxed by claiming that they paid it all out again. And that is exactly what they did.

Let me show you the figures. These are Mr. Byron Cain's. You see the figures up here. He has got milk,
5299 30,000; corn syrup, 12,000; cocoa bean deal, 30,000 dollars.

Have you heard anything about a cocoa bean deal here? Of course you haven't. Mr. Cain said there were no such things. He sat down in five minutes and dreamed this up. And why in the world would he dream it up, if it wasn't true? For just one reason. He was going to mislead the United States Government at the time he was making his voluntary disclosure.

And did he do so? He certainly attempted to, because look at this, which was turned over by Mr. Busby, the accountant, to the Revenue agent who came in to investigate the case. It contains exactly those same figures, exactly. Chocolate, 45,000; milk 30,000; and so on. They come up with the ridiculous figure of $5,898.00 left in the pot, after they got through. And they admit not even that was reported as income. This doesn't agree with this amount. I think they claim $338.68 to balance. I don't know what that is. Somebody's figure that they must have gotten out of a balance some place.

5300 And here, too, while we are on the disclosure period, here are some figures which were prepared by Mr. Busby. And this will also tend to put the lie in Byron

Cain's teeth, as to how much they were paying in overages, or receiving in overages, during 1945. Right here, this sheet shows 1944. And look at this. This is in Huebner's handwriting. Ten cents all the way down the line.

Now, don't you think that if they were actually only paying three cents,—or receiving, I mean, three cents in those days, they would put down three cents? Why should they charge themselves with a greater amount than they actually received in?

Because Lubben said so? They said Lubben claimed it. Claimed what? What do Lubben's claims have to do here? Lubben wasn't around when they prepared this. Lubben was out of business by that time. Lubben wasn't around when they prepared any of these figures at all. He went out of business in February of 1948, if you remember.

They didn't even start preparing this until later.
5301 They wanted Lubben to come to Chicago, you recall, because Byron wanted to talk to him. He didn't have enough money to come.

The true fact of the matter is that they actually did receive ten cents in 1944, and they did receive it in the early part of '45. And they received 18⅔ cents on chocolate in 1945.

It is simply ridiculous for them to stand up here and say, "We were just black marketing a little bit. Not as much as the Government claims, just a little bit."

Mr. Kirby attacks the Government's evidence, these documents. To be sure, we don't have a complete double entry set of books for every period of the partnership and the corporation. Thank God, somebody kept books, even this kind of books. You know where we would be if Lubben had kept the sort of books the Shotwell Manufacturing Company kept, don't you? And had destroyed them immediately afterward, the way they did?

If he had gotten their permission, he wouldn't have
5302 kept those records at all. He didn't get permission to mark up their invoices, and, believe me, he didn't have permission to keep those books. Because if he had, if he had spoken to them about it, before he did, in 1947, or 1948, they would have gotten hold of them. You notice they did get hold of a good many of them.

Did they get them from Lubben? No, they went to Sproull and Scholz. That is where they got a lot of their information. They got a lot of it from this man Tobias.

And while I am speaking of Tobias, Mr. O'Brien mentioned that we had him here and we didn't call him.

He overlooked one important thing. The defense also had him subpoenaed, and they didn't call him, either. I don't know why they had him, but the Government had him for an entirely different reason. We had no necessity for calling him.

5303 Mr. Kirby also mentioned that on this audit statement which was prepared by Sproull-Scholz it shows an $11,000.00 profit. Well, I am not surprised. I hadn't checked the figures, as a matter of fact, so I don't know if that is the correct one or not. But assuming that it is. You recall that this is the audit statement for late 1947—February 28, 1947, and it shows that Lubben was in just exactly the kind of financial condition he said he was in. Remember, he went to get a $75,000.00 loan from Byron Cain. If he only had that much profit he needed a loan and he subsequently went broke a year later.

So it doesn't prove anything, that the man had that sort of a profit. Don't forget, Lubben was selling in the black market, but the reason he went broke is that he paid half a million dollars to these people, had nothing left over after he got through with them.

And that black market again. Mr. Kirby talks about the Government having paid premiums in the black market for corn. Well, the black market, I suppose, was in existence, in corn. There was a black market in existence

5304 in a lot of things, as we all remember from those years, in tires, in gasoline, in butter, in meat.

Did that force us to go in the black market? No. You just went without. Or you did with a little less. And they could have done the same thing. They were getting corn syrup, they were getting sugar on allotments under their government contracts. They could have gotten by. Maybe they wouldn't have added any millions, but they could have kept going. But they weren't satisfied with just getting by. They weren't satisfied with just keeping within the law. What they wanted to do was to build a candy empire. What they wanted to do was build up their business until after the war, when they would have a great many customers. They were going to build and expand —a plant on the East Coast and a plant on the West Coast.

You remember Mr. Cain talking about that on the stand.

He said that was one of the reasons that he gave the $75,000.00 loan.

And you heard Mr. Kirby making all sorts of suppositions about supposing that the defense had bought so much corn in those black markets and supposing that corn had cost so much, why, then based upon all those
5305 supposes it would have probably cost the Shotwell Manufacturing Company so many thousands of dollars in the black market.

Well, taking all these supposes out, what do you have left? Do you have the testimony of one single, solitary individual who says he sold any corn, or arranged the sale of any corn for Shotwell in the black market? Do you know of one single dime that was paid to one single person for a single grain of corn in the black market? No.

These people are well educated. They are well experienced business people. Do you think for one minute that they are going to let a hundred thousand or four hundred thousand, or any other amount of money be paid out without knowing, having the slightest idea of where it is going? It just isn't sensible. If they knew who got that money, if they had paid it out, I should say they would know who got it, and if they know who got it they would have them here.

There is only one conclusion, and that is that if any was paid out at all it was so small that it just doesn't support their case.

5306 There were only ninety-six cars of corn that I recall were testified to from the stand that could conceivably be connected with those so-called corn deals. There is no guarantee that they paid a dime in the black market for any of that corn. They may have gotten it for friendship. They may have gotten it for any other reasons.

But they did arrange the purchase of ninety-six cars of corn. I think the testimony was that there was from two hundred to seven hundred dollars premium, based upon what period of time it was. Well, assume that they paid $200.00 a car. That's around eighteen hundred, nineteen hundred and sixty dollars, or something of that sort—nineteen thousand, rather,—nineteen thousand dollars that they would have had to pay out for those ninety-six cars of corn. That still leaves them an awful lot of money left in the kitty from what they even admit Mr. Lubben paid them.

And assume there was as high as $700.00 paid a car for corn. And that would have been very unusual.
5307 It wouldn't have been charged on all ninety-six cars. Assuming that it was, though, that would be around $63,000.00. That still leaves a great deal of money left over.

But the thing that you have to remember is that they haven't proved a dime of it. They tear apart the Government's case on what these records prove and don't prove, and then come in and expect you to believe something just on faith, just because they tell you "That is the way other people were doing it, therefore we want you to believe we did it that way, too." That is not proof. It is guesswork.

Now, the Government's good faith was questioned by Mr. McConnell on this voluntary disclosure policy. The facts, however—now twisted, weasled—tend to show that The Shotwell Manufacturing Company never really intended to make a voluntary disclosure. I just didn't want you to get the impression that these people had been led into revealing something which was contrary to their rights as citizens of this country and then had that
5308 information used against them. That is not so. They were not. They have been given every possible protection that the Constitution and the laws of the United States allow them.

The Government has made available to them all of its records in this case. They have had every opportunity to examine them before they were brought here in the court and showed to these witnesses and made available to the jury. And you will have an opportunity to see them.

In no way whatsoever have they been deprived of any of those rights. And when Mr. McConnell said that the Government was guilty of bad faith, I think that he was over-stating his case and he didn't really mean what he said.

He said one other thing. He said that you have to live with your conscience. I agree with that. We all do. One of the things that a conscience requires us to do is to do your duty. We have a duty here. As the Government prosecutor, I have a duty to represent the public to
5309 the best of my ability. The defense counsel have duties to represent their clients. The Judge, of

course, discharges his duty as the arbiter and in giving you the instructions.

And now the duty passes to you, as the jurors, to decide the truth and the falsity of the facts in this case. I ask you to do that duty without regard to prejudice, without regard to sympathy, without regard to color or position in any way whatsoever. I want you to cut through the Gordian knot of complications which the defense have wound about this case and cut it down to the simple issues that I tried to explain to you this morning, and on my opening statement.

If you will do that duty, if you will see that duty, there is only one conclusion that you can come to, and that is that all of the testimony you have heard, and the records which you will have an opportunity to examine, point to but one thing, and that is the unquestioned guilt of all three of these defendants, and I believe that you will come back with a verdict of guilty as to all three individuals and the corporation.

5310 Thank you.

By the Court: Well, members of the jury, as I told you, we will be in recess now until Friday morning at ten o'clock. Friday morning at ten o'clock.

By the Marshal: Will the audience please remain standing until the jury and the Judge leave the court room.

This Honorable Court will recess until Friday morning at ten o'clock.

(Whereupon an adjournment was taken in the above-entitled cause to Friday, October 16, 1953, at 10:00 o'clock a. m.)

5311 * * (Caption—No. 53 CR 143) * *

Chicago, Illinois, Friday, October 16, 1953, 10:00 o'clock a.m.

Court met pursuant to adjournment.

PRESENT:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. William T. Kirby,

AND THEREUPON the following further proceedings were had herein, in the presence and hearing of the Jury:—

By the Clerk: No. 52 CR 143, United States *versus* The Shotwell Manufacturing Company, et al, case on trial.

5312 By the Marshal: This Honorable Court is now in session pursuant to adjournment.

By Mr. Lockley: If your Honor please, may I at this time request permission to substitute photostatic copies of Exhibits 1, 1-A, 2, and 3, which are the income tax returns of the corporation, and the excess profit tax returns for the years 1945 and 1946.

By Mr. O'Brien: No objection.

By the Court: Very well.

By Mr. O'Brien: Judge, may I ask you and Mr. Lockley, I don't know if the instructions go to the Jury, or do they not?

By Mr. Lockley: I don't think so.

By the Court: They don't.

By Mr. O'Brien: No. 2—

By the Court: This isn't for the record.

(Discussion off the record).

By the Court: Mr. Reporter, will you indicate in the record—I don't believe I made a formal ruling on the exhibits. I will receive them in evidence, and they are 49, 50, 51, and 52. I receive them in evidence as Exhibits.

5313 (Said documents were received in evidence by the Court, and marked Defendants' Exhibits 49, 50, and 51 and 52.)

By Mr. Lockley: And 156 and 156-A, your Honor.

By the Court: Government exhibits?

By Mr. Lockley: 156 and 156-A, Government exhibits.

By the Court: They will be received.

(Said documents were received in evidence by the Court, and marked Government's Exhibits 156 and 156-A.)

By Mr. O'Brien: Let us see what these are.

By the Court: I think I should say this to the audience here.

You know, a charge to a jury is rather long and rather involved, and, I would assume, quite uninteresting to an audience.

Nos. 470-471

TRANSCRIPT OF RECORD

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FILED
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SUPREME COURT, U.S.

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11265 vs.
THE SHUTTLE MANUFACTURING COMPANY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11266 vs.
BYRON A. CAIN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11139 vs.
FRANK J. HUESMAN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11313 vs.
HAROLD E. SULLIVAN,
Defendant-Appellant.

U. S. Supreme Court
FILED
JUL 1 1956

TRANSCRIPT OF RECORD FILED MARCH 1, 1956

PRINTED RECORD

In the

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 11108 *vs.*

THE SHOTWELL MANUFACTURING COMPANY,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 11109 *vs.*

BYRON A. CAIN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 11110 *vs.*

FRANK J. HUEBNER,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 11111 *vs.*

HAROLD E. SULLIVAN,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

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I merely say that to you because I have instructed the marshal to keep the doors closed, and no one will be permitted to leave or enter during the charge. And maybe some of you might like to leave at this time. It will be
5314 no discourtesy to me, if you leave, because I appreciate full well a charge to a jury is nothing very interesting to an audience.

But, be that as it may, the Marshal has been instructed to keep the doors closed, and no one will enter or leave until the Court has completed his charge.

Thereupon The Court Charged The Jury:

By the Court: Well, members of the Jury:

The testimony in this case is closed. Counsel have completed their respective arguments and summations, and it now becomes the duty of the Court to instruct you as to the law which may be applicable.

I take it that you understand; but it is my duty to remind you that under the law, you are constituted as the sole judges of the facts. And you have been sitting here now for over a month listening to this testimony, and observing these witnesses in order to enable you to determine the facts of this case.

The Court does not take it upon himself to make any comment upon any disputed issue, or express any opinion one way or another as to what your verdict should be, because if the Court did that, he would be trespassing,
5315 so to speak, upon your rights as jurors, for it is your sole responsibility to determine what the facts are, and from the facts as you find them to be, and from the law as given to you by the Court, you are to determine the guilt or innocence of these defendants.

The Court, as you have observed, presides during the trial and passes upon the competency and relevancy of the testimony, and then at the close of the trial, instructs the Jury as to the law.

It is your duty, of course, to take the law as the Court gives it to you, and apply it to the facts as you may find them to be. You will observe, therefore, that you have a duty to perform which is just as necessary and just as important as the duty which rests upon the shoulders of the Court, because to all intent and purposes, you are now sitting as the judges of the facts.

Now, during this charge, the Court will endeavor to summarize for you the respective contentions of the parties as
the Court understands them for the purpose of clarify-
5316 ing the issues of fact which will be submitted to you,
but any summarization, or deductions from the evidence which the Court may make, are merely his best recollection and understanding. They are not binding on you, and should not be accepted by you unless they coincide with your own recollection, and understanding of the testimony.

You will understand that this matter comes before the Court upon an indictment returned by the Grand Jury of the United States in which it is charged in two counts that the defendants have committed certain offenses against the laws of the United States. The indictment is not any evidence of guilt; it is merely a means by which the defendants are brought into Court to answer the charges made. Nor does the indictment give rise to any presumption of guilt, and must not be so considered by you.

Under our laws, every defendant who is charged with a crime is presumed to be innocent. Now, that presumption remains with him throughout the entire trial, until that
time, if that time is reached, that the Government has
5317 established his guilt beyond a reasonable doubt. The
defendants here are entitled to the benefit of that presumption, and it is for you to determine, members of the Jury, whether or not the guilt of any of the defendants has been established beyond a reasonable doubt.

When the Court uses the term "reasonable doubt," and instructs you that the burden rests on the Government to prove the defendants' guilt beyond a reasonable doubt, the Court does not mean that it is incumbent upon the Government to prove a defendant's guilt to a mathematical certainty, or beyond the peradventure of doubt. A reasonable doubt does not mean a whimsical or fantastic doubt. The term "reasonable doubt" is probably self-explanatory, and is sufficiently clear, and lucid without any additional explanation on the part of the Court.

However, if after a full and fair consideration of all the evidence and testimony in this case, there is in your mind a lasting and abiding conviction of the guilt of any defend-
ant named in this indictment amounting to a moral
5318 certainty, then you may say to yourselves that as to
such defendant you have been convinced beyond a

reasonable doubt.

On the other hand, if you do not have after a full and fair consideration of all the evidence and testimony, an abiding conviction of the guilt of any defendant charged herein, amounting to a moral certainty, then the guilt of such defendant has not been established as the law requires, and it would be your duty to return a verdict of not guilty as to such defendant or defendants.

The indictment, as I informed you, is in two counts. The first count charges:

"That on or about the 15th day of March, 1946, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, THE SHOTWELL MANUFACTURING COMPANY, a corporation, BYRON A. CAIN, President and Treasurer in 1945 and 1946, HAROLD E. SULLIVAN, Attorney in 1945 and 1946, and Executive Vice President and Attorney in 1946, and FRANK J. HUEBNER, Vice President in 1945 and 1946, of the corporation, did
5319 wilfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the corporation to the United States of America, for the calendar year, 1945, by filing and causing to be filed with the Collector of Internal Revenue, for the First Internal Revenue Collection District of Illinois, at Chicago, Illinois, false and fraudulent tax returns wherein they alleged the net income of the corporation for the said calendar year was the sum of $561,064.42, and that the total amount of tax due thereon was in the sum of $370,638.95, whereas as they then and there well knew, the net income of the corporation for the said calendar year, was the sum of $738,210.65, upon which net income the corporation owed to the United States of America, a total tax of $534,288.89."

5320 The second count makes the same formal charges as to the same defendants as is contained in the first count, except the violation is alleged to have taken place on or about the 15th day of March, 1947, with reference to the 1946 taxes allegedly due and owing the United States, and it is charged in the second count, that these defendants did wilfully and knowingly attempt to evade and—defeat and evade a large part of the taxes due, and owing by The Shotwell Manufacturing Company to the United States, for the year 1946, by filing and causing to be filed with the Collector of Internal Revenue at Chicago, Illinois, a false

and fraululent tax return wherein they alleged that the net income of the corporation for the calendar year was the sum of $1,202,917.18, and that the total amount of tax due thereon was the sum of $450,012.98, whereas, as they then and there well knew, the net income of the corporation for said calendar year was the sum of $1,526,490.47, upon which net income the corporation owed to the United States of America a total tax of $579,970.83.

5321 You are instructed that an attempt to evade income tax for one year is a separate offense from an attempt to evade the tax for a different year.

The indictment in this case, therefore, charges separate offenses for the year 1946— 1945 and 1946, for the wilfull attempts to evade and defeat the corporate taxes of The Shotwell Manufacturing Company.

The Government contends, through the evidence which has been offered, that The Shotwell Manufacturing Company, during the period in question was engaged in the manufacture of candy and marshmallows in Chicago, Illinois; that Byron A. Cain was President and Treasurer in 1945 and '46, Harold E. Sullivan was a Director and Attorney in 1945, and Executive Vice President and Attorney in 1946, and Frank J. Huebner was Vice President in 1945 and 1946; that one David Lubben was in the candy business in New York, and that during the first six months of 1945, he was the sole proprietor of a concern which did business under the name of Eatsum Food Products Company; that Lubben did business under that name from about May, 1944, until June 1, 1945.

5322 The Government contends that the Eatsum Food Products Company became a partnership on or about June 1, 1945, when Lubben and one Giglio became partners under that name with certain limited partners on each side, and that the partnership continued in the candy business until about March 6, 1946, when Lubben left, and organized a concern known as General Confections, which was a corporation, with Lubben owning most of the stock, and the General Confections carrying on a business similar to that of Eatsum Food Products Company; that the Reserve Trading Company was a subsidiary of the General Confections, and that these two concerns, General Confections, and Reserve Trading Company continued in business until some time in March, 1948, when General Confections went into receivership.

The Government contends that Lubben was a jobber doing business with Shotwell late in 1943, or early in 1944, and that when Lubben purchased the Eatsum Food Products Company from the Burry Biscuit Company early in 1944, or thereabout, the Government contends that
5323 Lubben requested Frank J. Huebner of the Shotwell Company for an increase in the quota of the candy alloted to him by that company, and that later in 1944, an arrangement was made through Huebner, whereby Shotwell would increase Lubben's quota if a cash premium or overage would be paid by Lubben for merchandise shipped to him by Shotwell.

At this time, candy was under an OPA ceiling price. The Government contends that this arrangement with Lubben and Huebner was agreed to, and that premiums, or overages, which Lubben agreed to pay were in excess of the ceiling price established by the OPA.

5324 The Government contends that from late in 1944 the arrangement for premium payments with Lubben and the Shotwell Company was carried on with reference to all candy shipped by Shotwell to the Eatsum Food Products Company; that during the proprietorship, that is, when Lubben was the sole owner of Eatsum, the Government contends that when invoices were sent by Shotwell to Eatsum the ceiling price of the merchandise was stated on the face of the invoice, but that when the invoice reached Eatsum, Lubben or his bookkeeper would add to the invoice the amount of the premium or overage and then enter the full amount of the invoice plus the overage in the purchase book record and the accounts payable record of the Eatsum Food Products Company.

The Govenment contends that Eatsum would forward a check to Shotwell for the face amount of the invoice and then at some later time a check to cash totaling at times the overages on several invoices would be entered by Eatsum in the cash disbursements book and the check cashed and the proceeds generally turned over to Lubben, who then arranged for the payment of the money to the Shotwell Company.

5325 The Government contends that in the year 1945 the first payment by Lubben was at the Pennsylvania Hotel in New York when Lubben had a conference with the defendants Cain, Sullivan and Huebner, and that at

that time a payment of some $19,000.00 was made to Huebner alone, when Sullivan and Cain were not present, and that this payment was made for overages due the Shotwell Company on merchandise which had been shipped.

And it is the Government's contention that from time to time thereafter during the existence of the proprietorship Lubben received candy shipments from Shotwell with the invoice noting the ceiling price, and that in accordance with the practice of Eatsum during that period, there would be noted on such invoice the amount of the overages which Lubben had agreed to pay and the transaction handled substantially as above outlined.

The Government contends that substantial cash payments were made to Huebner for the Shotwell Company by Lubben throughout the first six months of 1945. Usually the cash payments, according to the Government, were made by Lubben to Huebner, either in Chicago or New York.

5326 And it is contended that when the payments were made to Huebner he generally followed the practice of counting the money and checking the amount with a record that he kept and the cash would be divided into three piles by Huebner, with the statement on the part of Huebner that one pile was for Byron, referring to the defendant Cain, one was for Harold, referring to the defendant Sullivan, and the third was for him, and that Huebner would skim off some of the money from each pile stating that this was for the horses, or words to that effect.

The Government contends that during the proprietorship of Eatsum by Lubben in 1945, $105,473.86 of over-ceiling payments was paid to Shotwell on candy sold by Shotwell to Eatsum, and that all of such payments were made in cash.

Now, the Government contends that when the partnership was formed Eatsum discontinued the practice of entering in pencil the overage due Shotwell on the invoices which Shotwell forwarded to Eatsum, but that the payment of overages continued by cash payments to Shotwell generally through Frank J. Huebner.

5327 The Government contends that the Eatsum partnership paid to Shotwell for overages on candy sold by Shotwell from June 1, 1945, to November 27, 1945, a total of $71,672.35, and that this sum added to the $105,473.86, which the Government contends represented the overages

paid up to June 1, 1945, makes a total of $177,146.21 for the overages paid Shotwell from Eatsum as a partnership —Eatsum as a proprietorship and Eatsum as a partnership during the year 1945.

The government contends that during 1946 the Eatsum partnership continued to pay overages to Shotwell but early in March Lubben, after some disagreement with Giglio, left the partnership, and there had accrued on account of overages some $41,682.10 due Shotwell from the partnership which was unpaid at the time Lubben left, and it was shortly after Lubben left the partnership, according to the government, that he came to Chicago with three checks, identified as Government's Exhibits 14, 14-A and 14-B, each in the amount of $13,894.03, payable to Byron Cain, Harold Sullivan and Frank Huebner, and that Lubben conferred with Huebner and Cain and told them that he was leaving the partnership but wanted to take
5328 care of the amount that was due Shotwell.

The Government contends that at this time Huebner and Cain refused to accept the checks for the overages, and that later the amount of the three checks, totaling some $41,682.09, was, according to the Government, paid to Huebner and Cain by Lubben in cash from the funds of the General Confections on or about March 29, 1946.

After General Confections was organized by Lubben in March, 1946, the Government contends that that concern continued the over ceiling payments upon merchandise sold by Shotwell, by making cash payments to the Shotwell Company substantially in the same manner as had been done during the proprietorship, and the partnership of Eatsum Food Products Company, except, as I remember, that no notations of the overages were made on the invoices.

Now, the Government contends, members of the Jury, that most of the payments made by General Confections were made to the defendant, Huebner, either in New York or at the Shotwell factory in Chicago. Some of the
5329 payments, according to the Government were made by one James Moran, a brother-in-law of Huebner—of Lubben, and one William Heitmann, a factory superintendent, or assistant factory superintendent for General Confections.

During 1946, when General Confections and Reserve

Trading Company were doing business with Shotwell, the Government contends that corn syrup was bought from Shotwell at a premium price and that overages were paid to one Stanley Graflund of the Shotwell Company, who was comptroller for Shotwell, and that these payments were made to Graflund at the request of Huebner.

It was during the period that General Confections was dealing with Shotwell, according to the Government, that Huebner arranged with Lubben to make shipments for General Confections without any bills or invoices, and that it was at this time that shipments of candy were made by Shotwell on bills of lading noting the shipper as the ABC Company, to several of General Confections customers, and on these so-called unbilled shipments alone, the Government contends that the over ceiling payments made
5330 to Shotwell total some $65,532.18; that including the $1,450 payment made by Lubben, on jewelry at Mr. Cain's request, the over ceiling payments made by Eatsum and General Confections during the year 1946 total payments of $211,193.90 were made, and that these premium payments, added to the premium payments made on the unbilled shipments of $65,532.18, results in a total of $276,728.08, which, according to the Government, represents the total over ceiling payments made by Shotwell—made to Shotwell by the Eatsum Company, General Confections, and Reserve Trading during the year 1946.

These figures, members of the Jury, may not be to the cent correct, but they are approximately, as I remember the evidence that was introduced on behalf of the Government.

Now, the Government contends that these defendant officers, and directors of the Shotwell Manufacturing Company knew that the premium payments made by the Eatsum Food Products Company, General Confections and Reserve Trading were not entered on the books of the Shotwell Company, and knew when the auditor, which they hired
5331 to audit the books of the Shotwell Company, and to assemble the data for the 1945 and 1946 income statements of the Government, that the auditor in preparing and filing such income tax statements would not include or consider as a part of the income of the company the premium payments which were made during these years.

It is the Government's position that defendants purpose-

ly and intentionally handled these premium payments in a manner so that there would be no book record of them, and that they would not be reflected on any income tax statements, and that their plan and scheme was to wilfully and intentionally attempt to defeat and to evade a large part of the taxes due the Government by the Shotwell Company for the two years in question by having the Shotwell corporation file a false and fraudulent tax return.

And it is the Government's position that for the year 1945, the tax due the United States from the Shotwell Company was $149,430.92 more than the tax which Shotwell paid for that year, and for the year 1946, according to the Government, the tax due the United States from the Shotwell Company was $105,155.94 more than the tax which Shotwell paid for that year.

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It is the position of the Government that while most of the payments were made to Huebner for the Shotwell Company, Cain and Sullivan, as well as Huebner, were aware that the payments were not entered on the books of the company, and that each of these defendants knowingly and intentionally aided and assisted, and caused the Shotwell Company to file false and fraudulent tax returns for the years in question.

The Government contends that in August, 1948, when it was learned that Government inspectors were inquiring into Shotwell's dealings with Lubben, that Cain suggested to Lubben that he leave the country, and go to South America, and absent himself from this country for a period of a couple of years so that he could not be called upon to testify in any tax proceeding which might be instituted against Shotwell by the Government, and that Lubben refused to comply with that suggestion.

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As heretofore stated, the Government contends that Huebner was the one with whom Lubben primarily dealt, and to whom he usually paid most of the overages which were due Shotwell under the agreement, and that Huebner stated from time to time to Lubben that if he, Lubben, kept the money coming by way of overages, that merchandise from Shotwell would be forwarded to him, but that without such overages Shotwell would not be able to ship any substantial amount of candy to him.

It is the position of the Government, as the Court understands it, that from the various records of Eatsum and

General Confections introduced in evidence, and the oral testimony as to the payment of overages, it has established beyond a reasonable doubt that there was a substantial amount of taxes due the United States from the Shotwell Company for each of the years 1945, and 1946, over and above that which was reported and paid by the company, and that each individual defendant, including the Shotwell Company, wilfully and intentionally attempted to
5334 evade or defeat such tax in payment thereof, by filing or aiding, assisting, or causing to be filed false and fraudulent returns for such years.

Well, members of the Jury, that gives you in a very summary, and somewhat sketchy way, the Court's understanding of the Government's position herein. Obviously, I have not intended, nor attempted to repeat or summarize all of the details of the testimony which may bear upon the Government's contentions, and of course, members of the Jury, if your recollection of, or deductions from, the testimony differs from mine, you will disregard what I have stated and depend entirely upon your own recollection and deductions, because it is your recollection of the testimony and the contentions of the parties which must govern, not mine.

Now, each of the defendants has entered a plea of not guilty, and that places in issue, each and every essential element charged in the indictment.

Mr. Cain and Mr. Sullivan have taken the stand in
5335 their own behalf, and considerable testimony has been offered by the defense to refute the charges made against them.

At the outset, members of the Jury, in attempting to present to you defendants' position and contentions, as I understand them from the evidence, it may be helpful to call to your attention some of the salient, that is, the important matters which are not in dispute.

The defendants admit that a considerable amount of merchandise was sold by the Shotwell Company to the Eatsum companies, and to General Confections during 1945, and 1946. They admit that for a period beginning with the latter part of 1945, and up to on or about July 1, 1946, Shotwell, with the knowledge of all of these defendants, sold candies to these concerns at a price which was in excess of the OPA ceiling price on the candy sold.

They admit, or, at least, do not deny, that these overages were paid by the Eatsum companies, and General Confections through Lubben in cash, and that the overages were not entered on the books of Shotwell, though defendant Sullivan contends that he did not know the overages 5336 were not entered on the books.

They contend that the 1945 and 1946 income tax returns of Shotwell do not reflect these cash payments which were made to the Shotwell Company. They deny, however, that the cash payments were made in the amounts testified to by Lubben, as being made to Shotwell, by way of overages.

It is the defendants' position that these cash payments, or cash overages paid by Lubben, and his companies, first commenced on or about September or October, 1945; that at that time there was a shortage of corn throughout the United States, and that was occasioned by the ceiling price the Government had placed on corn, which resulted in the corn raisers finding it more profitable to feed their corn to their livestock than to sell it on the market.

Corn, according to the defendants, was an important factor in the candy industry, because from corn, corn syrup, and corn starch are obtained and widely used by candy manufacturers. They contend that corn syrup was in unusual demand during this particular period by such 5337 manufacturers because of the shortage of sugar. The refiners of corn were, according to the defendants, unable to purchase any raw corn on the market, and hence, had to cut down their quotas to their customers.

Defendants contend that the situation became so critical during the period in question, that is, between September-October, 1945 and July 1, 1946, that a practice grew up whereby those who needed corn syrup would buy the raw corn on the so-called black market, that is, pay over ceiling prices for the corn, and arrange for the shipment of the corn to the corn refiner, who paid the ceiling price to the jobber, but agreed to refine the corn into corn syrup, and other by-products, and to allocate from the corn supplied by the particular supplier, a certain amount of the corn syrup and corn starch. The remaining by-products of the corn, such as syrups, starch, etcetera, would be used by the refiner to supply his customers who had quotas to the extent that the refiner could meet the quotas.

This situation, according to the defendants, in order
5338 to keep their factory from closing down, because of the lack of raw materials, induced them to arrange with Lubben a plan for cash overpayments for candy sold, and to use the cash overages for the purchase of raw corn to be shipped to the refiners, and thus obtain the required corn syrup, and other by-products necessary for the operation of their candy factory.

Apparently it is conceded that the only customer with whom Shotwell had such an arrangement for overages was Lubben. It is the position of the defendants that every dollar of the cash overages received from Lubben were utilized for this purpose, that is, for the purpose of buying raw corn, and having the corn shipped to the refiners, and to obtain the necessary corn syrup for the manufacture of their candy. And the defendants contend that in carrying out their plan, the money was not deposited in the regular bank account, or reflected upon their books, but was placed in a so-called cash box, which was kept and maintained in the Shotwell factory, and where the cash overages
5339 received from Lubben were placed, and sometimes the company's safety deposit box at the bank was also utilized for the safekeeping of such cash.

Now, the defendants contend that a record of the "in and out" transactions of the cash box was maintained by some of the Shotwell employees, and that during the corn shortage from September-October, 1945, until July, 1946, all of the cash overages deposited in the box were withdrawn from time to time in order to effect the raw corn purchases.

Defendants Cain and Sullivan have testified that none of the cash overages were ever diverted to them for their own personal use, and that not one single penny of the cash payments by Lubben was retained by them.

Defendants contend that Lubben's books, as to the cash payments to Shotwell, or whatever records he may have in that regard, are not reliable or trustworthy, and that they are replete with inaccuracies. And there is testimony with respect to certain specific items which the defendants contend indicate that instead of the money coming to Shotwell, as Lubben has testified, certain checks to cash were used for other purposes.

5340 They contend that Lubben was dealing heavily in the black market during 1945 and 1946 with many con-

cerns and drew out during that period large sums of cash money from Eatsum and from General Confections, and that in handling so much cash and in making so many cash payments, his testimony as to the portion which was paid to Shotwell through Huebner is not reliable.

Defendants contend that Lubben, by reason of his financial difficulties, induced Mr. Cain and Shotwell—and the Shotwell Company, I should say, to assist him, first, in obtaining the $75,000.00 loan by guaranteeing the note which Lubben gave to the Sterling Bank at New York, where the loan was obtained, and that later, when it appeared that the $75,000.00 loan did not relieve Lubben's financial stress, he attempted to obtain an additional $50,000.00 loan direct from Shotwell.

Defendants contend that at that time the $75,000.00 loan was in default, it having been reduced to some $66,000.00 or $67,000.00, and that no further payments were made, and that when Mr. Cain had Busby and Graflund examine
the books of General Confections in order to determine
5341 whether or not a further loan should be made they found the financial condition to be such that a $50,000.00 loan was not justified.

Then it was, according to the defendants, that the arrangement between Lubben and Shotwell resulted in the so-called Haberkorn deal, whereby Shotwell bought the Haberkorn factory, and whereby the obligation to the Sterling Bank was liquidated in this deal by Shotwell, in that the Shotwell Company reduced its claim against General Confections from the $66,000.00 or $67,000.00 due on the Sterling Bank note to some $30,000.00.

Defendants contend that thereafter General Confections went into receivership in March, 1948, and that Lubben wanted the Shotwell Company, or Mr. Cain, to assist him further financially, but that Mr. Cain refused to consider any further financial aid or help. On account of this refusal, it is defendants' position that Lubben's testimony regarding the over-ceiling payments must be construed in light of all these circumstances.

Defendant Cain denies that he ever requested Lubben
to go to South America, as Lubben testified, and de-
5342 fendant Sullivan denies that he ever had any conversation with Lubben where he asked Lubben whether or not Lubben was keeping records of the amount of over-

payments made to Shotwell. Cain admits that Lubben advanced $1,450.00 for the jewelry that Mrs. Krasne brought to Chicago for him, but he contends that this was not an advance for overages, but was a mere personal transaction between him and Lubben, and that he repaid that $1,450.00 in cash to Lubben at a later date.

Cain admits that he made certain statements at a court hearing as to the Shotwell Company's tax statement being false for the years in question, and that the overages paid by Lubben might total some $400,000.00, but it is his position that these alleged admissions and the testimony read from the transcript of the court hearing must be appraised in light of his understanding of the law in 1948 when the so-called disclosure to the government was made by him and Mr. Busby, the accountant.

It is Mr. Cain's position that at that time he was informed that the government would not allow as an offset to the over-ceiling payments received for merchandise the
5343 premium payments made for raw materials in the manufacture of the merchandise thus sold; that is, that the overages paid for raw corn should not be included in the income tax computations as an expense of doing business because it was a payment made in violation of law.

Therefore, it is Cain's contention that he assumed that Shotwell did owe some taxes on account of the overages received from Lubben, even though at all times he contended that the money received did not aggregate Lubben's figures and had been used to buy raw corn, and it was thus an expense of doing business.

It is his position, as I understand it, that by reason of his then understanding of the law he indicated a willingness to file an amended return and pay any tax which the government computed to be due.

5344 Cain contends that his submission of any temporary figures to the Government as to the amounts of money received from Lubben and its disbursements for various items connected with Shotwell's business, was merely a plan to get the matter settled, and to pay any tax that the Government concluded was due from Shotwell, and that he, in good faith, assumed on account of his understanding of the so-called voluntary disclosure, that there would be no criminal prosecution if a disclosure was made of the tax liability before any investigation was made by the Government.

These defendants contend that the reason the over ceiling payments received from Lubben and the over ceiling payments made for raw corn were not recorded on the books of Shotwell was because both these types of transactions were violations of the OPA Law, which existed at that time, and would subject them to criminal, as well as to civil penalties, in the event such facts were disclosed in their books.

They contend that they did not wilfully or inten-
5345 tionally attempt to defeat or evade any taxes due the United States, because they assumed in good faith, that the over ceiling payments received were offset by the over ceiling payments made for raw corn, and they assumed that such receipts and such payments would offset one another, so as not to affect the net income of the company, and hence, that it would not increase the income tax over the sums which Shotwell did pay for these years.

They contend that the first time that they knew of the Government's ruling as to the Government's refusal to recognize over ceiling purchases, for raw materials as an expense of doing business, was when Mr. Busby informed Mr. Cain, after he had inspected Lubben's books, and learned of these over ceiling transactions, and that as soon as it was learned there would be a tax due the Government, under the Government's ruling, they notified Mr. Busby to make a complete disclosure to the agent in charge of the Internal Revenue Department here in Chicago.

Consequently, summarizing the defendants' position as I understand it, while they admit that they violated the
5346 OPA Law in receiving overages, and paying overages, to suppliers of raw corn, they contend that all the monies received from Lubben were utilized for the purpose of buying raw corn which was refined into corn syrup and that they never wilfully intended to violate any tax laws, or to defraud or defeat the Government out of any income taxes due for the years 1945 and 1946, or either of them.

Now, members of the Jury, I make the same statement with reference to the summary of defendants' position and contentions in this matter as I did with reference to the Government's contentions.

Obviously, I have not attempted to cover any detail of the defendants' testimony, or every contention herein. My only purpose in attempting to summarize the position that

the Government takes, on the one hand, and the defendants on the other, is to crystallize and clarify, if possible, the fact issues which you will be called upon to determine, and if my summation of defendants' position herein, does not coincide with your understanding of the testimony, or
5347 your deductions from the testimony, then you may disregard what I have stated and depend entirely upon your own recollection and understanding of the testimony, and the deductions to be drawn from such testimony.

The pertinent portion of the United States Statute involved in this case reads—and possibly, I might read the entire statute. While some of it doesn't necessarily pertain to this matter, I will not read any portions that are disconnected.

The indictment is brought under this statute:

"Any person required under this Chapter to collect, account for, and pay over any tax imposed by this Chapter, who wilfully fails to collect, or truthfully account for and pay over such tax * *"

And then comes the portion which pertains to the charge made here:

"** and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this Chapter, or the payment thereof, shall**" be guilty of a violation of law.

5348 The term "person" as used in the law, of course, includes a corporation. And the statute also says that:

"The term 'person' as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

And then there is another section of the law which you may consider, which provides as follows:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal;" and:

"Whoever causes an act to be done which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

The crime with which these defendants are charged
5349 in each count of the indictment involves two principal elements: First, there must have been a tax due under

the applicable revenue act from the Shotwell Company to the United States for the years in question over and above that which the Shotwell Company paid; and, second, there must have been a wilful and intentional attempt to evade or defeat such tax or the payment thereof.

The attempt to evade or defeat the tax must be a willful attempt, that is, intentionally done, not something that happened accidentally or through oversight or misunderstanding of the law. The act must be done with the intent that the Government should be defrauded of the income taxes due from the taxpayer.

Now, intent is a state of mind and it is not possible to look into a man's mind to see what goes on. The only way you have of arriving at the intent of any defendant in this case is to take into consideration all the facts and circumstances shown by the testimony and exhibits which have been received in evidence herein.

5350 Direct proof of wilful intent is not necessary. It may be inferred from the acts of the defendants and such inferences may arise from a combination of acts, although each act by itself may seem unimportant. It is a question of fact, members of the jury, to be determined from all of the evidence.

You will observe, therefore, that the first question which you should determine is whether or not you are convinced beyond a reasonable doubt from all of the evidence that there was due from the Shotwell Company for one or both of the years named in the indictment, an income tax in an amount substantially greater than that reported and paid by the Shotwell Company to the Government for such year or years; that is, members of the jury, if the Shotwell Company paid the taxes due the Government for the years in question then, of course, that will end this case and your verdict must be one of not guilty as to each one of these defendants.

So you will readily understand that your first prob-
5351 lem will be to determine from the evidence the amount of overages which were paid to Shotwell during 1945 and 1946. And I charge you that regardless of what the Commissioner's ruling was in 1948, or prior thereto, as to the nondeductibility of overages paid for the cost of goods sold, the law is now settled that such an expense is deductible in computing income taxes. Hence, if all the overages

paid to Shotwell by Lubben and his companies were paid out by the Shotwell Company for raw corn in procuring syrup and other by-products of corn for the manufacture of candy during the years in question, then no tax in addition to that which was paid by Shotwell was due to the United States and each of these defendants must be found not guilty.

Well, what amount did Shotwell receive by way of overages during 1945 and 1946? You will remember that the Government contends that the total overages in 1945 amounted to $177,146.23 and in 1946 the total overages paid to Shotwell amounted to $276,726.08. There does not appear in the record, as I remember it, any direct testimony for the defendants as to the total overages which they
5352 admit Lubben paid, except they contend that Lubben's figures as reflected in the testimony are grossly exaggerated.

First, members of the jury, it would seem to me that you would want to consider at what time did the overages begin? Lubben contends that Huebner required him to pay overages in the latter part of 1944 and that the overages were paid during the entire years of 1945 and 1946. The defendants contend that the first payment of overages did not take place until September or October of 1945. Who is giving you a correct version of that? The testimony offered by the Government, or that offered by the defendants?

It would be important for you to determine when the overages began, because defendants contend that there were no overages paid, except during the period of the corn shortage, which was from September-October, 1945, to about July 1, 1946, while the Government contends that these payments which were made by Lubben had no relation to the so-called corn shortage, but were paid to Shotwell months before there was any critical shortage of corn syrup.

5353 Well, you have seen Lubben on the stand and had an opportunity to observe him during the days that he was subject to direct and cross examination. You have heard the other testimony and written records offered by the Government which it is contended substantiate Lubben's testimony as to the times when the over-ceiling payments were made and as to the amount.

And you have heard the testimony offered by the defendants in this regard, and their records and exhibits offered by them, which they contend discredit Lubben's testimony, and the records offered by the Government in this regard. The truth as to when the overages began, their duration, and their amount is a matter, and an important matter, which you will have to determine from all the evidence introduced.

You will remember that the defendants contend that no complete records of the amount of overages paid by Lubben are available, in that Shotwell did not attempt to keep any records, except the notations made as to the cash put in and taken out of the cash box, and that that record is no longer in existence.

5354 The testimony as to what happened to the records of the "in and out" transactions of Shotwell's cash box is in dispute. Stanley Graflund, the former comptroller of Shotwell, says that this record was destroyed on orders from Mr. Cain. Mr. Cain denies that any such orders were given. In any event, we do not have the written record which defendants contend was maintained and which noted the "in and out" transactions of the cash box.

Well, whatever the amount of the overages may have been which were paid to Shotwell, what disposition was made of such receipts by Shotwell? Were they all paid out for raw corn during the latter part of 1945 and up to about July 1, 1946, as the defendants contend? If that is true, then there was no additional tax due the United States over that which Shotwell paid. You have heard the testimony as to the alleged corn purchases and the records in evidence which pertain thereto. You have heard the testimony with reference to the shortage of corn during the period beginning the latter part of 1945 and up to July 1, 1946, and

5355 the alleged practice which prevailed with reference to raw corn, and shipping the same to the refiners in order to obtain corn products.

Moreover, you have heard the testimony as to the allocation of corn syrup to those who had quotas, including Shotwell.

Defendants contend that the records of the corn refiners available do not reflect all the Shotwell purchases for raw corn in that the memoranda and other records kept by the corn refiners of raw corn shipped by the supplier to the

refiner were not in all instances retained. Therefore, the defendants contend they do not have available all of the written records as to the raw corn purchases by Shotwell. However, they contend that from time to time packages of money were taken from the cash box and delivered to various purchasers—or delivered to various persons, I should say, and that such deliveries of money were in connection with corn purchases.

The Government, on the other hand, contends that if any of the overages were used by Shotwell in the purchase of raw corn, such purchases were a relatively small part
5356 of the overages paid by Lubben, and that the greater part of the overages was never used for that purpose.

You may consider, members of the jury, all direct and circumstantial evidence which may bear upon that question and determine in light of all the evidence whether or not any over-ceiling premiums which Shotwell received were used for the procurement of corn to obtain corn syrup, and other products, during the years in question, and if so, to what extent. If Shotwell received more in overages than it paid out for raw materials in 1945 and 1946, what about the balance? Where did it go? What light does that throw, if any, upon the intent of the parties with reference to the charge made in this indictment?

Well, members of the jury, you will have to determine the true, the believable and the plausible and reasonable facts in that regard from all the evidence which you have heard. It is not necessary for the Government to prove an attempt to evade or defeat the exact sum of
5357 taxes charged in the indictment. In other words, if the overages received by Shotwell as income constituted income of that corporation during the years in question and if only a part of it was used for the purchase of raw corn for the business of the corporation, and if you find by reason thereof that there was a substantial part of the taxes due the Government during 1945 and 1946, or for one of these years, which was due and which was not paid by Shotwell, then as to such year or years, if any of these defendants wilfully and knowingly attempted to evade and defeat such tax as charged in the indictment, then such defendant or defendants would be guilty as charged.

Apparently it is not disputed that when merchandise

was sold by Shotwell to the Lubben companies, and upon which an overage was paid, it was the custom of Shotwell to forward to the Lubben companies an invoice which noted the ceiling price of the particular candy which was sold and that an understanding was had between Lubben and Shotwell that the amount of overages would be paid in cash. The entire selling price, therefore, included not
5358 only the invoice price but also the invoice price plus the overage.

There is testimony by Lubben that Huebner stated that the overages were to be divided among the three defendants, Cain, Sullivan and Huebner. However, the defendants deny that any money was diverted to the pockets of these defendants, or that there was any plan or scheme whereby these overages were to be divided or, rather, diverted from the income of the corporation into the pockets of these three individual defendants.

You will understand, however, that the only issue on trial before you is that contained in the indictment which charges the defendants with attempting to evade income taxes owed by The Shotwell Manufacturing Company, a corporation. The indictment does not accuse the individual defendants, Cain, Sullivan and Huebner, of attempting to evade income tax owed by them personally, nor is such issue before you.

Any cash payments by way of overages made by Eatsum, Reserve Trading Company, General Confections, may be considered in support of the Government's case only
5359 if such constituted taxable income to The Shotwell Manufacturing Company. But payments to a corporation, and received by it, for goods sold by it on the so-called black market, do constitute revenue for tax purposes.

I see it is eleven-fifteen, members of the jury, and while I do not have a great deal left in my charge, I think probably you would like a short recess. I think we will take a short recess. We will be at recess for ten minutes.

By the Marshal: Will the audience please remain standing while the Judge and jury leave the court room.

This Honorable Court will recess for ten minutes.

(Short recess.)

By the Marshal: This Honorable Court will now resume its session.

By the Court: Well, continuing, members of the jury, from where I left off when we took our recess, in determining the issues of this case you have a right to take into consideration the manner in which such transactions involving overages were entered on the books of the
5360 Lubben companies in so far as they were entered and you have a right to take into consideration any records kept by Shotwell and also the testimony regarding the suggested division of the overages which were paid, together with all other facts and circumstances which may throw any light as to whether or not these overages constituted income to Shotwell.

I charge you that to the extent that you find from the evidence that any cash payments for overages were received by individual defendants for their own benefit, then to such extent such payments would constitute income to such individual defendant and did not constitute taxable income to The Shotwell Manufacturing Company.

These defendants are not charged with the violation of any OPA law, and an intent to violate the tax laws cannot be proven simply because there was an intent to violate the OPA law, or any other Federal law.

5361 The fact that the OPA laws were admittedly violated may be considered by you in so far as such circumstances may throw light upon the conduct of the parties, their failure to keep adequate books and records of the overpayments, and to explain or throw light upon their conduct in handling these transactions, and with reference to the question of intent or lack of intent to wilfully violate the tax laws.

The fact, if it be a fact, that the defendants, or some of them, committed offenses against the price control laws of the United States creates no presumption that such defendant or defendants committed the offenses here charged against him or them.

Now, some testimony, members of the Jury, has been introduced about a disclosure made by Mr. Cain and Mr. Busby to the Revenue authorities, when it was learned from Mr. Busby that Lubben's books upon examination by Busby, and Graflund, reflected certain over ceiling payments to Shotwell. It appears that Busby advised Cain as to the necessity of a disclosure to the Revenue
5362 authorities, because of the failure of the 1945 and 1946 income tax returns to disclose these over ceiling payments, and their disposition.

You heard the testimony as to the visits made by Cain and Busby to one Mr. Sauber, who was connected with the Internal Revenue Department, and the statements made by Cain and Busby with respect to the over ceiling payments received, and their alleged disposition for raw materials by Shotwell.

You have heard the testimony regarding Cain's alleged admission as to the falsity or incompleteness of these tax returns, and his explanation as to why, in his opinion, at the time he assumed they were false and inaccurate.

There has also been received in evidence work sheets and data compiled by Mr. Busby, and certain data compiled by Mr. Cain with respect to an alleged tentative compilation of the overages, and the disposition of such receipts by Shotwell, for raw materials, and the nature and character of the disposition, which was allegedly made.

5363 All of the testimony should be considered by you, that is, all that testimony should be considered by you in view of the circumstances, and understanding of the parties in so far as it may bear upon any intent of the parties to wilfully violate the income tax laws or their good faith, or lack of good faith in the matter.

Any admission by Mr. Cain as to taxes due the Government at that time from Shotwell must be considered in light of his understanding of the law at that time, that is, that overages paid for raw materials in violation of the OPA law would not be recognized by the Tax Income authorities at that time as an expense of doing business.

Now, it is not necessary for you to determine the effect of any so-called disclosure, except in so far as it may throw light upon the conduct of the parties, and the objects and the purposes which they had in mind in doing that which they did do, during that period, and in so far as it may throw light upon the intent of the parties and their good faith, or lack of good faith.

5364 Whether immunity should be granted because of any so-called disclosure depends upon many facts and circumstances which are not for you to decide.

From the fact that we are here to determine the guilt or innocence of these defendants in this criminal case, it must necessarily follow that no immunity has been granted, and any alleged disclosure has not freed these defendants from criminal prosecution.

The so-called disclosure policy of the Government which may have been evidenced by certain statements of the Treasury Department was primarily promulgated for the purpose of obtaining from various defrauding taxpayers confessions of their fraudulent attempts to defeat their income tax, and to make a disclosure to the Government of such fraud, and to honestly disclose the amount of the tax due, and to aid and assist the Government in all matters pertaining thereto. Whether a disclosure within the meaning of the so-called disclosure policy of the Government in order to grant them immunity from criminal prosecution has been made, is a matter for the Court to determine
5365 and not for the Jury, and the only purpose, the only purpose of admitting any testimony regarding any alleged disclosure of the defendants with respect to their income tax for 1945, and 1946, is to enable the Jury to understand that the defendants contend that they attempted to make a disclosure and that certain statements and admissions were made to the Government on the assumption that they had made a disclosure.

Consequently, any reference to any voluntary disclosure may be considered by you only in so far as it may throw light or bear upon the conduct of the parties during the time that the alleged disclosure was made, and whether they intended to violate the income tax laws.

The fact that the defendants may have assumed that their disclosure granted immunity to the Shotwell Company, and to the individual defendants herein, is no defense in this proceeding, and as I have stated, and I repeat again, it is only material in so far as it may bear upon the intent of the individual defendants, or the intent of the Shotwell Company to violate the income tax laws, and their
5366 good faith, or lack of good faith in doing that, which they did do in reference to their alleged disclosure, and in so far as it may have a bearing upon any of the acts, admissions, conduct, etcetera, which may have taken place during such alleged disclosure.

Any statement or act of any of the defendants not in the presence of another defendant is not binding upon the absent defendants, even though one or more of the defendants were mentioned in the conversation, nor are such matters competent evidence against any other defendant not present. I have limited, you will observe, certain evi-

dence during the trial, from time to time, as being competent only as to certain defendant or defendants, that is, by way of example, what Mr. Huebner, or Mr. Cain may have said or done in the absence of Mr. Sullivan, would not be binding or competent as to Mr. Sullivan. Likewise, what Mr. Huebner may have said or done not in the presence of Cain, would not be binding on Cain, and what Mr. Cain may have said in the absence of Huebner would not be binding on Huebner.

5367 But in so far as the corporation is concerned, these three individual defendants were either directors, or officers of the corporation during 1945, and 1946. A corporation is a legal entity in the eyes of the law, and must act through its Board of Directors and officers, who under its By-laws are charged with certain duties. When such officers are carrying out the duties assigned to them by the corporation and are acting in the course and scope of such duties, they are acting for the corporation, and their acts and statements thus made are binding on the corporation.

The only way a corporation can function is through its duly appointed representatives, and whether or not that which was done or said by any of these individual defendants was binding upon the corporation is for you to determine, and if you find that they in doing that which they did do, were acting in furtherance of their duties as such officers or directors, or attorneys, then to that extent their acts are binding upon the corporation.

5368 In order to find the Shotwell Manufacturing Corporation guilty of an attempt to evade taxes, you must be convinced beyond a reasonable doubt not only that there was a tax due and owing, but also that the corporation had knowledge of its obligation and wrongfully and intentionally intended to evade payment.

As I have stated, a corporation is a legal entity. Since it is impersonal, it must have officers and agents to act for it. And a general rule is that any act done, or admission or declaration made within the officers' scope of authority is binding upon the corporation. This, in substance, I have already said to you.

However, if an officer or agent has a personal interest in any transaction which is adverse or inconsistent with that of his corporation, then the officer or agent's conduct, admissions or declarations cannot be considered as a

corporate act, and if in this case, it appears that any officer was acting for his personal interest, and such interest was adverse to the interests of the corporation, then such statements, declarations, or admissions; or
5369 acts, would not bind the corporation. It is for you to decide from the testimony what these individual defendants did or said as officers, and then determine whether they were acting in the interests of the corporation, or their own personal interests, adverse to the corporation.

Therefore, if you find that the individual defendants, or any of them, in any transaction or transactions, had a personal interest adverse to that of the corporation, then in such transaction or transactions, whatever guilty knowledge or wrongful intent, if any, was possessed by that defendant or defendants, with respect to such transaction or transactions, cannot be imputed to the corporation.

The mere fact that any of the defendants was an officer or director of The Shotwell Company during a portion or all of the time here involved is not in and of itself proof of any wilful or knowing attempt to defraud the Government. A director or officer is not bound by the act, or representations of other officers, or employees, until it is shown that he knowingly and wilfully intended to adopt such act or representation. Nor is an officer or director criminally
5370 accountable for the acts of other officers, unless such acts were done at his direction or under his control. The mere fact that a defendant was an officer or director of the company does not charge him with the knowledge of the contents of the books and records of the corporation, and he cannot be charged with knowledge of any of the entries of said books in absence of proof of actual knowledge.

Now, you will remember that the income tax returns for 1945 and 1946 made by Shotwell were not signed by any one of these defendants, nor prepared by them. The evidence indicates that the accountant, Busby, prepared the tax statements from the books of the company, and Gladys Morrill, the office manager, and Stanley Graflund, either Secretary or Comptroller, signed the returns. The fact that none of the defendants herein prepared or signed the returns may be considered by you in so far as that fact may have a bearing upon the charges made against them in this indictment, and their intent to wilfully evade or defeat

any tax due the Government.

5371 However, even though any individual defendant did not prepare or sign the tax return, if the facts and circumstances disclosed by the evidence establish beyond a reasonable doubt that any defendant wilfully and intentionally aided, assisted, or caused the corporation to file a false return for the years in question, with an intent to evade or defeat such taxes, or the payment thereof, then such defendant is guilty of the charge made in this indictment.

If you find from all of the evidence that at the time of the filing the corporate tax returns for the years 1945 and 1946, respectively, any individual defendant or defendants, believed that all unreported income of the corporation for those years had been disbursed for unreported expenditures for raw materials, then you must find such individual defendant or defendants not guilty because there would be no intent to evade income tax of the corporation, even though you also find that all of such unreported income of the corporation defendant—or the corporate defendant had not been, in fact, so expended.

5372 Since each of these individual defendants is charged with wilfully and knowingly attempting to defeat or evade a large part of the taxes due and owing to the United States from the Shotwell Company, by filing or causing to be filed a false or fraudulent income tax return for the corporation, the corporate defendant, you would not be justified in finding any defendant guilty unless you were satisfied by the evidence, beyond and to the exclusion of a reasonable doubt, that he aided, assisted, or caused erroneous income tax returns to be filed by the corporate defendant in a wilfull and knowing attempt to defeat and evade a large part of the taxes, which were due and owing the United States from the corporate defendant, and which such individual defendants knew were so due and owing.

The question is, therefore, members of the Jury, whether you are convinced from all the evidence that there were taxes due the Government for the years in question in amounts substantially higher than those reported and paid by the corporation to the Government, and whether

5373 you are convinced from all the evidence, beyond a reasonable doubt, that there was a wilful attempt by the defendants, or any of them in such years to evade or

defeat any substantial part of such income tax by filing or causing to be filed a false and fraudulent return for the corporate defendant for the years in question.

There has been some reference to trade deals. Well, if you find from the evidence that there were trade deals by which the corporate defendant sold some of its merchandise at ceiling in return for the sale to it by the customer, or some third party, of raw materials, at ceiling prices, you are instructed that no income to the corporation resulted therefrom.

Now, the burden of proof in this case, members of the Jury, rests upon the Government. I have informed you that the Government must establish the guilt of any defendant beyond a reasonable doubt, and it is for you to determine in light of all the evidence, whether or not the Government has sustained that burden. You have seen the witnesses on the stand. You have had an opportunity
5374 to observe them. You have a right to make use of your own common observations, and experience, as men and women in the affairs of life, and consider all the evidence in the light of your common observations and such experience, and ascertain where the truth may be on any material fact in this case.

You have the right to take into consideration the frankness, or lack of frankness of the witnesses, their candor, or lack of candor, the reasonableness or unreasonableness of their statements, the opportunity or lack of opportunity of knowing that about which they have testified, the interest or lack of interest which they may have in the outcome of this proceeding; and from all these facts and circumstances together with all the other facts and circumstances, of the case, decide whether or not the Government has sustained the burden of proof.

It is not sufficient for the Government to establish the probability that the facts charged are more likely to be true than the contrary, and you have no right to entertain the opinion or assert the argument that the defendants,
5375 or any one of them are probably guilty of the crime charged, or else the Government would not have gone to the trouble or expense of this trial.

The fact that the Government is a party does not give it a higher standing in court than any other litigant. In other words, members of the Jury, you should consider all

of the evidence in light of these instructions, and bring in such a verdict as the evidence and the law fairly and honestly justify.

If the Government has sustained the burden of proof as to Count 1, or Count 2 of the indictment, or both of them, in the manner in which the law requires as to any defendant, then a verdict of guilty should be returned as to such defendant, even though such defendant may not have profited personally by the fraud. If the Government has not sustained the burden of proof as to either Count, as to any defendant, then your verdict should be one of not guilty as to each count, as to such defendant.

And not only are you the sole judges of the facts,
5376 but you are the sole judges of the credibility of the witnesses.

You are not to accept the testimony of any witness simply because it is sworn to, or follow it blindly wherever it may lead you. The law anticipates that you will weigh and scrutinize all the testimony in order to determine where the truth may be.

You men and women are from different walks of life. You have had experience in your own private affairs, and you have observed the conduct of men and women in various phases of human activity. Apply to the testimony your good common sense, and analyze, weigh and scrutinize all the testimony and determine the truth.

I charge you that if you find that during this trial any witness or witnesses have wilfully testified falsely with respect to any material matter, then you are at liberty to disregard the entire testimony, except in so far as such testimony may be corroborated by other credible testimony.

5377 Various books and records and memoranda have been introduced in evidence. If you believe from the evidence that any of such books, records or memoranda have in any way been falsified then you should scrutinize carefully all of the other books, records and memoranda of that person or corporation in order to determine whether the remainder of the books and records or other memoranda are dependable and worthy of belief.

Now, there are two classes of evidence recognized and admitted in a court of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct

evidence and the other is circumstantial evidence. Circumstantial evidence may consist of any acts, declarations or circumstances admitted in evidence, or the reasonable and convincing inferences to be drawn therefrom as to any defendant tending to prove the crime charged or tending to connect such defendant with the commission of the offense charged.

The Government has offered both direct and circumstantial evidence. And while a conviction may be had
5378 upon circumstantial evidence alone, where a conviction of a criminal offense or any element thereof is sought by circumstantial evidence, the Government must not only show by evidence beyond a reasonable doubt that the alleged facts and circumstances are true, but it must appear that such facts and circumstances are incompatible with any reasonable hypothesis other than the guilt of the defendant. Unless there is substantial evidence of facts as to any defendant which excludes every reasonable hypothesis but that of guilt, such defendant must be acquitted. Evidence of facts that are as consistent with innocence as they are with guilt is insufficient to warrant a conviction. In order to warrant a conviction on circumstantial evidence all the circumstances must be consistent with each other, consistent with the hypothesis that the accused is guilty, and inconsistent with the hypothesis that he is innocent. Where the conclusions from the circumstances proven permit any rational conclusion of innocence, there is not sufficient proof of guilt. If you find upon an impartial consideration of all the evidence in the case that the
5379 evidence supports and sustains two reasonable theories and that one of such theories is consistent with guilt of the defendant, and that the other such theory is consistent with the innocence of the defendant, then the law makes it your duty to adopt the theory that is consistent with the innocence of said defendant and find him not guilty.

Now, in closing, members of the jury, may I call to your attention that when you were examined by the Court as to your competency and qualifications to act as jurors in this case each one of you answered, and I think frankly, the questions which were put to you by the Court, and you were accepted as jurors because it was assumed by both sides that you were competent and qualified to act as jurors. You indicated to the Court that you felt that you were free from

any prejudice and free from any passion or sympathy and that you could decide this case fairly, honestly and impartially upon the evidence and the law that the Court would give to you. And, of course, it would be improper for you to disregard the answers that you gave to the
5380 Court when you were interrogated as to your competency as jurors.

Now, the Court has not intended during the trial of this case, and does not intend to express any opinion as to any matter of fact disclosed by the evidence, and if the Court has, you are at liberty to disregard such opinion, and it is your duty to do so, if it does not coincide with your own recollection.

During the trial certain evidence has been stricken and I have tried to indicate to you when upon motion of any party the answers of any witnesses have been stricken. Such statements which have been stricken are not evidence in the case and must not be so considered by you.

During a trial of this length it is inevitable that there will be frequent objections by attorneys on either side to questions that are asked or answers that may be made by the witnesses. Of course, it is the right of the attorneys on either side to object to the introduction of testimony and the mere fact that the Court has overruled objections or sustained objections; or if during the trial the Court
5381 has admonished counsel, if the Court deemed that the remarks of counsel or questions of counsel were improper, you should not assume to infer therefrom that the Court has expressed any view one way or another as to the merits of the Government's position or as to the merits of the defendants' position. The Court has endeavored to be entirely impartial during the trial and you are not to assume by reason of any ruling that the Court has made that that indicates any view of the Court one way or the other as to what your verdict should be.

Of course, a finding of guilt cannot rest upon pure conjecture. It must be based upon substantial evidence, which leaves an abiding conviction that the accused is guilty. And when you go to your jury room you must keep in mind in passing upon the guilt or innocence of the defendants, each of the two counts of the indictment constitutes a separate charge, and each count of the indictment should be considered by you in arriving at the guilt or innocence of the

defendants separately. Under the evidence you must
5382 find the defendants guilty or not guilty as to each count of the indictment, and these instructions apply as to each count of the indictment just as though the defendants were not charged in the other count. You will find the defendants guilty or not guilty on either of the counts of the indictment as under the evidence and these instructions you conclude that it is your duty to do.

In considering your verdict, if you find after due deliberation that you cannot agree on the guilt or innocence of any defendant or defendants and cannot agree on the guilt or innocence of the other defendants—I think that probably is—I will read that again. I think I inadvertently misread it.

In considering your verdict if you find after due deliberation that you can agree on the guilt or innocence of any defendant or defendants and cannot agree on the guilt or innocence of the other defendant or defendants, you are instructed that you may render your verdict as to the defendant or defendants upon whose guilt or innocence you can agree.

5383 Now, a defendant is under no obligation to testify in his own behalf. He may do so, if he chooses. However, his neglect to testify does not raise any presumption against him or any of the other defendants and I instruct you that you shall not consider the failure of any defendant to testify in the case, nor shall you draw any presumption of the guilt of any defendant because of his failure to testify.

During the trial you have heard certain witnesses who have testified to the good character and reputation of the individual defendants. Such evidence is competent in so far as it may tend to show that he would not be likely to commit the crime alleged against him in the indictment. If the jury believes from all the evidence that prior to the alleged commission of the alleged crime any defendant has always borne a good reputation as a man of honesty and integrity among acquaintances and in the community, it is a fact to be considered by the jury with all the other evidence in the case in determining the guilt or innocence of these defendants, and the good reputation of the defendant or defendants for honesty and integrity may be
5384 sufficient to raise a reasonable doubt as to any defendant's guilt.

You will remember that during the trial certain summaries have been made by witnesses which purport to summarize for your benefit what certain exhibits and certain testimony establish. Of course, such summaries are entitled to weight as evidence only to the extent that you choose to give weight to the testimony of the witnesses or the books and records upon which the summaries are based. If you choose to disregard as evidence all or part of the testimony of such witnesses or the correctness of such books and records, then you must likewise disregard so much of the summaries as are based upon the testimony of such witnesses and the books and records which you decide to disregard.

Some reference has been made to the civil liability of the corporate defendant for taxes due for the years 1945 and 1946. Well, of course, we are not concerned with that question and it is not an issue in this matter, and the outcome of this case in your hands in no way affects the rights to proceed against the corporation for any taxes due in
5385 civil proceedings if the Government believes that additional taxes may be due the Government from the defendants.

I have already indicated that these counts constitute a separate and distinct charge against each defendant and that it is necessary that you consider each count of the indictment separately and that you consider the guilt or innocence of each defendant separately as to each count. In reality, it is just as though you were trying eight separate cases, because we have four defendants, and we have two counts as to each. You must take up and consider separately each of these cases as you find the evidence bears upon each of them. Your verdict, of course, must be unanimous as to each count and as to each defendant regarding whom you render a verdict.

I take it, members of the jury, that it is not necessary for me to remind you that this case is important. It is important to the Government. It is important to these defendants. It is the taxable income of individuals, partnerships and corporations which forms the principal revenue for the
5386 support of the Government. The wilful violation of the income tax laws of the land is, therefore, a matter of great concern to the Government, and those guilty of such an offense and proven to be guilty should be speedily found guilty by a jury chosen in such trial.

On the other hand, this case is of no less importance to each of the defendants who is charged with a serious crime and if he is not guilty or if his guilt is not established you should, of course, not hesitate to return speedily a finding of not guilty as to such defendant or defendants.

There has been a great deal of testimony presented in this case, and a vast amount of books and records. There may be, members of the jury, considerable testimony which has only a remote bearing upon the salient, that is, the controlling issues of this case. I am anxious that you be not misled or confused by collateral issues or matters which are of no particular materiality or help in determining the real issues of this lawsuit. Although this case has taken a long time to try and there is a mass of evidence for you to consider, the controlling issues are
5387 not complicated. Ask yourselves what in light of the evidence was the amount of the overages which were paid by Lubben and his companies to the Shotwell Company and received by that company as income during 1945 and 1946? Did such payments constitute income to the Shotwell Company in light of these instructions? What amount of overages which were paid to the Shotwell Company, and which constituted income to that company, were paid by Shotwell for raw corn during 1945 and 1946? If all the overages received from Lubben and his companies by Shotwell were paid out for raw corn by Shotwell during 1945 and 1946, that ends this case and you should return a verdict for each of the defendants of not guilty, because the transaction would result in no taxable income to the Shotwell Company.

On the other hand, if all the overages paid by Lubben and his companies to Shotwell, and which constituted income to Shotwell within the meaning of these instructions, were not paid out by Shotwell during 1945 and 1946 for raw corn and there remained from these transactions in-
5388 come to the Shotwell Company during those years in a substantial amount which resulted in a substantial taxable income due the United States which was not reported in the 1945 and 1946 tax returns, or either of them, and if it appears from the evidence beyond a reasonable doubt that any defendant wilfully, knowingly and intentionally attempted to evade or defeat such tax for 1945 or 1946, or both, by filing or causing to be filed a false and

fraudulent tax return, then as to such defendant and for such year or years you should find such defendant guilty.

Now, you have no interest in this case, except to see that justice is done, and you are now sitting here as the servants of the law. Put aside all collateral matters and all prejudice or sympathy you may have one way or another. And if you return a verdict of guilty, members of the jury, as to any of these defendants, you are not concerned with the punishment that the Court may mete out. Your only duty is to determine whether any of the defendants is guilty or not guilty of the offense charged in each of the two counts of the indictment.

5389 The exhibits which have been received may be taken by you to your jury room and may be used by you in your deliberations.

Your first duty will be to elect a foreman, or a forewoman, and then proceed to deliberate upon the case.

Your verdict must be unanimous. The clerk has prepared a form of verdict which reads as follows:

"We, the jury, find the defendant, the Shotwell Company"

and then there is a blank, and you will have your foreman write in word "guilty" or "not guilty," as you may find it to be, because the verdict then goes on to read:

"as charged in the first count of the indictment."

Then the verdict goes on to read:

"and we find said defendant" then there is a blank, and your foreman will write "guilty" or "not guilty"—"as charged in the second count of the indictment."

I take it you will have no difficulty in understanding how to make out that verdict.

5390 Then the verdict goes on to read:

"We, the jury, find the defendant, Byron A. Cain,"—then there is the blank, and you will write the word "guilty" or "not guilty." And then the verdict goes on to read: "as charged in the first count of the indictment. And we find said defendant"—of course, that is Byron A. Cain—blank—you will insert therein "guilty," or "not guilty"—"as charged in the second count of the indictment."

Then the verdict goes on to read:

"And we the jury find the defendant, Harold E. Sullivan"—blank—you write therein, "guilty," or "not guilty"

—"as charged in the first count of the indictment. And we find said defendant"—referring to Harold E. Sullivan—blank—and you write therein, the word "guilty" or "not guilty"—"as charged in the second count of the indictment, and we the jury find the defendant, Frank J. Huebner"—

blank and you write therein the word "guilty" or
5391 "not guilty"—"as charged in the first count of the in-
dictment, and we find the said defendant"—referring to Frank J. Huebner—blank—insert therein the word "guilty," or "Not guilty"—"as charged in the second count of the indictment."

That verdict then will be signed by your foreman. And I understand the practice in this District is that each individual juror will sign his name to the verdict that you find.

Well, members of the jury, my charge has taken a long time. Perhaps too long. I suppose the purpose of the Court primarily is to try to make an intelligible charge to the jury so that you may clearly understand the issues which you are going to try, and that you may proceed intelligently to determine this law suit. I know that you will try to do a good job. After all, you have been sitting here for over a month. The Government doesn't pay you a great deal. Many of you have been here at a sacrifice, I know. But the great compensation that you receive from jury service, is to know that you have done a good job, that you have

been honest, that you have done what you honestly
5392 believe the evidence and the law as the Court gives
it to you, require.

And if you have that satisfaction, then you will have something that will remain with you for a long, long time, and far more valuable and far more lasting than the remuneration that you receive from the Government.

Now, Mrs. Blondin who has been our alternate juror, and who has been very faithful in serving as such, now that we have twelve jurors who seem healthy and able to carry on, we, of course, are in a position to excuse Mrs. Blondin. I want to thank you, most sincerely, for your attention, and your aid and help that you have given us in this case.

I would suggest to you that you don't talk to anybody about it, till after you are through, after the jury returns

a verdict. Then I don't care. If anybody asks you how you have decided, Mrs. Blondin, you simply say, "I don't care to make any comment." I think that is the better way to handle it. Thank you.

In any event, the Marshal who is here in attendance will arrange to show you where you should go, to take care
5393 of your per diem and your mileage. Thank you.

(Alternate juror Rose E. Blondin was thereupon excused.)

Now, then, counsel may call to my attention any errors that I have made in my summation of facts, or any errors that I may have made in my statements of the law.

And as you know, the rules require that that must be taken care of before the jury retires.

By Mr. O'Brien: Out of the presence of the jury, Judge.

By the Court: Out of the presence of the jury.

I haven't any objection if you want to retire to my Chambers, if you think that is more convenient, and you can then make such record as you think you should. And the jury may remain in their seats, because, I take it, it will take only relatively a few minutes.

(And thereupon the following further proceedings were had herein, in Chambers, outside the hearing and presence of the Jury:—)

5394 By Mr. Lockley: I might say at the outset, your Honor, that the Government has no comments to make on the charge.

By the Court: You might start in, Mr. Kirby.

By Mr. Kirby: All right.

On behalf of the defendant Sullivan, I have these exceptions and suggestions. The Court early in the charge spoke of payments to Shotwell as money due to Shotwell, foreclosing the issue which is raised by later instructions as to the question of fact as to whether they were or were not income to Shotwell.

Another point is that the Court stated in its summary of the Government's case that Lubben had a conference at the Pennsylvania Hotel with Cain, Huebner, and Sullivan early in 1945, and that then the money was paid to Huebner alone. There was no testimony, so far as I recall it, of a conference with Sullivan on that occasion. There was the statement that they went to dinner, but a conference would

be quite a crucial matter, and my memory differs from that of the Court.

The Court referred in its summary to payments to
5395 Huebner, and his saying that they were for Harold Sullivan and the others, and that happened more than once in the Court's summary, without the Court saying that such evidence was not competent against Harold Sullivan, and I state now generally that the Court knows my view that an instruction cannot cure the situation with respect to Sullivan.

I attempted to cure that at the close of the Government's case by my motion for a severance, and by the remarks I made then.

But I think when the Court undertakes to summarize the evidence as the Court did, and states evidence as if it was equally applicable to Sullivan, which is not applicable to Sullivan, under the Court's own ruling, that that gives the Jury the idea that they may consider it against him, and it is is not cured by your later instruction, because certainly they don't think you are going to call to your attention evidence which they shouldn't consider against Sullivan.

Another exception is that you tied in one of your points, the knowledge of the failure of the books to record these payments, to a knowledge of their being omitted from
5396 the income tax report. And that is particularly important to me, because—

By the Court: I don't understand that.

By Mr. Kirby: Will you please read that statement?

(Record read.)

By the Court: Well, I think I stated that the defendant Sullivan said that he did not know that the books did not record the overpayment received.

By Mr. Kirby: Yes, you did, but my point was that at one point, you tied a knowledge of how the payments were, or were not being entered, to a knowledge that they didn't go on the income tax report, tied the two together.

Now, another point is that in the summary you made of the defendants' case, there was an entire omission of any evidence, or any contention of the defense as to how these deals did start in that early period with Lubben, not any mention, for instance, that the shipments of candy were

explained by the defense as having been occasioned by trade deals, as indeed Lubben said the first shipments were, so that we come up—

5397 By the Court: May I suggest that you make it short because you can protect your record by not arguing. Otherwise, we will be here—

By Mr. Kirby: Then on the question of the disclosure material, there were four separate occasions that I will just group in one, as saying to your Honor that you talked of the disclosure material and the statements and the admissions of Cain as being competent upon the issue of intent, when, of course, the admissions and statements and the writings are not admissible on any such issue, as against the defendant Sullivan at all.

By the Court: Well, of course, you must remember the defendant Sullivan became a part of the so-called disclosure in that he said he recommended a disclosure be made, and, therefore, I assumed you would want me to include that generally, because he specifically stated that when he learned of the situation, he was insistent that a disclosure be made.

By Mr. Kirby: That is true, but these documents, like 186, 189-A, and those admissions, made at the disclosure hearing, those are not competent against him at all, but in your charge were treated as though they were.

5398 By the Court: Didn't I expressly state that to the Jury when they were received?

By Mr. Kirby: Yes.

By the Court: All right.

By Mr. Kirby: In summarizing the testimony, so far as the defense was concerned, as to the amounts received, I felt that the Court wholly omitted the testimony of what I call the second team at Shotwell, Graflund, Morrill, Roeser, and those people, as to the essence being that everything they knew of that came in, did go out.

By the Court: I thought I made that repeatedly as to the contentions of the defendants, and in very specific language that every single penny that came in by way of overages was paid out. I don't think the Jury could possibly be misled or mistaken in any statement I made in that regard.

By Mr. Kirby: With respect to the question— and I only have a couple more—about the overages, whether they did or didn't belong to the corporation, or whether they did

or didn't get paid, for example, to the individuals, your Honor, I thought was speaking of what the contention of the defendants on it was, when actually the real test, as I conceive it, is: Did the Government prove the
5399 receipt of the income by Shotwell corporation and if their evidence, taken as given from the stand, was weak on that issue, as taken by the statement of the contention of the defendants—

By the Court: I gave the instruction pertaining to it verbatim.

By Mr. Kirby: That is true, but I am talking now about your summary.

5400 By the Court: That is the only instruction that was submitted to me upon the question.

By Mr. Kirby: Your Honor goes further than the instruction. You are making summaries of the evidence.

By the Court: Let's not argue that.

By Mr. Kirby: I am excepting to that.

By the Court: Just state your exception.

By Mr. Kirby: My final point is that in the very last summary that your Honor made, where you compressed it down, I did not feel that that was complete.

That is all.

By the Court: All right.

By Mr. Kirby: And I want the Court to know that, as you do, as people look at a long trial like this, there are going to be divergencies of views between them and I urge these, not to be captious, but quite sincerely.

By the Court: All right. Mr. O'Brien.

By Mr. O'Brien: I am primarily interested in that instruction 22, Judge, and I have a note on it here. 22,
5401 as I heard it, was given in substance, but with some—

By the Court: It was given verbatim.

By Mr. O'Brien: But with some interpolation.

By the Court: No, I followed your 22 as you modified it, Mr. O'Brien, in accordance with my understanding.

By Mr. O'Brien: Well, there was the statement that I heard, which was the interpolation, "but payments to a corporation do constitute revenue for tax purposes when sold for premiums on the black market."

By the Court: That is an entirely different place. To let the jury understand that the mere fact that payments were black market payments, that, nevertheless, they constitute

taxable income, if they were income to the corporation.

By Mr. O'Brien: In my notes that is really the only thing of any significance, over and above what Mr. Kirby said.

Now, you had a note that I asked you to make, Dick. Would you state it for the record? Whatever you have got there, state it.

By Mr. Wattling: The first point we had was the 5402 initial instruction with respect to reasonable doubt.

I believe your Honor used the term there until—

By the Court: You just take your exceptions and do not argue, because we haven't enough time.

By Mr. Wattling: "Until the Government proves the guilt of the defendants beyond a reasonable doubt."

We object to that as permitting an inference by the jury that at some time during the trial the burden of proof might have shifted from the Government to the defense.

With respect to Instruction 22—

By Mr. Johnson: That was on the presumption of innocence, not reasonable doubt.

By Mr. Wattling: But the presumption of innocence continued.

By Mr. O'Brien: Go ahead. You state it.

By Mr. Wattling: The next one is with respect to Instruction 22. We think that in view of the fact that your Honor emphasized in the summation of the evidence, that is, during the course—about the middle of the charge, that

the jury must determine what overages had in fact 5403 been paid to Shotwell by Lubben. Then a little later,

they must also determine as to whether there was a balance of overages which were not paid out for goods.

We think there that in view of the emphasis on those issues for the jury to consider, you should also charge them that in addition they must consider not only what overages were paid by Lubben, but what portion of those overages, on the basis of the Government's evidence, constituted taxable income to Shotwell.

By the Court: I think you will find, if you followed me, that I used that very same modification, and which constituted income to Shotwell.

By Mr. Wattling: Then with respect to the thing as to the balance, or any balance that might have existed, over and above, from the overages over and above what was paid

out for corn, there should be the instruction as to what they must determine, what portion, if any, of that balance, if any, constituted taxable income to Shotwell.

By the Court: All right.

5404 By Mr. Kirby: One final point, Judge, that I didn't think of. The evidence with respect to what a disclosure was, was ruled out, and then your Honor gave a summary of the policy.

By the Court: Say that again, please.

By Mr. Kirby: The evidence that was tendered, like the Wenchel document, as to what the disclosure policy was, was ruled out, and then your Honor gave a summary of what—

By the Court: I stated at the time that I—this isn't for the record.

(Discussion off the record.)

By the Court: Now, for the record, I did receive those records in evidence, but only for the perusal of the Court, in so far as the Court could utilize them in stating what the disclosure policy was, in so far as I deemed it necessary for the jury to understand it in my comments.

By Mr. O'Brien: Judge, I am not sure that our suggested instructions 45 and 47 were given.

By the Court: They were combined—

By Mr. O'Brien: In substance.

By the Court:—the best I could. They were duplicitous, I thought, and I dictated what I thought was a fair

5405 summary of 45 and 47. I remember them very well because I put them aside and I tried the best I could to summarize what I thought you included in those two instructions.

(And thereupon the following further proceedings herein were had in the hearing and presence of the jury:)

By the Marshal: This Honorable Court will now resume its session.

By the Court: Now, then, will the clerk swear the marshals who are going to have custody of the jury?

Will the marshals come forward.

(Thereupon the marshals were duly sworn.)

By the Court: May I say to counsel that I think it would be very helpful if you could sort of collaborate in getting

these exhibits in order and getting them in such shape that they will be available to the jury. And the jury may retire now and we will send in the exhibits as soon as you have them in proper order. Thank you.

By the Marshal: This Honorable Court will adjourn until the returning of the jury.

(And thereupon the jury retired to con-of their verdict; and the following further proceedings were had outside the hearing and presence of the jury:)

5406 By Mr. Kirby: I was just wondering about the time. We were considering how long the jury should stay out.

By the Court: I assume—

This isn't for the record.

(Discussion off the record.)

By Mr. Kirby: Judge, the exceptions that we made in there, may they also be considered made on behalf of the corporation, as though Mr. McConnell were here, too.

By the Court: Surely.

By Mr. O'Brien: They were made for everybody.

By the Court: That may be so understood.

(Thereupon, at approximatey 12:30 P.M. of the same day, October 16, 1953, the court was in recess until proceedings were resumed at 4:30 P.M.)

5407 * * (Caption—No. 52 CR 143) * *

Before Nordbye, J. and J., Chicago, Illinois, Friday, October 16, 1953, 4:30 o'clock p.m. Court convened pursuant to the recess.

PRESENT:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley.
Mr. Vincent O'Brien,
Mr. William T. Kirby.

AND THEREUPON the following further proceedings were had herein, in the presence and hearing of the Jury:

By the Marshal: Will the Foreman sit in the front seat, please?

You were the Foreman all the time?

5408 By the Juror Leroy J. Ryan: Yes.

By the Marshal: This Honorable Court will now resume its session.

By the Court: Members of the Jury, have you agreed upon a verdict?

By Foreman Leroy J. Ryan: Yes, sir; we have.

By the Court: Will you hand it to the Marshal, please?

(The Foreman handed the Verdict to the Marshal; the Marshal handed the verdict to the Court; the Court handed the Verdict to the Clerk.)

By the Clerk: "We, the Jury, find the defendant Shotwell Manufacturing Company guilty as charged in the first count of the indictment, and we find the said defendant guilty as charged in the second count of the indictment."

"And we, the Jury, find the defendant Byron A. Cain guilty as charged in the first count of the indictment, and we find the said defendant guilty as charged in the second count of the indictment."

"And we, the Jury, find the defendant Harold E. Sullivan guilty as charged in the first count of the indictment,

5409 and we find said defendant guilty as charged in the second count of the indictment."

"And we, the Jury, find the defendant Frank J. Huebner, guilty as charged in the first count of the indictment, and we find the said defendant guilty as charged in the second count of the indictment."

By the Court: Members of the Jury, is this your verdict; so say you all?

By the Jury (In Chorus): Yes.

By the Court: The Court thanks you for your services in this case, members of the Jury.

By Mr. O'Brien: May we have the jury polled?

By the Court: You may have the jury polled.

By the Clerk: As each juror's name is called, will you please rise and respond to the following question:

Francis R. Schubert, was this and is this now your verdict?

By Juror Francis R. Schubert: Yes.

By the Clerk: Ethel A. Gassen, was this and is this now your verdict?

By the Juror Ethel A. Gassen: Yes.

5410 By the Clerk: Jean F. Lawler, was this and is this now your verdict?

By Juror Jean F. Lawler: Yes.

By the Clerk: Ruth L. Schiller, was this and is this now your verdict?

By Juror Ruth L. Schiller: Yes.

By the Clerk: Anthony F. Massaro, was this and is this now your verdict?

By Juror Anthony F. Massaro: Yes.

By the Clerk: Helen Sajewski, was this and is this now your verdict?

By Juror Helen Sajewski: (Juror nods.)

By the Clerk: Arthur Amodeo, was this and is this now your verdict?

By Juror Arthur Amodeo: Yes.

By the Clerk: Harry Marschak, was this and is this now your verdict?

By Juror Harry Marschak: Yes.

By the Clerk: LeRoy E. Jasch, was this and is this now your verdict?

By Juror John E. Jasch: You mispronounced the name. It is John.

By the Clerk: John E. Jasch?

By Juror John E. Jasch: Yes.

By the Clerk: Stanley M. Grzywacz, was this and is this now your verdict?

5411 By Juror Stanley M. Grzywacz: Yes.

By the Clerk: And so say you all; this is your verdict.

5412 By the Court: The Court thanks you for your services in this case, members of the Jury.

By Foreman Leroy J. Ryan: He did not poll me.

By the Court: Didn't you poll the foreman?

By the Clerk: LeRoy J. Ryan, was this and is this now your verdict?

By the Foreman Leroy J. Ryan: Yes, sir.

By the Court: I am sorry, I assumed you had.

Well, I start again to express my thanks for your services in this long case. And the marshal tells me, of course, that this will end your jury service, and he will look after you in so far as your mileage and your per diem is concerned.

We will take a recess for about ten minutes, but the defendants will remain in the court room and perhaps Mr. Lockley will be good enough to come into my chambers.

By the Marshal: Will the audience please remain standing while the jury and the Judge leave the court room.

(Court and counsel retired to chambers.)

(Jury retired. Court and counsel retire to chambers, 5413 after which the following proceedings were had in the court room:)

By the Court: The record may indicate that the clerk informs me that one of the jurors wasn't polled, and I have talked to Mr. O'Brien and Mr. Kirby, attorneys for the defendants, and they have informed me that it is not necessary for the entire jury to be brought back, but only the juror who was not polled. And I gather that I am correctly stating counsel's statement to me. Therefore, Mr. Clerk, you may poll the juror that you forgot to poll.

By the Clerk: Margaret M. Capinegro, was that and is this now your verdict?

By Juror Margaret M. Capinegro: Yes, sir.

By the Court: Thank you.

Now, Mr. Lockley, I would like to see you.

The defendants will remain in the court room for the time being.

By the Marshal: This Honorable Court will recess for ten minutes.

(Whereupon the Court and counsel retired to chambers, after which the following proceedings were had 5414 in the court room:)

By the Court: Well, gentlemen, I am going to impose sentence tomorrow morning at ten o'clock. And the defendants may be released on their present bond, I take it.

By Mr. Lockley: Yes, your Honor, the Government has no objection to that.

By the Court: Until that time and they will present themselves here tomorrow morning at ten o'clock.

By Mr. O'Brien: If the Court please, your Honor, about the motion for a new trial and arrest of judgment—

By the Court: I don't believe that I will defer sentence by reason of any motions that may be made. My practice is to impose sentence and then thereafter if counsel makes motions with reference to a new trial, good and well, but I

don't follow the practice of deferring the imposition of sentence merely because counsel tells me that they are going to make a motion for a new trial. And that is the practice that I intend to follow. So we will be in adjournment now.

5415 By Mr. O'Brien: May I ask this, your Honor— I don't want to detain you—but on the present bail—I have not ascertained what that is—but I should like to make a motion before the time is too late to continue the bail.

5416 By the Court: Well, I don't assume there will be any objection to that, or any difficulty in arranging matters with reference to bail, Mr. Lockley.

By Mr. Lockley: No, sir; we have no objection to continuing the present bail.

By the Court: Very well. The Court will be in adjournment until tomorrow morning at ten o'clock.

By Mr. Kirby: That last remark applies to even after tomorrow, with respect to the question of the proceeding tomorrow, doesn't it, on the bail question?

By the Court: Of course that is a matter that Mr. Lockley will have to consider. I don't even know the amount of the bail. Anything that is satisfactory to Mr. Lockley is satisfactory to the Court. And if he tells you that the present bail may stand, even after sentence, that is entirely satisfactory to the Court.

By Mr. Kirby: Is that what you say, Mr. Lockley?

By Mr. Lockley: May I make my mind up on that tomorrow morning, when the time is appropriate?

5417 By Mr. Kirby: In the case of the defendant Sullivan, you have a reserved motion for acquittal. I would like to be heard upon that, your Honor. The rules do provide that that, of course, can be reserved until after the verdict, and your Honor did make an indication of your feeling on it, but did reserve the ruling until after the verdict.

And I would like to be heard tomorrow morning on that motion for acquittal.

By the Court: I will give you an opportunity to be heard.

By Mr. Kirby: Thank you, your Honor.

By the Court: Very well. We will be in adjournment until tomorrow morning at ten o'clock.

By the Marshal: This Honorable Court will recess until tomorrow morning.

(Whereupon the hearing in the above cause, was adjourned until the next morning, being Saturday, October 17, 1953, at the hour of 10:00 o'clock a.m.)

5418 * * (Caption—No. 52 CR 143)

Before Nordbye, J. Chicago, Illinois, Saturday, October 17, 1953, 10:00 o'clock a.m. Court met pursuant to adjournment.

PRESENT:

Mr. Edward J. Calihan, Jr.
Mr. John Lockley,
Mr. Vincent O'Brien
Mr. William T. Kirby

AND THEREUPON the following further proceedings were had herein:—

By the Clerk: No. CR 52 143, United States versus Shotwell Manufacturing Company, et al. Disposition.

5419 By Mr. Kirby: The Court said last evening that I might bring up the motion of the defendant Sullivan for acquittal, which was reserved under the provisions of Rule 29-B, this morning, and I will address myself directly to that, if I may, your Honor.

Now, in the case, at the conclusion of the Government's evidence, I made a motion for acquittal, and your Honor ruled on it, in the following language at page 3058 of the record:

"In so far as the defendant Sullivan is concerned, and his motion for acquittal, the Court must consider the testimony in the record as to him, in the most favorable light, in support of the charges made in the indictment. Whether on this record the Government has established his guilt of the offense charged beyond a reasonable doubt is for the Jury to determine.

"Lubben's testimony as to his conversation with Mr. Sullivan is not denied or controverted in the record.

5420 The Court cannot say on this record that such testimony should be disregarded. The mere fact that Lubben changed his testimony as to the time the alleged conversation took place does not justify a motion to strike the entire testimony.

"Lubben contends that everything he related in his first testimony regarding the conversation is true, except as to the time when it took place. None of this testimony, or any of the reasonable inferences to be drawn from other facts and circumstances, disclosed by the evidence, are controverted.

"The Court is well aware that there must be more than a scintilla of evidence involving defendant Sullivan in order to justify a finding of guilty. Whether he intentionally and wilfully with guilty knowledge intended to defraud the Government of any income tax due from Shotwell for the years 1945 and 1946, as charged, is, at this time, at least, a question for the jury to determine, and not for the
5421 Court to decide as a matter of law."

Subsequent to that, the defendant Sullivan testified specifically with respect to the alleged conversation which Mr. Lubben had first said took place in February of '46, and then in August or September of '46.

Mr. Sullivan testified quite clearly, and that indeed was not contradicted, that the testimony was false.

In particular, he illustrated the driveway incident, that is to say, Lubben's contention that what Mr. Sullivan wanted the cash for was for the fixing of a driveway, was impossible.

Now, the Court will also recall that on this question of whether that testimony of Mr. Lubben's as to its having happened in September and October, is to be given weight, the Court will recall that Mr. Lubben was very specific in his testimony as to the occurrences, and the payments in August, September, and October. He identified particular checks, he said who went with them to Chicago. Those were the periods in which James Moran was introduced, or one of those periods, in which Heitmann was introduced,
5422 show just exactly who made the trips to Chicago in the late '46 period, and to whom the money was paid.

For instance, that is when the payment to Graflund was testified to. That was very specific in Mr. Lubben's testimony. And in no place did it leave room for this so-called conversation in August, September, or October with Mr. Sullivan.

So, that, on that I think, while it is certainly true that the case stood as your Honor described it with respect to no denial of that, at the end of the Government's case, that is not the situation at the moment.

Now then, your Honor, in yesterday's summary of some of the circumstances made reference to one other meeting which Mr. Lubben had testified to, and that was an early January, 1945, meeting. And just for a second, let me call the Court's attention to the record at page 491 where this took place.

Mr. Lockley said to Lubben:

"Q. You say it was in New York City?

"A. Yes.

"Q. When?

"A. January 19, 1945.

5423 "Q. And who was there?

"A. Mr. Huebner.

"Q. And what happened?

"By Mr. Kirby: If your Honor please, the defendant Harold Sullivan not having been there, there is no way he can meet this type of proof, and I ask you to instruct the jury that it must be disregarded so far as the defendant, Harold Sullivan, is concerned.

"By the Court: I will instruct the jury that it is only binding upon the defendant Huebner, in that he was the only defendant alleged to be there, and what took place is only binding—or relevant, rather, I should say, to the defendant—competent as to the defendant Huebner."

So that the testimony with respect to the Government's proof as to Harold Sullivan is just as limited as your Honor indicated it was on the ruling on the motion at the close of the Government's case, and I think has been completely overcome by the proof that was introduced, and

5424 by the inherent facts of that situation, with respect to the driveway, and by the fact that Lubben when he did testify about those fall months, completely left out any testimony with respect to Sullivan on that.

Now, I just went to those particular points quickly, because you had adverted to them in the prior ruling.

Your Honor, another thing that I do want to call your attention to, as to the difference in the proof at the time of the Government's case closing, and all of the proof closing, is that it has been held repeatedly that the intent in an income tax case may be testified to by the person accused, and this person's testimony is competent testimony which must be considered, and that it cannot be disregarded. Indeed, since that is one of the crucial questions in the

case, and since the only testimony specifically on the absence of intent or the existence of the intent, is Mr. Sullivan's, it should be given—I am sure is given—some important weight.

Now, to go directly to some of the points that I wish to make in the light of the proof, I think that your Honor's instructions were completely accurate in that in order
5425 to convict any of the defendants it was necessary that defendant know of the falsity of the returns. Now, for the defendant Sullivan to have knowledge of the falsity of the returns in this case would require proof by the Government, upon whom, of course, the burden exists, would require proof, affirmative proof that Sullivan knew two things: First of all, he had to have a knowledge of an amount coming in, in excess of an amount going out, because if he didn't have that knowledge, he could not have knowledge of the existence of a tax due.

Now, the second thing that they would need to also prove, would be not only that he had knowledge that more was coming in than was going out, but that he knew that that excess was not being carried on the books. Those two things they would need to show affirmatively.

Now, as to the first point, as to the knowledge of Sullivan's part, that an amount was coming in, in excess of the amount being paid out, the persons—first, no one has testified that he did have knowledge of an amount coming in, in excess of what was going out. As a matter of
5426 fact, the persons with whom he would logically have talked, or from whom he could logically have secured information, the persons in the plant, such as Mrs. Morrill, they testified in each case that their knowledge was that the amount that came in, did go out.

Now, there is not the slightest showing of fact that Harold Sullivan did not, and could not, as he testified, have relied upon those people. Gladys Morrill said that so far as she knew the quantity, everything that came in went out. Graflund, who was actually the man who was there as the comptroller, he testified that so far as he knew everything that came in went out.

Roeser, who had been a prior comptroller to Graflund, testified that so far as he knew everything that came in went out. And Harold Sullivan himself, testified to that.

Now, there is an absence of any proof to the contrary.

Now, is it unreasonable—or let me put it this way, is there a necessary inference that Harold Sullivan had to know there was more coming in than was going out, when the
5427 proof is that his knowledge was exactly the same, so far as the quantum that was left, as those people that were actually handling the money in the plan?

Now, the second thing is: Not only is there a complete absence of proof of that essential element of the Government's case, the proof that they must introduce, that he knew of an excess, but they have to go further. They have to show that he knew that that excess was not being reported for income tax purposes.

Now, what is the proof on that? The proof on that is that when they came to close the box, there was some $15,000 in the box, and that that $15,000 was deposited in the bank account of the corporation, as shown on the corporation's books. It went to clear out an account which had been charged for $15,550.00, which had been taken out of the corporation, charged against the company at a time when they were short of money, and that was put in the cash box.

Now, that transaction is unquestioned, your Honor, and it is shown on the books. And there isn't anything in the record to indicate that Harold Sullivan knew any more
5428 but what when they did come to the end of this transaction, that the money that remained was put into the books of the corporation to clear up that outstanding account, and that it was so entered.

Now, then, is there any proof to the contrary that he knew more? Who could have told him he knew more? Gladys Morrill, who worked on the books, she said she never discussed with him how that was being handled. The same thing is true of Graflund. The same thing is true of Roeser.

Now, if the Court please, I submit with sincerity, that you cannot take the testimony of those witnesses and ignore it. That testimony is in. Much of it was put in, in the Government's case, and there is nothing to the contrary.

Now, then, to just review those two points. First of all, it would have to be shown beyond all reasonable doubt that he had a knowledge that there was an amount coming in, in excess of the amount going out. Now, there is an

absence of that proof. And there is proof to the contrary.

5429 And, secondly, there would need to be proof beyond all reasonable doubt that he had a knowledge that such an excess, if one existed, was not on the books and that they were trying to defeat the income tax law. And as to the knowledge of the excess, I don't think you can impute to him a knowledge that there was an excess, or what happened to an excess. Certainly the testimony is to the contrary.

Now, then, let me go to the next point. I have been talking, at the moment, of the knowledge of the falsity of the returns. And I will conclude it by saying that the testimony that Harold Sullivan did not know what was going in these returns and did not affirmatively have anything to do with them is just as explicit as anything could be. The people that did sign the returns expressly said they never took them up with him.

Now, I want to go to the question of intent. Intent, as I view it at this moment, is this question, and that is: Is there proof that Harold Sullivan was personally doing some affirmative act to effectuate a cheating of the government of its income tax? Your Honor, as I pose the ques-

5430 tion the answer springs to mind: There is no proof at all. There must be some affirmative act that he is doing to cheat the government of its income tax or there is an absence of proof of intent to cheat the government of its income tax. We can't build a third inference. We cannot say, first, there is a knowledge, we infer a knowledge on his part that more came in than went out. And then we are going, on that first inference, to build a second inference, that he must have known that it wasn't being properly entered on the books, and on the second inference draw a third inference, and that therefore he must have been intending to cheat the government out of its income tax.

Your Honor is aware that inferences may come from facts, but your Honor knows that an inference cannot be built upon an inference, and a third inference is never built upon a second inference.

If the Court please, a difficulty in this case, and a grievous difficulty in this case has been that the proof, competent, material and admitted by the Court, so far as the defendant Sullivan is concerned, is just exactly like Cunningham pre-

dicted early last spring; that is to say, it was practi-
5431 cally nonexistent, except as it could come out of
Lubben's testimony. And I think we have disposed of such proof as Lubben made on these issues of knowledge of the amounts, and all of that.

But we are met with this situation, that he is tried and that your Honor has, by the necessities of the posture of the case, admitted evidence for purposes not related to and, indeed, not competent to Sullivan. And what has happened, I submit, is this: That this difficult question as to Sullivan, which your Honor I know feels in his heart exists, that difficult question as to Sullivan is decided very rapidly by a jury and I think unquestionably the verdict shows from the speed with which it was reached that they lumped these people together, that they lumped the knowledge of everybody together, and that the jury did not pay that cautious attention to this very, very delicate question of proof that the jury might otherwise have paid.

Now, under those circumstances that illustrates perfectly the wisdom of the drawers of the criminal rules when they said that the Court could permit the jury to consider
the case but still reserve its discretion to grant an
5432 acquittal even after a verdict of guilty.

Now, the different cases that bear upon the questions to which our minds are turning your Honor knows and I am going to only refer to a very few. There is a Seventh Circuit case, United States *vs.* Littberg, it is in 175 F. 2d, at page 20, and it says:

"An inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof."

And I urge the Court that if the people who have testified did say that they did not come to an inference there was more money around there than was paid out, that inference is just as reasonable, it is just as permissible an inference, so far as Harold Sullivan is concerned, to say that he did not know there was more as to infer that he did know there was more, because there is not a shadow of proof, or a word of proof that Harold Sullivan saw a single one dollar bill, not the slightest proof he knew of the

amounts in any way. There just is an absence of proof on that.

5433 Now, speculation cannot support—or cannot supplant an absence of proof when the government must prove its case.

There is a case, Foster *vs.* United States, 178 F. 165. In that case a man was a big stockholder, but the circumstances in proof showed that he was not possessed of personal knowledge of the things that the government was claiming were the essence, the gist of the claim, so that though he knew the general tenor of the business there was not sufficient proof and it was held an acquittal was required as to him.

The case on the knowledge of the falsity, which is quite specific in an income tax matter, is the Lurdling case, 179 F. 2d—

By the Court: Again.

By Mr. Kirby: Lurdling case, 179 F. 2d, 419. Now there the defendant was convicted for violation of Section 145-B—the same one that is involved here—and on appeal it was reversed and it was remanded for a new trial. And the Court said:

"The act here involved is the filing of an inaccurate return. In the complexity of successive tax laws, many

5434 thousand of taxpayers do that innocently. Such filing is unlawful, however, only if made wilfully, with knowledge of its falseness and with intent to evade taxes. There is no presumption that may be drawn from the act itself—both knowledge and wilfulness must be established by independent proof, direct or circumstantial."

In Hargrove *vs.* the United States, 67 F. 2d, 820—that again was an income tax case and the Court there said:

"The Court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its wilful doing. In the first class of cases, especially in those offenses mal prohibita, the law imputes the intent.—(Citing cases)—Had the prosecution here been under such a statute, the charge of the Court would have been unexceptionable. In the second

5435 class of cases a specific wrongful intent, that is, actual knowledge of the existence of the obligation and a wrongful intent to evade it, is of the essence."

Now, applying that language to this case, there must be, the Court says, actual knowledge of the existence of obligation, that is, actual knowledge on Harold Sullivan's part that there is this unaccounted for surplus of dollars, actual knowledge, and there is not proof of that in this case.

Then, secondly, there must be not only that knowledge of the obligation, but a wrongful intent to evade that obligation. And there is a complete absence of proof that he knew that.

Now, those cases as to the intent are bottomed upon the Supreme Court case of United States *vs.* Murdock, 290 U.S. 389, which laid down the rule of the necessity for wilful intent in tax cases. And it says:

"Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax,
as to his duty to make a return, or as to the adequacy
5436 of the records be maintained, should become a criminal
by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be wilful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information."

There remains only the question of whether circumstantial evidence exists which could supply these omissions of proof. I think not. But as they said in 193 F. 2d, 907:

"It is still the law that there can be no conviction of crime on circumstantial evidence unless the only possible inference to be derived from it is that of guilty. There must be evidence which forecloses and makes impossible any other conclusion."

Now, I certainly feel that you cannot say that the evidence in this record forecloses and makes any conclusion possible except the knowledge of Sullivan of the excess and a knowledge of Sullivan that it was not going on the books,
5437 and a knowledge of Sullivan that the net of it was not
being reported, and a knowledge of Sullivan that he was himself affirmatively doing some intentional act to defraud the government of its revenue. There is nothing in the testimony that would make you assume this to be a man who would start out to cheat the government, from the time he went to the Army for the government down to the time when he, as he testified,—this company, since he has been

there, has paid $2,700,000.00 in taxes, when, before that, the company never paid any. There is nothing to make you take the contrary inference. The reasonable inference is that the circumstances are just as compatible with a reasonable hypothesis of innocence as with a hypothesis of guilt.

Now, your Honor is familiar with the cases that hold wherever there are questions of circumstantial evidence involved that the proof must exclude every other reasonable hypothesis but that of guilt. And I want to refer to the Van Gorder case, 21 F. 2d, 939. That was not an income tax case, but the defendant was charged with the theft of two keys from the post office and with receiving stolen government property. In reversing the lower court
5438 and holding that the trial judge should have directed a verdict on the defendant's motion for acquittal the court said:

"In order to sustain a conviction of a crime on circumstantial evidence it must be such as to exclude every reasonable hypothesis but that of guilt of the accused. The facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. The evidence in this case utterly failed to exclude every other hypothesis but that of guilt. The hypothesis that one of the clerks in the post office who was present there on the evening of January 17, 1924, picked up the keys which the substitute letter carrier left lying on the table outside the money order department, dropped or laid them elsewhere, whence they had been transferred by him, or others, until they had come to the possession of the defendant, the hypothesis that some thief had stolen them, and lost them and then the defendant had innocently found them, or that in
5439 many other ways without the theft of the defendant they had come to his possession is, under all the evidence, as probable in the face of the legal presumption of the defendant's innocence and the requirement that his guilt be proved by the government beyond a reasonable doubt before his conviction than the hypothesis that he was guilty of the crime."

Now, there is a case, the Gasomiser case in the 7 Rules Decision at 712, and they say this, on this question of the reserved motion for acquittal, and I think that that case has been quite extensively cited, even though it is only in the Rules Decisions—they say:

"While we might agree with the verdict of the jury as evidencing the adoption of one or more reasonable hypotheses, and believe that the guilt may have been established beyond a reasonable doubt, yet in view of the evidence I cannot say that, even assuming the truth of all the circumstantial evidence, the verdict of guilty was based upon
5440 the only reasonable hypothesis, or in the words of the rule that there is excluded every reasonable hypothesis but that of guilt, I cannot say that a juror individually or collectively could not have arrived at a different conclusion. I must, therefore, grant the motions of each of the defendants for judgments of acquittal. This case clearly shows the value of the procedure preserved by Rule 29-B of the Rules of Criminal Procedure. Under such rule the court may allow a jury to pass upon the facts for a possible affirmative verdict of not guilty for a defendant and at the same time, after proper reservation, maintain its jurisdiction to direct in a proper case an acquittal as a matter of law."

And in United States *vs.* Standard Oil Company, 24 F. Supp.—that is the case that Judge Stone had in Madison and in which they appealed on Judge Stone all the way to the Supreme Court, even making him a defendant in the Supreme Court. In that case Judge Stone said this,
5441 and it was sustained all the way up to the Supreme Court:

"The constitutional right of a defendant to a trial by jury recognizes that all questions of law have been decided by the court and questions of fact by the jury. It is just as important that the defendant be given the benefit of one as of the other and if he be denied one or the other his constitutional right to that extent has been denied. In the careful and full review of the record and study of the briefs filed before and after verdict the Court was definitely of the opinion that as to most of the defendants dismissed by the order of July 19 last there was no substantial evidence indicating participation in the conspiracy and that as to others the evidence adduced was clearly as consistent with innocence as with guilt, which raises a question of law for the Court, and in such circumstances it becomes the duty of the Court to grant the motion for a directed verdict.
5442 To do otherwise is clearly error. The following cases hold that where the evidence is as consistent with

innocence as with guilt it is the duty of the court to direct a verdict for the defendant."

And it then goes on citing the cases which give the rule applied by the Court in that case to the effect that it is not enough that there be a hypothesis which the jury could adopt, it must be that there is no reasonable hypothesis at all consistent with the facts and consistent with innocence.

Now, your Honor, I shall not take your time further. I do know that it poses a question of difficulty, and it is a matter of grievous moment, and I actually feel that the proof as to Sullivan is so slight that if treated alone, would surely—and if it stood on its own, if it were a separate matter entirely, it would just overwhelmingly persuade the Court to grant the motion.

We have the difficulty, of course—all of us; I do—in separating this set of facts from that set of facts. But we have got to do our best. And I have done my best to
5443 make it plain to the Court that there is not that quantum of proof which justifies the Court in denying the motion for acquittal.

5444 By Mr. Lockley: If your Honor please, your Honor is well aware that on a motion of this nature, the sole duty of the trial Judge is to determine whether there is substantial evidence taken in the light most favorable to the Government, tending to show that the defendant is guilty beyond a reasonable doubt. And in the case of United States *vs.* Storr it was said that in a tax fraud case, the weight of the evidence, the credibility of the witnesses, and conflicts of the testimony were questions for the jury, and therefore, the trial Judge, in considering the defendant's motion for a judgment of acquittal, would not have been concerned with these matters.

I refer you also to the Seventh Circuit Case of Yeoman Henderson, 193 Fed 2d, 867. Now, considered in the light most favorable to the Government, many of the analyses that Mr. Kirby has made of the evidence this morning, must be resolved against the defendant.

In this case, we have these particular items which tend to show specifically the defendant Sullivan's knowl-
5445 edge of what was going on in the corporation, and his participation in it, and his intent.

First, of course, is the testimony of the witness Lubben. In the light of the verdict of the Jury, we must consider that testimony as the true testimony—that Lubben talked to the defendant Sullivan at his office; that Sullivan made some comment to him at that time as to whether any record was being kept of the cash payments which were being made. This indicates that Sullivan had guilty knowledge at that time, that these cash payments were not being recorded on the books and records of the Shotwell Company, and that he was aware they were not being recorded on the income tax returns. The evidence to the contrary that Mr. Kirby cites, the lack of improvements to the driveway, for example, must be considered as having been rejected by the Jury. The Jury believes Lubben's version of that testimony, and that is the only version which may be taken into consideration by your Honor, in determining whether there is substantial evidence to support the verdict.

5446 Likewise, the testimony of Mr. Ericson that there was a conference or a meeting in the spring of 1946, when the defendant Sullivan and other defendants were present together with Lubben, and it was decided at that time that there would be certain shipments made without invoices, that clearly indicates that Sullivan knew that those invoices—the proceeds from those shipments, would not be recorded on the books of the company and they could have only had one possible reason, and that is that they were also not reported on the income tax returns.

There is the defendant's own admission that he knew in 1945 and 1946, for that short period of time, that candy was being sold in the black market. He admitted on cross examination that for purposes of violating the OPA regulations, it was necessary to leave those particular transactions relating to corn purchases and money received for that purpose, off the books and records.

And when asked whether it didn't have to be left off for income tax purposes, he sought refuge in the answer, "I don't know."

5447 You must take into consideration, too, the conflict of his testimony respecting the meeting at the Gotham Hotel, when he said that Lubben had displayed to him certain marked up invoices.

In view of the Jury's verdict, it is appropriate to examine that the Jury believed he was lying at that time, and they believed that if he was lying then, he was lying also when he said he didn't know whether or not those transactions were being recorded on the books and records.

Also, Mr. Kirby relates, or refers to the testimony of the defendants, that the money was going out, and that the defendant Sullivan thought that all of the money received was subsequently paid out.

It must be assumed that the Jury, in view of its verdict, believed that the money was not paid out. As a matter of fact, your Honor will recall that there was a complete lack of proof other than by inference, that any such money had been paid out, and the Jury, by rejecting that testimony, must be assumed to have concluded that Sullivan only lied when he thought—when he said he thought
5448 the money was all paid out, but that he knew it was not.

Furthermore, Sullivan's defense is a general denial that he knew what was happening as to the books and records, and the income tax returns of the company. The Jury was entitled to infer from the fact that he was receiving a thirty-thousand dollar a year fee, as its attorney, that he actually knew more about the business, and he knew more about the income tax returns than he admitted to.

Mr. Kirby refers to the absence of specific proof of wilfullness. I do not consider it the Government's burden to prove a positive act of wilfullness on the part of the defendant in an income tax return. Intent, as your Honor knows, usually cannot be proved by specific evidence. It is something that must be inferred from all of the facts and circumstances in this case, and intent in this particular instance is inferred from the fact that Sullivan was a high placed officer in the corporation, that he knew there were black market transactions going on, that he knew the direct results of those black market transactions was that there was no record made on the books of the company, and
5449 that he knew as a consequence of that, none of them were being reported in the income tax returns, that he knew about the unbilled shipments, that he knew in general that the books and records upon which the accountant relied in preparing the income tax returns were not complete, and if he had part of the responsibility for keeping certain

transactions off those books and records from which he knew the returns would be prepared, then he was as responsible for evading the taxes as the corporation, as if he had prepared the return with his own hand.

Sullivan also knew that there were certain corn deals going. He testified, as a matter of fact, that he personally attempted to purchase corn from some of these brokers as a legitimate transaction, and that he was unable to do so, after Huebner had spoken to him. That indicates further that he had a far greater knowledge in the affairs of the business than he has admitted up to now.

While in the New York conference on January 19th, it is true that Mr. Sullivan was not present at the time the money was actually passed to Mr. Huebner, the Jury
5450 was entitled to infer from the fact that he was in the city, that he was at the hotel, at the time when the transactions were going on, that he had some personal knowledge of what the transactions all amounted to; and then there is also the testimony of the various witnesses, Morrill, Graflund and Roeser, that they only performed the act which led to the failure to putting these receipts on the books, at the direction of the three defendants.

At this late date, they are unable to say whether it was the defendant Huebner, the defendant Cain, or the defendant Sullivan, but the Jury was also entitled to infer from Sullivan's position in the company, that he was directly responsible, together with the other defendants for having kept those matters off the books, and likewise, off of the income tax returns.

In view of the requirement of the law that the evidence be considered in the light most favorable to the Government to sustain the verdict, your Honor, it is the Government's position that it has borne its burden, and that the motion for the defendant should be denied.

5451 By Mr. Kirby: Going quickly down the items relied on by the government, the first that Mr. Lockley referred to was Lubben's testimony that Mr. Sullivan asked whether records were being kept by Lubben. Mr. Lockley says that indicates a guilty knowledge on Mr. Sullivan's part that the matter was not going on the books of Shotwell. Even if that inference be true, which I do not agree, because he is not asking about at all, it certainly doesn't jump to the next position that it did not go on the income

tax returns. There is no question about Sullivan having known that they were violating the OPA. But the Court said, in his instructions, and it certainly is true, that an intent to violate the OPA is not equivalent to intent to violate the income tax laws. And an act done for that purpose, which is a purpose which is consistent with innocence, under the income tax law, although pointing to guilt under the OPA law, but that circumstance, that explanation, that is, that it was done to keep it off for OPA purposes, if that be a reasonable one, then that is one to be accepted.

Now, the next point that he talked about was that
5452 Ericson said that Sullivan attended a conference about unbilled shipments. Well, Mr. Ericson said that he assumed Mr. Sullivan attended the conference. On cross examination Mr. Ericson was asked whether he knew it or he was only assuming it. Well, he said, "I assume it. I don't know that he was." And that is not adequate proof.

The next is this question of the defendant's admission that he knew of the violation of the black market. And I have already referred to that.

The next is the Gotham Hotel meeting and Mr. Lockley says, as to that, that the jury must have believed that he was lying about that meeting with Mr. Lubben. I can't see that that follows at all. It is hard to take a general verdict and figure out what it would mean on a particular thing like that.

Then he relies particularly, I thought, upon this, that is, that the jury, he thinks, believes, from its verdict, that the money was not paid out. Now, that doesn't follow at all. It might very well be that the jury believed that there was money paid out. But the jury might have believed there
was not as much paid out as came in. But than Mr.
5453 Lockley has not addressed himself at all to any proof that would show Harold Sullivan would know whether more came in than went out. The proof is to the contrary. The proof is by all the people that handled it that what came in, so far as they knew, did go out and that Harold Sullivan's extent of knowledge was the same as theirs.

He said that Sullivan's defense was merely a general denial and that Sullivan's earning $30,000.00 a year allowed the jury to infer that Sullivan knew more than he admitted. Well, the rule, of course, is, as I will now cite it from Fletcher Encyclopedia of Corporations:

"A corporate officer, without regard to his position, is ordinarily not criminally liable for corporate acts performed by other officers or agents of the corporation."

And then at another place:

"It is essential to criminal liability of an officer that he actually and personally do the acts which constitute the offense or that they be done by his direction or permission."

5454 And you cannot assume that just because a man occupies a post, and is a lawyer, and does get paid, that he is engaged in a criminal activity.

Now, he refers finally to Graflund, Morrill and Roeser, and he says that they say that they did acts with respect to the keeping of the books at the direction of some one, of the three, but that he concedes that they said they couldn't say which one of the three. I think the proof went even further than that. That is weakness enough in his proof, but I think it went further. I asked each of them specifically whether Harold Sullivan instructed them in any way with respect to the keeping of the books or the income tax returns and they specifically said that he did not.

Now, it gets down to this, I think. I think the summary of the government's position is that from Sullivan's knowledge of the OPA violation there can be inferred a knowledge of an income tax violation and that from the fact that Sullivan was an officer there follows the inference that he was a person actively participating with guilty and wilful knowledge.

But, as I said to the Court earlier, they must prove, in order to show a knowledge of the falsity of the returns,

5455 they must first show that he had a knowledge that there was more coming in than was being spent. And then they must show that he had a knowledge not only that that was so, but that the excess was not going on the books. They have to show that that closing transaction was to him known to be an inaccurate closing transaction. And then on the intent they must show that he was personally doing some affirmative act.

5456 By the Court: Well, gentlemen, in so far as the motion for the defendant Sullivan for an acquittal, the Court will take that under advisement and file an order in due time.

By Mr. Kirby: Your Honor, could I have leave to file a written brief on the subject?

By the Court: Well, you have probably given me such cases as you have in mind, and I have made a note of them. If you have anything in addition, you might do so.

By Mr. Kirby: Thank you, your Honor.

By the Court: I would like to have available to me Lubben's testimony as to Sullivan, Ericson's testimony, and Sullivan's testimony. I haven't the record, and while I have kept rather complete notes, I would like to review those parts of the record. Any testimony by Lubben wherein he refers to Sullivan, as either talking to him, or Sullivan being present, I would like that. I don't mind if you send me the excerpts rather than the transcript, if that is more convenient.

And then I would like to have Ericson's testimony, the portion of it that referred to Sullivan, and I would like to have the complete transcript of the defendant Sullivan's testimony.

5457 By Mr. Kirby: I will get all of that up to you, your Honor, together with my cases, and would it be satisfactory if I had it to your Honor by Friday next?

By the Court: All right. I am ready to dispose of the other matters, of Shotwell, and Cain, and defendant Huebner.

By Mr. O'Brien: If your Honor please, I would like to file a written motion along the line that I orally presented yesterday, the first part of it being that imposition of sentence be deferred pending the filing of the motion for acquittal, on which your Honor expressed your position—

By the Court: I will deny that portion of your motion.

By Mr. O'Brien:—the second part being we should like, in view of the length of the record, an additional five days beyond the time provided, beyond the five provided by the rules.

By the Court: I have no objection to granting that portion of your motion.

By Mr. O'Brien: The third portion of the same motion, I believe, was orally covered yesterday, and acquiesced in by Mr. Lockley, and has to do with the continuance of

5458 the bail until the hearing, and determination of those motions, or until the failure of such defendant to file a motion within the time provided.

By the Court: I don't know whether Mr. Lockley wants to be heard on the question of bail.

By Mr. Lockley: No, your Honor. The Government is satisfied to continue the present bail for all purposes.

By the Court: Well, now, Mr. O'Brien, have you any other motions that you want to present to me now?

By Mr. O'Brien: No motions at this time, your Honor.

By the Court: Then I am ready to impose the sentence on the Shotwell Manufacturing Company, and while Mr. McConnell isn't here, I assume you, in his absence, are authorized to represent the corporation?

By Mr. O'Brien: Yes, your Honor. He so stated, I think, in both our presence.

By the Court: Well, I will hear you with reference to anything you may desire to say on behalf of the corporation before I pronounce sentence.

5459 By Mr. O'Brien: I do not think that any of the matters which I have in mind to say for the individuals, are appropriate in respect of the intangible entity of the corporation itself.

By the Court: Mr. Lockley, have you the statute that covers the penalties, so that I may be accurate in my statements?

By Mr. Lockley: I am sorry. I do not have it. I know what the penalty is, but I am afraid I do not have the statute with me.

By the Court: I think I know, but I would like to have my memory refreshed. In so far as the Shotwell Company is concerned, I understand the law provides for a maximum of ten thousand dollars on each count.

By Mr. Lockley: That is correct, your Honor.

By the Court: Well, it is considered and adjudged by this court that The Shotwell Manufacturing Company, as punishment for the crime of which it was duly convicted by a verdict of the Jury, that as to the first count, it shall pay a fine in the sum of $10,000 and costs, and as to the second count, the Court imposes a fine of $10,000 and costs.

5460 I may state, in so far as the costs are concerned, that the United States Attorney, or Mr. Lockley, will present to the Court a proposed bill of costs, and I assume the Court will have to determine what part of the costs proposed to be taxed should be taxed, and when I determine that amount, it will be added to the fine that I have imposed.

Of course, the costs will not be duplicated as to the first and second counts. It will be applicable, of course, to both counts. I haven't yet determined the exact way that I will enter that, but I didn't mean, of course, to have a duplication of costs. It means that I am imposing a fine of $10,000 as to each count, and costs as will hereafter be determined, assessed, and entered as part of the judgment.

5461 Now, then, I am ready to impose sentence on the defendant, Byron A. Cain.

By Mr. Byron A. Cain: If the Court please, I would like to make this statement to you and in no way do I admit any guilt in this matter. I feel that we have a situation here that could be a little unfair. Frank Huebner was an employee of the Shotwell Manufacturing Company. He owned less than 300 shares of stock.

By the Court: The last part I didn't hear.

By Mr. Byron A. Cain: He owned less than 300 shares of stock. Any actions that Frank Huebner took with regard to the Shotwell Manufacturing Company were taken with either the approval of Mr. Shotwell, Mr. Sullivan, or myself and I ask your Honor to be as considerate of him as the government has been of Miss Morrill, Mr. Graflund, Mr. Roeser and all of the rest of the employees of the Shotwell Manufacturing Company.

Thank you, sir.

By the Court: Mr. O'Brien, is there anything you want to say on behalf of Mr. Cain before I pronounce the sentence?

Mr. Cain, you will stand here, please.

5462 By Mr. O'Brien: These are factors, your Honor, which I would like to expressly commend to your attention:

First, as the record shows, Mr. Cain's primary business is that of a real estate broker, a real estate occupation, for the practice of which he has and requires a license which will be lost should the conviction here be maintained.

Second, and special to Mr. Cain and to this case, Mr. Cain is the president of the Uptown Federal Savings & Loan Association and that position will likewise be lost.

Third, from the inception of the matter, I suppose surely since 1948 and more particularly from the time of the indictment, there has been unusual publicity and consequent conditions which the defendant Cain and the other defend-

ants as well in the case have had to encounter over and above those reactions which normally occur. They have unquestionably suffered seriously from that—Mr. Cain, personally, I know.

As far as the civil aspect of the matter enters into the consideration of the case, there is no doubt, none whatever on this, but that Mr. Cain as well as the other people, 5463 but particularly Mr. Cain, has been willing at all times to pay the tax or to have the corporation pay the tax or whatever it took or takes to get done that liability, such liability or deficiency as the agents might reasonably or properly impose. There has been no effort at that on the part of the government because, as your Honor knows, while the criminal matter is pending, there is no attempt at all to make a disposition on the civil side, or of the civil side of the tax problem.

Now again and separately beyond the question, Mr. Cain—

By the Court: I think you may sit down for the time being, Mr. Cain, if Mr. O'Brien has a lengthy statement. I don't see why you have to stand up.

By Mr. O'Brien: I don't want to be lengthy, Judge, but I am trying to say what occurs to me as being pertinent.

Mr. Cain has had a long and honorable record in every community in which he has resided, and in this community. He is a family man, as the testimony shows. He has four children of whom three are minors, the ages respectively being 9, 11 and 16. He has one boy who has attained his majority and who is married but the others, all of 5464 them, are in school.

He has never had any kind of trouble or difficulty other than this. Now, your Honor knows the nature of the proceeding here. I don't see that anything that I can say about it would even refresh the Court's recollection on anything that would be worthy of consideration, except perhaps for one thing, that we are not confined to technical evidence, but refer only to matters as to which the Court could almost take a judicial knowledge, or have a judicial knowledge. There have been many of these matters; many of them have been disposed of. This case has gone on to indictment for reasons which are none of my concern and for reasons which are unknown to me in relation to the

many other matters which have been disposed of without going that far.

I think that that covers the matters which I think your Honor would want to take into consideration and which perhaps you have taken into consideration in so far as Mr. Cain is concerned, except one thing, and I am not clear on just how much is pertinent, but the only other thing that I recollect is that there was that newspaper item about
5465 the assessment of a large deficiency in another matter against Mr. Cain. I do assert with knowledge of the facts, based upon inquiry which I have made directly of Mr. Cain's lawyer in that matter, that the assessment there made is not based on any audit of Mr. Cain's books or study of the circumstances, but arose because of his unwillingness under all of the circumstances to give the Revenue a waiver of the time within which it must assess and this large assessment followed. Then, in the Tax Court at Washington, Mr. Cain's attorney, Daniel Taylor, asked for what I would term a bill of particulars, which the Court there ordered within sixty days, the government taking the position that until it looked at his books and studied the matter, it would be unable to state how the deficiency as assessed was arrived at.

Those, I think, your Honor, are the pertinent facts in my position.

By the Court: All right. Mr. Cain.

Now, Mr. Cain, is there anything you care to say in addition to what Mr. O'Brien has said before I pronounce sentence?

By Mr. Byron A. Cain: Nothing, your Honor.

5466 By the Court: Well, you have had a fair trial. You have been represented by able counsel, and in my opinion, the verdict of the Jury is just and fair. And under those circumstances, I feel I have no other alternative but to impose a substantial sentence, and that I will do.

It is considered and adjudged that you, Byron A. Cain, as punishment for the offense as set forth in the first count of the indictment of which you have been duly convicted by the verdict of the Jury, that you shall be confined in a penal institution of the United States, to be selected by the Attorney General of the United States for a period of three years, and to pay a fine in the sum of $5,000.

It is considered and adjudged as to the second count of the indictment, of which you have been duly found guilty by a verdict of the Jury, that you shall be confined in a penal institution of the United States to be selected by the Attorney General of the United States, for a period of three years, and pay a fine in the sum of $5,000.

5467 It is further ordered that the sentences, that is, the sentences to a penal institution, shall run concurrently and not consecutively.

That will be all.

Now, Mr. Huebner. Now, I have no objection if Mr. Huebner wants to sit down, if you have a rather lengthy statement, Mr. O'Brien.

By Mr. O'Brien: Thank you very much, Judge.

Just sit down for a moment, Frank.

The statement is not lengthy, if the Court please.

The situation as to Mr. Huebner, again is that he is a family man, but in his case, his children are grown, and as Mr. Cain indicated, he was and has been for many years, an employee of this company. Mr. Cain did not say how many years, but I am informed that he was an employee for well over 25 to 30 years—was it not, Frank?

By Mr. Frank Huebner: Twenty-one.

By Mr. O'Brien: Twenty-one years at the company, and he was there when these folks came in, and again, Mr. Cain did not say, but it is the fact that the stock which he had, he had before these folks acquired any interest.

5468 He does not have independent means. Mr. Huebner is presently working at a candy company as a superintendent, running the candy plant, ever since the Shotwell Company has closed, and sold its assets to someone else. And his family—he lives with Mrs. Huebner—has been and is dependent upon his earnings from that source. The people for whom he is working have had such confidence, and do have such confidence in him, that they retained him in the face of this proceeding. They have given him leave of absence, so to speak, to be here, and would welcome him back to his position, if he should be available.

I do not know any fact which would make Mr. Huebner's situation different than that of Mrs. Morrill, Graflund and Roeser. True it is that as the superintendent, and as the operating person there, there were moneys that he received, but I think also some of the other people signed the returns, just as he did. Those are technical things.

All I can say to the Court is you know the nature of the operation. It was not confined to the top officials, but
5469 the lower echelon of people were active also to the extent that was required.

Mr. Huebner was one of those, but he was on the operating, or firing line end of that company, as your Honor can observe. Now, Mr. Cain has himself stated, and I may add that on Mr. Cain's part it was wholly voluntary, without any suggestion of any kind from me, and I think he has expressed correctly the feeling which he has as to Mr. Huebner's position in that whole situation, and I can't do any more.

By the Court: Now, Mr. Huebner, is there anything you desire to say before I pronounce your sentence?

By Mr. Frank J. Huebner: No, your Honor, I haven't.

By the Court: Well, you haven't taken the stand. Of course, I haven't heard your testimony, and I don't know just what your position is with reference to all of the testimony that has involved you in this matter.

I believe that Lubben told the truth on the stand.
5470 I was impressed with his testimony, and if I had been the Jury, I would have returned the verdict as to you, just as the Jury did.

I understand that you are not a man of any great means. I don't intend to impose a very substantial fine, for that reason, but I am going to impose a substantial penitentiary sentence. I have debated, somewhat, as to whether I should make any distinction between you and Mr. Cain as to the length of the sentence. It has been very difficult for me to decide that question.

From Mr. Lubben's testimony, you were as heavily involved in this scheme as any one of the officers, and certainly acted as a go-between with Lubben, and handled substantially all of the cash.

5471 As to your guilt and as to your participation in this scheme to evade and defeat the United States from its taxes, it seems to me, that the testimony is overwhelming. Well, I merely make that statement to indicate my own views. Lubben was haled as a blackmailer and haled as a very dishonest man. I saw no evidence in the case which indicated that he was trying to blackmail anybody. True, he was in dire financial straits and he may well have come to Mr. Cain and to Shotwell, realizing all the money he had

paid to them on the black market, and I assume he may have thought that there was some obligation on Shotwell to help him out when he was in dire financial straits. Well, I don't consider there was any blackmail. My opinion is that Lubben tried to tell the truth. That doesn't mean that he may not have been mistaken in some matters. This happened many years ago. He had to search his memory carefully, but, by and large, I was convinced by the sincerity and I believe by the truthfulness of his testimony.

Well, Mr. Huebner, it is regrettable that a man who has borne a good reputation and who has never been in trouble before has to come before the Court as you and
5472 Mr. Cain have now, involved in a serious charge of this kind, but you had a fair trial and you have been represented by able counsel and as I have indicated before, I am of the opinion that the verdict is a just one.

And if we are ever going to have any recognition by the citizens of this country with reference to the payment of their income taxes without fraud, and to stamp out schemes and plans to evade the payment of their just income tax, it seems to me the Court must mete out reasonably severe sentences.

And, of course, you men were making a great deal of money. Shotwell was in a good financial condition. It had no reason to go out on the black market and obtain all this money from Lubben. There was no danger of Shotwell having to close its doors because of its inability to get raw corn. I haven't any doubt that some of this money went for raw corn. Undoubtedly it did, but the large bulk of the money that Lubben paid to the Shotwell Company never went for raw corn. Where it went to, I don't know. At least, it didn't go for raw corn.

Well, there isn't much I can say to you, Mr. Huebner,
5473 that will lessen the stigma or lessen the blow that will necessarily go along with the sentence that I am going to impose.

As I have indicated, I am not going to impose a very heavy fine because I don't believe you are a man of means, and in view of a fairly substantial sentence, I believe the ends of justice will be met by the sentence which I am about now to impose.

It is considered and adjudged that you, Frank J. Huebner, as punishment for the offenses as set forth in the first count

of the indictment on which you have been duly convicted by a verdict of the jury that you shall be confined in a penal institution of the United States to be selected by the Attorney General of the United States for a period of three years and pay a fine in the sum of $1,000.00.

It is further considered and adjudged that as to the second count of the indictment of which you have been duly convicted by a verdict of the jury that you shall be confined in a penal institution of the United States to be selected by the Attorney General of the United States for a period of three years and to pay a fine in the sum of $1,000.00.

It is further ordered that the penitentiary
5474 sentences that I am imposing will run concurrently and not consecutively.

Very well.

By Mr. Lockley: If your Honor please, I am advised by the Marshal that the defendants have never surrendered to him for such measures as are required by the Attorney General. I now move that the Court require them to surrender themselves so that the Marshal may take such action as is required by him by departmental regulations.

By Mr. O'Brien: May I discuss that, briefly, with your Honor when we are finished here? Will your Honor withhold his ruling on that motion until I can discuss it with you? I will be through presently, Judge. I just have a couple of odds and ends.

Judge, I think you have our exhibits 96, 97 and 98. Those were the ones produced by Mr. Schwartz, these disclosure documents that you put in evidence at record 4907 for the limited purpose of your instruction.

5475 By the Court: I don't think I have, Mr. O'Brien, but if I have that exhibit, I will, of course, make a search. I didn't run across it.

By Mr. O'Brien: That is 96, 97, and 98. If I gave them back, would you check it?

By Mr. Lockley: I didn't have them.

By Mr. O'Brien: I think I last saw them with your Honor, but they may have been handed to one of our people. If you have them, fine.

No. 2, I requested instructions; are those filed of record?

By the Court: They will be filed.

By Mr. O'Brien: They will be filed.

By the Court: I am waiting for the reporters to return

to me my copy of my charge, and I have ruled on every request, but there is one request that I felt I should have my charge before me, so that I could more accurately rule.

By Mr. O'Brien: Yes.

By the Court: And they borrowed it yesterday, and they haven't yet returned it, but if they will do it, this morning, I will do so.

By Mr. Roy Fuller: It was returned to your secretary this morning, Your Honor at 9:30.

5476 By the Court: I will see, of course, that it is filed with the Clerk, and rulings noted on all of your objections.

By Mr. O'Brien: Judge, I think it is now an appropriate time to remind you of the fact findings and conclusions of law which your Honor said—

By the Court: Yes. I will file within due time, my formal memorandum on your motion to suppress, in that when I denied your motion I reserved the right to file a memorandum of findings of fact and conclusions of law. I am not sure just what is a better way to dispose of it, but in any event I will file a suitable order by way of a memorandum or finding of fact, and conclusions of law, with reference to that motion.

By Mr. O'Brien: All right.

That leaves one other thing only, Judge.

Mr. Huebner told me this morning that he would like to visit his son, Captain Frank Huebner, at Fort Benning, Georgia, to go Monday next, and to be back within the week. That would require permission, in view of this situation, and the bail.

5477 By the Court: I don't think there will be any objection to his trip to visit his son, if he desires to do so.

By Mr. Lockley: No objection by the Government, your Honor, no, sir.

By the Court: Now, then, I haven't been advised by counsel—well, maybe you have—you have asked me for an extension of five days in addition to the statutory time within which to file a motion for a new trial, is that right?

By Mr. O'Brien: Yes, sir, for both the new trial, and arrest of judgment, the statute, the rules cover.

By the Court: You, I suppose, are asking for a stay until I have heard that motion?

By Mr. O'Brien: Yes, sir.

By the Court: And that the defendants be released on their present bond?

By Mr. O'Brien: Yes, sir.

By the Court: Well, the statute requires you to make a motion within ten days, is it, or five days?

By Mr. O'Brien: For a new trial, Judge?

By the Court: Yes.

5478 By Mr. O'Brien: It requires it within five days of yesterday.

By the Court: Then you are granted a period of ten days within which to make your motion, right?

By Mr. O'Brien: Under your order, yes.

By the Court: All right.

By Mr. O'Brien: And would the Clerk make a minute order on that?

By the Court: Yes, the Clerk may make an appropriate minute.

By Mr. O'Brien: And then as to the other part, a stay pending disposition of such motion, if filed, within the time ordered.

By the Court: That is right.

By Mr. O'Brien: And on present bail to continue, as Mr. Lockley says.

By the Court: I understand Mr. Lockley has no objection to the continuance of the present bail, and that may be so ordered.

By Mr. O'Brien: There is only one other thing that we might do while the Judge is here, because it is difficult—we might have a gap when you get to Minneapolis.

5479 I had in mind to ask your Honor—let me say this: On any appeal, we should have to supply a new bond, if your Honor was permitting bail, as I understood Mr. Lockley to say, for all purposes I would assume he would include appeal. But even so, we would have to put up a new bond, and terms, conditions and amounts would have to be prescribed by your Honor.

5480 By the Court: Well, it seems to me that if you were going to take an appeal, you might indicate to Mr. Lockley and to Mr. Calihan or rather, they might indicate to you what bond they are going to recommend.

By Mr. O'Brien: Yes, sir.

By the Court: And we might have that determined now and then it seems to me that any Judge here can approve

the bond without having it forwarded to me, in the event I have ordered a bond in a certain amount.

By Mr. O'Brien: Yes, sir. Well, that would seem entirely —I hadn't thought of it, but it is such a routine thing, that the judge verify the security, that we could take it before any judge or court, I would assume.

By Mr. Lockley: I think, your Honor, that—

By Mr. O'Brien: You tell me the amount and—

By Mr. Lockley: I say, your Honor, I think that normally after a conviction, bond is increased.

By the Court: Yes.

By Mr. Lockley: I don't think that it makes a great deal of difference in this particular case, but $5,000.00 would be satisfactory with the government.

5481 By the Court: Well, very well. I gather then, that the defendants may be released on their present bond. If I deny them motion for a new trial and you take an appeal, the Clerk's minutes may show that I ordered a bond in the sum of $5,000.00 and that that bond may be presented to any available judge here for approval without the formality of sending it to me.

By Mr. O'Brien: Thank you, Judge.

By Mr. Kirby: Now, your Honor, with respect to the defendant Sullivan, may all of the same orders appear—apply, I should say, in the event the motion for acquittal is denied, but with the time being extended?

By the Court: If the motion for acquittal is denied, then I will impose sentence on defendant Sullivan and I will make such order then. I think I will make such orders then as I think necessary.

By Mr. Kirby: We can take it up then. The only problem that it presents is this: That the statute with respect to a motion for a new trial does key it, your Honor, to the date of the verdict and therefore, could we have an extension—

By the Court: Well, I haven't any objection to an 5482 order extending your right to make a motion for a new trial within ten days after I impose sentence on the defendant Sullivan, if I deny your motion for acquittal.

By Mr. Kirby: Thank you, your Honor. That will take care of the record. Thank you.

By the Court: Now, then, I know of no reasons why these defendants shouldn't comply with the regulations of the Marshal's office with reference to fingerprinting or any

other formalities which the Marshal is under orders to obtain. And they may go to the Marshal's office at such time as the Marshal—as is convenient to the Marshal and comply with the formalities.

Is there anything further you gentlemen want to discuss with me before I leave the bench?

By Mr. Lockley: Just one thing, your Honor. I will not be back, I hope, next Monday, and I just want to say goodbye to you.

By the Marshal: Will the audience please remain standing while the Judge leaves the court room.

This Honorable Court will recess.

5483 UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

TRANSCRIPT OF FURTHER PROCEEDINGS

had in the above-entitled cause before the Honorable Gunnar H. Nordbye, Chief Judge of the United States District Court for the District of Minnesota, sitting as one of the Judges of the United States District Court for the Northern District of Illinois, Eastern Division, in his court room in the United States Court House, at Chicago, Illinois, on December 7, 1953, at 10:00 o'clock a.m. pursuant to notice and adjournment from the last prior proceedings had herein, on October 17, 1953.

5484 PRESENT:
Hon. Otto Kerner, Jr.,
United States Attorney,
(U. S. Court House, Chicago 4, Ill.); by
Edward J. Calihan, Jr., Esq.,
Assistant United States Attorney, on behalf of the United States.

Vincent O'Brien, Esq.,
(105 S. LaSalle St., Chicago 3, Ill.)
William T. Kirby, Esq.,
(One N. LaSalle St., Chicago 2, Ill.),
on behalf of Defendants.

5485 By the Clerk: 52 CR 143, United States of America *vs.* Harold E. Sullivan, disposition.

By Mr. Kirby: Good morning, your Honor. I have a motion which I now wish to file captioned "Motion for Entry of Order as to time for filing a motion for a new trial."

The point is, your Honor, that the Clerk's docket, through inadvertence, did not show your Honor's advice to me that the motion for a new trial with respect to Harold Sullivan might be filed at any time within ten days after any action by your Honor on the motions that were then pending.

I talked wth Mr. Calihan at the time about it and he mentioned the matter briefly to the Clerk but it is something which I think needs to be cured by a nunc pro tunc order and I don't imagine there would be any objection.

By Mr. Calihan: No objection.

By Mr. Kirby: Now, your Honor, I should like to, if I may, address myself to the motion for a new trial. I am sure that the Court appreciates that a motion for a new trial can be granted even in cases where there has been a ruling adversely on a motion to acquit and even where the Court has indicated the Court's finding that there was evi-

5486 dence sufficient to go to the jury.

The cases have all said, as Judge Holtzoff said in United States *vs.* Robinson in 71 F. Supp., in setting the verdict aside itself, as distinguished from granting an acquittal:

"... in setting the verdict aside the Court merely grants a new trial and submits the issues for determination by another jury. It is appropriate that in the latter instance the Court should have wide discretion in the interests of justice."

The Court reviews many cases and then says:

"The foregoing discussion inescapably leads to the conclusion that a judge may set a verdict aside as contrary to the weight of evidence and grant a new trial, even

if there was substantial evidence requiring him to submit the issues to the determination of a jury."

That same rule, the wider discretion and the granting of a new trial was approved by our Seventh Circuit in the Applebaum *vs.* U. S. Case, 274 F. 43 at page 46.

5487 Now, the Court has already had my motion for a new trial for approximately a week and so is familiar with it. By arguing this more than certain of the grounds assigned in the motion, I do not waive any of the others or mean to minimize them. First, your Honor, let me speak of certain rulings that were made on the trial. A number of question rulings are specifically set out in my motion for a new trial and in that which was filed by Mr. O'Brien and by Mr. McConnell and I do not repeat them here verbatim nor do I waive any of them in this argument. But, your Honor, I do specifically want to speak of the limitations of the cross examination of Lubben because limitations are mentioned specifically in our motion and are of special importance, for he was the key witness, indeed, the only witness of any importance as to the defendant Sullivan.

I will read from two income tax cases recently sent back for new trials because of undue limitations on cross examination of the principal government witness. The first case is the case decided by the Fifth Circuit early this year, 1953, Montgomery *vs.* United States, in the Fifth Circuit, 203 F. 2d, 887. This was a prosecution against a sheriff

5488 under Section 145(b) of the income tax law. A witness testified that he paid some cash to the sheriff and then the defense sought to extensively cross examine the witness as to his handling of cash, especially in respect to payments to others and the Court ruled that out with the view they were not concerned with the cash to others but only cash to this defendant. The defense said it was important, as you said here, that they be permitted to go into this man's deals so that it could be shown what credibility could be attached to it. On appeal this position of the defense was sustained, the Court saying at page 890 that the Court should

"... accord the defendant the benefit of cross examination however searching. Cross examination of a witness is a matter of right (citing cases). Indeed, cross examination, as has been often observed, is the surest test yet devised to the truthfulness of a witness' testimony, and its allowance is especially important..."

and this language is applicable to Lubben, sir, and I will repeat:

"... and its allowance is especially important in the case of a witness who is himself an admitted violator of the
5489 law. We think the action of the Court was an undue restriction on the defendant's right to cross examine this witness."

Another income tax case under 145(b) was decided in 1951 by the Third Circuit, United States *vs.* Augustine, 189 F. 2d, 587. In that income tax case, an important question was what had happened to some $236,000.00 in cash which supposedly had been paid to a man by the name of Valetta. Valetta was dead when the trial came on but a man by the name of Ceasare was a witness and Ceasare had handled Valetta's affairs and knew of all his various financial transactions. The witness was asked about how Valetta handled this case, about his going to the horse races, about his betting a lot of money, how the man generally handled his affairs. The cross examination on those questions was denied and this was held to require a new trial, the Court saying—having in mind, sir, this is an income tax case:

"His credibility was a critical point for the defendant's case. Likewise the unhappy financial situation outlined by the witness in his history of Valetta was open to
5490 further development and perhaps some prodding. It is possible, had the inquiry been permitted to widen out, that some of this witness' testimony could have been shaken. If it could, the defendant was entitled to shake it. If this were a collateral point, extended cross-examination of the witness would not have been so important. But the heart of the case was whether defendant had paid the money over to Valetta."

Much as in this case, your Honor: The heart of this case is whether Lubben paid money over to the Shotwell Company. Going on with the quotation:

"Ceasare's testimony made this appear extremely unlikely. The answer to defendant's questions might have raised the inference that Ceasare was mistaken, or deceived by Valetta or that Ceasare was lying about Valetta's financial condition. We conclude that the cross-examination was unduly restricted and that the likelihood of this cause being prejudiced to defendant necessitates a new trial."

They compare Alford *vs.* United States, 282 U. S. 687.
5491 That last case was a case which holds that cross-examining the key witness was a matter of right and that there is, of course, no obligation to protect such a witness from being personally discredited.

Now, your Honor will recall various grounds on which we sought to go into Lubben's financial transactions in the black market, his own handling of the cash, his own income tax reports and a number of those visits, upon which your Honor indicated that we were not trying matters of Lubben; we were trying matters of these people and the cross-examination of the witness of the Government terminated on those lines. Your Honor, it is particularly important as to Sullivan that Lubben be cross-examined on points which tend to destroy his credibility. Your Honor knows that the Government's attorney said that without Lubben, the case against Sullivan was practically non-existent.

Your Honor knows that there was only one conversation testified to by Lubben in his direct evidence sought to be used to hold Sullivan in this case. I say to your Honor that the tests which are applied to a witness by the courts where that witness has much to gain for himself by his testi-
5492 mony—when that witness by his own testimony is engaging in practices which are violations of the law and expose him to possible prosecution under the income tax laws, the tests are very, very strict.

McGinnis *vs.* United States, 256 Fed. 621, at page 625, states a rule which I think is still more strict:

"We feel required to say that the uncorroborated testimony of this perpetrator of a crime confessed under oath, and not supported by other witnesses, with a possible hope of immunity from punishment, is not only insufficient to establish the guilt of the plaintiff in error beyond a reasonable doubt, but that it presents no substantial evidence of it."

Having in mind then that test and that there is only that piece with respect to the defendant Sullivan, it is particularly important that I urge upon your Honor a review in your mind of the restrictions upon the cross-examination of Lubben to which objections were made in the conduct of the trial.

As I say, your Honor, other matters relating to ad-
5493 mission and exclusion of evidence are sufficiently
covered in our motions and I do not waive them. I am sure the Court has them in mind.

I want now to pass to the instructions given by the Court. We shall not discuss all of the points made in our motions and of course, waive none of them, but each point that we will discuss here, mentions an error which was called to the attention of the Court as required by the rules after the charge and before the retirement of the jury. That will be true of each of these things that I mention.

I, of course, am much better prepared with the citations today, your Honor, and I hope to be more lucid, but the objections under the rule were properly saved. If I may, I am first going to refer only to the general rules which indicate not only the great, great power of the Court in the federal system but also the careful duty of the Court when it seeks to instruct. The Supreme Court in Bollenbach *vs.* U. S., a 1946 case, 326 U. S. 607, at page 612, says this:

"...'in a trial by jury in a Federal Court, the judge is
not a mere moderator, but is the governor of the trial
5494 for the purpose of assuring its proper conduct and of
determining questions of law.'"

Citing cases.

"'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr *v.* United States, 153 U.S. 614, 626,... and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is the specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

My exception started at page 5394 of the record, your Honor. I will, as we go through, refer to the specific exceptions, if you would like.

The Court: Just as you wish.

By Mr. Kirby: All right. I have a little advantage over the Court in that I know which ones I will refer to, so perhaps I can refer to the page easier than your Honor. And that Supreme Court, in that case, after remarking that a specific good instruction is overbalanced by a bad in-
struction—I am not stating that correctly, so I should
5495 read the language again:

"If it is a specific ruling on a vital issue and mis-

leading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

And the Court says that

"a conviction ought not to rest on an equivocal direction to the jury on a basic issue."

Because otherwise you "transfer to the jury the judge's function in giving the law."

Now the first instruction that I wish particularly to question is the instruction with respect to the presumption of innocence. May I point out that paragraph number 16 in the new trial refers to an instruction of yours which begins at transcript 5316.

By the Court: Was any exception taken to that?

By Mr. Kirby: Yes, sir.

By the Court: On what page?

By Mr. Kirby: I don't find it. Here is my memory of the matter: Not to contradict this record, when we discussed in chambers the questions—

By the Court: Well, I don't believe there is any pur-
5496 pose in referring to the informal discussions. I merely want to know whether or not an exception was taken to that portion of the charge. If you want to argue it generally, good and well, I have no objection, but I was interested in knowing if you had taken an exception to it.

By Mr. Kirby: Let me tell you how it arose.

By the Court: There is no use referring to an informal discussion. The record speaks for itself. The Court's charge speaks for itself. Whether you took any exception will appear in the record. If you want to argue notwithstanding, if you didn't take some exception and there was some error, good and well.

By Mr. Kirby: In this case this one instruction, my memory is not clear on it and I will tell you how it arose.

By the Court: I am not interested in that. Just tell me what your trouble is.

By Mr. Kirby: I will tell you what my trouble is. When we were discussing instructions, I read your Honor's instruction in an income tax case in Minneapolis and in those instructions there had been a reference to the presumption of innocence continuing until such time as the proof beyond all reasonable doubt convinced—

5497 By the Court: Until such time, if that time was ever reached, that the Government established their guilt.

By Mr. Kirby: That is correct. Your Honor's memory is precisely fine. And I had said in the course of our discussion that I didn't want to see that kind of an instruction. Now why, when you gave that kind of an instruction I didn't actually preserve it in the record, I can't tell you. It must have been that I was thinking of the same thing your Honor is now thinking yourself, and here is the instruction at transcript 5316, your Honor:

"Under our laws, every defendant who is charged with a crime is presumed to be innocent. Now, that presumption remains with him throughout the entire trial, until that time, if that time is reached, that the Government has established his guilt beyond a reasonable doubt."

By the Court: That is a good instruction.

By Mr. Kirby: In Lurding *v.* United States, Circuit Court of Appeals Sixth, 179 Fed. 2d 419, which is an income tax trial under 145-B, I will read this language:

5498 "... Again, the Court instructed the jury that 'the law in addition to that presumes all persons innocent of the offense with which they are charged until such time as the proof produced by the Government establishes their guilt to the exclusion of a reasonable doubt.'"

And then the Court goes on:

"It is difficult to apprehend what interpretation may be placed by the jury upon the phrase 'until such time.' If it carries to the mind the connotation that guilt is established at the conclusion of the Government's proof, then the burden of proof has been shifted to the defendant. The presumption of innocence remains throughout the trial and it may well be that a juror's conviction of guilt upon consideration of the Government's proof alone is either completely shattered or diluted by a reasonable doubt when the defense has had its say. Such inept phrasing should be zealously guarded against, unless accompanied by some instruction that directs a consideration of all the evidence.

5499 "Reversed and remanded for new trial in conformity herewith."

The next instruction that I wish to call the Court's attention to is the one which appears at page 5361 that talks about the violation which was involved in this case of the OPA laws and I think that the instruction as a whole, while

it has a good opening and a good closing paragraph, has a middle paragraph which would permit the jury to consider the violation of the OPA laws might be considered to show intent to violate the income tax laws.

By the Court: Did you take an exception to that?

By Mr. Kirby: At page 5395 we were referring to the tying of the knowledge of the failure of the books to record payments. That is the closest, I think, we come to that because you see, your Honor, discussing the failure to record the payments as being connected with an attempt to avoid liability in connection with the OPA laws—the part on page 5361 to which we particularly direct our attention is this: After an opening paragraph about the violation of the OPA law, you say:

"The fact that the OPA laws were admittedly vio-
5500 lated may be considered by you insofar as such cir-
cumstances may throw light upon the conduct of the parties, the failure to keep adequate books and records of the overpayments, and to explain or throw light upon their conduct in handling these transactions, and with reference to the question of intent or lack of intent to wilfully violate the tax laws."

And then the next paragraph is good:

"The fact, if it be a fact, that the defendants, or some of them, committed offenses against the price control laws of the United States creates no presumption that such defendant or defendants committed the offenses here charged against him or them."

The preceding paragraph was good:

"These defendants are not charged with the violation of any OPA law, and an intent to violate the tax laws cannot be proven simply because there was an intent to violate the OPA law, or any other federal law."

But, between the two paragraphs, your Honor, the two paragraphs that do say it is conclusive and it
5501 is not a presumption, is the paragraph to which we except and that is, to just summarize it, you say: "The fact that the OPA laws were admittedly violated may be considered by you . . ." And I will skip some language.

". . . and with reference to the question of that intent or lack of intent to wilfully violate the tax laws."

Now in the Montgomery case, Montgomery *v.* United States, 203 F. 2d 887 which was an income tax prosecu-

tion under 145-B, the Court speaks of the difficulty faced by the Court when mention of another federal violation or a state violation comes up in a trial, and the Court says in that case which involved payment of a graft to the sheriff:

"We think, however, that the jury should have been cautioned that the evidence was admitted only to the light that it might throw on the federal offenses on trial, and that no inference of guilt could be drawn merely from the commission of other offenses different in character. In short, the jury should not convict the defendant of
5502 income tax evasion because they concluded that he was a grafter."

The Lurding case we have already referred to is another income tax case. It talks about the running of a gambling establishment, which, of course, was in violation of the laws and there wasn't an instruction in there which spoke of that and then said that although they weren't being tried for that—just as your Honor has said here—this language appears:

"You may consider that fact along with the other testimony."

And then the Court says:

"It is true that it was immediately pointed out that operating the handbook is not the offense for which the defendant is being tried, though by this caution itself the operation of the handbook was placed upon the defendant ... It is established law, for which citation seems unnecessary, that no inference of guilt may be drawn from the commission of other offenses different in character from that with which the defendant is charged, unless by course of conduct or similarity of technique it tends to establish guilt of the crime charged. Running a gambling establishment, tolerated by community opinion even though
5503 prohibited by local law, is a far cry from violating federal law in respect to taxes. The jury should not have been permitted to consider the handbook operation for any purpose other than as a source of income."

The next instruction I wish to refer to is the question about the money paid out by Shotwell and in the exception that I took at page 5398 I say this:

"With respect to the question—and I only have a couple more—about the overages, whether they did or didn't belong to the corporation, or whether they did or didn't get

paid, for example, to the individuals, your Honor, I thought was speaking of what the contention of the defendants on it was, when actually the real test, as I concede it, is: Did the Government prove the receipt of the income by Shotwell Corporation and if their evidence, taken as given from the stand, was weak on that issue, as taken by the statement of the contention of the defendants—"

And then the Court said:

5504 "I gave the instruction pertaining to it verbatim."

And I said:

"That is true, but I am talking now about your summary."

That is, not the abstract of instruction, but the summary, and the Court said, "That is the only instruction that was submitted to me upon the question." And I said, "Your Honor goes further than the instruction. You are making summaries of the evidence."

And your Honor said, "Let's not argue that." And I said, "I am excepting to that."

Now, let me get to that question, about the overages and the discussion of it in your Honor's summary and what the proof was about it. My point 26 is the one which particularly refers to that in the motion for a new trial. At page 5354 I will read what your Honor said about that money being paid out. I think, your Honor, that I should say that the burden of proof on that issue, which was the key issue, is rather convincingly placed upon the defendants by the Court. Now at page 5354:

5505 "Well, whatever the amount of the overages may have been which were paid to Shotwell, what disposition was made of such receipts by Shotwell? Were they all paid out for raw corn during the latter part of 1945 and up to about July 1, 1946, as the defendants contend? If that is true, then there was no additional tax due the United States over that which Shotwell paid . . ."

And at page 5356 your Honor says this:

"You may consider, members of the jury, all direct and circumstantial evidence which may bear upon that question and determine in light of all the evidence whether or not any overceiling premiums which Shotwell received were used for the procurement of corn to obtain corn syrup, and other products, during the years in question, and if so, to

what extent. If Shotwell received more in overages than it paid out for raw materials in 1945 and 1946, what about the balance? Where did it go? What light does that throw, if any, upon the intent of the parties with reference to the charge made in this indictment?"

5506 Much later, some thirty pages later, at page 5386, which is your Honor's final, concluding summation, I think, of what you considered to be the controlling issues, you say this:

"... I am anxious that you be not misled or confused by collateral issues or matters which are of no particular materiality or help in determining the real issues of this lawsuit."

Your Honor, before I finish reading that, I am going to read the cases that state my point and then you can better see whether your charge fits them. I think that would be a little more sensible. In Boatright *v.* United States, an Eighth Circuit case in 1939, 105 F. 2d 737, that was a mail fraud case. The Court said that if a judge undertakes to sum up the evidence, he must do so with great care. Then the Court, the trial court had given this charge to the jury:

"On the other hand if you should find or believe from the evidence in this case that these defendants did not devise an artifice or scheme to defraud; that they did not make false and fraudulent representations or promises; that if such were made, there was no intention on their part

5507 to defraud, and no intention on their part to obtain money or property by means of the representations made, then it would be your duty to find either one or both of them not guilty, according to what you believe, or either one of them, according to what you believe, if they were without fraudulent intent."

As to the instruction, the Court of Appeals said it required a new trial, saying:

"The defendants complained that this shifted to them the burden of proving their innocence. It was, of course, incumbent upon the Government to prove every essential element of the offense charged. Unless the Government thus established the guilt of the defendants beyond a reasonable doubt, they were entitled to an acquittal. But this instruction placed upon the defendants the burden of convincing the jury that they did not devise a scheme, that they did

not make false representations, that they did not intend to
defraud, that they did not intend to obtain money by
5508 false pretenses. The instruction we think was erron-
eous."

In an income tax case under Section 145(b), Nicola *v.* United States, 72 F. 2d 780, there were instructions given, one of them being what is called the 4th contention instruction with respect to when commissions were earned on the sale of certain printing, and the Court said this, that the time when the allotment had to be made effective, the allotment of the earnings, was very important in the case and the Court said this at page 788:

"Before the jury could find the defendant guilty, the Government had to establish beyond a reasonable doubt that the defendant had not made the allotment when the negotiations for the sale actually began. The defendant did not have to prove himself innocent by showing that he had made the allotment. He could stand mute until the Government had established his failure thus to make the allotment beyond a reasonable doubt. But the effect of the
charge was that unless he had firmly established that
5509 he had made the allotment to the Point Company at
some one of the towns mentioned, the jury could find that he had not made it and so was guilty. This placed upon him a burden which the law does not compel him to bear and was not cured by the instruction in the beginning of the charge that the defendant was presumed to be innocent until proved to be guilty beyond a reasonable doubt.

The Court also said in that case that:

"Where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, it is impossible to tell which one the jury followed and constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one unless the former is withdrawn."

There is a recent case decided this spring by the Fifth Circuit, Price *v.* U. S., 200 F. 2d 652. It was a case where an important question in the defense was the question of whether a certain lawyer had actually been empowered to
act as an agent and the Court charged the jury:
5510 "If you find and believe from the evidence beyond a
reasonable doubt that counsel, George T. Wilson, was

empowered and authorized to act as agent for the purchaser of these stocks, the defendant would be entitled to an acquittal."

As to this, the Court said at page 655:

"If the defendant did not know or have reason to believe that the mails would be used in the transaction, then the fact, if it be a fact, that the attorney who actually mailed the letters represented the purchasers would be a complete defense, where in that event the defendant would not be guilty of causing the securities to be carried through the mails. Admittedly, the parts quoted and that we have referred to as appellant's 4th contention was erroneous in placing the burden on the defendant to prove beyond a reasonable doubt that the lawyer was authorized to act as agent for the purchaser. The burden was, of course, on the prosecution to establish the guilt of the defendant beyond a reasonable doubt... The Government argues that the erroneous charge was cured by other parts of the
5511 Court's charge. We cannot speculate as to which part would be accepted by the jury, nor can we say with fair assurance that the jury's verdict would not have been different had the burden of proof on this question not been misplaced (Citing cases). For the error in so charging the jury, the judgment is reversed and the cause remanded for a new trial."

Now then, in the light of those cases, your Honor, let me read the part which, at the end of the case, you said was the controlling part, starting from 5386:

"... I am anxious that you be not misled or confused by collateral issues or matters which are of no particular materiality or help in determining the real issues of this lawsuit. Although this case has taken a long time to try and there is a mass of evidence for you to consider, the controlling issues are not complicated. Ask yourselves what in the light of the evidence was the amount of the overages which were paid by Lubben and his companies to the
5512 Shotwell Company and received by that company as income during 1945 and 1946? Did such payments constitute income to the Shotwell Company in the light of these instructions? What amount of overages which were paid to the Shotwell Company and which constituted income to that company, were paid by Shotwell for raw corn during 1945 and 1946? If all the overages received from Lubben

and his companies by Shotwell were paid out for raw corn by Shotwell during 1945 and 1946, that ends this case and you should return a verdict for each of the defendants of not guilty, because the transaction would result in no taxable income to the Shotwell Company.

"On the other hand, if all the overages paid by Lubben and his companies to Shotwell, and which constituted income to Shotwell within the meaning of these instructions, were not paid out by Shotwell during 1945 and 1946 for raw corn and there remained from these transactions income to the Shotwell Company during those years in
5513 a substantial amount which resulted in a substantial taxable income due the United States which was not reported in the 1945 and 1946 tax returns, or either of them, and if it appears from the evidence beyond a reasonable doubt that any defendant wilfully, knowingly and intentionally attempted to evade or defeat such tax for 1945 or 1946, or both, by filing or causing to be filed a false and fraudulent tax return, then as to such defendant and for such year or years you should find such defendant guilty."

I respecfully submit to the Court, that last, in substance, the quotation of the statute is correct, but your Honor, having in mind the great weight that is correctly and necessarily attached to these instructions, when you state you are going to summarize the controlling issues and then you say that if the defendants have paid out that money then they go free, I think it comes within the condemnation of those cases which I have read.

If the Court will bear with me, on the placing of the
5514 burden upon the defense, relating to an instruction at Transcript 5348—this next point relates to the aiding and abetting statute. I don't find an exception to it in the charge. We had discussed it when we were talking about the instructions but it is not in the last exceptions, your Honor. It relates to the statutes which your Honor read, you see. Your Honor at page 5347 and 5348 referred to three statutes that would bear on the guilt of these defendants.

Now, the first one that you referred to, your Honor, appears on page 5347 and you say:

"The indictment is brought under this statute:

'Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who wilfully fails to collect, or truthfully account for and pay over such tax * * *,'"

And then you go on and you say:

"And then comes the portion which pertains to the charge made here:

'* * * and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this
5515 chapter, or the payment thereof, shall * * *' a violation of law."

And then you refer to the term "person" and then you say at Transcript 5348:

"And then there is another section of the law which you may consider, which provides as follows:

'Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal;' and:

'Whoever causes an act to be done which is directly performed by him would be an offense against the United States, is also a principal and punishable as such.'"

Now, your Honor, you first cited the statute on page 5347 which is a misdemeanor statute. It is not a felony statute. If the jury found them guilty under that, there could not be a conviction of a felony. That is Section 145(a), your Honor; not 145(b) at all. And then the final statute your Honor refers to, the aiding and abetting statute, I do believe there is an aiding and abetting statute which relates to income tax, but that is not it. So that, the statutory
5516 references which were made for the guidance of the jury, I humbly point out to the Court, are in error in two out of three instances.

I now want to address myself to the instructions—yes, the instruction as to trade deals. The exception was taken in this language, after the charge at page 5396, and I said this:

"Now, another point is that in the summary you made of the defendants' case, there was an entire omission of any evidence, or any contention of the defense as to how these deals did start in that early period with Lubben, not any mention, for instance, that the shipments of candy were explained by the defense of having been occasioned by trade deals, as indeed Lubben said the first shipments were, so that we come up—

"By the Court: May I suggest that you make it short because you can protect your record by not arguing. Otherwise, we will be here—"

And then I went on to another point.

5517 The instructions with respect to the trade deals, if the Court please, we seek to criticize them, because I believe that the Court erred when it summarized the Government's contention and when it summarized the defendants' contention in leaving out all reference to the start of these transactions as having been occasioned innocently by trade deals, although such trade deals were unquestioned, at least in the beginning, and were important then and the trade deals were most crucial as to the time of when any cash payments actually did start. Your Honor gave instructions with respect to the Government's contention as to how this started out, at page 5322, and you said:

"The Government contends that Lubben was a jobber doing business with Shotwell late in 1943, or early in 1944, and that when Lubben purchased the Eatsum Food Products Company from the Burry Biscuit Company early in 1944, or thereabouts, the Government contends that Lubben requested Frank J. Huebner of the Shotwell Company for an increase in the quota of the candy alloted to him by that company, and that later in 1944, an arrangement was

5518 made through Huebner, whereby Shotwell would increase Lubben's quota if a cash premium or overage would be paid by Lubben for merchandise shipped to him by Shotwell."

Then it summarized the defendant's position at page 5336 where you said:

"It is the defendants' position that these cash payments, or cash overages paid by Lubben, and his companies, first commenced on or about September or October, 1945;"

And then you referred to the corn situation, and so on, and then:

"This situation," you said, "according to the defendants, in order to keep their factory from closing down, because of the lack of raw materials, induced them to arrange with Lubben a plan for cash overpayments for candy sold, and to use the cash overages for the purchase of raw corn . . ."

and so on.

At page 5353 you stress the matter and you say:

5519 "The truth as to when the overages began, their duration, and their amount is a matter, and an impor-

tant matter, which you will have to determine from all the evidence introduced."

And on the preceding page you had said this:

"It would be important for you to determine when the overages began, because defendants contend that there were no overages paid, except during the period of the corn shortage, which was from September-October, 1945, to about July 1, 1946, while the Government contends that these payments which were made by Lubben had no relation to the so-called corn shortage, but were paid to Shotwell months before there was any critical shortage of corn syrup."

Now, your Honor did refer to trade deals. Their importance in the case, as we believe them to be, is in connection with how this stuff started.

By the Court: What did you say?

By Mr. Kirby: Sir?

By the Court: What things started?

5520 By Mr. Kirby: How any transactions with Lubben started. You see, as your Honor says, the time when the overages began to be paid in cash was a crucial period. Now, there is a lot of proof, so far as the defense is concerned, that the early deals with Lubben were trade deals. Indeed, that proof would bring the trade deals down until the period of the corn shortage. Having in mind that that was what the defendants', their proof, would substantiate, now let me read what the Court did say about trade deals. I mean, this is the only reference I am aware of—

By the Court: Wasn't that the only requested instruction that I received with respect to trade deals?

By Mr. Kirby: Well, this is not an instruction that we tendered, the one I now read to you. However, I feel your Honor, that we did not tender any summation for you to give. The summation is not ours to submit. The question whether the summation is or is not correct, is not added, but whether we did or didn't give it to you. This is what your Honor said at 5373:

"There has been some reference to trade deals. Well,
5521 if you find from the evidence that there were trade deals by which the corporate defendant sold some of its merchandise at ceiling in return for the sale to it by the customer, or some third party, of raw materials, at ceiling prices, you are instructed that no income to the corporation resulted therefrom."

Now, let me just for a second refer to certain instances in the record where the trade deals assumed much more importance than that. First of all, at Transcript 421—

By the Court: Was there any exception taken to the Court's failure to go further into the analysis of trade deals?

By Mr. Kirby: Yes, and I read that at the beginning of this point here.

By the Court: What page was that again?

By Mr. Kirby: At 5396 where I say:

"Now, another point is that in the summary you made of the defendants' case, there was an entire omission of any evidence, or any contention of the defense as to how these deals did start in that early period with Lubben, not
5522 any mention, for instance, that the shipments of candy were explained by the defense as having been occasioned by trade deals, as indeed Lubben said the first shipments were, so that we come up—"

And then I proceeded, on the Court's instruction, into further points. Now, your Honor, here were the points which could have been mentioned and I think quite properly belonged in. Lubben at 421 of the transcript explained that the first deal with Huebner to get more chocolate or candy of any kind was as a result of a trade deal. Lubben at transcript page 1172 again was discussing the early deals and this question and answer series appears:

"Q. And nothing was paid to Shotwell for that candy other than the regular invoice price?

"A. That is correct, sir.

"Q. So Shotwell got the candy and—or Shotwell got the chocolate and you were able to sell the candy, and that was a perfectly legitimate transaction, is that right?

"A. I was made the Shotwell broker in the New York territory, New York City.

5523 "Q. But that transaction did not involve overage?

"A. No, sir; it did not."

Another question of the overage, particularly with respect to the defense, was early in 1945 when there was some 60 tons of chocolate candy and 55 tons of chocolate, as the defense contended, involved in a trade deal. This question was asked of Lubben on cross:

"Q. Did you, as a matter of fact, meet with Mr. Cain and Mr. Huebner in Boston in early 1945 so that you might

introduce them to Mr. August Nelson of the United Chocolate Refiners?"

And he said he did. I don't contend that Lubben admitted that he did not give money for that chocolate deal. Indeed he says that he paid money, but it did support the defense in the contention that that was what was going on in early 1945 and it is quite important to Sullivan, if the Court please, that there is understandable and explainable proof in the record of how these transactions were going on, exclusive of cash, during the early period. Now, there is Hogan's testimony at 3212. There is Cain's testimony.
5524 There is Bond's testimony at Transcript 3331, and Cramer's testimony at 3362, all of which relate to the trade deals.

Now then, I want to get to my final points with respect to the instructions and they all relate particularly to the failure to distinguish and define the proof as to Sullivan alone. At the conclusion of our having heard the Court's charge to the jury, we retired to chambers and I there made this objection at page 5395:

"But I think when the Court undertakes to summarize the evidence as the Court did, and states evidence as if it was equally applicable to Sullivan, which is not applicable to Sullivan, under the Court's own ruling, that that gives the jury the idea that they may consider it against him, and it is not cured by your later instruction; because certainly they don't think you are going to call to their attention evidence which they shouldn't consider against Sullivan."

5525 Now, let me refer to some of the type of evidence which your Honor had said should not be considered against Sullivan. I will read from the transcript at page 491, Mr. Lubben's direct examination:

"Q. You say it was in New York City?

"A. Yes.

"Q. When?

"A. January 19, 1945.

"Q. And who was there?

"A. Mr. Huebner.

"Q. And what happened?

"By Mr. Kirby: If your Honor please, the defendant Harold Sullivan, not having been there, there is no way he

can meet this type of proof, and I ask that you instruct the jury that it must be disregarded so far as the defendant, Harold Sullivan, is concerned.

"By the Court: I will instruct the jury that it is only binding upon the defendant Huebner in that he was the only defendant alleged to be there, and what took place is only binding—or relevant, rather, I should say, to the
5526 defendant—competent as to the defendant Huebner.

"By Mr. Kirby: That's right. I'm glad to have the Court's instruction, because I don't want the jury to think there is anything improper in making that type of objection.

"By the Court: It is perfectly proper for you to make that type of objection.

"By Mr. Kirby: Thank you, your Honor."

And then he goes on and he says that it took place at the Pennsylvania Hotel in early 1945 and then he starts out to tell of a conversation about the payment of the money and dividing of it in piles and then I say, at page 494:

"By Mr. Kirby: May that conversation, in view of its having been in the absence of the defendants Cain and Sullivan, be—"

And then the Court said:

"If Mr. Huebner was there alone that conversation is competent only as to him."

Now, I just read that, your Honor, because that same thing happened throughout the trial. There were instances, of course, when the objection was not made because the one time that it had been made plain that objections
5527 didn't have to be made all the time. There wasn't any misunderstanding so far as Court and Counsel were concerned, as to the limitations which we were seeking to maintain. Now, let me just read to the Court—this is the instruction, the abstract instruction, if I may say, which your Honor gave at Transcript 5366. Well, if I did that, I would be reading it out of order. Let me read it in the order in which it actually took place and that will be more accurate. At Transcript 5325 and thereafter through a series of references that I am going to read to the Court, you summarized the evidence in the case with no distinction whatever that the evidence, or that most of the evidence which we were referring to could not be considered as to

the defendant Sullivan at all, and at 5325 this is what you said:

"The Government contends that substantial cash payments were made to Huebner for the Shotwell Company by Lubben throughout the first six months of 1945. Usually the cash payments, according to the Government, were made by Lubben to Huebner, either in Chicago or New
5328 York. And it is contended that when the payments were made to Huebner he generally followed the practice of counting the money and checking the amount with a record that he kept and the cash would be divided into three piles by Huebner, with the statement on the part of Huebner that one pile was for Byron, referring to the defendant Cain, one was for Harold, referring to the defendant Sullivan, and the third was for him, and that Huebner would skim off some of the money from each pile stating that this was for the horses, or words to that effect.

"The Government contends that during the proprietorship of Eatsum by Lubben in 1945, $105,473.86 of overceiling payments was paid to Shotwell on candy sold by Shotwell to Eatsum, and that all of such payments were made in cash."

And then at Transcript 5328 I might say—well, I will go along:

"After General Confections was organized by Lubben in March, 1946, the Government contends that that con-
5329 cern continued the overceiling payments upon merchandise sold by Shotwell, by making payments to the Shotwell Company substantially in the same manner as had been done during the proprietorship, and the partnership of Eatsum Food Products Company, except, as I remember, that no notations of the overages were made on the invoices.

"Now the Government contends, members of the jury, that most of the payments made by General Confections were made to the defendant, Huebner, either in New York or at the Shotwell factory in Chicago. Some of the payments, according to the Government, were made by one James Moran, a brother-in-law of Huebner—of Lubben, and one William Heitmann, the factory superintendent, or assistant factory superintendent for General Confections."

And then you go on and you talk about the Krasne item, for example, the Krasne jewelry item, and you total up the

payments in general—having in mind, if the Court please,
that you are now summarizing what they can consider
5530 without it being limited in any way as to the defendant
Sullivan. And after that, your Honor, you come then
to Transcript 5333:

"It is the position of the Government, as the Court understands it, that from the various records of Eatsum and General Confections introduced in evidence, and the oral testimony as the payment of overages, it has established beyond a reasonable doubt that there was a substantial amount of taxes due the United States from the Shotwell Company for each of the years 1945 and 1946, over and above that which was reported and paid by the company, and that each individual defendant, including Shotwell Company, wilfully and intentionally attempted to evade or defeat such tax in payment thereof, by filing or aiding, assisting, or causing to be filed false and fraudulent returns for such years."

But, let me read, in summary fashion, what that instruction could be taken to mean—that by some of the oral testimony as to the payment of overages and the records,
5531 it has been established beyond a reasonable doubt that
each individual defendant committed the crime and
the great bulk of that was not admitted against Sullivan
at all.

At Transcript 5356, the Court was quite explicit and you said this:

"You may consider, members of the jury, all direct and circumstantial evidence which may bear upon that question and determine in light of all the evidence whether or not any overceiling premiums which Shotwell received were used for the procurement of corn to obtain corn syrup, and other products, during the years in question, and if so, to what extent. If Shotwell received more in overages than it paid out for raw materials in 1945 and 1946, what about the balance? Where did it go? What light does that throw, if any, upon the intent of the parties with reference to the charge made in this indictment?"

At Transcript 5358 you say:

"Any cash payments by way of overages made by
5532 Eatsum, Reserve Trading Company, General Confec-
tions, may be considered in support of the Govern-

ment's case only if such constituted taxable income to the Shotwell Manufacturing Company. But payments to a corporation, and received by it, for goods sold by it on the so-called black market, do constitute revenue for tax purposes."

At Transcript 5359 you say:

"Well, continuing, members of the jury, from where I left off when we took our recess, in determining the issues of this case you have a right to take into consideration the manner in which such transactions involving overages were entered on the books of the Lubben companies insofar as they were entered and you have a right to take into consideration any records kept by Shotwell and also the testimony regarding the suggested division of the overages which were made, together with all other facts and circumstances which may throw any light as to whether or not these overages constituted income to Shotwell."

5533 Now Your Honor—

By the Court: Of course, that last statement, as to whether or not the payments constituted income to Shotwell, the testimony with regard to the suggested division of the overages, that was one of the matters which you called my attention to. If the payments were made, that would be income to Shotwell, of course, and the testimony of Huebner as to what was done with the money was a pertinent factor in order to determine whether or not the money did constitute income to Shotwell, isn't that right?

By Mr. Kirby: Your Honor, I don't concede that when you admit that testimony with reference to Huebner it brings it in. But in these instructions and perhaps in the argument this morning, you were saying it may be considered, if you will forgive me. I just don't think it can be considered for any purpose, and in your instruction—I was under the impression it was not going to be received.

The Court: I merely call your attention to it. I am not carrying out your line of thought. I thought I should call your attention to the language with reference to the suggested division of these overages which was used there,

5534 insofar as the question as to whether or not this money constituted income to Shotwell.

By Mr. Kirby: I appreciate the contention you make on this, of whose income tax are we trying, yes. Now, if the Court will forgive me, in the instructions which I have just

read to you in connection with this point, there are, it seems to me, seventeen different points on which a proper objection may be made that those things are not in evidence against Sullivan at all. But, you are treating them and you are given more credence and you are given more confidence and you are given more attention properly so than anybody else when you make your summary.

Now then, after that had occurred, we then come to page 5366 and you give an instruction in the abstract.

By the Court: 56 or 66?

By Mr. Kirby: 66. That is some forty pages after the other material started. You say this and this is a good instruction:

"Any statement or act of any of the defendants not in the presence of another defendant is not binding upon the absent defendants, even though one or more of the
5535 defendants were mentioned in the conversation, nor are such matters competent evidence against any other defendants not present. I have limited, you will observe, certain evidence during the trial, from time to time, as being competent only as to certain defendant or defendants, that is, by way of example, what Mr. Hubner or Mr. Cain may have said or done in the absence of Mr. Sullivan, would not be binding or competent as to Mr. Sullivan. Likewise, what Mr. Huebner may have said or done in the presence of Cain would not be binding on Cain, and what Mr. Cain may have said in the absence of Huebner would not be binding on Huebner."

I think I must have misread that latter part.

"And what Mr. Cain may have said in the absence of Huebner would not be binding on Huebner."

By the Court: I think the stenographer inadvertently omitted the word "not." Likewise what Mr. Huebner may have said or done not in the presence of Cain.

By Mr. Kirby: Yes.

5536 By the Court: My own record indicates the word "not" and I think that is an inadvertent omission.

By Mr. Kirby: I mention that the instruction which you gave at that point was correct. Now then, I submit, however, that a correct abstract instruction is not effective to overcome the damage which is done by a specific instruction which might be in error and I think that is doubly true where it is in the summary which an experienced judge

gives to the jury of what they should consider. Now, they were told throughout all of that which I have read to you things that they could consider to determine the guilt or innocence of the defendant. And those things were not in evidence and they will follow you, your Honor.

Now, the Supreme Court in Lutwak *v.* United States, 344 U.S. 604, spoke of the great care that it is necessary to have where there is evidence which is admissible for certain of the defendants but not as to others and they say at page 618:

"The Court must be careful at the time of the admission and by its instructions to make it clear that the evi-
5537 dence is limited as against the declarant only."

And then it says a little later on:

"In the trial of a criminal case for conspiracy, it is inevitable that there shall be, as there was in this case, evidence as to declarations that is admissible as against all of the alleged conspirators; there are also other declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declaration. These declarations must be carefully and clearly limited by the Court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances with specific purpose."

5538 A Supreme Court case, Krulewitch *v.* United States 336 U.S. 440, has this language in the opinion of Mr. Justice Jackson at 453:

"As a practical matter, the accused often is confronted with a hodge-podge of acts and statements by others which he may never have authorized or intended or even known about, but which helped to persuade the jury of existence of the conspiracy itself . . . The naive assumption that prejudicial effects can be overcome by instructions to the jury (citing cases) all practicing lawyers know to be unmitigated fiction."

That case and that language is particularly cited, but in the Seventh Circuit Court of Appeals in a case of this year, United States *v.* Konovsky, 202 F. 2d 271, in MacFarland

v. The United States, the Circuit Court of Appeals, the District of Columbia, 174 F. 2d 538, the Court said at page 539:

"In a charge to a jury, considered in its entirety, correctly states the law, the incorrectness of one paragraph, or one phrase standing alone ordinarily does not constitute reversible error; but it is otherwise if two instructions
5539 are in direct conflict and one is clearly prejudicial, where the jury might have followed the erroneous instruction. (Citing cases) A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

In the case of Price *v.* United States, 200 F. 2d 652, the Government argues—this is a quotation.

"The Government argues that the erroneous charge was cured by other parts of the Court's charge. We cannot speculate as to which part would be accepted by the jury, nor can we say with fair assurance that the jury's verdict would not have been different had the burden of proof on this question not been misplaced."

In Drossos *v.* United States, an Eighth Circuit case in 1924, 2nd F. 2nd 538, the Court said that other general instructions did not cure it, saying:

"But that is not the rule where two instructions are
5540 directly in conflict and one of them clearly erroneous and prejudicial, such as is presented here, for the jury will assume that the instructions are all correct and will as likely follow the incorrect as the correct instruction."

And the case was reversed for a new trial.

The point which I have just addressed myself to, your Honor, was general. I now want to come to the circumstantial evidence instructions which you gave. It is part of the same point, namely, that you did not distinguish and define the proof as to Sullivan alone. At Transcript 5349—or let me say this: The Court's instructions with respect to circumstantial evidence, and circumstantial evidence is of immense importance to the Sullivan case—its instructions I believe were in error because those instructions would allow the jury to believe that they might consider acts, declarations or circumstances that relate to others. They might consider them against Sullivan even though they were not admissible as to Sullivan.

By the Court: Didn't I grant your request as to circumstantial evidence almost verbatim?

5541 By Mr. Kirby: Yes, you did when you gave the abstract charges.

By the Court: Well, that was the only request I was given.

By Mr. Kirby: Well, your Honor, you gave general instructions and I did except to this.

By the Court: You are talking about circumstantial evidence?

By Mr. Kirby: Yes.

By the Court: I say, the only request of circumstantial evidence that was given by me that I recollect was substantially verbatim as you requested.

By Mr. Kirby: Well, the instruction I gave you was circumstantial evidence must exclude every other hypothesis but that of innocence and that you gave, and that I am sure no one need question.

By the Court: It is about as strong as the English language could make it.

By Mr. Kirby: Now, I want to read to the Court something which is just about as strong as the English language could make it which I did not request and which tells the jury that they can consider against him matters which are not in the evidence against him, defendant Sullivan.

5542 Now, let me refer to Transcript 5349 and you say this:

"Now, intent is a state of mind and it is not possible to look into a man's mind to see what goes on. The only way you have of arriving at the intent of any defendant in this case is to take into consideration all the facts and circumstances shown by the testimony and exhibits which have been received in evidence herein."

And at transcript page 5350:

"Direct proof of wilfull intent is not necessary. It may be inferred from the acts of the defendants and such inferences may arise from a combination of acts, although each act by itself may seem unimportant. It is a question of fact, members of the jury, to be determined from all of the evidence."

And then at transcript page 5377 you said:

"Now, there are two classes of evidence recognized and admitted in a court of justice, upon either of which juries

may lawfully find an accused guilty of crime. One is
5543 direct evidence and the other is circumstantial evidence. Circumstantial evidence may consist of any acts, declarations or circumstances admitted in evidence, or the reasonable and convincing inferences to be drawn therefrom as to any defendant tending to prove the crime charged or tending to connect such defendant with the commission of the offense charged.

"The Government has offered both direct and circumstantial evidence..."

Let me just call your attention to just one little bit of evidence which was not admitted against Sullivan but which under those instructions is one of the types which they might consider against him and which would be terribly harmful.

At transcript page 443 Lubben was testifying and he said this:

"A. Mr. Huebner told me that his partners, Mr. Cain and Mr. Sullivan, were always looking for more money, a lot of cash.

He says, 'If you can keep the cash coming, I can give you a lot of merchandise.'

5544 "By Mr. Kirby: I object to that, if your Honor please. It is not binding on the defendant Sullivan.

"By the Court: All right. That was understood. But it is only binding on defendant Huebner and not binding on defendant Sullivan."

That was a particularly vicious fact, if one might call it such, in the evidence that Sullivan was one of those who was hungry for money and who was always demanding it and having in mind that there was one, and there were many others in which your Honor's ruling was it shouldn't have been considered, let me repeat in the language at page 5377:

"Circumstantial evidence may consist of any acts, declarations or circumstances admitted in evidence, or the reasonable and convincing inferences to be drawn therefrom as to any defendant tending to prove the crime charged or tending to connect such defendant with the commission of the crime charged."

In the brief your Honor has studied, you know full well

the rule of the income tax cases that the intent or any
5545 intent from circumstantial evidence is quite a serious problem in an income tax case because of the strict proof that must be made.

I want to cite one additional case, one that was cited early this year by the Fifth Circuit, Wardlaw *v.* United States, 203 F. 2d 884. There was an instruction there in general language that a person was presumed to intend the natural consequences and effect of the things that he did. In other words, it was intent presumed in that fashion, and as to that, the Court said at page 887:

"We think the exception was good and the giving of this charge was prejudicial error. The intent involved in this offense is not inherent in the act itself, but is a specific intent involving bad purpose and evil motive and that specific intent must be proved by or clearly inferred from the evidence. See authorities footnote 2, supra.

"We find it unnecessary to pass upon the other specifications of error. The judgment of a conviction is reversed and the cause remanded for a new trial."

5546 I mention that case because this question of intent is so critically important and some of the evidence in this case, if it was allowed to be used against Sullivan, would inevitably have a prejudicial effect on him and on that issue, among others, but you can see that the instruction you gave was quite broad. You said they could draw their conclusions from anything in the evidence.

Now, it has been your Honor's custom to take a recess at approximately this hour. I would say I have approximately fifteen minutes more. Would you prefer to take a recess now or shall I continue?

By the Court: Do you want a recess?

By Mr. Kirby: I feel I have been imposing on the Court's patience.

By the Court: Not at all.

By Mr. Kirby: I think it would be better to take a recess.

By the Court: If you want a recess, we will take one. If you don't, we won't.

By Mr. Kirby: Since you put it on my shoulders, we will take a recess. Thank you.

(Recess taken.)

5547 By the Marshal: This Honorable Court will now resume its session.

By Mr. Kirby: The next point, your Honor, relates to the instructions that were given with respect to the Cain disclosure, admissions and documents. At page 5397 after your Honor's charge, I made this exception:

5548 "By Mr. Kirby: Then on the question of the disclosure material, there were four separate occasions that I will just group in one, saying to your Honor that you talked of the disclosure material and the statements and the admissions of Cain as being competent upon the issue of intent when, of course, the admissions and statements and the writings are not admissible on any such issue, as against the defendant Sullivan at all.

"By the Court: Well, of course, you must remember the defendant Sullivan became a part of the so-called disclosure in that he said he recommended a disclosure be made, and, therefore, I assumed you would want to include that generally, because he specifically stated that when he learned of the situation, he was insistent that disclosure be made.

"By Mr. Kirby: That is true, but these documents, like 186, 189-A, and those admissions, made at the disclosure hearing, those are not competent against him at all, but

5549 in your charge were treated as though they were.

"By the Court: Didn't I expressly state to the jury when they were received?

"By Mr. Kirby: Yes.

"By the Court: All right."

Let me refer to the actual proceeding with respect to the Cain testimony at the disclosure hearing and these documents, at transcript 2903, in chambers and out of the presence of the jury where this took place:

"By Mr. Kirby: Are you offering it against the defendant Sullivan or only against the defendant Cain?

"By Mr. Lockley: Well, those are only the defendant Cain's admissions. I would assume it is only admissible against the defendant Cain.

"By Mr. Kirby: Thank you. I am sure it is correct. There may be more limitations but that one certainly exists."

Then at transcript 2923 later, still out of the presence of the jury, we were talking about the same question and the Court said this:

"By the Court: Now, of course, we have the other

5550 question. You have already indicated that it is not offered with reference to the defendant Sullivan."

At transcript 4527 on the cross examination of Cain this took place, Mr. Cain made this answer:

"A. This was prepared as a memoranda for them to use outside of that sheet, that we recorded very carefully all of the income that we were charged with on Lubben's books.

"Q. For what purpose was it to be used?

"By Mr. Kirby: Well, I object on the ground we have certainly gone over that to exhaustion.

"By the Court: Well, the exhibit is not admissible as to your client.

"By Mr. Lockley: Q. Well, was Exhibit 185 used for the purpose of preparing Exhibit 186, if you know?

"A. I don't know.

"By Mr. Kirby: Excuse me, Mr. Lockley. I would assume, your Honor, not only that the exhibit is not admissible against my client but all of the testimony with respect to it is not admissible.

5551 "By the Court: I think that necesarily follows.

"By Mr. Kirby: Thank you, your Honor."

In rebuttal, the government put on Lima and Busby to identify disclosure documents and this took place on direct examination of Mr. Busby at transcript 4986.

"By Mr. Lockley: I offer Government's Exhibits 189-A, B, C, D, and E in evidence.

"By Mr. Kirby: I object, and I ask that the jury be instructed that neither 186 nor this, if it were to be received, would be binding on the defendant Sullivan, or any evidence against him at all.

"By the Court: Yes, it may be so understood, and the record may indicate that 186 was not received as to the defendant Sullivan."

Later, in Busby's direct, this took place at transcript 4998:

"By the Court: It may be received in evidence. And I understand that you make your objection, Mr. Kirby, to its competency as to Mr. Sullivan.

"By Mr. Kirby: Yes.

5552 "By the Court: I will sustain that objection.

"By Mr. Kirby: And will you instruct the jury with respect to that?

"(Said documents were received in evidence by the Court and marked Government's Exhibits 189-A, 189-B, 189-C, 189-D and 189-E.)"

Now, let me read our objection 21 in the motion for a new trial, to be specific:

"The Court erred in its summary of the defendant's position particularly when the Court discussed with the jury the Cain admissions made orally and in writing, such errors consisting not only in the summary itself not stating fully the situation relating to such admissions orally and in writing, but further the jury would assume from the Court's including those matters in general discussion of the position of the defendant that such matters were binding upon or admissible against or could be considered in connection with the defendant Sullivan, although such
matters had expressly not been offered by the govern-
5553 ment with respect to the defendant Sullivan and were
not in any way competent or in the record as against him."

In Point 30 which we make, it reads as follows:

"The Court erred in its instructions with respect to the disclosure and particularly in stating that such evidence (which had not been received with respect to the defendant Sullivan) might be considered as to the intent of the defendants, including Sullivan, to violate the income tax laws."

And then Point 31 says:

"The Court erred in its instructions with respect to the so-called disclosure and its effect, particularly as it might affect the defendant Sullivan."

Having in mind, your Honor, that those were the rulings that were made in the course of the trial and those were the objections made in our motion, let me read what your Honor said at transcript 5342. This is in the course of your advising the jury what the defendants' contentions were.

You say:

5554 "Cain admits that he made certain statements at a
court hearing as to the Shotwell Company's tax statements being false for the years in question, and that the overages paid by Lubben might total some $400,000.00, but it is his position that these alleged admissions and the testimony read from the transcript of the Court hearing must be appraised in light of his understanding of the law in 1948 when the so-called disclosure to the government was made by him and Mr. Busby, the accountant."

And then at page 5361 you say:

"Now, some testimony, members of the jury, has been introduced about a disclosure made by Mr. Cain and Mr. Busby to the revenue authorities, when it was learned from Mr. Busby that Lubben's books upon examination by Mr. Busby, and Graflund, reflected certain over-ceiling payments to Shotwell. It appears that Busby advised Cain as to the necessity of a disclosure to the revenue authorities, because of the failure of the 1945 and 1946 income tax returns to disclose these over-ceiling payments, and their disposition.

5555 "You heard the testimony as to the visits made by Cain and Busby to one Mr. Sauber, who was connected with the Internal Revenue Department, and the statements made by Cain and Busby with respect to the overceiling payments received, and their alleged disposition for raw materials by Shotwell.

"You have heard the testimony regarding Cain's alleged admission as to the falsity or incompleteness of these tax returns, and his explanation as to why, in his opinion, at the time he assumed they were false and inaccurate.

"There has also been received in evidence work sheets and data compiled by Mr. Busby,"—

Those are the exhibits 186 and the 189 series on which, your Honor, the rulings I specifically called to your attention—

"and certain data compiled by Mr. Cain with respect to an alleged tentative compilation of the overages, and . . ."—

That was 186—

"and the disposition of such receipts by Shotwell for 5556 raw materials, and the nature and character of the disposition, which was allegedly made.

"All the testimony should be considered by you, that is, all that testimony should be considered by you in view of the circumstances, and understanding of the parties in so far as it may bear upon any intent of the parties to wilfully violate the income tax laws or their good faith, or lack of good faith in the matter.

"Any admission by Mr. Cain as to taxes due the government at that time from Shotwell must be considered in light of his understanding of the law at that time, that is, that overages paid for raw materials in violation of the OPA law would not be recognized by the tax income authorities at that time as an expense of doing business.

"Now, it is not necessary for you to determine the effect of any so-called disclosure, except in so far as it may throw light upon the conduct of the parties, and the object and
the purposes which they had in mind in doing that
5557 which they did do, during that period, and in so far as
it may throw light upon the intent of the parties and their good faith, or lack of good faith."

In the Seventh Circuit, as recently ruled, in the case of United States *v.* Haupt—I shouldn't say "recently." It was in 1943. 136 F. 2d, 661, as to situations like the one which I have just called, I believe, your Honor's attention to, where admissions could be—where there could be confusion, and you have in mind, your Honor, that what I have read to you about the use of those disclosures and admissions does not in a single instance say they can't be used against Sullivan but quite affirmatively says they can be considered as to all parties, in the plural.

In that case, in 671, the Court says this:

"Defendants urge that they were deprived of a fair and impartial trial as guaranteed by the Constitution. At this point it seems appropriate to emphasize that no principle is more firmly embodied in our system of jurisprudence
than that a person shall not be deprived of life or lib-
5558 erty except upon a fair and impartial ascertainment of
his guilt. Of the many rights guaranteed to the people of this republic, there is none more sacred than that of trial by jury. Such right comprehends a fair determination, free from passion or prejudice, of the issues involved. The right is all-inclusive; it embraces every class and type of person. Those for whom we have contempt or even hatred are equally entitled to its benefit. It will be a sad day for our system of government if the time should come when any person, whoever he may be, is deprived of this fundamental safeguard. No more important responsibility rests upon courts than its preservation unimpaired. How wasted is American blood now being spilled in all parts of the world if we at home are unwilling or unable to accord every person charged with crime a trial in conformity with this constitutional requirement."

Page 672—this, incidentally, was a treason trial with
5559 several defendants. The Court said:

"We shall briefly refer to some of the more compelling grounds upon which we think defendants' conten-

tion must be sustained. As already shown, there were introduced in evidence fourteen statements, the length of which it is difficult to describe."

And then they go on to talk about them and they say:

"As there is no dispute but that such statements, or at any rate most of them, were of a highly incriminating nature, no purpose could be served in relating their contents. They were not only incriminating as to the defendant by whom made, but in the main equally incriminating against other defendants. True, as the government asserts, such statements were offered in evidence only against the defendant by whom made, and the Court instructed the jury accordingly. A reading of these statements, however, leaves no room for doubt but that they were damaging not only as to the defendants against whom offered but as to all 5560 others. We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any court, could perform such a Herculean feat."

Then they say that:

"A study of the record, however, is convincing that it is not sufficient as to one and perhaps to more of the defendants. This is so, even though it is assumed that the incriminating statements were properly admitted.

"We express this opinion in connection with our conviction that the guilt of individual defendants was not determined merely on evidence properly applicable to such defendant. If we indulge in the rather violent assumption that the verdict of guilty as to all defendants was not produced by passion and prejudice, it must have been the result of the inability of the jury to segregate from the mass of evidence introduced that relevant to in- 5561 dividual defendants and properly limit it thereto. Such was the inevitable result, under the circumstances of this case, of a joint trial."

And they reversed, saying in the course of the reversal that the only way the matter, once called to the Court's attention, could safely be handled would be by a severance.

Now, let me just call to the Court's attention and I will refer to it a little bit more later—

By the Court: Do you suppose we could have had some misunderstanding about the time? You said about fifteen minutes.

By Mr. Kirby: Yes. Well, I am afraid I was mistaken because I had forgotten the length of this citation, your Honor. It certainly won't be more than a final fifteen minutes. I will make it less. Yes, I will make it less.

Now, your Honor, in that Seventh Circuit Court of Appeals case they hold that even where the instructions were most careful there, nevertheless it is a violation to that defendant's rights where admissions of others are read to the jury in the case where he alone is involved.

5562 Of course, we have the position here, as I have stated it, that the instructions, I feel, did not properly delimit it to Sullivan.

Now, the Supreme Court of the United States has granted certiorari and has written extensive opinions in three recent cases where the question arises as to the admissibility or the effect upon a jury of statements in the nature of admissions by one defendant. And they have indicated in those three cases that it is the most dangerous kind of a thing for a defendant to meet. They have indicated that it is almost impossible and they have indicated that certainly nothing but the most careful and minute instructions and if any reference to such admissions must be given, that they can't be considered against these other defendants. Those three cases are Blumenthal *v.* United States, 332 U.S. 539, Krulewitch *v.* United States, 336 U.S. 440, and Lutwak, et al, *v.* United States, 344 U.S. 604.

In Blumenthal *v.* United States, that was a prosecution of five for a conspiracy to sell whiskey above OPA price and certain admissions by some of the defendants were put in the record and the Court said at page 551:

5563 "Whether or not the evidence stripped of those facts is sufficient to sustain the charge, a preliminary question arises upon the trial court's disposition of the admissions. They supplied strong confirmatory or supplementing proof to show, not only the connections of Goldsmith and Weiss with the scheme, but also its existant and illegal character. If, therefore, it was shown or even were doubtful that the admissions had been improperly received as against Blumenthal, Feigenbaum and Abel, reversal would be required as to them."

Then at page 559 the Court said:

"The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility nor from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a joint trial."

If you will forgive me, I will state, your Honor, that the instructions which were given there are quite explicit and there were three distinct places at which the Court made either abstractly or distinctly references to those ad-
5564 missions and specifically instructed the jury that they were not to consider them against these other persons and I do not say that is not true of our record here. The Court said:

"The danger rested rather in the risk that the jury, in disregard of the Court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants.

"That danger was real. It is one likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases. Perhaps even at best, the safeguards provided by clear rulings on admissibility, limitations on the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that these safeguards be made as impregnable as possible."

5565 In Krulewitch *v.* United States that I referred to, they say:

"A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

And at page 458:

"Few instruments of injustice can equal that of implied or presumed or constructed crimes... The most odious of all oppressions are those which mask as justice."

In that case, that is the case where the Court said that

the assumption that the jury will disregard it, all practicing lawyers know it to be unmitigated fiction.

In the Lutwak case they say that:

"The Court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only."

In United States *v.* Konovsky, the Seventh Circuit case of this spring, 202 F. 2d 721, the failure to restrict
5566 properly admissions of another was held to require reversible—was held to require a new trial.

Now, your Honor, if the Supreme Court in three recent cases has gone to the extent that it has to warn what impregnable barriers must be created against misunderstanding by juries, then I think that underlines the force of our objection here which is that in so many words the Court said to this jury that—and I will read some of it just for a second here—after referring to the Cain admissions and testimony and documents and the documents of Busby, all of which had been ruled out, in the very next sentence you say:

"All this testimony should be considered by you."

"All the testimony should be considered by you, that is, all that testimony should be considered by you in view of the circumstances, and understanding of the parties in so far as it may bear upon any intent of the parties to wilfully violate the income tax law or their good faith or lack of good faith in the matter.

"Any admission by Mr. Cain . . ." and so on.

5567 Now, your Honor, we come to the last point and that is that I feel it would be proper to grant a new trial to Sullivan for the errors assigned, and also because that is the only way he can fairly be given a trial. That is the only way your Honor can grant him a severance. A severance was requested in this case as soon as the evidence showed the necessity for a severance and granting a new trial is the approved way to grant such a severance.

Your Honor will recall that in the record at 3087 at the conclusion of the government's case I pointed out that you had ruled much of the evidence not binding on Sullivan, and that there was practically nothing in the case at that time against Sullivan and I did say that we wanted to go to the jury and your Honor at page 3090 said in part:

"You certainly have a right"—that is, to rest, "but I know of no way that a severance can be granted at this point of the trial, a severance such as you have outlined to me."

And then I said:

"I see no other way to do it."

At another point your Honor said, at 3089:

5568 "Your motion for a severance isn't timely. If there was any merit to your motion for a severance, it should have been made before we started the trial."

In the Haupt case, 136 F. 2d 661, the Court pointed out that before the evidence was in, a motion for severance had been made and it had been overruled and the Court said that on the evidence then before the Court they couldn't say that that discretion was in error. But the Court did, in view of the evidence after it was in, when it saw how important these admissions and these so-called confessions to this one defendant were, the Court then said, after that proof was in:

"... we are unaware of any procedure which the trial court could have devised, other than a severance, by which these incriminating statements could have been introduced against the defendants making them, without seriously prejudicing the rights of other defendants."

"We think," the Court says at a later page,

"that if these facts had been known to the trial court 5569 at the time the motion for severance was made, it would have been an abuse of discretion for the trial court to have refused a severance. When presented again in the motion for a new trial when all of these facts and circumstances were known to the Court, it was likewise an abuse of discretion to overrule such motion and thus refuse to remedy this prejudicial procedure."

And there is a very long discussion in that case, I might say, of how the damaging effect of these admissions was brought out when the trial was on.

Hale *v.* United States and one more case are the last two I will cite. The Hale case is an Eighth Circuit case in 1928, 25 F. 2d 430. That was a trial of two men for murdering an Indian and the statement of one had been admitted. There had been a motion for a severance but it was overruled. The Court pointed out that an instruction had been given to the

jury that the evidence was not to be considered as against Hale. At page 438, the Court said:

"The Court so stated when it was admitted, and again in its charge; but it is inconceivable that the impression
5570 made upon the minds of the jurors could have been removed by these formal remarks of the Court."

And at page 439:

"The balance of the statement or confession would not be binding upon Hale, and if admitted would leave upon the minds of the jurors a lasting impression to his prejudice. The unavoidable mischief of a joint trial is thus made clear."

The Court finally said:

"Upon the entire record we feel that the application for severance should have been granted, that in any event, the admission of the statement of Ramsey, with its attending circumstances, may have operated to the prejudice of the defendant Hale, and that in the interests of justice a new trial should be granted."

The final case, U. S. *v.* Decker, 51 F. Supp. 20. In that case there had been a denial of an acquittal motion. On a motion for new trial it was called to the Court's attention that statements against the defendants other than this one man had been put into the record and that there wasn't
5571 too much proof about this one man and that the effect of considering those statements as to the others would be clearly prejudicial and so on and the court said that even though there was evidence which would justify the Court in denying a motion for acquittal, still when it appeared from the trial that the evidence which was attributable to this defendant could not or was not by the Court kept clear in its charge, the proper way to remedy that was by a severance granted by a new trial.

Your Honor, I shan't attempt to summarize the matters that we have covered. I want to apologize when I stated to the Court that I had called your attention to the errors in the session in chambers before the jury retired. I was in error as to a couple of them because those occurred in the discussion when we were working on the instructions. However, as to each of these points that I have just now mentioned and particularly this one about the admissions, which I called your attention to the four instances when it was

done. Now, on a motion for a new trial, the discretion of the Court is extremely broad in the sense that the Court can right any situation that needs righting, right then and there. You don't pass upon the guilt or innocence
5572 of the defendant but you determine whether he is to be permitted to have a trial free of the matters complained of in the motion for a new trial.

I think, if the Court please, that I have read to the Court cases from the Courts of Appeal and from the Supreme Court of the United States, and I ask you not to take anything that I say as an individual but I ask you to pay the closest heed to what they have said. It is true, if the Court will bear with me, that in the summary that you made of this case, you inevitably had the rapt attention of the jury. They hung on your every word and were influenced by your every word and I think this argument this morning demonstrates that there were some instances in which they secured advice and guidance, well meaning as it was, from the Court which the Court should not have, in fact, given to them and which should result in the granting of a new trial.

In saying that, I fully concede that the Court's summary was an attempt to aid the jury, but that is what makes it all the more dangerous.

By Mr. Calihan: If the Court please, I do not intend to argue at any great length. I have sent Mr. Crane
5573 upstairs for a volume and I ask the Court's indulgence for a few moments until he returns.

I might state, at the outset, your Honor, that I view the argument of counsel for the defendant Harold E. Sullivan, as falling within two categories:

First, comment is made regarding Lubben's testimony, and second and most important is the discussion at great length of the Court's charge or instructions to the jury.

In so far as the Court's rulings on the trial with reference to Lubben is concerned, the government contends that there is absolutely no error. Counsel stated in the Montgomery case and in the Augustine case some error on the part of the Court in refusing to allow defense counsel to explore other deals. Now, I believe that is a matter of discretion. I don't know how multiple these deals were but if the Court will recall, as to Lubben, he had in excess of $12,000,000.00 in dealings in candy involving numerous parties and explor-

ation of each and every such detail would have made the trial almost a marathon, and I believe that the Court in limiting the extent of the cross examination was indeed very liberal in spite of the limitation that counsel complains of.

5574 I believe that this Court allowed a wide latitude. Mr. Lubben was on the stand six and a half days. It can be scarcely complained that counsel was restricted to any great degree. In any event, in view of the Judge's knowledge of the case of what went on, I believe there was no error in this restriction. As to the Court's instructions, at the outset I would like to recall or bring to the Court's attention his words to the jury at transcript page 5314.

"The Court does not take it upon himself to make any comment upon any disputed issue, or expess any opinion one way or another as to what your verdict should be, because if the Court did that, he would be trespassing, so to speak, upon your right as jurors, for it is your sole responsibility to determine what the facts are, and from the facts as you find them to be, and from the law as given to you by the Court, you are to determine the guilt or innocence of these defendants."

And further on:

"Now, during this charge, the Court will endeavor to summarize for you the respective contentions of the

5575 parties as the Court understands them for the purpose of clarifying the isues of fact which will be submitted to you, but any summarization, or deductions from the evidence which the Court may make, are merely his best recollection and understanding. They are not binding on you, and should not be accepted by you unless they coincide with your own recollection, and understanding of the testimony."

This admonition was repeated. The Court's attention is directed to page 5346 of the charge wherein you state:

"Obviously, I have not attempted to cover any detail of the defendants' testimony, or every contention herein. My only purpose in attempting to summarize the position that the government takes, on the one hand, and the defendants on the other, is to crystalize and clarify, if possible, the fact issues which you will be called upon to determine, and if my summation of defendants' position herein, does not coincide with your understanding of the testimony, or your

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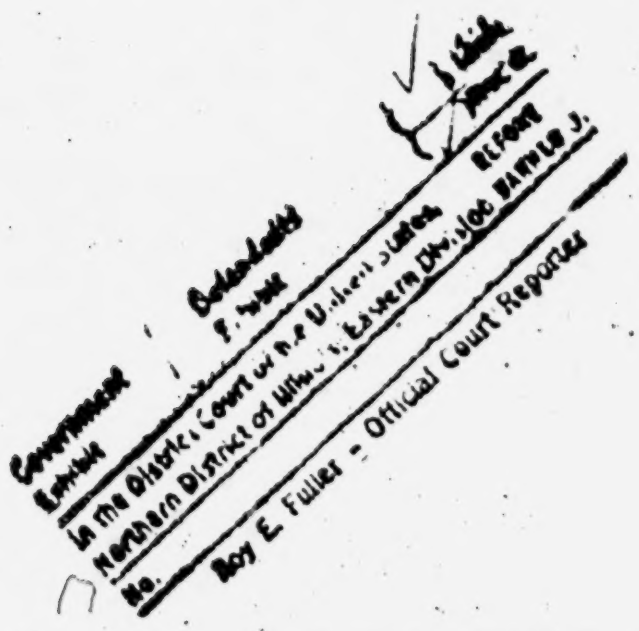

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, HAROLD E. SULLIVAN and FRANK J. HUEBNER, Defendants.	No. 52 CR 143

STATE OF ILLINOIS }
COUNTY OF COOK } ss

BYRON A. CAIN, being first duly sworn, on oath deposes and says that he is one of the defendants in the above-entitled cause, and that he makes this affidavit in support of the defendants' foregoing motion to dismiss.

Affiant further says:

1. During all of the year 1948, and continuously since, affiant was President and Treasurer of The Shotwell Manufacturing Company, a corporation, one of the defendants

deductions from the testimony, then you may disregard
5576 what I have stated and depend entirely upon your own recollection and understanding of the testimony, and the deductions to be drawn from such testimony."

Now, I believe that the charge as a whole is fair. We cannot overlook the fact that the jury here sat for 23 days and listened to evidence. I cannot believe that it can be successfully contended that all of that can be swept away by the remarks of this Court in a period of several hours.

Now, specifically going over some of these points raised by counsel, I note that some objection was made as to a shifting of the burden. I believe that the government proved a prima facie case of the receipt and a failure to report. Now, the comment by the Court as to whether or not the defendants paid it out was something relating to the affirmative proof offered by the defendant. I see no impropriety there.

I further want to call the Court's attention to another point raised by Mr. Kirby that the Court was in error in citing the statute. I have Section 145 here and I state that the testimony or the charge at 5347 which your Honor
read is correct. That introductory portion is from
5577 Section 145(b), as your Honor correctly stated it.

Now, with reference to trade deals, there was no evidence of trade deals involving Shotwell. There was a good deal of conversation about trade deals, but I think there was no testimony offered in this trial regarding any payment of moneys or any such transactions. It is true that Lubben testified that he first became a broker for Shotwell through a chocolate deal but any other reference to such deals had no connection with Shotwell, and I believe that the Court properly treated the subject of trade deals in his argument.

Now, as to the defendant Sullivan, I don't believe that anyone was more diligent in his objections and in his protection of a client's rights than was Mr. Kirby on behalf of the defendant Sullivan. I don't believe an opportunity—and I shouldn't use the word "opportunity"—I don't believe an occasion arose that Mr. Kirby did not protect the record in so far as the defendant Sullivan was concerned and I believe your Honor repeatedly called this matter to

the attention of the jury. I believe that it was adequately covered in the charge.

5578 After a time, in connection with the case involving multiple defendants, it becomes impossible to go to the lengths to which Mr. Kirby would have the Court believe should have been gone into in this cause.

As to the disclosure material, when the Court made reference at page 5397 of the charge, with respect to that matter, I can submit to your Honor that you were referring to what good would have come from the disclosure. Certainly it was not a matter entirely brought out by the government. I believe that the defendant had an interest in bringing forth the fact that in their good faith they sought to disclose the matter here and come forward as good citizens and taxpayers and that there was a benefit to be derived from such a disclosure.

I believe at another point toward the end, Mr. Kirby indicated that motion was made for severance or was asked for as soon as it became evident it was a necessity. I have it noted. I don't know whether that is true or not. I have been interested along here to note that counsel for the

5579 defendant relies greatly upon certain statements made by Arthur B. Cunningham, Special Assistant to the Attorney General. I believe at one point, in application for additional time, your Honor, Mr. Cunningham made the statement that most of the case, if not all, as to the defendant Sullivan, rested upon Mr. Lubben's testimony. I believe at that point it was quite evident that the situation as to Sullivan was of such nature as might require some different handling of it.

Now, the Court will recall when Mr. Kirby argued the Haupt case, 136 F. 2d 661, it was my understanding—correct me if I am wrong, Mr. Kirby—a motion for a severance was made at the close of the government's case.

By Mr. Kirby: In the Haupt case they said that on a motion for a new trial that is the right place to grant the severance and that is what I relied on.

By Mr. Calihan: In that Haupt case the motion for severance was made prior to trial. There was no such timely motion in this case. I submit, in view of that, the Haupt case cannot succesfully be urged in this matter.

Based upon the whole record, your Honor, upon the

5580 charges, we respectfully submit that the defendant Sullivan was given a fair trial; that there was no

undue prejudice which attached to his trial and that, therefore, the motion for a new trial should be denied.

By the Court: Gentlemen, I may say in passing that in so far as the motion for severance was concerned, I think there have been few lawsuits tried in which the defendants weren't so fully apprised of the government's case as in this one. You took the deposition of Davidson and Feldman and Heitmann, Tobias and several others. You had access to all of the evidence that the government was going to offer. There wasn't a single thing of surprise in this lawsuit.

You gentlemen of the defense, and rightfully so, prepared yourselves so that you knew almost to every item the testimony that the government was going to offer. Consequently, when you say the first time that it became apparent that Sullivan should have moved for a severance was at the close of the trial of the defendants' presentation, it seems to me that that can hardly be sustained by the record in this case.

Be that as it may, I merely observe that in passing
5581 because it seems to me, Mr. Kirby, in his long contact with this case, was surely aware of the apparent picture that the government was going to present.

By Mr. Kirby: The things that I think may have hurt us most grievously were these admissions which Mr. Cain made in the disclosure and we then insisted it just shouldn't go in.

By the Court: When you stop to consider that, what admissions did Mr. Cain make? He made the same admissions that he made here at the trial and the same admissions that Mr. Sullivan made, in other words, that they had received ceiling—over-ceiling payments in 1945 and 1946 and in order to enable Shotwell to take advantage of buying raw corn. They assumed in good faith they were not violating the income tax law because all of the moneys they obtained from Lubben were used for the purpose of buying raw materials, one offsetting the other. That is in substance what Cain admitted in his disclosure. Yes, he said he assumed it was fraudulent if it was true, as the government contended, that these payments of raw materials were not proper offsets and to that extent and if that was true, the situation presented a fraudulent return.

5582 His statement with reference to Exhibit 186 et cetera was to the effect that they were merely gotten out in

order to get rid of this matter and Shotwell, regardless of the fact that they denied they owed the government any taxes—but if the government wants to take the position that these payments of raw materials were not deductible, Shotwell was willing to go along and of course reserve their right to make a demand for the return of these taxes, of course, if it appeared later on that the government's position was incorrect.

Most of the matters which Mr. Kirby has referred to here were represented heretofore at various times in the trial, that is, at the close of the government's case, at the close of the defendants' case and on defendant Sullivan's motion for acquittal. I see no reason why I should now make any extended statement regarding my views in this matter at this time.

5583 My view is that the motion for a new trial will be denied and an order to that effect may be entered. I do reserve the right, however, to file a memorandum which will be made a part of my order denying the motion for a new trial in the event I deem it advisable and necessary to file such a memorandum. But I now make the tentative order in denying the motion for a new trial and of course the exception is reserved as to defendant Sullivan.

Now then, this matter with reference to sentence, the defendant Sullivan may come forward.

By Mr. Kirby: Your Honor, I want to make a motion for Harold Sullivan for judgment for acquittal notwithstanding the verdict.

By the Court: Well, I take it the motion may be filed. I have heretofore ruled on the motion for judgment of acquittal and I take it that you are now making this motion in order to be entirely sure that you are proceeding in accordance with the proper procedure, am I not correct?

By Mr. Kirby: Well, it is not a former matter but the grounds I assign are the same as those grounds made

5584 in the motion of defendant Shotwell Manufacturing Company, Byron A. Cain and Frank J. Huebner, which your Honor has heretofore considered.

By the Court: The motion will be denied and exception will be allowed.

By Mr. Kirby: And I make a motion for Harold Sullivan to arrest judgment and this on the grounds set forth in the motion of the defendants Shotwell Manufacturing Com-

pany, Byron A. Cain and Frank J. Huebner to arrest judgment.

By the Court: The motion will be denied and exception will be allowed.

By Mr. Kirby: I now make a motion—now comes the defendant Harold E. Sullivan and moves under Rule 32(c) of the Rules of Criminal Procedure, that a presentence investigation be made and under Rule 32(a) of the sentence procedure, that probation be granted.

By the Court: Well, the matter of presentence investigation is entirely within the discretion of the Court and in view of the fact that the Court has heard the entire testimony in a long, protracted trial and has heard defendant Sullivan's testimony, I don't believe there is a necessity
5585 for a presentence investigation and my motion with reference to probation will be reflected when I impose sentence. My order with reference to probation of sentence will be reflected when I impose sentence.

Mr. Kirby, is there anything you desire to say on behalf of Mr. Sullivan before I pronounce sentence?

By Mr. Kirby: Yes, your Honor. The question whether evidence exists enough to convict—

By the Court: If it is going to be rather lengthy, I don't have any objection, but if Mr. Sullivan wants to, he may sit down.

By Mr. Kirby: He can stand right here.

(Continuing) And the question of whether a new trial should be granted, we have passed. We come to the question of a sentence and the question of what would be fair in a sentence.

I want to call to the Court's attention what must be in his mind. Namely, that there have already been two of three defendants sentenced in this case. I would say to the Court that we have studied, you have, counsel for the
5586 defendants and myself have studied in the briefs already filed the quantum of proof and I think, for myself at least, it is plain that I feel that the quantum of proof is light. Your Honor used the language "paucity of proof" with respect to the defendant Sullivan. I don't mean to imply that your conclusion was less than firm. Indeed, I am sure from the language of your opinion, that it was. But now I would certainly not think there is that equality of proof as to this defendant that would require any equality of sentence.

That is not only true because the proof is fairly fragile as to Harold E. Sullivan, but it is also true because a verdict of conviction is much harder on a lawyer than on anybody else. Any punishment must be measured against the fact that his punishment already has been extreme. I can see no requirement of justice to ignore the quantum of proof and the punishment in effect already involved from the charge and the trial itself. I have confidence that your Honor has carefully thought out those matters, fully thought them out before I even mentioned them for your attention this morning. We get differences about the
5587value of proof and we get differences about the quantum of proof. Those differences are sincerely held but it is true, I submit, that the question of the quantum of proof here, the liability of the proof here is a grievous one as to this defendant, and that is also true as to the questions we have raised in our motion for a new trial this morning.

I have no other statement to make. I certainly feel that in my conduct in this case I have had your Honor's constant attention. I have had your Honor's agreement when you thought I was right. I have had your Honor's disagreement when you thought I was wrong but I am in one place in a better position than your Honor to judge and that is the severity of the punishment already imposed. I know more about it than you do and I assure you it is grievous and does not call for harshness upon the part of the judge.

By the Court: Mr. Sullivan, is there anything you care to say in addition to what counsel has said, before I pronounce sentence?

By Mr. Sullivan: If I may, may I read the statement, your Honor?

By the Court: You may.

5588 By Mr. Sullivan: Your Honor, you have asked me if I had anything to say before sentence was passed. Needless to say, in my wildest dreams I cannot realize that I would have had to answer such a question.

I am 58 years of age. I have strived all my life and I believe successfully, to warrant the confidence of all of those with whom it was my privilege to contact. I have been particularly zealous to deserve a good reputation all these years.

My early life was normal. I was taught those things that were to do—that had to do with good citizenship and my obligations to my fellowmen, my God and my country. I was practically left an orphan, my mother having died when I was three years old and my father when I was eight, but through the kindness of my older brothers and sisters, I was cared for.

When World War I started, I enlisted in the Army, subsequently saw active service in seven major battles of that war, and pardon me for saying so, I at no time ever shirked my obligation as a soldier.

When I was discharged from the Army, I was given
5589 a 100 per cent disability discharge because of being gassed in action in the Argonne Forest. My night school studies were interrupted for two years when I served in the Army and upon my discharge, I resumed the study of law and was admitted to the bar in the State of Illinois in 1921.

I have been a practicing attorney ever since. For the past nineteen years I have been honored by the judges of the Circuit Court of this county by serving as a Master in Chancery of that court and as evidence of my standing with the judges of the Circuit Court I was reappointed as Master in Chancery last December even after indictment was returned against me in this case.

In the practice of law, there are times when business opportunities manifest themselves. Shotwell was one of them. Over a period of eight years, something in excess of $1,700,000.00 was paid to the United States Government in income taxes, whereas for the ten years previous, preceding our assumption of control, nothing was paid to the Government. I was principally the attorney for the company, Violations of the OPA rules and regulations
5590 during 1945 and 1946 were not confined to Shotwell Manufacturing Company in the confectionery industry. There was no confectioner who remained in business at that time who didn't violate the OPA in some form or another.

During the years 1945 and 1946, the company paid income taxes aggregating $827,652.00 to the Government. This income was only possible because we did get the raw materials needed to keep our place of business open. Since

my troubles began in 1948 in this case I have been under investigation by several departments of the Internal Revenue Bureau. They have left no stone unturned to obtain evidence against me, and what happened? What did they produce? Nothing but the few words by Lubben, a few lines out of a record of over five thousand pages long.

Lubben said he talked to me only once and even then he changed his story about this conversation. This I deny ever took place. Who is Lubben? He was singled out by the Kefauver Committee as one of the creators of the black market in which we and other firms were forced to trade.

5591 He was walking in the street carrying immense amounts of cash, profiteering on the war at a time when most young men of his age were in the uniform of the United States Army or Navy.

Admittedly not a man of means, in 1944 he handled over $1,800,000.00 in cash in a little over two years' time. He has not yet, he testified, paid any income tax for those two years although Shotwell paid $827,652.00 in income tax during that same two years.

Who were his associates? His original partner was Roland Stone, a convicted perjurer. His later partners were Giglio and Loperfido. This is the man with the few words that are all that exist in the Government's case against me.

I do not believe that my service to my country should be ignored and my future ruined simply on such unreliable and contradictory testimony.

In conclusion, permit me to indelibly impress upon your Honor that I am not guilty of the crime charged in the indictment.

By the Court: Well, Mr. Sullivan, you take it upon yourself to attack the credibility of Mr. Lubben. Of course twelve jurors believed he was telling the truth. I believe he was telling the truth. With all of the background

5592 that you have illustrated in your statement, of course you men in Shotwell took him to your bosom and did business with him during a period of some years.

5593 Whatever his shortcomings might be, he seemed to be the fair-haired boy during those years when Shotwell saw fit to take advantage of his offers and when he paid over premium prices.

Be that as it may, I don't know of any case I have ever had in 30 years' experience that I have given more consideration to than yours. I cannot think of any case in 30 years' experience that I have given more consideration to than I have to yours, Mr. Sullivan. I suppose that is in some measure due to the fact that you are an attorney at this bar; that you have had a long and I believe respected career and I know of no record in your past that bears a blemish.

On the other hand, you stood trial in this matter, which you had a right to do. You have been represented by very eloquent and very competent counsel and you have had a fair trial. In my opinion, even though the evidence may be comparatively speaking scantier or at least not as complete as it was with reference to Huebner and Cain, I think there was evidence in the record beyond a reasonable doubt to sustain the jury's verdict. At least, as I have indicated in my order denying the motion for acquittal and after
5594 prolonged and protracted consideration, I have concluded that I should not disturb it and under those circumstances, I have no other alternative but to impose sentence. I have also given considerable consideration as to whether or not I should make any distinction as between you and Cain and between you and Huebner in so far as the disposition is concerned. My opinion is that all three of you are equally culpable and that I can't make any distinction, with reference to the gravity of your offense. True, Shotwell has paid a great deal of money to the government but we all recognize that that isn't any excuse for you men to enter into a scheme to aid Shotwell in defrauding the government out of moneys that are rightfully due to it and it hardly is a defense to indicate that merely because in the past Shotwell didn't pay any taxes and for a while paid very large sums, that that should have any bearing upon the gravity of this offense of which you have been found guilty. I don't say that to castigate you. I don't think it is the Court's business to indulge in any castigation when a man is about to be sentenced.

I have given your matter my best consideration; I
5595 have done the best that I could. I believe that I am honestly doing what is right and fair in the light of the evidence and law. That being my opinion, I say I have

no other alternative but to impose sentence upon you.

It is considered and adjudged that you, Harold E. Sullivan, as punishment for the offense as set forth in the first count of the indictment of which you have been found guilty by a verdict of the jury that you shall be confined in a penal institution of the United States Government to be selected by the Attorney General of the United States for a period of three years and it is further considered and adjudged that you will pay a fine in the sum of $2500.00 and the fine to be a committed fine.

It is further considered and adjudged that as punishment for the offense as set forth in the second count of the indictment of which you have been duly convicted by verdict of the jury that you shall be confined in a penal institution of the United States to be selected by the Attorney General of the United States for a period of three years and to pay a fine in the sum of $2500.00, the fine to be a committed fine.

5596 It is further considered and adjudged that the penal sentences that I am imposing will run concurrently and not consecutively.

Well, gentlemen, I believe that is all.

By Mr. Kirby: Now, your Honor I now move in the manner with respect to the other defendants that the present bail be continued until the filing of notice of appeal within the time allowed by law. May such bail be in the amount of $5,000.00 after the filing of notice of appeal?

By the Court: Well, I assume the United States Attorney's office has no objection.

By Mr. Calihan: No objection.

By the Court: I have no objection, of course, to such arrangement and I will sign the order.

By Mr. Kirby: Thank you.

By Mr. O'Brien: Judge, I am sorry—I have showed this to Mr. Crane and Mr. Calihan.

By the Court: Mr. Cain—

By Mr. O'Brien: It is just mechanical.

By Mr. Calihan: There is no objection, your Honor.

By Mr. O'Brien: I thank you, Judge.

5597 UNITED STATES OF AMERICA
Northern District of Illinois
Eastern Division

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

(Caption—No. 52 CR 143)

CERTIFICATE

I hereby certify that the above and foregoing transcript comprising 5596 pages numbered consecutively from 1 to 5596 is a full, true and accurate transcript of the original shorthand notes of all the proceedings had on the trial of the above-entitled cause, beginning on October 14, 1953, and concluding on December 7, 1953, before the Honorable Gunnar H. Nordbye, Chief Judge of the United States District Court for the District of Minnesota, sitting as one of the Judges of the United States District Court for the Northern District of Illinois, Eastern Division, and a jury.

ROY E. FULLER
Official Court Reporter
United States District Court
Northern District of Illinois

December 7, 1953.

Certified Exhibit
In the District Court of the United States
Northern District of Illinois, Eastern
No.
Roy E. Fuller - Official Court Rep

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, HAROLD E. SULLIVAN and FRANK J. HUEBNER,

Defendants.

No. 52 CR 143

STATE OF ILLINOIS }
} ss
COUNTY OF COOK }

BYRON A. CAIN, being first duly sworn, on oath deposes and says that he is one of the defendants in the above-entitled cause, and that he makes this affidavit in support of the defendants' foregoing motion to dismiss.

Affiant further says:

1. During all of the year 1948, and continuously since, affiant was President and Treasurer of The Shotwell Manufacturing Company, a corporation, one of the defendants in this cause, and that his co-defendants, Harold E. Sullivan and Frank J. Huebner were, respectively, Executive Vice President and Vice President of said corporation, and that Leon J. Busby was a member of the firm of Busby & Oury, certified public accountants employed by The Shotwell Manufacturing Company as its regular auditing firm during all of the year 1948 and for some years prior thereto.

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2. That during the month of January, 1948, affiant and other officers of the defendant corporation acting in behalf of said corporation and in their own behalf as officers thereof, delegated Leon J. Busby to communicate with a responsible officer or agent of the Treasury Department of the United States for the purpose of ascertaining whether there was still in effect the published policy of the Treasury Department, of which affiant had theretofore become aware, pertaining to the disclosure of omissions or misstatements in income tax returns, and if so, to ascertain in a preliminary way the requirements of such policy without disclosing the identity of the person by whom such disclosure might be made.

3. That thereafter, but during January of 1948, the said Leon J. Busby reported to affiant and to other officers of the defendant corporation that he had communicated with one Ernest J. Sauber, Chief Deputy Collector of Internal Revenue at Chicago, Illinois, who had told the said Busby that said policy was still in force and effect and that he was a proper person within the requirements of said published policy to whom such a disclosure might be made, and had further informed him that the requirements of such policy as to such disclosure would be fulfilled if the person in question would come forward before investigation had been initiated and acknowledge the incorrectness of his return, and that, in such event, there would be immunity under the Bureau's policy from criminal prosecution but that such tax, interest and

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penalties, if any, as might properly be due under the facts would be assessed.

4. Thereupon, affiant and other officers of said corporation in their behalf and on behalf of said defendant, during January, 1948, pursuant to said policy, directed said Busby to reveal to said Chief Deputy Collector of Internal Revenue the identity of The Shotwell Manufacturing Company as the person whose returns for the years 1945 and 1946 contained omissions or misstatements - those being the years in question at all times mentioned in this affidavit - and to inform him in a general way of the nature of said misstatements and omissions and to ascertain from him whether the preparation of amended returns for those years by said corporation should be then attempted, or whether their preparation and filing should be deferred pending an inspection of the books and records of the corporate defendant by agents of the Bureau of Internal Revenue.

5. That thereafter and during the month of January, 1948, the said Busby reported to affiant that he had again communicated with said Chief Deputy Collector of Internal Revenue and had revealed to him, pursuant to defendants' reliance on the policy aforesaid, that there were omissions and errors contained in the returns of said The Shotwell Manufacturing Company for the years 1945 and 1946 and of the general nature of said misstatements and omissions, and that he had inquired as to whether such communications constituted a sufficient disclosure and as to whether the preparation of amended returns for those

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years should be undertaken at that time; that said Busby further reported to affiant that said Chief Deputy Collector of Internal Revenue informed him that said communications constituted a sufficient disclosure and assured said Busby that he was the proper person to accept such disclosure and that no attempt should be made to file amended returns for those years because said Chief Deputy Collector of Internal Revenue would inform the office of the Agent in Charge to the end that the latter office would assign an agent to make such inspection and investigation as might be required, but that the said Chief Deputy Collector of Internal Revenue had further recommended that an attempt be made in the meantime by the officers of the corporation to approximate the extent of the omissions and misstatements based on their then recollections of the matters giving rise to said omissions and misstatements.

6. That thereafter according to his best present recollection, affiant himself during January of 1948, either alone or in the company of said Busby, and again to a certainty in the forepart of March, 1948, in the company of said Busby called upon said Chief Deputy Collector of Internal Revenue and was informed by him that the information communicated to him as such Chief Deputy Collector of Internal Revenue by said Busby constituted a sufficient disclosure and that he had made appropriate inquiry to ascertain whether any prior investigation had been initiated and had learned that there had been none and that there was none pending, and that the said disclosure was therefore timely within the Department's requirements, and further that the said Chief Deputy Collector of Internal Revenue had talked to Mr. Ralph Johnson, a squad chief in

5601

the office of Mr. E. C. Wright, the Internal Revenue Agent in Charge at Chicago, and that Mr. Johnson had indicated that he would go forward with the matter.

7. Thereafter the defendants and other representatives of the corporation, at their request, in reliance upon said policy and in reliance upon the representations aforesaid, commenced a course of cooperation, and solely for that purpose specially retained accountants who, commencing in 1948, and for a period of approximately four years, assisted the Internal Revenue agents in their inspection and examination of the books and records of the corporate defendant, and assembled for them such data and compilations as were requested, at an expense to the corporate defendant of approximately $70,000.00 or more; and that the examination by such agents of said books and records has extended over a period of approximately four years and was still being conducted at the time of the return of the indictment in this proceeding, and that much of the data and many of the compilations so prepared and furnished by said accountants were not available, in the form requested and supplied, from the books and records of the corporation.

8. That the defendants immediately following said disclosure and with the partial assistance of said accoutants thereunto specially directed - all in reliance upon the policy and representations aforesaid, including the representations as to the sufficiency and timeliness of their said disclosure - commenced the preparation and compilation of the preliminary approximation which the said

Sauber had recommended as averred in paragraph 5 hereof; that indispensable to the making of said statement was data and information not contained in the books and records of the corporate defendant but in the minds of the individual defendants, which the individual defendants well knew they could not be compelled to reveal and which they knew they had a constitutional right to withhold, but which, in reliance on the matters aforesaid, they supplied, with the result that such tentative apprdximation or statement was completed and reduced to writing and furnished to the said agents at or about the time of their first appearance for the purpose of inspecting the books and records of the corporate defendant. Affiant further avers that the said statement, among other things, showed that the net balance as a result of the operations therein reflected was $5,898.00, which sum had been deposited in the corporate defendant's bank account during the year 1946, and had been given effect to in its income tax return for that year. Said statement is in the possession of the plaintiff and was exhibited and otherwise used by the Government in the proceedings before the Grand Jury which returned the indictment in this proceeding. From time to time, and on request of agents of the Department of Internal Revenue, the individual defendants furnished said agents with other and more detailed and accurate information regarding the said omissions and misstatements known to them, but which were also not contained in the books and records of the defendant corporation, which information the defendants knew they were privileged not to reveal but did reveal in continued reliance on the policy and representations aforesaid. 5603

9. Affiant further avers that although he and his associates have steadfastly maintained that the defendant corporation owes no tax over and above the sum of $370,638.95, which it paid for the year 1945, or over and above the sum of $457,012.98, which it paid for the year 1946, the activities of said agents aforesaid were of such embarrassment in the conduct of the business of the corporate defendant and so disruptive to the relations of the corporate defendant with its customers and suppliers, that affiant at all times during the said period of four years importuned the said agents to bring the matter to a conclusion, and at all such times expressed the willingness of the corporation to pay such reasonable amount as the said agents might claim to be due. Nevertheless, and heedless of said importunings, and without completing said examination, and for the purpose of bringing a charge prior to the expiration of the six-year statute of limitations in relation to the first count of said indictment, the matter was presented to the Grand Jury on March 14, 1952, to-wit, the last day of the six years, by a special assistant to the Attorney General who received his authority only the day before.

(Sgd) Byron A. Cain

Subscribed and sworn to before me this 26th day of May, 1952.

(Sgd) Kirsten Sorensen
Notary Public

BUSHNELL MFG. CO., THE
3501 West Potomac Avenue
Chicago 51, Illinois

STATUTE OF LIMITATIONS EXPIRES

DIVISION ____ SYMBOL ____ FIELD CLASS ____
DISTRICT 1129 ON HAND ____ OFF. INTERVIEW ____
DATE
DISTRICT ____ SCHED. NO. ____

YEAR AND PERIOD NO.		DATE OF TAX OR PENALTY	CLAIMED	DISCOUNT AS COMPUTED	APPROVED REFUND	DISALLOWED	INTEREST PAID (Col. 9 or Bond) DATE	AMOUNT
1946 AA 4103920	A							
		TOTALS		3.44				

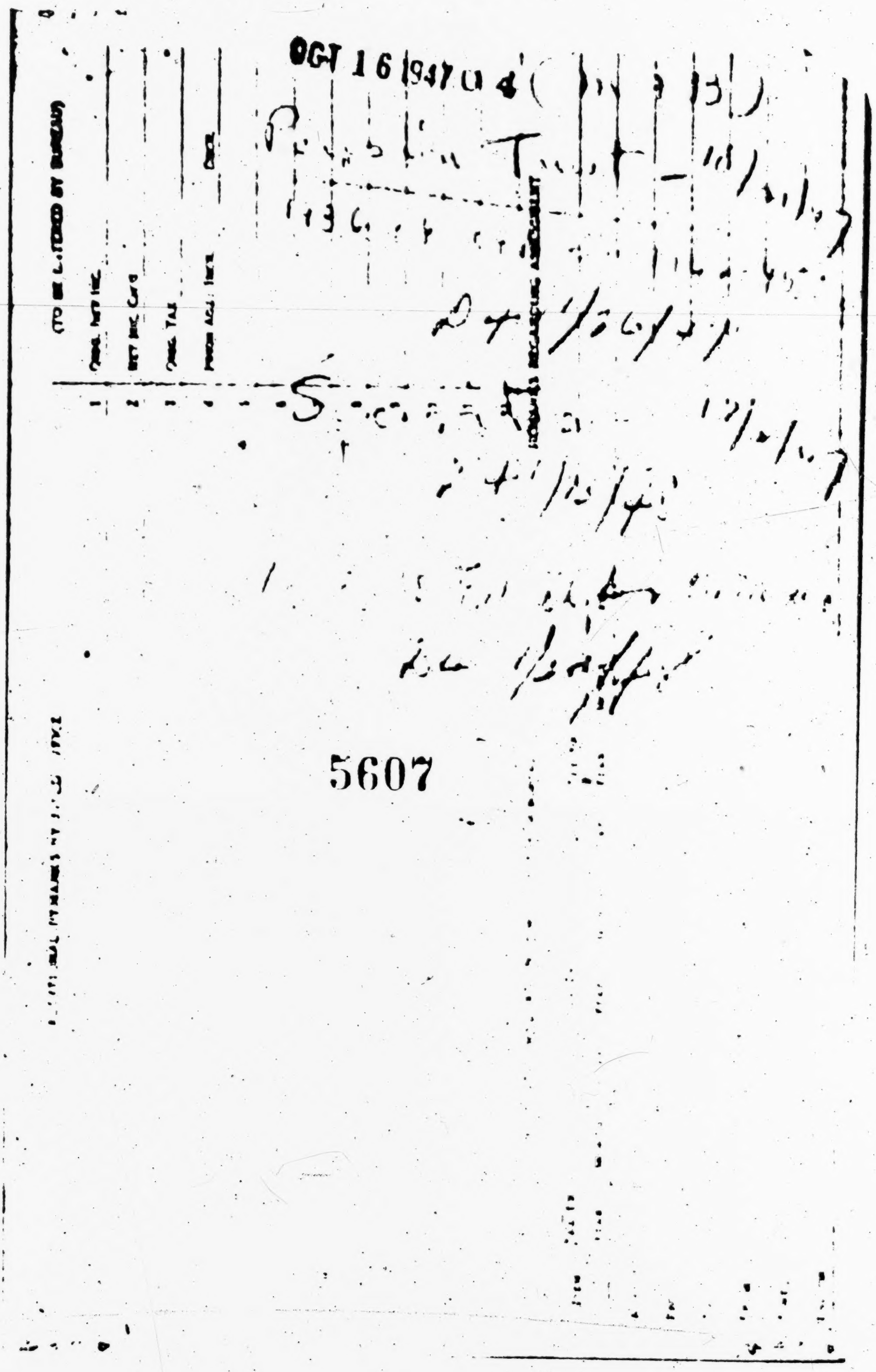
GROUP OR SECT. 51.2 D R W DATE 12/11/47
EXAMINED ____
ADV'D ____ RET'D REC'D ____ ADV
RET'D TO EXAM'R ____ REC'D ____ AGP
APP'D ____ RET'D
PREL. NOTICE ____ PROT ____ DEF ____ AGR
EXT. ____
INT. DEL. ____ RET'D ____ PD
INT. COMP. ____ BY ____ AGR

TO COMP. SECT.
ST. CASES FT. CASES
OTHER OFFICE OF INQUIRY

Government Exhibit 2 Defendants Exhibit
In the District Court of the United States, Northern District of Illinois Eastern Division BEFORE Hon. BARNES J.
No. 5605
Roy E. Fuller - Official Court Reporter

Form 1044-CONTROL CARD
TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE
(Revised March 1941)

DISPOSED OF ____ CLOSED B ___ C ___ D ___ TO DUP. C ___
CLOSED B 11 ___ F 14 ___ F 6 ___ F 10 ___ F 7 ___ TO DUP. B 20 ___ TO DUP. B 20 ___ PETN'D F 10 ___ F 11 ___ F 12 ___ F 20


OCT 16 1947
5607

ACCOUNTS RECEIVABLE

Sales, 11/9/44 - 12/31/44 (Price adjustment)			$ 29,837.00
Less, corrections, invoices			
#54263, shown $ 5,401.00 should be	$ 1,080.20		
54388, " 5,632.00	1,126.40		
$11,033.00	$ 2,206.60	8,826.40	
Net sales, 1944			$ 21,010.60
Collections, 1944			11,700.00
Balance due, 12/31/44			9,310.60
Sales, 1945: (Price adjustment)			
1/1/45 - 5/31/45		91,495.50	
6/7/45 -11/28/45 (Unverified approximation)		85,786.30	
11/28/45-12/31/45		26,823.30	204,105.10
			213,415.70
Collections, 1945			198,429.84
Balance due, 12/31/45			14,985.86
Sales, 1946:			
Price adjustments	$135,923.80		
Unbilled shipments	65,734.64	201,658.44	
Less, items uncollected due to financial difficulties		48,614.90	
Net sales, 1946			153,043.54
			168,029.40
Collections, 1946			168,029.40
Balance due, 12/31/46			$ -0-

52 v 143

CASH ACCOUNT

	1944	1945	1946
RECEIPTS (Collections)	$ 11,700.00	$198,429.84	$168,029.40
Balance forwarded	-0-	11,700.00	16,129.84
	11,700.00	210,129.84	184,159.24
DISBURSEMENTS:			
Chocolate		45,000.00	-0-
Milk		30,000.00	15,000.00
Corn syrup		12,000.00	87,775.00
Cocoa beans		22,000.00	-0-
Cocoa bean deal		30,000.00	-0-
Sugar deal		37,000.00	54,825.00
Sales expenses and unallocated		18,000.00	20,661.24
TOTAL DISBURSEMENTS	-0-	194,000.00	178,261.24
CASH BALANCE	$ 11,700.00	16,129.84	5,893.00
DEPOSITED IN BANK 7/25/46			$ 5,893.00

5608

Government Exhibit 4 Defendants Exhibit: { Iden. / Rec'd.

In the District Court of the United States, Northern District of Illinois, Eastern Division BEFORE BARNES J.

No.

Roy E. Fuller - Official Court Reporter

Government Exhibit 5 Defendants Exhibit Identification Rec'd.

In the District Court of the United States, Northern District of Illinois, Eastern Division BEFORE BARNES J.

No.

Roy E. Fuller - Official Court Reporter

WOTWELL MFG. CO. INC.
CHICAGO, ILL.

| | | |

) SNOTWELL MFG Co ( )
(CONT)

and Ed Urban who was a partner in the business until I bought the Habersham Candy Co which purchased by Byron Cain operating the Snotwell Mfg Co for the same. I gave $2.00 on half note to D. D. Stubbs. the other half went to Ed Urban.

The body was both Eatable Food Products. Mineral Confections affect the fact that all the check drawn to. Each check went to the Bank Indorsement with the name Snotwell Mfg Co went to it.

5610

SHOTWELL MFG. CO., THE
3501 W. Potomac Ave.
Chicago 51. Ill.

STATUTE OF LIMITATIONS EXPIRES

DIVISION Chicago — FIELD EXAM. X
FORM NO OF RETURN 1121 & 1120 — OFF. INTERVIEW
FILING DISTRICT 1st Ill. — CONFERENCE ALLOW

YEAR AND SERIAL NO.		KIND OF TAX OR PENALTY	CLAIMS	REPORT AS SUBMITTED	APPROVED REPORT	DIFFERENCE	INTEREST (FROM CRED. OR DUE) DATE	INTEREST (FROM CRED. OR DUE) AMOUNT
EP-1945 4001712	0	EX	✓	$34,436.97	$24,428.87	X		
1945 4105973	0	IT		5,427.69	11,110.33	X		
TOTALS								

GROUP OR SECT. EX DATE 2/18/47
EXAMINER A.S.KOTSAR
ASS'D 1/20/47 DEPT REC'D 8/5/47 ALR X
RET'D TO EXAM'R REC'D. AGR
APP'D DEP'R
PROP. NOTICE PROT. DEF. AGR
EXT.
DEF. DOM. RET'D PD
DEF. CONF. BY AGR

TO CONF SECT
REL CASES DEF CASES
OTHER STEPS REMARKS

Government Exhibit 3 Defendants Exhibit Iden. Rec'd.

In the District Court of the United States, BEFORE
Northern District of Illinois Eastern Division BARNES J.
No.
Ray E. Fuller - Official Court Reporter

5606

DUPLICATE CONTROL CARD
TREASURY DEPARTMENT Internal Revenue Service
(Revised March 1945)

DISPOSED OF ... EXHIBIT B ... C ✓ ... TYD B ... C ... TO D/R, C ...
CLOSED B.H. P.A. I.H. D.I. TYD B.M. TO D.A. B.M. PETN F.H. F.H. F.H.

Government's Ex. 3—Suppression Hearing 3085

ACCOUNTS RECEIVABLE

Sales, 11/4/44 - 12/31/44 (Price adjustment)			298700	
Less, corrections, invoices				
#57463, shown	$5701.00	Dk. Co	108070	
57488,	763.00		11760	
	$11033.00		119660	88660
Net sales, 1944				1010660
Collections, 1944				1170000
Balance due, 12/31/44				931060
Sales, 1945: (Price adjustment)				
1/1/45 - 7/31/45			9149550	
6/7/45 - 11/28/45 (demonified appropriations)			8578630	
11/28/45 - 12/31/45			2683730	20411810
				21341570
Collections, 1945				19842984
Balance due, 12/31/45				1498586
Sales, 1946:				
Price adjustments			1359280	
Unbilled shipments			6573464	20165864
Less, items uncollected due to financial difficulties				4861470
Net sales, 1946				15304394
				16802940
Collections, 1946				16802940
Balance due, 12/31/46				---

CASH ACCOUNT

	1944	1945	1946
RECEIPTS (Collections)	$1170000	$19849840	$16802940
Bal ford		1170000	1611984
	1170000	21019840	18414924
DISBURSEMENTS:			
Chocolate		4500000	--
Milk		3000000	1500000
Cane Syrup		1200000	8777500
Cocoa Beans		800000	
Cocoa bean deal		3000000	
Sugar deal		3700000	5485500
Sales Expenses & miscellaneous		1800000	2066124
TOTAL DISB.	--	19900000	17802624
CASH BALANCE	1170000	1611984	611300
DEPOSITED IN BANK 1/5/46			589800

1945

		His Record	He Added	Paid To Shotwell	Paid To Others	Shipped To Eaton
-6000		617700	348000	469700		
73100		315908	17310-	142808		
52400		278130	152400	125730		
34100		246733	134100	110632		
57500		287438	157500	129938		
56000		284700	156000	128700		
165000		292875	165000	127875		
37800		248145	137800	108345		
33500		236963	133500	103463		
-5100	160500	255283	146100	115583		
31000		246900	132000	108900		
30000		345500	180000	148500		
145500		265538	145500	120038		
146700		267728	146700	121028		
141900		258973	141900	109973		
143700		255068	143700	111368		
132700		815548	44670	368529		
132600		256655	144600	112065		
149400		272655	149400	123255		
143700	177500	255068	143700	111368		
143700		255068	143700	111368		
148800		264840	144800	115340		
77400		178020	77400	100620		
148500		271013	148500	122513		
38300		252946	138600	114346		
99000		301850	101250	201600		
135000		573526	223650	350176		
33440		424516	165200	258916		
131400		295850	162000	133650		
162000		403500	135000	268800		
132000	134850	239093	134700	104393		
134700		168500	82500	112000		W3 Bunker Eaton
549900		273203	149700	123503		
149700		496134	216000	280134		
138300		507007	234450	272857		
22637		168500	82500	112000		W5 Bunker Eaton
29000		521092	180900	360192		
68250		320508	165200	156608		
549900		177675	59400	118274		
176850		146714	69050	97664		
144000	158451	430700	144000	286720		
140900		351786	207600	249656		
61750		580696	248400	314053		
145500		150523	82500	68063		
92850		388573	216900	171673		
151500		259358	144100	113228		
5500		not located				
7050		276520	127600	169200		Eaton
10000		181710	60750			
14100		244755	136400			5613
20700			914850			
14850						
12960						
20250						
14100	67250					
19648						

Note:

Pages 3091 -3101 are mostly illegible.

		Amount	Net Weight	Description		
[illegible]	[illegible]	15013 lbs	10000#	Cocoa powder		
			5010	Cocoa drops		
21608	5/6	65130 lbs	5010	" drops		
51[illegible]0	11/9	61375 lbs	7500	" "		
[illegible]777	11/13	105675	13420	" "		
5[illegible]316	11/17	93020 lbs	11760	Cocoa Powder		
5[illegible]533	11/6	74899 lbs	9030	Cocoa Butter		
56[illegible]07	11/20	113355 lbs	13760	Cocoa Butter		.10
53[illegible]81	11/22	87163 lbs 84767	10590	Cocoa Butter		.10
[illegible]	11/25	125977 lbs	15270	Cocoa Butter		.10
5[illegible]	11/27	137[illegible]26 lbs	10302	Cocoa drops		.10
52[illegible]8	11/30	166653 lbs	11264	Cocoa drops		.10
[illegible]5	12/6	155775 lbs	20100	Cocoa drops		.10
[illegible]50	12/8	182765 lbs	23532	Cocoa drops		.10
52[illegible]9	12/9	155775 lbs	20100	Cocoa drops		.10
57[illegible]0	12/12	181515 lbs	23460	Cocoa drops		.10
60[illegible]2	12/16	153795 lbs	20060	Cocoa drops		.10

added from [illegible] records:

27[illegible]3	7/8
3[illegible]52	7/11
3[illegible]44	8/10
35873	8/21
38147	9/2

≠ 1961 11/15

≠ 1974 146

	His Record	He Added	Paid To Shotwell	Paid To Others	Shipped To
	160130	—	160130		
	65130	—	65130		
x	136875	75000	61875	75000 (Kent)	
x	97665	74800	22865		
x	211470	117600	93870		
	164798	90800	74498		
	250755	137600	113155		
	193468	105400	87368		
	278678	152700	125978		
+	680576	372100	308476		
+	709632	388200	321432		
	356775	201000	155775		
	418545	238000	180545		
	356775	201000	155775		
	416415	234600	181815		
	363698	204900	158798		
	65130	—	65130		Evans
	59500	—	59500		Evans
	7438	—	7438		-
	15938	—	15938		-
	15300	—	15300		-
				67500 (Cook)	
				47000	Bob's Own
		483700			

5612

Issue No.	Date	Issued	Weight	Description	
Issued)					
				Cardinal Elec.	11 -
				Elec Button	12
				Elec Button	
				Elec Buttons	
				Elec. Cur Hot Meats	
				Elec Button	
				Cardinal Elec.	18
				Cardinal Elec	
				Elec Button	
				Cardinal Elec	
				Cardinal Elec	
				Cardinal Elec	
				Cardinal Elec	18 1/3
				Elec	10
				Elec	10
				Elec Button	10
				Cardinal Elec.	18
					10
					10
					10
					10

His. Pieces	Mc Boxes	Paid To Chomell Crews	Shipped To
	512784		
	151800		
	478100		
	144300		
	121755 ?		
	—	8578630 ?	
	559999		
	671999		
	677200 ?		
	320100		
	1097314		
	557040		
	1014430 ?		
	325275		
	201765		
	191800		
	688260 ?		
		54704	
		357490 ?	
		54550 ?	
		180900	
		90900	
	18¾	294336	
		1464000 ?	
		207000 ?	
	18¾	331530	
		121510 ?	
	1115495	1020000	
		11260460	

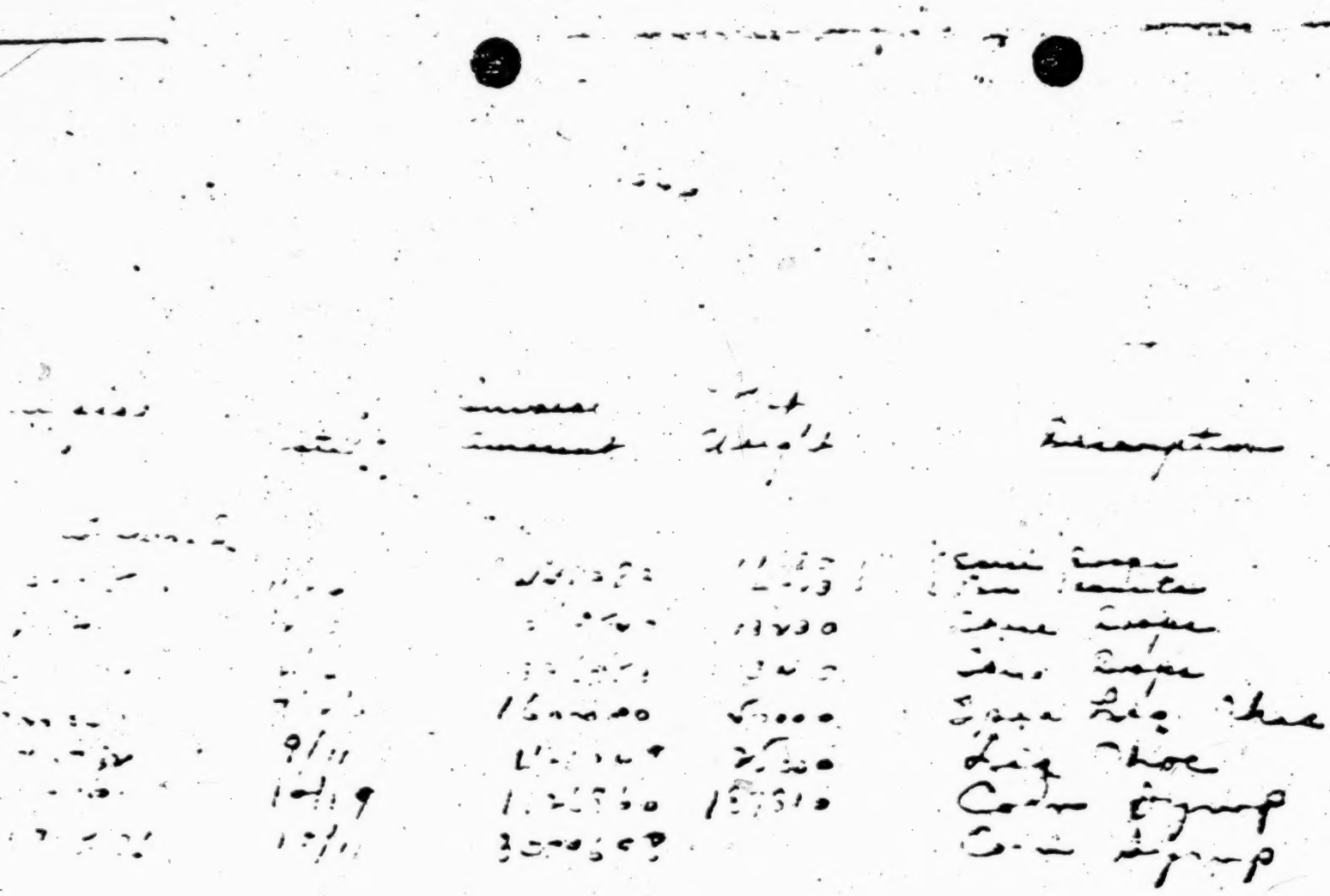
5614

1946

	Invoice No.	Date	Invoice amount	Net Weight	Description
C	130126	1/10	11801-6	11587	Clear Car Hunts
...	131541	1/16	14454	14693	" " "
	134508	1/19	10581	15560 / 11600	10/5 Cl. Cardinal - 4 to Span Dogs
	141335	2/8	5834	13894	Clear Car Hunts
	146305	3/5	11530	14880	Span Dogs
	148088	- -	15435	31794	Clear Car Hunts
	156017	4/10	16493	19890	Span Dogs
	157086	4/18	34930	5165	Clear Car Hunts
	157146	4/18	17143	11470	Span Dogs
	161154	4/23	45513	10080 / 9870	Cardinal / Span Dogs
	161096	4/24	16450	11000	Span Dogs
	162044	4/27	45056	10763	Clear Car Hunts
A	164730	4/30	60035	8493 / 6001	Span Dogs / Cardinal
	165161	5/10	13453	11000	Span Dogs (4 span dogs)
	165038	5/25	5434	12[illegible]	Clear Car Hunts
A	165030	5/25	3[illegible]	11470 / 15000	Span Dogs / 4 span Cardinal Dogs
	165904	5/27	60020	13950 / 13[illegible]	Clear Car Hunts / Span Dogs
	165[illegible]	5/30	2[illegible]	11470 / 1[illegible] / 6793	Span Dogs / Clear Car Hunts
A	167061	6/1	80[illegible]	11[illegible]	Cardinal
	167[illegible]	6/1	[illegible]	12[illegible]	Clear Car Hunts
	[illegible]	6/6	[illegible]	[illegible]	Cardinal Span
A.	[illegible]	6/7	13000	13000	Cardinal Span
	215[illegible]	6/10	3600[illegible]	30000	Eastern Jills
A.	[illegible]	6/10	[illegible]	[illegible]	Eastern Jills
	[illegible]	6/11	[illegible]	[illegible]	Eastern Jills
	[illegible]	6/25	[illegible]	[illegible]	Eastern Jills
	[illegible]	7/3	[illegible]	[illegible]	Eastern Jills
	[illegible]	7/5	[illegible]	[illegible]	Red Jills
	[illegible]	7/8	[illegible]	[illegible]	Red Jills
	[illegible]	7/10	[illegible]	[illegible]	Red Jills
	[illegible]	7/11	[illegible]	[illegible]	Red Jills
	[illegible]	7/12	[illegible]	[illegible]	Red Jills
	[illegible]	7/12	[illegible]	[illegible]	Red Jills
	[illegible]	7/13	[illegible]	[illegible]	Cardinal
	[illegible]	7/15	[illegible]	[illegible]	Eastern Cardinal
A-	[illegible]	8/1	[illegible]	[illegible]	Cardinal
A-	[illegible]	8/1	[illegible]	[illegible]	Cardinal
	[illegible]	8/3	[illegible]	[illegible]	Cardinal
	[illegible]	8/8	[illegible]	[illegible]	Crimson Mink
	[illegible]	8/14	[illegible]	[illegible]	Crimson Mink
	[illegible]	8/7	[illegible]	[illegible]	Eastern [illegible]
	[illegible]	9/14	[illegible]	[illegible]	Cardinal
	[illegible]	10/11	[illegible]	[illegible]	Crimson Mink
	[illegible]	10/11	[illegible]	[illegible]	Crimson Mink
	[illegible]	10/15	[illegible]	[illegible]	Cardinal
	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	10/21	[illegible]	[illegible]	Crimson Mink
	[illegible]	11/5	[illegible]	[illegible]	Cardinal
	[illegible]	11/18	[illegible]	[illegible]	Span Sables
	[illegible]	11/[illegible]	[illegible]	[illegible]	Span Sables

(continued)

5615

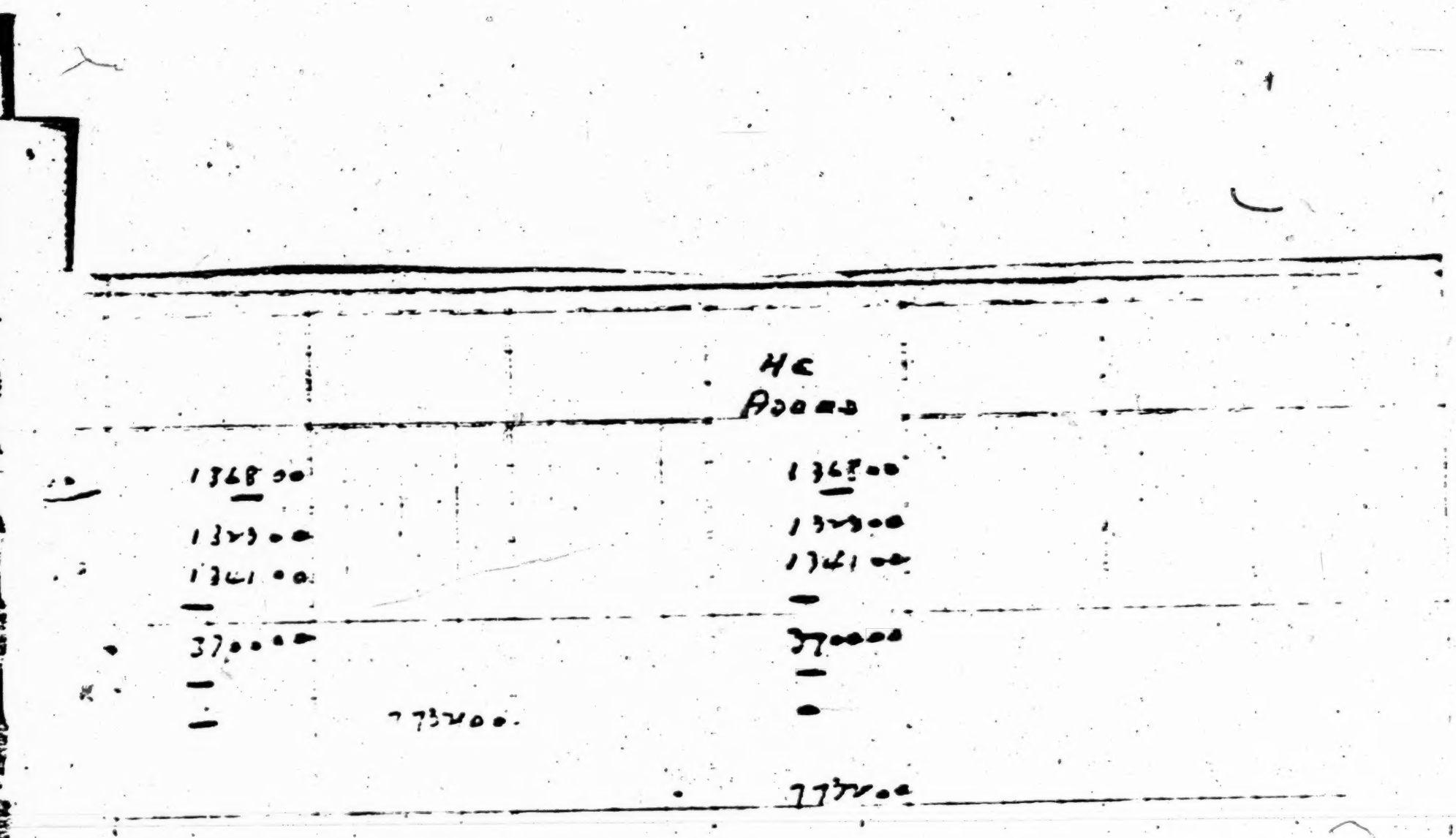


Government Exhibit | Defendants Exhibit | Identified Received

In the District Court of the United States, Northern District of Illinois, Eastern Division BEFORE BARNES J.

No.

Roy E. Fuller - Official Court Reporter



5616

ACCOUNTS RECEIVABLE

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Less, corrections, invoices			
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$11,033.00	$ 2,206.60	8,826.40	
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			213,415.70
Collections, 1945			198,429.34
Balance due, 12/31/45			14,985.56
Sales, 1946:			
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Net sales, 1946			153,043.54
			168,029.40
Collections, 1946			168,029.40
Balance due, 12/31/46			$ -o-

CASH ACCOUNT

	1944	1945	1946
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Balance forwarded	-o-	11,700.00	16,129.84
	11,700.00	210,129.34	184,159.24
DISBURSEMENTS:			
Chocolate		45,000.00	-o-
Milk		30,000.00	15,000.00
Corn syrup		12,000.00	87,775.00
Cocoa beans		22,000.00	-o-
Cocoa bean deal		30,000.00	-o-
Sugar deal		37,000.00	54,825.00
Sales expenses and unallocated		18,000.00	20,661.24
TOTAL DISBURSEMENTS	-o-	194,000.00	178,261.24
CASH BALANCE	$ 11,700.00	$ 16,129.84	5,898.00
DEPOSITED IN BANK 7/25/46			$ 5,898.00

5617

ANALYSIS OF TRANSACTIONS BETWEEN SHOTWELL AND DAVE LUBBEN, (GEN. CONF, EATSUM)
1944

Sales as Recorded on Shotwell Records					Shotwell Commission Per Lb.
Invoice No	Date	Invoice Amount	Net Weight	Description	
A 20257	Sept. 11	$ 150130	10000#	Cocoa powder	—
			5010	Extra drops	—
33609	8/12	65130	5010	Extra drops	—
51003	11/9	61575	7500	Spice Cotton	—
51711	11/13	105675	13620	Spice Cotton	—
52550	11/17	93020	11760	Spice G. Tins	—
52578	11/16	74650	9030	Spice Cotton	—
51007	11/20	113355	13760	Spice Cotton	.12
53491	11/22	5677	10590	Spice Cotton	.10
53739	11/25	250775	15270	Spice Cotton	.15
52711	11/27	139756	16160	G. Tins drops	.15
52915	11/30	165655	11760	Extra drops	.12
53[illegible]	12/6	155755	20100	[illegible] drops	.15
53[illegible]	12/8	192765	23760	[illegible] drops	.12
53[illegible]	12/10	165755	20100	[illegible] drops	.15
54[illegible]	12/12	19[illegible]	23760	[illegible] drops	.12
54[illegible]	12/16	139755	20100	[illegible] drops	.15
TOTAL (Recorded Sales)		1003133			

Added from L records:

27473	7/8	65130.
31532	7/21	59500.
33346	8/10	7438.
35873	8/21	15938.
36127	9/2	1530.
TOTAL (Recorded Sales)		163306

CK 1761 11/15

CK 1974 1/6

Computation of Price Adjustment

Total

Memo Taken from Lubon Record

	His Record	He Added	Paid To Shotwell	Paid To Others	Shipped To Eatons
	$ 150130	$ --	$ 150130		
	65130	--	65130		
x	136875	75000	(61875)	$75000 (Cash)	
x	178665	174700	102465		
x	214670	117600	97070		
	164798	90300	74498		
$ 137100	250755	137400	113355		
105900	193768	105900	87868		
152700	278678	152700	125978		
103200 +	680576	372100	(140476)		
112600 +	709632	583200	126432		
201000	356775	201000	155775		
273600	418545	235800	182745		
201000	357775	201000	155775		
234600	416615	234600	181815		
1170200	363698	704900	158798		

65130	-	65130	Bonus Check Eatons
59500	-	59500	-
7438	-	7438	-
15938	-	15938	-
15300	-	15300	-
		75000 (Cash)	
		470000 Bal. Comm. Acct.	

TOTAL (Used in Statement Page) 2431700

5618

ANALYSIS OF TRANSACTIONS BETWEEN
SHOTWELL AND DAVE LUDDEN (GEN. CONT. EARTHUM)
1925.

Sales as recorded on Shotwell Records

Invoice No.	Date	Invoice Amount	Net Weight	Description	Shotwell Invoiced Per Lb.
(Forward)					
C 90631	6/7	$ 1037.68	7779	Cardinal Glue	18¢
90598	6/6	1755.35	15180	Spun Buttons	10
94007	6/11	3531.63	41810	Spun Buttons	10
94986	6/19	1164.93	14130	Spun Buttons	10
114184	9/19	389.71	8119	Glue Cor. Hnd Meats	15
114549	10/1	468.00	(3400 Cs)	24/10 z Bunten Wh. Gl.	—
117897	10/17	1170.00	3000	Cardinal Glue	18¢
119874	10/20	1346.00	3600	Cardinal Glue	18 1/3
120655	10/29	1169.36	4519.5 / 3010	Glue Cor. Hnd Meats / Spun Buttons	15 / 25
122518	11/7	434.64	5985	Cardinal Glue	18¢
123407	11/17	1170.00	3000	Cardinal Glue	18 1/3
123399	11/10	916.48	6748 / 5960	Glue Cor. Hnd Meats / Spun Buttons	15 / 10
124206	11/19	347.50	4037 / 4011	Cardinal Glue / Glue Cor. Hnts	18¢ / 15
125386	12	1121.80	17680 / 4388	Spun Buttons / Glue Cor. Hnts	10 / 15
126180	11/28	435.48	6317	Cardinal Chocolate	18 1/3
126181	11/28	1134.58	16749	Glue Cor. Hnts	15
126517	12/5	1640.03	5137 / 18090	Glue Cor. Hnts 5137 / Spun Buttons 13090	15 / 10
127316	12/14	749.93	9090	Spun Buttons	10
127444	12/17	585.75	5768	Cardinal Glue	18 1/3
127455	12/17	1848.94	4404	Glue Cor. Hnts	15
127744	12/19	869.00	8700	Glue Cor. Hnts	10
127844	12/20	663.40	3760	Cardinal Glue	18 1/3
127785	12/20	518.74	4851	Glue Cor. Hnts	15
127905	12/21	84.50	1000	Spun Buttons	10
		27644.87			
	Less	11.70			
	TOTAL	38956.27			

Computation & Price Adjustments Total		His Records	He Added	Memo - (Partly) Taken from Ludden Paid To Shotwell	Paid To Others	Shipped To
$ 509.50	$ 518.74					
1518.00	1518.00					
4281.00	4281.00					
1413.00	1413.00					
1217.85	1217.85 ?					
—	—					
549.99	559.99	✓				
659.99	671.99	✓				
677.75	689.75	✓				
10.00	10.00					
10773.60	10773.10	✓				
549.99	559.99	✓				
1012.16	1030.32 ?	✓				
996.00	1026.00					
743.60	756.72					
661.65	673.65					
675.60	687.60					
516.00	18¼		547.04			
467.90			477.30			
655.50			668.63			
180.00			183.60			
90.00			90.00			
890.80	18¼		908.36			
440.00			448.80			
207.00			207.00 ?			
326.00	18¼		332.52			
123.50			125.10 ?			
100.00	111.99		100.00			
			27644.87			
TOTAL (Used in Disclosure Rep.)			11740.66			

$ 6578.20 ? ← Unverified - the Ludden record available for comparison.

5619

90598	6/6	1755735	15180	Spun Buttons	10	151800	151800				
94007	6/17	353183	47810	Spun Buttons	10	478100	478100				
94986	6/19	116593	14130	Spun Buttons	10	141300	141300				
114184	9/19	389715	8119	Elec. Cor. Mut. Meate	15	121785	121785 ?				
114549	10/1	468000	(1400 Ca)	24/10 2 Buttons " "		—	—				
117897	10/17	11700000	30000	Cardinal Elec.	18⅓	549999	549999	✓			
119874	10/20	13446000	36000	Cardinal Elec.	18⅓	659999	671999	✓			
120655	10/29	1769361	45195 / 37010	Elec Cor Mut Meate / Spun Buttons	15 / 25	677725	677725				
122518	11/7	1734644	49856	Cardinal Elec.	18⅓	1077366	1077315	✓			
123407	11/14	11700000	30000	Cardinal Elec.	18⅓	549999	549999	✓			
123399	11/10	791644	67484 / 99760	Elec Cor Mut Meate / Spun Buttons	15 / 10	1012516	1012516 ?				
124206	11/19	3972750	40536 / 40411 / 17680	Spun Buttons / Cardinal Elec. / Elec Cor Mute / Spun Buttons	10 / 18⅓ / 15 / 10	996 00 / 762900 / 96165 / 19680 / 678560	996 00 / 762900 / 96165 / 19680 / 678560				
125386	11/	1121102	43564	Elec Cor Mute	15						
126180	11/18	735648	6317	Cardinal Chocolate	18⅓	57600	18¼		54704		
126181	11/18	1173458	76749	Elec Cor. Mute	10	267490			253965 ?		
126517	12/5	756003	51870 / 18090	Elec Cor Mute 45720 / Spun Buttons 51120	15 / 10	657500			624625		
127316	12/14	74993	9090	Spun Buttons	10	970900			921855		
127444	12/17	585675	15768	Cardinal Elec.	18⅓	90900			90900		
127455	12/17	1848944	44077	Elec. Cor. Mute	10	789080	18¼		749626		
127745	12/19	876400	20700	Elec. Cor. Mute	10	440770			440770 ?		
128158	12/20	663040	17760	Cardinal Elec.	18⅓	207000			207000 ?		
127855	12/20	1518744	17351	Elec Cor. Mute	10	325600	18¼		331512		
127905	12/21	84150	10700	Spun Buttons	10	123510			117335 ?		
		27644084				1070000	1117945		1070000		
		11317045							1188078		
TOTAL		38956127									

TOTAL (Used in Disclosure Rep.) 11780466

65786 25? ← Unverified - No further record available for comparison.

+98.86

5619

Analysis of Transactions Between Shotwell and Dave Lubben, (Gen. Cons., Eatsum)
1945

Sales as recorded on Shotwell Records

Invoice No	Date	Invoice amount	Net Weight	Description	Shotwell Invoiced PER lb.	Computation & Price Adjustment $ TOTAL
C. 65050	1/5	$ 169700	34800	Sirloin Drops		348000
61904	1/7	144808	17310	Spare Buttons		173100
61548	1/10	125730	15440	Spare Buttons		154400
59931	1/13	110632	13410	Spare Buttons		134100
63830	1/19	129938	15750	Spare Buttons		157500
64176	1/20	128700	15600	Spare Buttons		156000
66013	1/29	127875	16500	Sirloin Drops		165000
61149	2/2	108345	13980	Sirloin Drops		139800
68517	2/8	103463	13350	Sirloin Drops		133500
70524	2/16	115583	14010	Spare Buttons		140100
70566	2/21	108900	13200	Spare Buttons		132000
70944	2/22	148500	18000	Spare Buttons		180000
70683	2/23	120038	14550	Spare Buttons		145500
71295	2/25	121028	14670	Spare Buttons		146700
71501	2/28	109973	14190	Sirloin Drops		141900
71778	3/1	111368	14370	Sirloin Drops		143700
73128	3/3	368529	44670	Spare Buttons		446700
73408	3/3	112065	14460	Sirloin Drops		144600
74510	3/14	123255	14940	Spare Buttons		149400
75019	3/21	111368	14370	Sirloin Drops		143700
75044	3/23	111368	14370	Sirloin Drops		143700
76054	3/28	115320	14880	Sirloin Drops		148800
77136	4/4	100620	7740	Cotton Drops		77400
77219	4/4	122513	14850	Spare Buttons		148500
77417	4/5	114098	13830	Spare Buttons		138300
77413	4/5	201600	24000	Bed Wonderlator		240000
77574	4/6	35201	4278 / 13500	Cotton Slips / Sirloin Drops		33440 / 131400
77574	4/7	138916	18720 / 13100	Cotton Slips / Sirloin Drops		165800 / 131000
78403	4/11	133650	16200	Spare Buttons		162000
78617	4/11	268800	7200	Cardinal Elbow		134700
78771	4/	104393	13470	Sirloin Drops		134700
79451	4/14	1120000	50000	Cardinal Elbow		549900
77202	4/	123503	14970	Spare Buttons		149700
76594	4/21	160134	17330 / 19440	Sirloin Drops / Sirloin Plus		173300 / 207037

Computation & Price Adjustment $ TOTAL	Memo Entries from Lubben Records: His Record	Memo Entries from Lubben Records: He Added	Memo Entries from Lubben Records: Paid To Shotwell	Memo Entries from Lubben Records: Paid To Others	Shipped To Eatsum
	$ 617700	$ 348000	$ 469700 (Wt 34800)		
	315908	173100	142808		
	278130	154400	125730		
	244733	134100	110632 (Wt 13410)		
	287438	157500	129938		
	284700	156000	128700		
	292875	165000	127875 (Wt 16500)		
	248145	139800	108345		
	236963	133500	103463 (Wt 13350)		
1699500	255883	140100	115583		
	240900	132000	108900		
	328500	180000	148500 (Wt 18000)		
	265538	145500	120038		
	267728	146700	121028		
	258973	141900	109973		
	255068	143700	111368		
	815568	446700	368529 (Wt 44670)		
	256625	144600	112065		
	272655	149400	123255		
1791700	255068	143700	111368		
	255068	143700	111368		
	264820	148800	115320		
	178620	77400	100620 (Wt 7740)		
	271013	148500	122513 (Wt 14850)		
	252946	138300	114346		
	301850	101250	201600 (Wt 24000)		
	573562	233650	35201 (Wt 4278)		
	404516	165800	238916 (Wt 18720)		
	295650	162000	133650 (Wt 16200)		
1349560	403800	135000	268800 (Wt 7200)		
	239093	134700	104393		
	168500	56500	1120000 (Wt 50000)		
	273203	149700	123503 (Wt 14970)		
	496134	216000	280134 (Wt 17330)		
	507007	214150	292857 (Wt 19440)		

W3 Bonner Eatsum

59931	1/13	1106.37	13410	Spec	Button		134100		244733	134100	110637		
63830	1/19	129938	15750	Spec	Button		157500		287438	157500	129938		
64176	1/20	128700	15600	Spec	Button		156000		284700	156000	128700		
66013	1/29	127875	16500	Elem	Drape		165000		292875	165000	127875	1361.25	
66969	2/2	108345	13980	Elem	Drape		139800		248145	139800	108345		
68517	2/8	103463	13350	Elem	Drape		133500		236963	133500	103463	1270.00	
70534	2/16	115583	14010	Spec	Button		140100	16995.00	255583	140100	115583		
70866	2/21	108900	13200	Spec	Button		132000		240900	132000	108900		
70944	2/22	148500	18000	Spec	Button		180000		328500	180000	148500	1498.46	
70683	2/23	120038	14550	Spec	Button		145500		265538	145500	120038		
71295	2/25	121028	14670	Elem	Button		146700		267728	146700	121028		
71501	2/28	109973	13390	Elem	Drape		133900		244373	133900	109973		
71778	3/1	111368	14370	Elem	Drape		143700		255068	143700	111368		
73128	3/5	368528	44670	Spec	Button		446700		815528	446700	368529	8951.89	
73458	3/13	112065	14460	Elem	Drape		144600		266565	144600	112065		
74510	3/14	123255	14940	Spec	Button		149400		273655	149400	123255		
75019	3/21	111368	14370	Elem	Drape		143700	17704.00	255068	143700	111368		
75544	3/23	111368	14370	Elem	Drape		143700		255068	143700	111368		
76054	3/28	115320	14880	Elem	Drape		148800		264420	148800	115320		
77136	4/4	100620	7740	Citizen	Drape		77400		178620	77400	100620		
77219	4/4	122513	14850	Spec	Button		148500		271013	148500	122513	1361.25	
77427	4/5	114098	13830	Spec	Button		138300		252946	138600	114346		
77413	4/5	201600	24200	Bal	Bandeau		99000		302850	101250	201600		
77577	4/6	350.12	42128 / 13500	Cadet / Citizen	Elec / Drape		135000		573526	223650	350.12	1512.50	
77574	4/7	238916	28668 / 13150	Cardinal / Citizen	Elec / Drape		131400		402516	165200	238916		
78443	4/11	133650	16200	Spec	Button		162000		295250	162000	133650		
78512	4/11	268800	7200	Cardinal	Elec		134000	13495.20	403800	135000	268800		
78721	4/11	104393	13470	Elem	Drape		134700		239093	134700	104393		
79451	4/14	1120000	50000	Cardinal	Elec		549900		1685500	582500	1120000		W^a Bonus
79726	4/	123503	14970	Spec	Button		149700		273203	149700	123503		Estimate
80159	4/21	260134	32544 / 17330	Cardinal / Elem	Elec / Drape		102300		496134	216000	280194		
80626	4/22	227857	28482 / 15200	Cardinal / Elem	Elec / Drape		60280		507007	234150	227857	2400.12	
A- 80378	4/21	1120000	30000	Cardinal	Elec		549900		1685500	582500	1120000		W^a Bonus
79993	4/20	360192	9648	Cardinal	Elec		176850		541092	180900	360192		Estimate
80857	4/24	154608	11400 / 11520	Elem / Citizen	Drape / Drape		144000		310508	165200	154608		
A 79944	4/28	118272	31.68	Cardinal	Elec		57974		177672	59400	118272		
81595	5/4	97644	7616	Cardinal	Elec		47960	1854.84	146714	49050	97644	1424.14	
82192	5/5	287320	7680	Cardinal	Elec		140900		430720	144000	287320		
82448	5/3	249686	33600 / 15500	Cardinal / Spec	Elec / Button		161700 / 92850 / 151500		455786	207600	249686		
82585	5/3	314043	50624 / 15150	Cardinal / Elec	Elec / Drape				586494	246450	314043		
82703	5/9	68063	8250	Spec	Button		82500		150583	82500	68063		
84901	5/11	171673	20250 / 15150	Elec / Elec	Button / Drape		70500 / 118500		388573	216900	171673	1424.14	
85158	5/17	113228	14610	Elec	Drape		144600		259378	146100	113228		
87459	5/23	491610	47520 / 15570	Cardinal / Elec	Elec / Drape		291600 / 105300		not listed				
88583	5/25	106920	12960	Elec	Button		114900		236520	129600	106920		Estimate
A 88585	5/25	1209600	32400	Cardinal	Elec		504000		1817100	607500			
89173	5/31	105555	13670	Elec	Drape		136700	7734.70	244755	136700			
	(Forward)	11211003						19844.94	Total Land Expenditures	9149510			

ANALYSIS OF TRANSACTIONS BETWEEN
SHOTWELL AND DAVE LOBDELL (GOV. CONT., EDISON)
1946

Sales as recorded on Shotwell Records

Invoice No.	Date	Invoice amount	Net Weight	Description
C 130176	1/10	$ 1180176	14587 #	Clear Cor Mesta
131641	1/16	1445464	14693	" "
132508	1/19	.058190	5560 / 14600	10/5 Co. Condemned - 4no Spun Dayton
140325	2/28	583464	13894	Clear Cor Mesta
146305	3/25	115340	14580	Steam Dayton
148088	4/4	154354	3174	Clear Cor Mesta
154017	4/10	164693	19890	Spun Stamps
155086	4/18	344930	8165	Clear Cor Mesta
155144	4/18	174443	14470	Steam Dayton
155184	4/23	455813	100820 / 9870	Condemned / Steam Dayton
151096	4/14	164750	14000	Steam Dayton
150944	4/14	450156	10718	Clear Cor Mesta
A 150730	4/10	60435	8490 / 14441	Steam Dayton / Condemned
150161	4/10	173450	14000	Spun Stamps (Steam Dayton?)
155038	4/25	50960	12880	Clear Cor Mesta
A 155030	4/25	314865	14660 / 15000	Steam Dayton / Spun Dayton Condemned
155904	4/24	600020	13950 / 1546	Spun Stamps / Clear Cor Mesta
156719	4/30	467744	14700 / 6693	Steam Dayton / Spun Dayton / Clear Cor Mesta
A- 157061	5/1	801024	14456	Condemned
156744	5/1	555454	12497	Clear Cor Mesta
158[illegible]	5/6	4[illegible]	100[illegible]	Condemned Clear
A- 157700	5/6	63000	13000	Condemned Clear
219515	6/17	360000	30000	Calaton Gulch
A 220553	6/20	228400	20700	Calaton Gulch
220591	6/24	256780	22140	Calaton Gulch
221149	6/28	230040	19170	Calaton Gulch
221445	7/3	369720	30810	Cal Gulch
222035	7/12	267540	22320	Cal Gulch
222221	7/8	338760	28230	Cal Gulch
223377	7/10	252000	21000	Cal Gulch
223633	7/11	400020	33335	Cal Gulch
221973	7/14	162360	13530	Cal Gulch
224000	7/17	120240	10020	Cal Gulch
179678	7/23	147516	39504	Condemned
226222	7/24	204000	11000	Western Cordova
A- 186315	8/2	158771	44548	Condemned
A- 159477	8/	147516	39548	Condemned
189605	8/9	82760	22440	Condemned

Shotwell Computation of Unexpended Brass Adjustment

Rem Lbs	Total		Added	Means taken from Hubbard Record
.15	# 368805		# 368805	
15	445395		445395	
1893	468600		476100	
10	176000		176000	
10	138970	133374	138970	
10	148900	14965 20	14885 00	
.10	199900		199900	
15	122475		—	
10	224700		224700	
10 1/3	189000	83377 5	189000	
10	98700		9870 00	
10	210000		210000	
10	84900		84900	
18 1/3	264880		270400	
10	210000	7697 80	210000	
10	37600		24660 / 13000	
10	139500		139500	
10	230700		221700 / 18000	
18 1/3	402300	11781 00	402300	
18 1/3	206200		206200	
18 1/3	33375		33750	
10	30000		30000	
10	207000		207000	
10	221000	14711 00	221400	
10	191700		191700	
10	308100		308100	
10	223200		223200	
10	282300		282300	
10	210000	14153 00	210000	
10	34700		34700	
10	136500		136500	
10	100200		100200	
13 1/3	724240	130740	737400	
	79400		—	15¼ 81157
	70150			15¼ 75343
15 1/3	41100			15¼ 41850

	131641	1/16	14[illegible]64	[illegible]693			.15	44395		44395
	13[illegible]08	1/19	.058190	[illegible]600	10[illegible] Co. Condemned - 4[illegible] Spec Design		1893	46960		[illegible]
	141335	2/18	5834[illegible]	13890	Clear Cor Monte		.10	13900		13900
	146305	3/15	11530	14880	Chem Design		.10	14880		14880
	148088	4/4	15435	3174	Clear Cor Monte					
	151017	4/10	16693	19890	Spec Design		.10	19890		19890
	15[illegible]86	4/18	34[illegible]30	8165	Clear Cor Monte		.15	12275		
	15[illegible]84	4/18	17[illegible]43	[illegible]970	Chem Design		.10	22470		22470
	151184	4/23	45[illegible]13	10030 9870	Condemd Chem Design		.15⅓ .10	18900 9870	833775	18900 9870
	151096	4/17	16[illegible]50	21000	Chem Design		.10	210000		210000
	150[illegible]4	4/17	45[illegible]56	10718	Clear Cor Monte					
A	150730	4/10	60[illegible]35	8490 [illegible]	Spec Design Condemd		.10⅓ .10⅓	84900 27480		84900 27480
	150161	4/10	17[illegible]50	21000	Spec Design (Chem Design?)		.10	21000		21000
	[illegible]5038	4/25	[illegible]0960	17880	Clear Cor Monte				76978	
A	155030	4/25	31[illegible]65	[illegible]4660 15000	Chem Design Spec Design & Comp		.10	37660		24660 13000
	155904	4/24	60[illegible]70	13950 [illegible]541	Spec Design Clear Cor Monte		.10	139500		139500
	156719	4/30	46[illegible]74	[illegible]170 1900 6693	Chem Design Spec Design Clear Cor Monte		.10	23970 00		23970 180
A-	157061	5/1	80[illegible]24	[illegible]1456	Condemd		18⅓	402300	11781 00	40300
	[illegible]57[illegible]	5/1	[illegible]5[illegible]85	[illegible]4972	Clear Cor Monte					
A-	[illegible]57[illegible]	5/16	[illegible]0[illegible]57[illegible]	[illegible]09[illegible]	Condemd Clear		18⅓	20620		[illegible]0620
	[illegible]57[illegible]	5/16	63[illegible]000	18000	Condemd Clear		13⅓	33750		33750
	159515	6/17	3600.00	30000	Tulare Fuller		.10	300000		300000
A	[illegible]0[illegible]53	6/20	[illegible]58400	[illegible]0700	Tulare Fuller		.10	20700		20700
	[illegible]0591	6/20	[illegible]56680	[illegible]1140	Tulare Fuller		.10	22100	14711 00	[illegible]1400
	[illegible]1149	6/28	13[illegible]40	19170	Tulare Fuller		.10	191700		191700
	[illegible]1445	7/3	36[illegible]70	3080	Tul Fuller		.10	30810		30810
	[illegible]1035	7/5	[illegible]67540	[illegible]2370	Tul Fuller		.10	24320		[illegible]2320
	[illegible]1441	7/8	33[illegible]60	28230	Tul Fuller		.10	28230		[illegible]8230
	[illegible]1377	7/10	[illegible]5000	[illegible]1000	Tul Fuller		.10	210000	14153 00	210000
	[illegible]3633	7/11	[illegible]00040	34170	Tul Fuller		.10	34170		34170
	[illegible]1973	7/12	16[illegible]00	13650	Tul Fuller		.10	136500		136500
	[illegible]1000	7/13	[illegible]0[illegible]40	10020	Tul Fuller		.10	100200		100200
	179678	7/13	14[illegible]5[illegible]16	39504	Condemd		18⅓	724140	13[illegible]40	73740
	[illegible]4[illegible]	7/17	[illegible]04000	11000	Tuolumne Condemn					
A-	186315	5/1	15877[illegible]	[illegible]4578	Condemd		.2[illegible]	79[illegible]00		81157
A-	159477	5/1	14[illegible]57[illegible]	39578	Condemd		18⅓	7[illegible]150		75[illegible]
	189605	5/9	83[illegible]60	[illegible]4440	Condemd		18⅓	411400		41858
	186413	8/8	[illegible]4[illegible]80	10020	Connet Mut		.10	100200		100200
	186550	8/12	[illegible]2040	5010	Connet Mut		.10	50100		51000
	189[illegible]4	8/7	[illegible]3[illegible]30	[illegible]2200	Cotton Condem					
	178[illegible]4	9/12	16[illegible]4[illegible]75	[illegible]0016	Condemd		13⅓	71696		93780
	187197	10/21	[illegible]4[illegible]80	10020	Connet Mut		.10	100200		100200
	187196	10/21	[illegible]4[illegible]40	[illegible]5010	Connet Mut		.10	50100		50100
	187178	10/25	63[illegible]16	17040	Condemd		13⅓	31200		31950
~~Dup~~	~~189196~~	~~10/21~~	~~[illegible]0[illegible]40~~	~~[illegible]5010~~	~~Connet Mut~~			~~50100~~		
	187198	10/21	[illegible]4[illegible]40	[illegible]5010	Connet Mut			[illegible]0[illegible]00		50100
	[illegible]1[illegible]3	11/6	19[illegible]76[illegible]16	[illegible]5704	Condemd		13[illegible]	96[illegible]60		98[illegible]
	196[illegible]	11/18	66[illegible]318	[illegible]1170 10370	Spec Design Spec Furniture		.10	[illegible]74350		11700
	196511	11/21	77[illegible]743	[illegible]1700 13[illegible]4	Spec Design Spec Furniture		.10	[illegible]0[illegible]3	[illegible]8[illegible]90	18700
		(Amended)	[illegible]0[illegible]07						13[illegible]05	[illegible]8[illegible]8 total

Cancelled from Lubeck due to the financial difficulties $48,614.20

5824

ANALYSIS OF TRANSACTIONS BETWEEN
SHOTWELL AND DAVE LUMBER (GEN. CONT., KNOXVILLE
1946

Sales as recorded on Shotwell Records

Invoice No.	Date	Invoice amount	Net Weight	Description
Forward				
197715	4/26	408983	12680	Spruce Dunnage
197700	12/10	207570	13139	Spruce Dunnage
A-197137	12/16	336053	13410	Spruce Dunnage
197421	2/26	160008	50000	Spruce Lag Shoe
170782	9/11	406947	25000	Lag Shoe
187191	12/19	1126860 - 187810		Cotton Dynamo
191524	10/11	3077698		Cotton Dynamo
		7316.61		
Invoices		26232607		
TOTAL		33548668		

Shotwell Computation & Corrected Price Adjustments

Per Ton	Total
10	$ 136800
11	13139.00
10	13410.00
	—
44½	37000.00
	—
	—
	773700

Memo (Partly) Copies from Knoxville Records

HC A30.00	
	$ 136800
	—
	134100
	—
	70000 Unverified - do Knoxville record for comparison
	—
	—
	77700
found	1281918a
TOTAL (Used in Overhead Recap)	1359238a

SHIPMENTS NOT BILLED:-

8/20/46	335 Cases	Cement Mixer @ $ 7.70 each		2441.00
7/24/46	1646 "	Cardinal	8.96	14751.00
6/8/46	70	"	8.96	627.20
5/24/46	1989	"	8.96	17821.44
3/6/46	600	Citrus Drops	375	2250.00
"	400	Spruce Drops	225	900.00
3/9/46	456	Citrus Drops	375	1710.00
"	571	Spruce Drops	225	128.475
"	7	Spruce Bottoms	255	17.85
3/5/46	1150	Cardinal	7.70	9000.00
3/4/46	1000	Spruce Bottoms	255	2550.00
8/9/46	1700	Cardinal	7.70	12398.40
				65734.64

TOTAL (Used in Overhead Recap) 65734.64

5622

201700	11/10	31 75 70	13 73 0	Spun Drops		11	13 73 00	13 73 00
A-201137	11/16	33 60 53	13 41 0	Spun Drops		10	13 41 00	13 41 00
201941	9/26	16 000 00	5000	Spun Leg Chairs			—	—
170780	9/11	406947	25000	Leg Chairs		44 8/10	370000	370000 Unverified - No Purchase record for comparison
187191	10/19	1126860	187810	Colon Syrup			—	—
191524	10/11	3077678		Corn Syrup			—	—
		7316061					773700	773700
	Tons	26234607						
	TOTAL	33548668					Total	1281918
							TOTAL (Used in Purchase Recap)	1359238

SHIPMENTS NOT BILLED:-

6/20/46	335 Cases	Canned Yams @	7.70	Case	2441 00
7/24/46	1646	Cardinal	8.96		14758 00
6/5/46	70	"	8.96		627 70
5/24/46	1989	"	8.96		17821 44
3/6/46	600	Citrus Drops	375		2250 00
"	400	Spun Drops	225		900 00
3/9/46	456	Citrus Drops	375		1710 00
"	571	Spun Drops	225		1284 75
"	7	Spun Buttons	255		17 85
3/5/46	1250	Cardinal	7.70		9000 00
3/4/46	1000	Spun Buttons	255		2555 00
8/9/46	1700	Cardinal	7.70		12398 40
					65734 65
				TOTAL (Used in Purchase Recap)	65734 65

5622

S 2 6 / 4 3

Def 6+ 7

EXCERPTS FROM HEARINGS BEFORE A SUBCOMMITTEE
OF THE COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES - EIGHTY-
SECOND CONGRESS, SECOND SESSION ON
ADMINISTRATION OF THE INTERNAL
REVENUE LAWS.

Government Exhibit
Defendants Exhibit 7
( ) Iden.
( ) Rec'd.
In the District Court of the United States,
Northern District of Illinois, Eastern Division BEFORE
No.
Gary E. Fuller - Official Court Reporter

5623

I N D E X

Page in Report

Page 7 - Snyder

Pages 78-80 - Snyder (79-80 crucial)

Page 84 - Dunlap

Pages 89-92 - Dunlap

Pages 92-98 - Dunlap and Lynch

Pages 138-141 - Schwartz (139-141) crucial

Complete set of Treasury Statements as to voluntary disclosure

Page 140 - 1912

Page 141 - 1919

Page 142 - 1934

Page 142 - 1945

Page 143 - 1945

Page 144 - 1947 - Wenchel

Page 150 - 1947

Page 151 - 1952 - Abandonment

Page 152 - Lynch

Page 155 - Schwartz

Page 160 - Schwartz

Page 161 - Lynch

Pages 234-238 - Mintz

Pages 241-243 - Arent's Statement

ARENT, ALBERT E. , former chairman, committee on procedure in fraud cases, section of taxation, American Bar Association

DUNLAP, JOHN B., Commissioner, Bureau of Internal Revenue

LYNCH, THOMAS J., General Counsel, Treasury Department

MINTZ, SEYMOUR S., Chairman, committee on procedure in fraud cases, section of taxation, American Bar Association

SCHWARTZ, RICHARD C., Assistant Head, Penal Division, Bureau of Internal Revenue

SNYDER, JOHN W., Secretary of the Treasury

J. P. WENCHEL, Chief Counsel, Bureau Internal Revenue

[illegible]5625

EXCERPTS FROM HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES - EIGHTY-SECOND CONGRESS, SECOND SESSION ON ADMINISTRATION OF THE INTERNAL REVENUE LAWS - JANUARY 22, 23, 24, AND 25, 1952.

Page No.

Statement by Secretary Snyder before the Committee on Expenditures, House of Representatives, January18, 1952.

* * * * * *

7 We have also announced the abandonment of the former voluntary disclosure policy. We abandoned this policy because of its controversial nature as reflected in court decisions, complexities of administration, and the abuses which arose.

* * * * * *

84 MR. DUNLAP. I have held administrative positions for 18 years in the internal revenue service, with which you are familiar. * * *

* * * * * *

Press release, Tuesday, December 11, 1951

Treasury Department

Bureau of Internal Revenue

S. 2910

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Voluntary Disclosure

The former voluntary disclosure policy while first adopted in 1919 had its origin in the controversy as to whether criminal liability should be compromised under the law. As early as 1912 the Bureau followed a policy of not accepting monetary payments in compromise of criminal liability where the evidence was sufficient to afford reasonable grounds to believe that a conviction could be secured.

On August 22, 1919, the first draft of a policy statement respecting voluntary disclosures was issued. This was the result of successful criminal prosecutions in cases involving fraudulent tax returns and the publicity attending the indictments in such cases. It was then felt that the tax evaders were responding to the vigorous prosecution work of the Bureau and realized that such an enforcement program would eventually disclose the deficiencies in their returns and result in criminal prosecution. The Bureau then found that many of these tax evaders were coming forward and throwing themselves on the leniency of the Bureau with the hope that they would thereby escape prosecution. The conclusion was reached that the increasing enforcement activities would result in additional criminal cases which would in turn induce additional voluntary disclosures.

The initial draft of the policy statement provided that where voluntary disclosure was made of intentional evasions which, if discovered by internal revenue officers, would be the basis of criminal prosecution, it would be the policy to impose maximum civil penalties and to accept offers in compromise in criminal liability instead of instituting prosecution and insisting on jail sentence. Some 3 weeks later, on September 8, 1919, this policy statement was changed to provide that offers in compromise of criminal liability would be considered rather than accepted in voluntary disclosure cases.

At the outset of the policy there was no outstanding public invitation from which tax evaders could imply a promise of immunity if they came in before the Bureau initiated an investigation. From 1919 until 1934 in voluntary disclosure cases the

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Treasury entered into legal and binding compromises under the statute where the decision was made not to prosecute because of the circumstances surrounding the voluntary disclosure. On July 2, 1934, decision was reached that the Treasury Department would in no case compromise criminal liability and that prosecution would be recommended or not solely on the basis of whether the evidence was sufficient to afford reasonable grounds for the belief that a conviction could be secured. Also at this time it was decided that in cases in which taxpayers made voluntary disclosures of intentional evasions before investigation by the Bureau had been initiated that the Bureau would not recommend criminal prosecution. The policy was administered on a case-by-case basis and without an open invitation to tax evaders to come in under an implied promise that immunity would be given if investigation had not been initiated.

With the inception of the drive against black marketeers by the Treasury Department in 1945, widespread publicity was given to various statements by Treasury and Bureau officials announcing the existence of the voluntary disclosure policy. It was then hoped that such publicity would result in securing additional revenue which would not otherwise be reached through investigation. As a result of this publicity, many tax evaders who were not under investigation came forth in good faith and in reliance upon the promise of immunity disclosed their deficiencies. There were also instances where tax evaders already under investigation came forward and attempted to secure immunity on the basis of the public announcements. In these cases no difficulty was encountered where the investigations had proceeded to the point where the Bureau could establish that the disclosure was in fact made with knowledge of the investigation and not in good faith reliance on the immunity held out by the policy.

The principal difficulty in the administration of the policy resulted where, despite the prior initiation of an investigation, the Bureau was unable to clearly establish that the taxpayer had knowledge that he was under investigation before he made his alleged voluntary disclosure. In these instances, lack of knowledge on the part of the taxpayer was easy for the tax evaders to simulate and the difficulty was with the Government to disprove the alleged lack of knowledge. In the administrative consideration of these cases -- regardless of whether the question was raised in the collector's office, in the office of the revenue agent in question, before the Intelligence Unit, or before the Chief Counsel's office -- the representative of the Bureau was faced with a border-line case. The cases which fell in this twilight zone, depending upon the decision finally made, were usually susceptible of criticism that the administrative officer had abused his discretion in resolving the case one way or the other.

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If the disclosure had actually been made in good faith reliance on the promise of immunity, the taxpayer's confession and the self-imcriminating evidence submitted by him could not be used against him because of the constitutional privilege against self-incrimination.

The independent authority of the offices of the collector, the revenue agent in charge, and the special agent in charge to initiate investigations resulted in situations where a taxpayer under investigation by one of those offices would attempt to make a voluntary disclosure before an officer of one of the other two offices. Here again it was found that in many instances the Government could not establish that the tax evader had knowledge of the investi ation which had been initiated. Having in mind the open invitation to come in and confess his crime, the tax evader would then appear in one of the offices having no record of the investigation pending elsewhere and submit his confession and self-incriminating evidence before adequate check could be made against the records of various other offices which may have initiated an investigation.

To guard against litigation of cases which would result in decisions that the taxpayer's constitutional rights would be violated if the evidence secured through the disclosure were used, the Bureau attempted to resolve cases in the taxpayer's favor where there was a reasonable doubt that the taxpayer had knowledge of the investigation. Despite the attempt to avoid litigation on this question, the issue was placed before the courts in several cases. In the Lustig case in 1947 the Court of Appeals for the Second Circuit held in favor of the Government when it was established not only that the investigation had been initiated prior to the disclosure but that the special agent in charge had so advised one of the taxpayer's representatives. In the Colonial Rubber Co. case, the Government's position was again upheld on the basis of evidence showing that the taxpayer knew that the agents were on the trail of the fraud and because of that knowledge had confessed.

In the Abe H. Liebster case in Pennsylvania, the Government's evidence was suppressed on the basis that the evidence did not show that the taxpayer knew he was under investigation when he made his disclosure. The question of knowledge was again decisive in the Saxe case in Massachusetts where the judge concluded that he could not find that the taxpayer, at the time of his disclosure, did not know he was under investigation.

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The Government was also successful in opposing motions to suppress evidence in two cases decided in 1951, the Harlic Bag Co. case in Connecticut and the White case in Mississippi. The latter case is now on appeal. The voluntary-disclosure question is currently in litigation in another case in California.

Another factor involved in these border-line voluntary-disclosure cases was the matter of delay where the voluntary-disclosure issue was raised either in the Bureau or after the reference of the cases to the Department of Justice. The belated contentions of voluntary disclosure involving alleged violation of the constitutional rights of the taxpayers often required lengthy supplemental investigations and delayed the ultimate disposition of the prosecution question until voluntary disclosure question could be decided.

The Bureau gave serious consideration to various proposals in 1949 and 1950 that taxpayers be permitted to make voluntary disclosures until they had actual knowledge that their returns were being investigated or until they had knowledge that they were being investigated for fraud. Here again the negative fact of knowledge was such that the adoption of these suggestions would require the mailing of a notice to the taxpayers when investigation was initiated. Among the reasons which made it impractical to adopt such a practice were the following: First, honest taxpayers would resent any form of notice which would imply that it was too late for them to make a voluntary disclosure and such resentment would result in a lessening of the cooperation usually extended by taxpayers in permitting the examination of their books and records; second, early notice in the cases of racketeers and other law breakers that their returns were under investigation would lead to destruction of records, intimidations of witnesses, and general concealment of facts which the agents might otherwise get through continued confidential investigation; and, third, it was believed that such a notice would lead to concealment of assets which might otherwise be reached through jeopardy assessment proceedings to satisfy the civil liability.

The intensified drive against racketeers initiated by the Bureau in 1951 raised the further question as to whether or not racketeers and members of the criminal element were to be allowed to escape criminal prosecution by making voluntary disclosures.

Another practical difficulty with the policy was that it contemplated that confession of an intentional evasion would be folowed by full and complete settlement of the civil liability. It was not unusual to find that once tax evaders were safeguarded from criminal prosecution through their constitutional rights where a promise of immunity had been made, they would refuse to pay the amount of the civil liability. In these instances the Bureau was forced to rely upon statutory remedies to enforce collection, and in many instances found that the fruits of the evasion had disappeared or had been concealed prior to the disclosure.

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It was finally concluded that long-range enforcement of the internal revenue laws would be served best by a policy of closing all loopholes to which tax evaders could look to avoid criminal prosecution. It was thus concluded that the abandonment of the policy should be recommended and action to that effect was taken by the Secretary on January 10, 1952.

89 Mr. Dunlap. They are pretty well stated in that document. Of course, I have had some rather harrowing experiences with that voluntary disclosure policy as a field officer in charge. There, again, I think that the facts should be presented to the Department of Justice and that they should take all those things into consideration in determining whether or not the man should be prosecuted. But I do not feel that because of various allegations which have been subjected to a great deal of abuse, we should be prevented from presenting the facts to the Department of Justice.

Many, many claims in the past have been made, of voluntary disclosure, which proved out to be not quite what they appeared on the face. There have been many conflicting court opinions on the subject. It is just not the kind of controversial field that I feel we should be in.

I again feel that all of the facts, including the fact that the taxpayer cooperated 100 percent or he did not, and things of that nature, should be forwarded with our case report to the Department of Justice, who, after all, is the agency charged with the final determination of whether the man should be prosecuted, or not.

Mr. DeWind. If I understand correctly, then, it is the new policy of the bureau of Internal Revenue that the factor of taxpayer cooperation or voluntary coming forward to disclose tax fraud will not be taken into account in the decision to refer the case to the Department of Justice.

Mr. Dunlap. No, but the fact that he did that would be given to the Department of Justice.

Mr. DeWind. But that has no bearing on the decision to recommend prosecution as far as the Bureau is concerned, is that correct?

90 Mr. Dunlap. That is correct. It would be one of the factors that they would consider, of course. The very fact that he did that would be entered into our record of the case as it is transmitted to the Department.

Mr. DeWind. Perhaps I should then ask this question: From your viewpoint, as Commissioner of Internal Revenue, would you recommend that the Department of Justice have a policy of taking into account voluntary disclosure or cooperation of the taxpayer in the decision as to whether or not to refer to the United States attorney.

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Mr. Dunlap. Mr. DeWind, I would say it would be very

unbecoming on my part to recommend to the Department of Justice anything that they should take into consideration in running their business. I just would not think it would be appropriate.

Mr. DeWind. The question is an important one. I think, from the point of view of this committee as to whether your feeling would be that it is desirable, in the administration of the tax laws, to have voluntary disclosure policy at some level in the consideration of the cases before they reach indictment.

Mr. Dunlap. You know, and I know, that the Department of Justice is going to have to take into account all elements in the case which would tend to influence the decision of a jury. We merely intend to give them all of the facts, and then they would have to make up their minds as to whether or not, in the light of the facts that we have given them, they can hope to secure a conviction.

There, again, I must say that we have to do all of the work anyhow. To get at the true tax liability we must make a complete examination. So we are wasting no time and no effort at any point in the process.

Mr. DeWind. There are really two things involved, are there not. One is whether the actions of the taxpayer may have either legal or as a matter of psychology prejudiced the chances of a successful conviction. That could be one issue and that would be an issue that presumably, in the decision as to whether or not to develop the criminal case, the Bureau would have, to some extent, to take into account as to whether or not, as a legal matter, you have a case that would stand up under prosecution.

The second aspect is something different, though. If the taxpayer decides to come forward voluntarily, should there be any policy or procedure which would guarantee in advance of that timely disclosure that it would result in no recommendation for prosecution?

Mr. Dunlap. That is the very thing that I object to: guaranteeing the taxpayer in advance any immunity from prosecution. I base my thinking on some very unfortunate cases that I know of.

Mr. DeWind. That decision is at the Bureau level. You feel that is a factor that should not weigh in the Bureau's handling of the case.

But is it a factor that should weigh in the handling of the case by the Department of Justice? 5632

Mr. Dunlap. There, again, I will say I think the decision should be made by the people who have to try the case, that our

sole responsibility should lie in giving them all of the facts - and I emphasize the word "all".

Mr. DeWind. Of course, the results of the Department of Justice prosecution policy will have a direct bearing on taxpayer morale and a direct influence on tax administration in the Bureau of Internal Revenue. Therefore, the question really is whether or not you would favor the Department of Justice having a fixed policy of automatically dropping prosecution in
92 voluntary disclosure situations.

Mr. Dunlap. I do not think they can have a fixed policy in there. The cases vary too much one from another.

Take the case of a taxpayer who, in his own defense, comes in and says, "I want to make a voluntary disclosure," and he makes a voluntary disclosure and he files an amended return. He says, "I have made a voluntary disclosure."

Then you go out in the field and examine that and find out he did not reveal but 10 percent of the income in that case; he just took it for granted you are going to take his word for it.

When you check it you find he only reported 10 percent of it voluntarily.

Now, what are you going to do in that case? He is going to plead before the court that he made a voluntary disclosure when actually he did not. Does the Bureau decide whether that case is to be prosecuted, or does the Department of Justice decide?

I think the only way we can work it satisfactorily is to give them all of the facts and let them decide.

In other cases, the taxpayer may come in and make a 100 percent full and complete disclosure. And in that event, we so tell the Department of Justice, that after our checking, we find he has done that.

Those are the considerations that they must take into account in arriving at their decision. I think they should have our recommendation in each case, and certainly we intend to give it to them.

Mr. Byrnes. By recommendations, what do you mean? The conclusion to be drawn from the facts that you are sending to them? 634

Mr. Dunlap. Conclusions to be drawn from all the facts as we have found them. But we will not recommend no prosecution purely on the basis that the taxpayer is claiming a voluntary disclosure.

Mr. Curtis. Do you that that it is sound public policy to have a situation where a taxpayer who has underreported his income and he honestly and conscientiously decides to make full disclosure, not only voluntary, but full, do you think that it would be sound public policy to compel him to choose between making that disclosure and putting himself right in the position --

Mr. Dunlap. Mr. Curtis, may I inject this thinking into your question, if I may: The policy has been in effect for some time. It has been highly publicized. People who have sinned in that regard in the past have known about it and have had full opportunities.

We have been faced many, many times by the problem, under our former policy, of starting an investigation, having it pretty well underway, and this fellow runs into some office where the head of it does not know that the investigation is underway, and the fellow says: "I want to make a voluntary disclosure," and he starts talking.

Now, under our rules, that was not a voluntary disclosure, but he was laying a predicate for his own defense, and unjustly so. He did not do a thing until we forced him to.

Mr. Curtis. But suppose the investigation had not started, then what is the situation?

Mr. Dunlap. The situation, as I see it, is that we should check his voluntary disclosure to be sure that he has made a 100-percent statement to us; determine all of the facts; what happened, how he did it, what he did in cooperation with us, and how he disclosed it to us, and report those facts to the Department of Justice.

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Mr. Curtis. Including the fact that you had already started investigating?

Mr. Dunlap. Yes.

Mr. Curtis. Suppose you start investigating his neighbor, but not him, and he decided to make a disclosure; what is his situation?

Mr. Dunlap. I should think that it would be the same picture. We would develop all of the facts, including the fact that he cooperated with us 100 percent; that he did make a full disclosure; that he did it voluntarily, and present that to the judicial branch of the Government for their decision.

5635

Mr. Keogh. May I ask a question here?

Mr. Curtis. Yes.

Mr. Keogh. When you do that, do you recommend prosecution?

Mr. Dunlap. That would depend on the facts involved in each individual case.

Mr. Keogh. But in some cases you might make all those facts known , that he did come in completely voluntarily and disclosed a previously unreported income. Would you in some cases then recommend prosecution, too, or would you leave that up to the Department of Justice?

Mr. Lynch. Mr. Keogh, I wonder if I could answer it along a little different line and then come to this.

I think our difficulty with the voluntary disclosure policy has laid in the fact that it is an open promise of immunity. That means that it is fixed in terms of words, so that anybody could say that there is an open statement from the Bureau of Internal Revenue that anyone that comes in and does that --

Mr. Keogh. Let me interrupt you at that point.

If we assume that the disclosure is voluntary and is prior to the institution of any investigation by you and is complete, are not the objectives of the code carried out?

After all, the idea is not to enforce the penal provisions of the code, but to insure the collection of taxes.

Mr. Lynch. I do not believe so.

Mr. Keogh. Why not?

Mr. Lynch. What I wanted to come to is this point, that obviously any prosecutive agency -- and this happens every day; it must happen every day in the world that we live in -- that any prosecutive agency with respect to any crime, would have to consider whether, taking all the facts as a whole, it is a case where there is a reasonable chance of conviction for the crime.

Mr. Keogh. I do not agree with that statement, Mr. Lynch. Every day in the year, I am sure that district attorneys in the counties in this country send witnesses before grand juries without waivers of indictment, knowing that those people will gain immunity.

Mr. Lynch. Yes; that may be.

Mr. Keogh. Even when they know they have a good case against that particular witness.

Mr. Lynch. But I do not think there is a circumstance equivalent to this, where they are playing against a set rule, that is, the former rule which said that in cases where there were disclosures before any investigation started immunity was 93 automatically promised in advance.

And I wish that when you go into this in detail, that we could present to you all the cases and all the difficulties and all the litigation and all the administrative difficulties.

Mr. Keogh. My question was that if you make the assumptions that I did, would you, in addition to that, recommend prosecution where there has been a voluntary disclosure?

Mr. Lynch. I would have to answer that this way: We would have to consider all the circumstances in a case like that to determine whether it would be considered a prosecution case.

Mr. Keogh. Who do you not tell the Department of Justice that?

Mr. Lynch. I would not want to say that automatically there never would be a prosecution; nor would I want to say that there is any commitment outstanding in the sense of an automatic commitment of immunity, where anyone coming in will, at the beginning, get the commitment of immunity.

It seems to me that is a decision that prosecutors have to make every day regarding the whole facts of the case.

Mr. Curtis. Could I state the problem in another way? I am not speaking in reference to the hardened conniving crook, but in the category of other citizens who are guilty of wrongdoing in reference to their taxes for maybe one, two, or three, or many years.

It is your feeling, from your experience, that fear of prosecution is preventing them from making a disclosure and paying what they know to be owing?

Mr. Dunlap. Are you directing that question to Mr. Lynch, or to me?

Mr. Curtis. To you.

Mr. Dunlap. No, sir; I do not think that fear is preventing them from it. I think that, under the old system, there was a great temptation there, Mr. Curtis, on the part of quite a few of our people, to take advantage of the thing and only come in with the true story when they learned that they were going to be investigated. The temptation was there. All we are doing is removing that temptation. 5637

Mr. Curtis. I wonder what the right policy should be in regard to the individual who has it on his mind but has never disclosed to anyone. He has to choose between taking the risk of never being discovered, or getting right and making a disclosure.

Mr. Dunlap. That is true in a lot of cases other than income tax cases, Mr. Curtis.

This subject has been analyzed, discussed, and talked between us and lawyers on both sides, between our management committees, our study groups, and I might practically say that the preponderance of opinion in the Bureau and among its people who have been working with it is that it should be revoked.

I agree with them, after encountering the many, many difficulties that a field officer in charge has under such a policy.

Mr. Curtis. And the policy you had was not too well fixed with definite guidance, was it?

Mr. Dunlap. There are two definite lines in that regard. In my way of thinking, it wasdefinitely well fixed. In other schools of thought it was pretty vague, and it is very difficult to put down an iron-clad rule of what should constitute a voluntary disclosure.

It is most difficult to define in precise legal termswhat is a true voluntary disclosure, and therein lie the differences of opinion which result in these different schools of thought.

94 Mr. Curtis. Should there be an incentive to people to get right and pay what they owe?

Mr. Dunlap. I think the incentive is there in the knowledge had by most lawyers of the circumstances which would enter into consideration of whether a man is going to be prosecuted, or not.

Certainly all of our attorneys in this country know what must be considered before any prosecuting official is going to take his client before the jury.

Mr. Keogh. Am I correctly informed, General, that, when this abandonment of the voluntary disclosure policy was effected, all pending cases of voluntary disclosure resulted in the taxpayer being notified of the cancellation of the policy?

Mr. Dunlap. No, sir; that is not correct.

Mr. Keogh. But in some instances it happened, did it not?

Mr. Dunlap. There is a directive and explantory mimeograph in preparation on that subject now.

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That is right. That is our attitude toward it. Their rights, under the Constitution, would prevent our making it retroactive.

Mr. DeWind. That is, there has been in effect a promise of immunity; is that correct?

Mr. Dunlap. That is right.

Mr. Lynch. But the policy obtains in all cases of voluntary disclosure up to the time of announcement of the change in that policy.

Mr. Keogh. I saw a letter from the Bureau on that.

Mr. Dunlap. Yes. I understand that some of them did go out, Mr. Keogh.

But that has been corrected. In other words, it has been called to the attention of our people that that be not retroactive behind the date of the announcement.

Mr. DeWind. I do not know whether I addressthis to you, or to Mr. Lynch, Mr. Commissioner.

I believe the situation this subcommittee is going to be confronted with may be this; that representatives of bar associations and other groups are likely to appear before this committee and recommend that either through legislative action or through administrative action, either by the Bureau or the Department of Justice, a voluntary disclosure policy, whether roughly the same or some modified policy be reinstituted.

This committee will, therefore, have to consider the desirability of reinstituting that policy.

I judge it to be, in the view of the Department, that it should not be reinstituted at the Bureau level. My question is: Should it be reinstituted at the Department of Justice level?

Mr. Dunlap. I would say that if the Congress adopted such a policy into legislation, or if the committee recommended the adoption of such a policy, that certainly they should be explicit in spelling out the ground rules of what constitutes a true and correct voluntary disclosure, because that has been the source of our headache.

Mr. DeWind. Could you or your penal division people give the committee the benefit of your recommendations on how best that could be done if it were to be done?

Mr. Dunlap. We would be happy to cooperate with the committee in any way; yes, sir.

Mr. DeWind. That is a topic we might go into tomorrow, too.

95 Mr. Dunlap. I think the further you go into it, and if you will particularly analyze the minutes of the meeting of the Wiggins committee held January a year ago, that you will see some of the many, many difficulties that we have encountered in that field over many years.

Mr. DeWind. Does that represent two conclusions on your part, Mr. Commissioner? One, that those basic difficulties outweigh the benefits, the favorable factors that led to the adoption of the voluntary disclosure policy, and, in the second place, that those basic difficulties cannot be corrected legislatively or administratively so as to resolve them in favor of the favorable factors?

Mr. Dunlap. I think so; yes, sir.

Mr. DeWind. I gathered, from what Mr. Lynch said, that it was his view that, as a practical matter, a case that would be, let us say, a clear voluntary disclosure case under the old policy would probably not be recommended for prosecution to the Department of Justice; that is, it would not be forwarded at all to the Department of Justice, but that it should not be a fixed policy on which the taxpayer could have a right or claim an immunity, but rather a discretionary policy in the decision as to whether or not to send it forward. Is that right?

Mr. Lynch. Yes. But again I want to say that in mechanical terms it is not a factor of 90 percent or 50 percent or anything else. What I want to say is that you have a resolution of judgment as to whether or not a case is appropriate for recommendation for prosecution, in which you take into consideration all the circumstances.

Mr. DeWind. Perhaps we can take a.. extreme to get the point. Suppose you have a case of fairly flagrant tax fraud, where there is no question about the fraud involved and the intent and the planning that went into that fraud, but, at the same time, you have a clear disclosure prior to any knowledge or possible investigation by the Bureau; would that be the sort of case that would, nevertheless, be sent forward with recommendation for prosecution?

Mr. Lynch. I should think that would be a consideration that might well lead to sending it forward with a recommendation for prosecution.

It is the automatic aspect of this that has been so disturbing, and it is the fact that we find people are playing so much against it in claims of immunity when we do not think they are well deserved.

Mr. DeWind. It is the abuse of the system or the improper application of the system that has caused the problem. F 5640

Mr. Lynch. I would suggest here that the proper application

of the system presents the problem which for ages has been a problem that confronts any prosecutive agency, and that is as to what considerations they give to various factors based upon the particular circumstances.

Mr. DeWind. Then, very clearly, it would still be a factor to be taken into account by the Bureau, in deciding whether or not to send the case forward, that the taxpayer came forward voluntarily or cooperated fully and so forth.

Mr. Lynch. Yes. It certainly is easy to conceive of a case where it would be a waste of time to send it forward with a recommendation for prosecution.

Mr. DeWind. Would that be the test, Mr. Lynch; or would it be somewhat a different test?

96 Is the only test: "Can we successfully prosecute?" or is there a somewhat different test? Is there a quite clear policy in certain cases not to prosecute, so as to encourage voluntary disclosure?

Mr. Lynch, I did not mean that is the only test. I mean a sort of resolution of judgment as to all the facts in the case itself.

Mr. Dunlap. That gets back to the question also, Mr. DeWind, what is public policy. Is it public policy to let people sit back and go for years without paying their taxes and then, when they decide come in and do it, say "Fine and dandy"? Or is it public policy to say that our people should pay their taxes fairly and honestly the da they are due?

Mr. DeWind. I see no easy resolution of these problems. I am not pretending here that I am not perplexed by these same problems. What I am trying to do, though, is to get ultimately your judgment as Commissioner, on a very difficult policy question. It is a matter of judgment.

Mr. Lynch. Could I add one factor with respect to the suggestion of a statutory definition? And, obviously, this has be be in the abstract.

We do not have any particular statutory definition before us; but by and large, the difficulty is that you would have two issues to try in every criminal case. You would have the issue to try as to whether it meets with the statutory voluntary-disclosure requirements of again, automatic immunity, as well as all the issues to determine in the case as to whether or not substantively it is a tax-fraud case.

Now, it may be there is a way to eliminate that difficulty.

Mr. DeWind. I was going to say: In your experience would that be eliminated by a formalization of the policy?

Suppose that, instead of an informal or unformal policy, a formal disclosure could be made to any officer or official of this Bureau of Internal Revenue. Suppose there were a formalized proceeding, in which voluntary disclosure was required to be sent in in writing, sent by mail to the Commissioner of Internal Revenue, or some Washington official; that they would have to set forth in detail the matters to be disclosed; that the definition of what constituted the beginning of an investigation would be a published definition requiring, I would think setting up within the Bureau some sort of card system, which would fix the time when investigation was begun in fraud cases. Could those mechanics resolve these abuses and lead to a proper voluntary-disclosure policy?

Mr. Dunlap. You get right back to the same difficulties that we have experienced trying to arrive at these conclusions, and that is: When does an investigation start? Is it when an agent goes out and takes some overt action like contacting the taxpayer or contacting the bank, or contacting somebody he has done business with; or is it when we get the lead that is going to lead to the investigation? When did the investigation start?

I tell you, if the Congress, for instance, wanted to spell out a definition of "voluntary disclosure" under which immunity would be granted, I think it should be spelled out for the Department of Justice and not for the Bureau of Internal Revenue. I think we should continue to be the fact-finding body -- give all of those facts to the Department. If, under their policy, he should not be prosecuted, fine, if he should, that is fine, too.

97 Mr. Keogh. You send to the Department of Justice only those cases that you think should be prosecuted; do you not?

Mr. Dunlap. That is correct; yes, sir.

Mr. Keogh. Yes. So that the mere sending over of a case would mean you think it should be prosecuted.

Mr. Dunlap. Yes, sir; and before we send them, of course, every fact is taken into consideration.

Mr. Keogh. If you have no policy with respect to declining prosecution, why do you have a policy with respect to recommending prosecution, in such cases as we were discussing?

Mr. Dunlap. Mr. Lynch will answer that.

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Mr. Lynch. I think the answer to your question has to be that we do take into consideration all the factors as to whether or not it should go forward with a recommendation for prosecution.

Mr. Keogh. So, your policy is to resolve all those cases where voluntary disclosure is a part, which are sent to Justice in favor of prosecution?

Mr. Lynch. No; I think that what the Commissioner has in mind is that it largely gets down here, as I see it, to whether or not there is a meritorious claim for immunity. We want to take it out of the area that it has been in before under this so-called voluntary-disclosure policy.

Mr. Keogh. You take it out of that area by sending it to Justice, and, by sending it to Justice, you are recommending prosecution. Are you not?

Mr. Lynch. Well, we can deal particularly with that factor of it, Mr. Congressman.

Mr. DeWind. It would seem to me this subcommittee might find itself in a place where it would want a recommendation from the Bureau of Internal Revenue, in the light of its experience, as to whether or not the Bureau considers it possible to frame a voluntary-disclosure policy, either at the Department of Justice level or the Bureau level, which would be a proper and helpful factor in tax administration, or whether it is the judgment that you cannot do that; that it is not possible to set up such a policy.

Mr. Dunlap. We would be glad to give consideration to it, Mr. DeWind, of course.

Mr. DeWind. Could we get the help of your experts in the Penal Division on that tomorrow, their judgment on the questions, and how they might be met, if it were desired to have a voluntary disclosure policy.

Mr. Dunlap. Surely. They will be made available to you.

Mr. Keogh. Mr. Chairman, may I express an opinion, for what it is worth?

Chairman King. You may.

Mr. Keogh. If all doubts are going to be resolved against the taxpayer and criminal prosecution recommended in every possible case, there will, in my opinion, be a reaction to that which, I am fearful, would have worse effects upon our fiscal system, than would your meeting this problem squarely and adopting the policy that all taxpayers know will be applied with uniform force.

Mr. Lynch. Mr. Congressman, I just want to observe this: I think this committee deserves a very precise statement on the
98 effect of the abandonment, what the proposal is with respect to the treatment in such cases, and how they will be handled.

We would be very happy to give that to the committee.

I think the memorandum which was submitted for the record answers mainly the questions as to why it was abandoned, but the inquiry has turned over to the affirmative side, too, and I think I want to direct ourselves to that.

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138 MR. DEWIND. Mr. Schwartz, perhaps the easiest way to get into this voluntary-disclosure matter would be if you could outline to the subcommittee the background of the history of development of that policy so that we may have before us as precise a statement as possible of the policy that was abandoned.

MR. SCHWARTZ. The first Bureau instructions respecting voluntary disclosure were issued in 1919. Prior to that date, the Bureau always had before it the question of whether or not the matter of criminal liability would be compromised in any case. I have traced back to Treasury Decision 1795, of September 10, 1912, and I might give you this for background.

That mimeograph, or Treasury decision, states that a policy had been followed by the Commissioner's office for the last few years with gratifying results, and that is the policy of not accepting any money penalty in payment of criminal liability; and at that time, in 1912, it was believed that—

When it becomes generally known among lawbreakers that when caught they must answer for their offense in the courts and cannot escape by more money payment to compromise, the result will be far more beneficial to the interest of the Government in the long run than the acceptance of compromise offers.

139 Now, the first memeograph to which I referred, issued initially within the Bureau on August 22, 1919, provided—and before I give you that provision of the mimeograph respecting voluntary disclosures, it might be helpful to give you the background of the thinking of these men at that time.

The mimeograph states:

Recent successful prosecution of criminal cases arising out of the fraudulent income- and profit-tax returns, and the publicity attending indictments in other cases, has induced the voluntary disclosure of evasion of tax liability and other deficiencies of returns filed in the past years. The persons affected by these cases have felt that the plans of the Bureau for vigorous prosecution or for verifying income- and profits-tax returns on file would eventually disclose these deficiencies and cause indictments to be secured and criminal prosecution to be instituted. They have therefore preferred to make voluntary disclosure at this time in the hope that by following this course and throwing themselves on the leniency of the Bureau they would be able to escape criminal prosecution. The increasing activities of the internal revenue officers will inevitably add to the number of criminal cases now on hand, and this, in turn, will induce a more general desire to disclose voluntarily the evasions and deficiencies of returns filed in past years. Consequently, it is deemed appropriate to announce the general policy which the Bureau will follow with respect to these cases.

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139 Now, as initially announced on August 22 of that year, 1919, the statement on voluntary disclosures was that—

In cases where voluntary disclosure is made of deficiencies through intentional evasions which, if discovered by internal revenue officers, would be made the basis of criminal prosecution, it will be the policy of the Bureau to impose maximum civil penalties and accept offers in compromise of criminal liability, instead of instituting prosecution and insisting on jail sentence.

About 3 weeks later, September 8, 1919, that was changed to remove the words, "accept offers in compromise," and substitute "consider offers in compromise."

Now, at that time we had a relatively small number of taxpayers, and not a very broad base. Our operations were extremely limited, when we consider what they are today.

The policy as announced in this 1919 mimeograph continued in operation until 1934, when it was again decided that the Bureau would abandon the policy of compromising criminal liability. The policy was then restated, on July 2, 1934, as follows:

Where a violation of the internal revenue laws is deliberate and with intent to defraud, and is discovered through internal revenue officers or is disclosed by a taxpayer after the Bureau has initiated an investigation, the criminal liability will in no case be compromised by the Treasury Department. Prosecution will be recommended solely on the basis of whether the evidence is sufficient to afford reasonable grounds for the belief that a conviction can be secured. In cases in which taxpayers make voluntary disclosures of intentional evasions before investigation by the Bureau has been initiated, the Bureau will not recommend criminal prosecution, but will impose the maximum civil penalties unless there is substantial doubt as to collectibility.

The policy as announced, again within the Bureau, in 1934 by this confidential mimeograph which I have just quoted from, was not made public until 1945. At that time we instituted the drive on black marketeers, and in connection with that drive there were various public statements made by Bureau and Treasury Department officials which in effect held out to the public this policy which had previously been announced in confidential mimeographs, and those announcements invited the public to come in and make disclosures; and if they did so before the initiation of investigation, that prosecution would not be recommended.

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140 That is the general background.

MR. DEWIND. Are the announcements you refer to, announcements by then Secretary of the Treasury Vinson in a speech that the Chief Counsel Wenchel made?

MR. SCHWARTZ. That is correct, and there were other releases by the Commissioner of Internal Revenue, Mr. Nunan; and at or about the time of the Lustig case there were press converences in which statements were made.

MR. DEWIND. Do you have a collection or file of those statements and press releases, and so forth?

MR. SCHWARTZ. Yes: I do.

MR. DEWIND. Could you make that available to be made a part of the record of the subcommittee?

MR. SCHWARTZ. We can furnish this to you later, Mr. DeWind.

MR. DEWIND. Mr. Chairman, would there be any objection at this point to insert in the record copies of the public statements, pronouncements, and press releases of the Treasury relating to the voluntary disclosure policy?

CHAIRMAN KING. Without objection, it is so ordered.

MR. SCHWARTZ. In addition to the public statements to which you refer, I can furnish you the provisions of the two mimeographs which I quoted, together with Treasury Decision 1795 of 1912 which I referred to.

(The documents referred to are as follows:)

(T. D. 1795)

COMPROMISES

Favorable consideration will not be given to offers in compromise where the violation of law is deliberate and with intent to defraud and the evidence is sufficient to convict.

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C., September 10, 1912.

Mr._____,
United States Attorney.

Sir: This office has under consideration the proposal of _____ to pay $_____ in addition to the $_____ previously deposited, making a total of $_____, together with the cost of guarding the distillery, in compromise of the civil and criminal liabilities charged against him.

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140 In this connection, I desire to state that it is the belief of this office that section 3229, Revised Statutes, was enacted by Congress for the purpose of affording relief to persons who have unintentionally and without any fraudulent design violated some of the provisions of the internal revenue laws, many of which are exceedingly drastic and for obvious reasons do not make intent a factor in the offense. It is equally of the opinion, however, that, where the violation is deliberate and with intent to defraud, no money penalty, however large, should be accepted by way of compromise in lieu of prosecution, provided only that the evidence is of such character as to afford reasonable grounds for the belief that a conviction can be secured.

This policy has been followed by this office for the last few years with gratifying results, and it is believed that, when it becomes generally known among lawbreakers that when caught they must answer for their offenses in the courts and cannot escape by a mere money payment through compromise, the result will be far more beneficial to the interests of the Government in the long run than the acceptance of compromise offers.

141 Having the foregoing statement of policy in mind, you are requested to advise this office as to your views of the evidence in the case of _____, with your recommendation as to the propriety of acceptance of the offer made.

Please state court costs incurred.

Respectfully,

Royal E. Cabell, Commissioner.

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Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C., September 8, 1919.

CONFIDENTIAL.

Cons. Dim. 2239——Amended.*

TO COLLECTORS OF INTERNAL REVENUE, AND INTERNAL REVENUE AGENTS IN CHARGE:

Recent successful prosecution of criminal cases arising out of fraudulent income and profits tax returns and the publicity attending indictments in other cases has induced the voluntary disclosure of evasions of tax liability and other deficiencies in returns filed for past years. The persons affected by these cases have felt that the plans of the Bureau for the vigorous prosecution of the work of verifying income and profits tax returns on file would eventually disclose these deficiencies and cause indictments to be secured and criminal prosecution instituted. They have therefore preferred to make voluntary disclosure at this time in the hope that by following this course and throwing themselves on the leniency of the Bureau they would be able to escape criminal prosecution. The increasing activities of internal revenue officers will inevitably add to the number of criminal cases

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1/1 now in hand and this in turn will induce a more general desire to disclose voluntarily the evasions and deficiencies in returns filed in past years. Consequently it is deemed appropriate to announce the general policy which the Bureau will follow with respect to these cases.

In cases in which fraud or intentional evasion is discovered through internal revenue officers, or is disclosed after the Bureau has initiated an investigation of the tax liability, it will be the policy of the Bureau to impose the maximum civil penalties and institute criminal prosecution.

In cases in which deficiencies not involving fraud or intentional evasion are discovered by internal revenue officers no penalties will ordinarily be asserted upon returns for 1917 and prior years and upon returns for 1918 the only penalties ordinarily to be asserted are the 5 percent penalty and interest at the rate of 1 per centum per month, prescribed by paragraph 2 of subdivision (h) of section 250 of the Revenue Act of 1918.

In cases in which deficiencies in returns for past years are voluntarily disclosed by the taxpayer and in which the taxpayer is clearly not guilty of fraud or intentional evasion no penalties will ordinarily be asserted.

In cases in which voluntary disclosure is made of deficiencies through intentional evasions which if discovered by internal revenue officers would be made the basis of criminal prosecution, it will be the policy of the Bureau to impose the maximum civil penalties and to consider offers in compromise of the criminal liability, instead of instituting prosecution and insisting on jail sentence.

In all cases of the kind mentioned above, full statements of fact are to be secured and verified, if possible, by officers making investigations or to whom disclosures are made, and these statements, accompanied by amended returns, should be forwarded to the Bureau for consideration.

Daniel C. Roper, Commissioner.

*Note.—The only change herein made in the original draft of mimeographed issued August 22, 1919, is the substitution of the word "consider" for the word "accept" in the fifth line of the second page. This copy should be substituted in your file for the original draft.

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Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C., July 2, 1934.

CONFIDENTIAL

STATEMENT OF POLICY WITH RESPECT TO THE COMPROMISE OF TAXES, INTEREST, AND PENALTIES

OFFICIALS OF THE BUREAU OF INTERNAL REVENUE, COLLECTORS OF INTERNAL REVENUE, INTERNAL REVENUE AGENTS IN CHARGE, AND OTHER EMPLOYEES CONCERNED:

(Part II, relating to Compromise and voluntary disclosure in fraud and criminal cases)

* * * * * * * * * * * *

PART II--FRAUD AND CRIMINAL CASES

17. Where a violation of the internal revenue laws is deliberate and with intent to defraud, and is discovered through internal revenue officers, or is disclosed by the taxpayer after the Bureau has initiated an investigation, the criminal liability will in no case be compromised by the Treasury Department. Prosecution will be recommended or not, solely on the basis of whether the evidence is sufficient to afford reasonable grounds for the belief that a conviction can be secured.

18. In cases in which taxpayers make voluntary disclosures of intentional evasions before investigation by the Bureau has been initiated, the Bureau will not recommend criminal prosecution, but will impose the maximum civil penalties unless there is substantial doubt as to collectibility.

19. In all cases not covered by Paragraphs 17 and 18 in which there is evidence of intentional evasion, the Bureau will impose the maximum civil penalties unless there is substantial doubt as to liability or collectibility.

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Guy T. Helvering, COMMISSIONER.

Approved June 27, 1934.

H. Morgenthau, Jr.
Secretary of the Treasury.

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TREASURY DEPARTMENT

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TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE
WASHINGTON

(For release, morning newspapers, Friday, October 5, 1945)

PRESS SERVICE NO. V-87

Three officials of the Bureau of Internal Revenue left today for the Pacific coast for a series of conferences with district enforcement and administrative heads designed to step up the Treasury's drive against tax evaders and to set up machinery for expediting settlement of tax liabilities for the war years generally.

Joseph D. Nunan, Jr., Commissioner, Norman D. Cann, Deputy Commissioner in charge of the Income Tax Unit, and J. P. Wenchel, chief Counsel, are making the inspection trip. They will arrive in Los Angeles Friday noon, for conferences with Bureau personnel lasting through October 9. They will be in San Francisco October 10, 11, and 12 for meetings with revenue and special agent and collector's staffs.

Mr. Nunan said similar conferences in other sections of the country are contemplated.

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Mr. Nunan said one major subject of the conferences will be means of insuring prompt settlement of refunds that will be due many businesses under the so-called relief provisions of wartime tax laws, and thus help industry in the shift to peacetime production.

Another purpose of the meetings is to insure unity of action on the part of all branches of the revenue service in the drive against tax cheats, to plan for effective use of new personnel now being rapidly recruited; and to give personal attention to problems arising from specific investigations now under way.

The Commissioner pointed out that California is the setting for the most far-reaching tax investigation now being conducted by the Bureau, that into the raisin-grape industry. Tax liabilities of scores of operators in this field are being examined, with prospects of collection of many millions of dollars in additional taxes, he said. Suspected black-market operations in meat and poultry and other lines also are under scrutiny.

Mr. Nunan expressed gratification at the progress being made throughout the country in organizing and pushing the campaign against evaders. He said a substantial flow of completed investigations into the courts is under way, with 13 major indictments returned by Federal grand juries during September. New revenue and special agents are being assigned daily as recruiting proceeds, and the effects of the expanding force of investigators will be apparent from now on, he feels. Some 2,500 Bureau employees now are engaged in tax-fraud case work.

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The Commissioner said that since June 1, some 30,000 delinquent or amended returns had been filed voluntarily, accounting for additional taxes of more than $50,000,000.

Mr. Nunan again stressed the Bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases.

In addition to the drive against evaders, the Bureau executives will give particular attention to organizing in the field the tremendous task of prompt settlement of tax liabilities arising from the war, including such problems as the determination and allowance of refunds and credits where due.

The Commissioner pointed out that many wartime tax laws contained provisions under which thousands of business tax returns must be reopened for adjustments arising from such factors as the carry-back of losses and the unused excess profits credits, postwar credits of excess profits tax and other relief provisions, and the respread of special amortization allowances on war plants and other emergency facilities.

"The disposition of the pending war-year cases will enable business to know precisely where it stands in the matter of tax liabilities, and thus eliminate a possible source of concern which might otherwise interfere with reconversion and employment," Mr. Nunan said.

"This work will be expedited in every possible manner. We promise to exercise every resource so that the taxpayer entitled to refunds may receive his money promptly."

Mr. Nunan also will give attention to the machanism for making refunds of taxes overpaid by individuals. He pointed out that the Bureau recently completed the mailing, ahead of schedule, to some 20,000,000 taxpayers refunds totaling a billion dollars.

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(From the Washington Post, August 21, 1945)

EXCERPT FROM A STATEMENT BY SECRETARY OF THE TREASURY, FRED M. VINSON, REGARDING THE TAX DRIVE * * * * *

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TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE
Washington 25, D. C.

(The following address by J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, was prepared for delivery before the annual dinner of the Tax Executives Institute at the Waldorf-Astoria hotel in New York City at 10 p.m. eastern daylight saving time, May 14, 1947, and is for release at that time.)

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TAX FRAUDS AND VOLUNTARY DISCLOSURES

I want to say a few plain words tonight about tax frauds and voluntary disclosures by repentant taxpayers.

I think this subject is particularly important to this audience whose declaration of principles are: "The Tax Executive Institute stands for the practice of the highest ethical standards in the administration of tax accounting and procedure in the preparation of tax returns, reports, and other presentations toward the establishment of confidence by management and tax authorities and to assist its members in their many problems of taxation. The Tax Executives Institute hereby dedicated itself to the observance of these principles."

I think this subject is important to our radio listeners as well, because—sooner or later—the honest taxpayers must make up the revenues that the cheat evades.

At the outset, let me make it clear that the tax laws define two entirely different kinds of tax fraud. One is criminal. The other is civil. Of course, a person may be guilty of both.

But, if you keep this distinction in mind, you will be able better to understand the Treasury's policy of encouraging the repentant taxpayer to clear himself without criminal punishment, even though he may be required to pay his taxes plus a civil money penalty for his fraud upon the Government.

Happily, by far the majority, of course, recognize their obligations and to the best of their ability fulfill them. There is, however, that cross section which, while percentagewise may be small, bulks large in the work of the Department, particularly now, as well as during the war years. With record billions in cash in circulation and high rates of tax, the temptation, and it is simply that, has been strong. Regrettably, too, tax frauds have not been, and are not, confined to a class. The sorry picture is, and you have seen it particularly the last few years in your own newspapers, that all too many in every line of endeavor have been trying to bilk the country.

The cases run the gantlet, and some of them are fantastic. At one end are the New York candy manufacturers who diverted 25 million pounds of sugar for soft-drink purposes and then decided not to pay their taxes. They were caught. There are two interesting side lights on that case. First, the 25 million pounds of sugar were the equivalent of a 2-weeks' wartime ration for every person in the country. Second, the sugar was obtained under the guise that it was being used in the manufacture of foodstuffs for Army and Navy hospitals.

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1/5 Then there is the doctor from Georgia whose case always appealed to me. He sent in a return for one year to which he attached a statement that while he did not owe any taxes he felt the country had been so good to him he should make a contribution. He ended up by making quite a contribution, because at the same time he claimed he owed the Government nothing, he in fact owed thousands.

Even the tattooing business skyrocketed during the war. One Hawaiian engaged in that business paid a young Japanese $10 to show him a simple method of understating income. The method? Drawing a line halfway down the true record of receipts and reporting only that amount above the line for tax purposes.

In another case, our examining officers personnally observed the owner of a restaurant making alterations in her records. The original figures were clearly revealed when photographed under infra-red ray lamp. Although reporting a modest income, she had invested thousands of dollars in antiques, single-premium life insurance, and a home and decorations.

Two brothers living in northern Ohio were big-time gamblers. Their illegal activities for years had gone virtually unchecked. A statement submitted with their pleas of guilty offered mitigating circumstances—the death of a bookie with whom they had placed bets on behalf of a local banker. The entire tax evasion resulted from sums the brothers had received in horse-race bets from the banker, and involved several hundred thousand dollars. The judge was so amazed that he remarked he had thought such cases happened only on radio programs.

Looking back over the welter of cases, I have been continually struck with the essential stupidity of the evader.

It's much like a school of fish swimming upstream. Each one pops up his head with what must appear to him as being an original method and quite foolproof. As a matter of fact, we've seen nothing new in the devices employed. All are merely variations of the same old themes. Maybe larger, perhaps more grandiose, but the patterns are the same with only slightly changed overtones.

What can the man do who attempts to evade his just taxes?

If he keeps a record, he is immediately in a dilemma, for once something is written down, curiously enough, some day and in some way that record, or copies, will turn up in the wrong hands. Once something goes down on paper, complications always set in. If a man keeps a wrong record, he must keep a correct one, too, and it is then only a question of time until trouble begins to boil. Witness the gentleman from one of our Southern States, once started, who was forced to end up keeping one set of records for his partnership, one for the OPA, one for internal revenue, one for his partner, and, finally, one for himself. He literally became lost in the morass of his own paper work.

If he keeps no record, then he deals in cash—a favorite form of attempted tax dodging. It is favored because it appears to leave no trail. The converse is actually the case. It is as true today as it always has been that money can either be spent or allowed to rot. Once it is begun to be spent, it leaves a trail, and our agents can and do follow every trail. If it rots, no one is advantaged.

Let me give you an example which occurred just a few months ago on the west coast. Two big-time gamblers had spent several years dodging the tax collector. We had reason to be suspicious that they weren't paying their taxes, and they knew we were suspicious. Eventually both died. But when their estates were handed over to a reputable attorney for handling on behalf of their heirs, he found by means of sealed instructions and reported to us, over $600,000 that the gamblers had buried in the ground. Their cheating of the Government never did them any good. They never felt safe to spend the money, and they couldn't take it with them.

One thing the tax evader seems never able to appreciate is that in these days of high taxes there is always someone comparing his income with his own and wondering how he's able to live as well as he does and still pay his taxes. He doesn't seem to know that there has been on the statute books since 1867 a provision of law which authorizes the Commissioner to pay for information leading to the discovery and recovery of additional revenue. The act of March 4, 1867, now carried in the Internal Revenue Code as section 3792, encourages informers, and the informer runs the complete scale from disgruntled employees to discarded wives. One of the most interesting cases of the latter sort occurred recently when a wife appeared before the Chief of the Intelligence Unit of the Bureau and stated that she wished to inform against her husband for evading his income tax. She was asked whether she had anything more than a suspicion and she replied that she certainly did. Upon being pressed, she stated he had cheated on everything else, including her, and that it was inconceivable that he had not cheated the Government. Another interesting case occurred when one of two partners, having had a falling out over some finances, appeared before a special agent and stated he wished to inform against his partner who had been evading his income tax. Upon questioning, the revenue agent quickly discovered that not only had the partner informed against evaded his income tax but the informer had also evaded his, and, furthermore, that both had connived together to evade the income tax of the partnership.

Quite simply, attempted evasion is a disease, and a disease that has to be fought with strong remedies. That is why, once criminal fraud is discovered by our examining officers, the Federal Government is unbending and relentless. The law requires the prosecution of the tax evader and that is what the Department recommends to the Attorney General.

There is one important exception to that. The Department has broad discretionary power long recognized by the Congress to determine the policy and procedure for the effective enforcement of the internal-revenue laws. The Department, acting under that power, does not recommend prosecution of the evader who repents in time. There is nothing new in the position. For years the position of the Department has been that where the taxpayer makes a voluntary disclosure of intentional evasion before investigation has been initiated, criminal prosecution will not be recommended.

The Department has always encouraged voluntary disclosures. 5655

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And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the Government.

Healthy administration of the internal revenue laws long ago dictated that policy, and I believe that its worth is obvious.

The making of a voluntary disclosure is a simple thing. The taxpayer or his legal agent can go before any official of the Bureau of Internal Revenue or any of its field offices—whether it is the collector, a deputy collector, a revenue agent, a special agent, or any other responsible Treasury officer.. There is no special form for making the disclosure. The simple statement that "I have filed false tax returns and I want to make the Government whole," would constitute a complete disclosure. Of course, it is usually best to present an amended return or other written document as evidence of the disclosure. If possible, the disclosure should be accompanied by payment of the tax which is known to be due, but this is not a prerequisite.

What kind of people make disclosures? They are all kinds. Some are people who are honestly repentant. Others are people who would rather sacrifice their ill-gotten gains than go to jail. Some are small people. Others are large corporations.

We had a good illustration recently in the Midwest. A large produce concern that had enriched itself on war contracts to help feed the Army, came to see the light. It made a complete statement to our local officials and paid $1,765,000 in taxes, interest, and civil penalties in order to clear its record and to keep its officers out of jail.

We have had voluntary disclosures from black-market meat and car dealers. We have had similar repentances from people in all walks of life. Of the $3,000,000,000 collected from taxpayers within the past 18 months as a result of the current drive against tax evaders, $500,000,000 has been paid on voluntary disclosures.

Now we have said that in order to be considered voluntary, a disclosure must be made before we have initiated an investigation in the case. Therefore, it is essential that we define "the initiation of an investigation."

The mere record of a name does not mean that an investigation has been initiated. The fact is that examining officers throughout the country have thousands of names or possible leads. To deny the existence of a voluntary disclosure merely because we have a name would be comparable to regarding the telephone book as a dossier of tax evaders.

An investigation is initiated when a special agent, an internal revenue agent, a deputy collector, or other Bureau officer, is assigned a return for examination, or where an investigating officer has requested advice of appropriate officers of the Bureau with respect to the filing of a return or the payment of taxes.

The time of disclosure and the time an investigation begins are, therefore, matters which can be ascertained with complete objectivity and certainty, thus protecting both the Government and the taxpayer from decisions based on guesswork or other vague circumstances. To assure adherence to this principle, the Bureau stands ready at all times where a dispute may arise as to the time of a disclosure and the time an investigation was initiated to open its records in that regard.

We are not concerned with the motivating force behind an individual's deciding to come in and talk to us about his evasion. If he "gets religion" before we have done anything, he will not be prosecuted.

Before we leave this subject, let me make one thing clear. When we excuse a man from criminal prosecution because of his voluntary disclosure, we are not in any sense condoning his action. Nor are we letting anyone off easy. At the outset, I mentioned that there are two kinds of fraud, criminal and civil. Voluntary disclosure excuses a man from criminal punishment, but it does not excuse him from the civil penalties. Therefore, the public revenues and the public conscience are both protected by this policy.

In excusing the man from criminal prosecution, we are merely taking a sensible step to produce the revenue called for by law with the minimum cost of investigation. The man who makes a voluntary disclosure saves us a lot of money in investigating. In return, we can spare him a term in jail. This is good business from his standpoint and it is good business from the Government's standpoint.

Turning to the civil sanctions for the protection of the revenues, although a voluntary disclosure may relieve a taxpayer of criminal prosecution, it will not necessarily relieve him of the civil penalty for fraud. The Department may insist upon the maximum civil penalties. Section 293 (b) of the Internal Revenue Code provides that, if any part of any income-tax deficiency is due to fraud with intent to evade tax, a penalty of 50 percent of the deficiency shall be added to the tax.

This is true even for the year 1942, the year of forgiveness, under section 6 of the Current Tax Payment Act of 1943 and no part of the tax for 1942 is forgiven. Under section 6 of the Current Tax Payment Act of 1943, it is expressly provided that the discharge of the tax for the year 1942 as therein provided shall not be applicable in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for 1942 or in which additions to the tax for the taxable year 1942 are applicable by reason of fraud. Therefore, the practical result of fraud in the year 1942 return brings about not merely a 50-percent penalty but a penalty in astronomical figures.

Since the penalty is measured by the additional tax, no civil penalty can result from fraud unless there is a deficiency. If there is a deficiency, the 50-percent penalty attaches to its entire amount, if any part of it involves fraud. In fact, the penalty reaches back and applies to the entire additional tax which may have been paid, above that shown on the return, and is not limited to 50 percent of the deficiency shown in the deficiency notice. Even if the taxpayer has paid the entire additional tax, further deficiency may be asserted consisting solely of the fraud penalty. The 50-percent fraud penalty and the 25-percent penalty for delinquent filing of the return may both be assessed, making a total penalty of 75 percent, if both fraud and delinquency are present.

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147 On the other hand, the fraud penalty and the 5-percent negligence penalty are mutually exclusive, and the fraud penalty alone applies if any part of the deficiency was due to fraud, ven if another part was due to negligence. Nevertheless, since an act which appears fraudulent may be found to have been merely negligent, it is not uncommon for the Commissioner to assert a negligence penalty as an alternative in the event that the fraud should not be established. It appears, however, that the courts will not of their own motion determine a negligence penalty when the Commissioner has asserted only fraud.

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It is impossible to lay down a general definition of fraud for purposes of applying the civil penalty. Mere negligence is not enough, of course, nor is ignorance or error of law. It is not enough that the taxpayer was engaged in a generally fraudulent transaction, such as a fraud on his employer; an intent or purpose to evade tax is essential. A corporation may be held responsible for the fraud of its officials, committed in its behalf; and its responsibility continues notwithstanding their death or withdrawal from its business affairs. Similarly, an individual taxpayer cannot insulate himself against liability for fraud by delegating the preparation of his returns to others, the issue in such cases being essentially one of the taxpayer's good faith. The latter aspect is likewise stressed in the related problem of reliance upon the advice of counsel. While normally if a taxpayer acts upon the advice of reputable counsel, he will not be held liable for fraud penalties; nevertheless, in such cases, it must appear that he conveyed complete and accurate information to his counsel.

The fraud which incurs a civil penalty may be a less serious matter than that for which criminal prosecution is instituted, and there are many cases where the civil penalty alone is asserted. But the mere fact that criminal penalties are imposed does not relieve a taxpayer of the civil penalty. The Supreme Court has held that the purpose of the civil fraud penalty is not punishment but is primarily to safeguard the revenue and to reimburse the Government for the heavy expense of investigation and for the loss resulting from the fraud. Therefore, the taxpayer's right not to be subjected to double jeopardy is not violated by the imposition of the civil fraud penalty after a prosecution for tax evasion, whether the taxpayer was convicted or acquitted of the crime. Conversely, the imposition of the civil penalty is no barrier to subsequent criminal prosecution.

An acquittal on the criminal charge of tax evasion is not res adjudicata with respect to the civil penalty, since the required degree of proof to sustain the criminal charge is greater than for the civil penalty, and the acquittal establishes, not that there was no fraud, but only that it was not proved beyond a reasonable doubt. Further, such an acquittal is not, in a civil case, admissible evidence of the taxpayer's freedom from fraud.

Whether a judgment of conviction for criminal evasion is admissible evidence of fraud in a civil tax case is a matter upon which we have no case law. As a matter of principle, the weight of authority at the common law, as developed in our State jurisdictions, appears to be opposed to the use of criminal convictions as evidence in civil cases of the facts on which they were bases. On the other hand, a respected author has suggested, not only that a conviction should be admissible evidence, but, as well, that it should be considered res adjudicata in a civil action bases upon the same facts, since the praties are the same and the facts would have been proved beyond a reasonable doubt in the criminal action. The application of res adjudicata in the instant situation may be questioned, however, in that the issue involved in a criminal charge of

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149 "willfully" attempteding to "evade and defeat" the tax may not be an issue identical with the civil "fraud" which must be proved in a penalty case.

Whatever may be the law with respect to the admissibility and effect of a conviction, as such, there is no doubt that if the taxpayer entered a plea of guilty in the criminal case, it may be introduced in a civil case involving fraud penalties upon the theory that it constitutes an admission tending to prove, not the amount of the penalty or tax, but the fradulent nature of his conduct. On the other hand, if a taxpayer pleads nolo contendere in the criminal case, it is an admission only for the purpose of that case, and may not be used against him in a civil proceding involving the same act.

The difference between the civil and criminal penalties is emphasized by the difference in the procedure for their enforcement. The civil-fraud penalty is assessed and collected in the same manner as a deficiency in tax, rather than through a criminal proceeding. The penalty is included in a deficiency notice, and if the taxpayer wishes to test its validity before payment he must do so in the Tax Court, where, of course, the right of trial by jury and the other features of criminal procedure do not apply. The taxpayer may not enjoin the collection of a civil-fraud penalty duly assessed, any more than collection of the tax itself may be enjoined. If he desires a jury trial on the issue of fraud, he must first pay the tax and penalty and then bring suit in the district court for refund.

The procedure respecting the civil penalty is also unlike a criminal proceeding in that it is not necessary for the Commissioner to prove fraud beyond a reasonable doubt. In fact, prior to 1928, the Board of Tax Appeals attached to the fraud penalty the same presumption of correctness that attaches to other determinations of the Commissioner and placed the burden of disproving fraud on the taxpayer, although there were decisions even under that prior law to the effect that fraud is never presumed and that the Commissioner had the burden of proving it. The Revenue Act of 1928 expressly placed the burden of proof on the Commissioner "in any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax." The cases hold that it is not enough for the Commissioner to prove fraud by a preponderance of the evidence. The evidence of fraud must be "clear and convincing". That requirment does not, of course, preclude establishing fraud by circumstantial evidence. It is the duty of the court to draw all reasonable inferences from the facts which are proved; and to resort to the entire record in determining fraud regardless of which party actually produced the evidence.

The burden of proof which is thus placed on the Commissioner extends only to the issue of fraud, and the presence of a fraud issue does not affect the usual presumption that the amount of the tax was correctly determined. Thus, if issue is joined and neither party introduces any proof, the tax will be sustained but the fraud penalty will be disallowed.

An analysis of the Tax Court decisions for the fiscal years 1945 and 1946 indicates that during that period the Commissioner successfully sustained his
150 burden of proof in two-thirds of the cases in which he asserted the fraud penalty. During the afore-mentioned period 21 decisions (four by published one-judge opinions, 17 by memorandum opinions) were rendered by the Tax Court, the Coommissioner being successful in 14, and failing to sustain his burden in seven. As a matter of interest it might be noted that on March 31, 1946, there were 155 protested cases involving fraud penalties pending in the offices of the internal revenue agents in charge, the greater number being in the New York division (49 cases) and the Pacific division (27 cases).

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150 If the taxpayer pays the tax and penalty and sues for its recovery, it is an open question whether the burden of proof on the issue of fraud is on him or on the Government. Since the taxpayer is the plaintiff seeking toget the fraud penalty back and since there is not satute expressly shifting the burden of proof as there is for Tax Court cases, it might be argued that the burden of disproving fraud is on the taxpayer. There is authority to the contrary, however.

The character of the civil-fraud penalty as a remedial device rather than a punishment is further illustrated by the fact that the liability for the penalty survives the death of the taxpayer and may be assessed against and collected from his estate.

In appropriation cases, the Commissioner is authorized to compromise fraud penalties, with the approval of the Secretary of the Treasury, the Under Secretary or an Assistant Secretary. If the case has been referred to the Department of Justice, that power is exercised by the Attorney General. Since the penalty is an integral part of the tax liability, a compromise of the penalty is deemed a settlement of the tax, and no refund of the tax may subsequently be obtained.

In conclusion, it should be pointed out that a taxpayer can always minimize the possibility of the Commissioner asserting fraud penalties. A complete disclosure in h's return of all the facts, even though the taxpayer vigorously denies any tax responsibility, will go far toward assuring, if not guaranteeing, that no penalties will be asserted or sustained. This is not to say that every failure to disclose justifies the imputation of fraud, for the questioned item may be of highly doubtful characterwhich the taxpayer failed to report after being advised by reputable counsel that there is no tax liability. In such a case, it may be that the failure to disclose is not attributable to fraudulent intent. However, the only reasonably safe method is for a taxpayer at all times to cut "square corners" with his Government, and to submit with his return full information concerning any doubtful item.

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TREASURY DEPARTMENT

WASHINGTON
(For release, Sunday newspapers, May 25, 1947)
Press Service No. S-341

Secretary Snyder said today that the continuing drive against tax evaders recently turned up a $3,700,000 income-tax-fraud case against a large paper and metal concern.

The company had amassed bulging bank accounts under secret names as the result of black-market operations, short-weighting customers, and falsifying tax returns.

The officers of the corporation, who face criminal prosecution, said their purpose in evading taxes was to save up money to pay fines if caught by OPA inspectors.

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150 The Secretary observed that, although this was the largest case developed in recent weeks, it was generally typical of thousands of smaller cases which brought $1,461,000,000 of additional revenue into the Treasury in the first 9 months of the current fiscal year—an increase of 40.5 percent over the similar period last year.

Although most fraud cases are settled upon payment of the tax plus interest and civil penalties, the number of prosecutions also has been rising. In the 9 month period, 117 persons pleaded guilty or were convicted on income-tax charges, compared with 47 in the similar period last year.

One of the important elements in settling cases, with civil penalties and without prosecution, has been the Treasury's policy of not prosecuting persons who make a voluntary disclosure of their fraud before the Treasury begins an investigation of their cases. This means that, in order to assure himself against criminal prosecution, a repentant taxpayer must disclose his fraud to an official of the Bureau of Internal Revenue before the case has been assigned for examination and before an investigating officer of the Bureau has requested advice from appropriate officers of the Bureau regarding the case. Prior to such action within the Bureau, a taxpayer may make a voluntary disclosure and escape criminal prosecution even though his name may appear in an inactive file of suspects. This presumes, of course, that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability.

Full understanding of this policy is expected to stimulate voluntary disclosures by repentant taxpayers, similar to a recent case in the Middle West, where a produce firm paid over $1,000,000 in taxes, interest, and civil penalties in order to avoid prosecution.

Other recent developments in the tax drive include:

A man appealed to his local police to help find the owner of a carton full of currency which appeared mysteriously in the man's cellar. Investigation indicates that the man owned the money himself and was only trying to cover up black-market profits.

Another man who had concealed income-tax frauds by burying currency in his basement was found out when $125,000 of the money got so mouldy that he tried to turn it in for fresh bills.

Investigation of one war contractor recently resulted in additional tax assessments totalling $1,000,000.

A tedious study of gate receipts at a major-league ball park resulted in the filing of criminal charges against a ring of "ticket scalpers."

A Midwestern mortician was found to have cheated on his income tax by claiming "bad debt" deductions on all funerals unpaid for on the last day of the year, even though the bills were invariably paid shortly afterwards.

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151 A southern dentist said he was going to move to South America after income-tax agents discovered frauds from which the man had acquired an 18-room house, a racing stable, and many other expensive luxuries.

A west coast bakery was assessed $228,000 after agents discovered that tax frauds had been concealed by juggling the company's books.

In New England, a persistent agent, who had been assigned to check up on an apparent $18,000-tax deficiency owed by a corporation, discovered that the true tax bill was $670,000.

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TREASURY DEPARTMENT

INFORMATION SERVICE
Washington, D. C.

(Immediate release, Thursday, January 10, 1952)

S-2930

Secretary Snyder announced today that the Treasury Department has abandoned the policy under which criminal prosecution has not been recommended in cases where taxpayers made voluntary disclosures of intentional violation of the internal-revenue laws prior to the initiation of the investigation by the Bureau of Internal Revenue. This action was recommended by Commissioner Dunlap. In connection with this change of policy, the Secretary issued the following statement:

"While it has been the long-established policy of the Treasury Department to refrain from recommending criminal prosecution where taxpayers make voluntary disclosure of intentional tax evasion prior to the initiation of an investigation by the Bureau of Internal Revenue it has been concluded that such policy will no longer be followed. Litigation in the courts in recent years has illustrated the controversial nature of the question as to what constitutes a true voluntary disclosure in fact. In the administration of the policy it has been difficult and at times impossible to ascertain whether the disclosure
152 was made because the taxpayer realized he was under investigation or whether the disclosure was in fact voluntary and in reliance on the immunity held out by the policy.

"The intensified enforcement activities of the Bureau's special tax fraud drive and racket squads throughout the country are ferreting out the willful tax evaders, and resulting in recovery of the additional taxes and penalties due the Government. It is the policy of the Treasury Department to recommend criminal prosecution in every case where the facts and circumstances warrant that action."

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152 MR. DEVIND. On that point, are there no memoranda within the Department discussing the issues involved in the adoption of this policy?

MR. LYNCH. I have not found any. I would be glad to search and see if there are any. Right now, I do not know of any at that time. I am speaking of 1945.

As to that statement in 1945, the situation was this: We had gone through several war years where tax collections and tax rates had exceeded by far what they had been on the prewar basis. In addition to that, we had gone through a period when, as you know, it was quite difficult to have adequate staffing of the Bureau of Internal Revenue. Many of the people there, of course, were called into the armed services, and to other duties, during the war period. In other words, we had suffered considerably from understaffing.

Then there came a period in 1945 when this vigorous tax-fraud drive was to be instituted. It was directed, of course, against all the enlarged opportunities for tax evasion during the war years.

At that time it was felt that because the years were slipping by from the standpoint of the statute of limitations—the war years of the heaviest income—and also because necessarily you were still limited in bringing quite effective action as quickly as you liked to, it was felt under the circumstances there it would be the most prudent helpful thing in the interest of the revenue to couple the invigorated fraud drive with this prominent public statement of what the policy was about coming forward and making full disclosure.

What I want to point out to you is the coincidence there as to back years—high income-tax years—the fact of previously severe handicaps in the program of enforcement, coincident with a renewed vigorous drive for tax-fraud enforcement that policy was announced.

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155 MR. SCHWARTZ. To comply with the provisions of the mimeograph which I quoted, there must be a disclosure before the initiation of an investigation. That disclosure must be full and complete, and that disclosure must be accompanied or followed by the payment of the full amount of the civil penalties and interest to the extent of the taxpayer's ability to make those payments.

MR. DEVIND. Within that description of the operation, the disclosure could have been made in any informal manner whatsoever. That is, you could make an oral disclosure to a revenue agent.

MR. SCHWARTZ. The initial step could have been an oral disclosure to a revenue agent.

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MR. DEVID. So that under the policy that was applied, there would be no necessity to have a written record of the time, place, and nature of the matters disclosed?

MR. SCHWARTZ. Yes. The policy and the instructions to the field officers contemplated that there would be a record made of any contact with a taxpayer.

Incidentally, before I forget, in my description of the policy, I think I omitted to say that the disclosure must have been one of intentional violation of the internal revenue laws.

MR. DEVID. But there was no requirement that a written record be made by the taxpayer of the time, place and nature of his disclosure. If he made an oral disclosure the matter was left to such report as the Revenue Agent might make of the conversation that took place?

MR. SCHWARTZ. As far as the record in the Bureau is concerned, that is what we would have, that agent's memorandum record of the receipt of the information from the taxpayer.

MR. DEVID. In one of the cases we had in our hearings in New York that seemed to be precisely the situation. A year and a half after a tax fraud investigation was begun, it was claimed by the accountant for the taxpayers that he had orally informed the revenue agent at a time when no investigation was under way of the facts involved in the criminal prosecution. It became a matter of word against word. There was no record in the Internal Revenue Bureau of any such conversation, and the accountant swore under oath that he had made such a disclosure.

That was the sort of situation that could arise.

MR. SCHWARTZ. Yes; that could arise.

MR. DEVID. That would not have been a necessary part of the policy.

MR. SCHWARTZ. I would say it would be incident to that particular case, when the disclosure issue finally came down to who was right and wrong, you had a conflict of evidence, and the revenue agent in the case you mentioned was not prepared to back up his own testimony with any entry in his diary or other written record. So you come out with a conflict of testimony between two people.

MR. DEVID. He said there was no occasion for any written record to be made, because the conversation never took place. That was the case where a complaint was filed against the accountant for making a false statement to the Federal Government. That matter is now before the courts.

But it is an indication of what could happen under the informal procedure. That problem could to some extent be eliminated, could it not, by requiring disclosures to be made in writing to a specified official or

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156 officials of the Internal Revenue Bureau, and in other ways pinning down the time, place and manner and nature of the disclosure?

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160 MR. DEVIND. As a matter of law, Mr. Schwartz, it is your view that the fact that the offer of immunity was conditioned upon paying of the civil liability would not be sufficient to reopen the criminal prosecution matter if the taxpayer, for example, showed inability to pay?

MR. SCHWARTZ. No, sir; not once you have taken that self-incriminating evidence under promise of immunity.

MR. DEVIND. Is that clear?

MR. SCHWARTZ. That is my clear understanding.

MR. CURTIS. When does the investigation begin?

161 MR. LYNCH. That is our great difficulty.

MR. SCHWARTZ. There have been various definitions of when an investigation begins.

MR. CURTIS. Mr. Kean tells me you covered that in detail in my absence.

MR. SCHWARTZ. Yes; we covered that in general.

MR. CURTIS. I will read the record.

Now, I will ask this question: From the standpoint of the Bureau records, can you always establish with certainty to your own satisfaction, at least, as to when an investigation began?

MR. SCHWARTZ. Not for this purpose, sir.

MR. CURTIS. I would think that even if your policy of voluntary disclosure is abandoned that, in line with preparation for any suit that you might file, a criminal or civil suit, that there ought to be a procedure set up so that at least the Bureau can be free of any doubt as to when they started an investigation. Would that be possible?

MR. LYNCH. I think so, subject to this difficulty; as it involves this policy of voluntary disclosure. As to the "when," from the standpoint of the Bureau or any of its personnel, the investigation is initiated when a particular case is jacketed, and the lead may come from any source, as you know.

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234 MR. ARENT. May I add something at this point. I want to say in the first place that the purpose of getting a workable voluntary-disclosure policy and setting up a list of the sort Mr. Mintz mentioned, and on which I will elaborate in a minute, is not to protect a few crooks but to make it possible for reputable lawyers and accountants when they uncover fraud in dealing with their clients to get them to come in and disclose and pay their tax, and interest, and 50-percent penalty.

At present those men who stumble upon fraud in the course of their representation of people are afraid to tell their clients to come in and do this, because at no point can they tell their client definitely that by paying all of these things he can be sure that he will not be prosecuted.

Now, I would suggest that some organization, somebody mentioned the Committee on Enrollment and Practice of the Treasury, keep a central file of cases which have reached that stage of development, wherever it may be, which the Bureau chooses to define as the turning point in a voluntary disclosure. The taxpayer's attorney can come there, armed with a power of attorney, and ask that committee whether his client is on that list, by giving assurance to the comittee that if he is not on that list the taxpayer will proceed to make voluntary disclosure. The offer to disclose could be made in writing, and the Bureau could respond in writing, stating that the off has been received, that it is still timely, provided the taxpayer complies with certain conditions, such as making a complete disclosure, and not holding anything back, and cooperating fully in the investigation.

Now, that does not strike me as being such a hopelessly difficult and impossible task, and yet the Bureau has shied away from it constantly, despite constant efforts to make them become definite.

One further aspect of this: The voluntary-disclosure policy is there, as the Department of Justice officials testified, to plague the Government whether it likes it or not. If it does not establish a definite policy of this sort, it is still going to have to consider the element of cooperation and disclosure in determining which cases to prosecute, because it knows that the thing will be waved as a red flag in the course of the trial. I think we can serve not only the bar, and the accountants and taxpayers, who regardless of their moral attitude and their state of mind, are nevertheless ready to pay up. You can serve not only those groups, but the public through increasing the

235 revenues and by making prosecution a cleaner and more clear-cut business.

MR. DEWIND. To make any such proposal as that work you would really have to have amended returns prepared and submitted for filing subject only to the condition thatthe name not appear on the list.

MR. ARENT. I do not agree with that, Mr. DeWind. When you first learn that a man has concealed income or taken false deductions, you may have 3 or 4 months' work ahead of you before you are able to come in with a proper construction of income. I think all that should be required of the taxpayer—because you want him to come in as fast as he can, at that point—is a statement that "I have failed to report income which should have been

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235 disclosed, and which should have been reported"; or "I have taken a deduction to which I was not entitled, and I would like to cooperate in ascertaining the correct amount of tax and making restitution."

I may also say that where there has been good faith on the part of the Bureau officials in certain areas of this country, some of us who practice tax law have come in and have asked whether a certain individual was under investigation, and when told he was not, we have proceeded to make just that kind of written general offer to disclose, followed by cooperation, and the Bureau has kept faith and everybody has benefited.

MR. DEWIND. You would agree at least that if the taxpayer came in under such a system and the name was not on the list, that he would know in advance that that name would then be referred to the Bureau of Internal Revenue, regardless of what he did from then on?

MR. ARENT. No; if I understand you correctly, Mr. DeWind, the purpose of setting up a list of this sort in the hands of an independent body, would be so that——

MR. DEWIND. Perhaps you did not understand. You cannot make this list if you are going to have such a thing, a way in which a taxpayer can always find out if anybody has anything on him, without disclosing anything, and so that if he finds his name is not on the list then it would seem to me that at the very least his name would then be forwarded to the Bureau as a person who had a voluntary disclosure to make.

MR. ARENT. If his name is not on the list, he is expected to make the voluntary disclosure, and he would, of course, be investigated if he failed to do it, and the book would be thrown at him, probably.

MR. DEWIND. Assuming that that first step, namely, the check on whether or not it is a timely disclosure, were covered by some such procedure, then do you have specific suggestions as to how the policy might be formalized to prevent the abuses that have been brought out here after that stage? This would establish the date of the intention to make disclosure, but what of the actual disclosure, and it would have to be in writing; would it?

MR. MINTZ. I would assume it should be in writing; yes, sir.

MR. DEWIND. And the notice of acceptance would be a formalized document which would be the only document that could confer immunity, and it would be publicly stated that no oral statement of immunity would have any effect, and the only statement is an official one, namely, a notice of acceptance in writing.

MR. MINTZ. That is right.

236 MR. DEWIND. Are there any other aspects that should be considered in your view to making a satisfactory formalized procedure?

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236 MR. MINTZ. Well, I had not come today prepared to discuss those phases of it. Certainly our committee will give immediate attention to them, and perhaps file some supplemental suggestions with you.

MR. DEWIND. I think the subcommittee would welcome that. One problem which has arisen here which seems to be very difficult of solution is the problem that arises from the fact that in so many collateral investigations of other taxpayers, information comes to light concerning another taxpayer. And so frequently the Bureau believes, I think, that a taxpayer comes in to make a voluntary disclosure, not because it is voluntary, but because he has been tipped off that an investigation is coming, becuase of information disclosed in a collateral investigation.

MR. MINTZ. I do not know any means of avoiding those inequities. The suggestion today about having some objective indicia, such as a filing system of this nature, presumably would establish a single standard, and it probably would be used by individuals who knew that they were soon to be investigated. I think that as a part of the voluntary-disclosure system it would have to be accepted.

MR. DEWIND. Would you also have to accept the standing temptation to employees of the revenue service to leak information to taxpayers or their representatives concerning imminent investigations?

MR. MINTZ. I have a certain amount of impatience with that question in the sense that if that is the sort of administration that we have, we might as well stop worrying about niceties, such as voluntary-disclosure policy and a lot of other things.

MR. DEWIND. One of the things that this subcommittee has been concerned about is to remove as many temptations as possible from the path of internal-revenue employees. Now, the removal of the temptation is not a controlling factor, but unless some very important value is obtained from exposing employees to such temptation, you do not want to do it.

MR. MINTZ. Iwould suppose in that sense there would be one or two or three hundred other forms of temptation to which Bureau employees are subject, and I would not know why this one should be any more liable to abuse than those other points where knowledge would have come to their attention, which they could use to their own profit by passing it on illicitly to the taxpayers.

MR. DEWIND. This might be a particularly acute form of that. Could you say this, Mr. Mintz, in your experience and the knowledge of others' experience, that you have gained on your committee work or otherwise, are there enough truly voluntary disclosures, that is, disclosures that are not made under the fear of an imminent investigation, to justify the existence of this sort of policy?

MR. MINTZ. I would answer that as follows: I think that there are comparatively few cases where a taxpayer who has filed a criminal tax return has an honest attack of conscience so strong that it compels him to go into

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the Bureau in an effort to make amends. I think in most instances what prompts the tax evader to desire to file an amended return is publicity in his city or elsewhere, given to a vigorous criminal tax-evasion investigation, word that friends are under investigation, or prominent people in the city are being investigated, a feeling that he may be next.

MR. ARENT. May I add something to that, Mr. DeWind. Within my experience and in the comments made to me by other attorneys and accountants, I find a considerable number of situations where a desire to make voluntary disclosure arises or would arise. I agree with Mr. Mintz that they are not usually matters of conscience, of religion and confession, but I think we confuse the issue when we get into the morals of it. We are dealing here with a long-range matter of raising revenue and our self-assessment system relies first upon respect for our revenue system, and the honesty of its administration, and secondly upon fear of sanctions, and fear of getting caught.

Now, the man who respects the system will file honestly in the first place, and some will file out of fear correctly in the first place. Then you get the group who afterward have a force working on them and they cannot sleep nights, and they hear of things happening to other people, and they may, as I know of two instances within my experience, hear of a friend of theirs who has been prosecuted for a similar type of situation, or a doctor may get inquiry from a revenue agent about whether a certain person paid him a medical fee for which he had taken a deduction, and that begins to ferment in the persons' not conscience, but mind and fears.

Now, from the standpoint of the revenue, if we can let those people who are operating under fear come in and pay their taxes and 50-percent penalty and interest, without spending a lot of money on Government investigations, we are accomplishing something very positive, because as long as they know that there is only a certain point up to which they can walk in and avoid prosecution, you are not weakening the sanction of the criminal prosecution, the fear of criminal prosecution. These people know that they must get in before Internal Revenue gets after them.

I think we would get a tremendous amount of revenue if all of us who are advising people in these situations were able to say to the, "You are still at a stage where you can come in and pay up, and not go to jail."

MR. DEWIND. You believe from your experience that there is a substantial number of such situations that are not simply cases that come in shortly before they would be detected anynow?

MR. ARENT. I failed to make the point I really wanted to make, which is that even if all of those who come in are people who are coming in because they understand Internal Revenue has a lead on them, Internal Revenue would still be way ahead if it let hose people get off by making voluntary disclosure; because we all know that no matter how much we build up Bureau personnel, and I hope it will be built up a great deal more, you are still going to investigate only a very small proportion of your cases, including the cases on which you have leads. In the case of this doctor, for example, the fact that

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237 Internal Revenue by a thoughtful analysis might have realized from comparing his return with the return of this patient of his, that there is something strange about the amount of income he reported—despite that fact I am certain Internal Revenue would never have followed up in that case, and it has too many vague leads of that sort which are strong enough to drive a man to voluntary disclosure, because he knows the situation and sees all of the
238 implications, whereas the Bureau with its limited personnel cannot see the whole situation, so that there is revenue to be gained there.

MR. DEWIND. Fundamentally you must believe from your experience that there are a substantial number of taxpayers who would respond to that sort of inducement.

MR. ARENT. I do honestly believe that.

MR. DEWIND. So that the taxpayers who wish to make voluntary disclosures in substantial number over and above those who have a fear that they are about to be detected, or I should say particular reason to know that they are about to be detected.

MR. ARENT. I think most of them act out of fear and not out of morality and, nevertheless, I think that their fear comes at a stage where the Bureau is not breathing down their necks, and they think the Bureau is breathing down their necks, but it is not that close, and most of them would get away with it if they had the ability to keep steady nerves and sleep nights, and fortunately they do not, and if you give us a chance we will bring those people in and make them pay their taxes and their penalties.

MR. DEWIND. There is no statistical information to buttress that feeling. We are trying to get what we can from the Bureau of Internal Revenue in connection with the volume of amended returns that are filed under the former voluntary-disclosure policy.

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STATEMENT OF ALBERT E. ARENT

Gentlemen, having served for 2 years as chairman of the committee on procedure in fraud cases of the section of taxation of the American Bar Association, I have learned considerable about the handling of fraud cases in both the Bureau of Internal Revenue and the Department of Justice and have become familiar with many of the complaints registered against those Departments by members of the bar. Since I no longer represent the section of taxation in the matter of the handling of tax fraud cases, I feel free to present to you my own personal views which, however, I believe are shared by many members of the tax bar.

Basically most tax lawyers respect the job which the Bureau of Internal Revenue and the Department of Justice have done in ferreting out fraud and processing cases to prosecution. We believe a better job could be done if both agencies were given additional manpower. Notwithstanding recent disclosures, we believe that most fraud cases have been honestly investigated and honestly prosecuted or withheld from prosecution. Certainly this committee recognizes the importance of separating the sheep from the goats and the need not only for vigorous law enforcement officers to send fraudulent taxpayers to jail but also for men of conscience with courage enough to protect the innocent as well as to prosecute the guilty. Honest men do sometimes get enmeshed in what superficially seems like fraud. It would, indeed, be unfortunate if the zeal for prosecution reached the stage where the effectiveness of Government officials was measured by the number of cases prosecuted, with the result that indictment and conviction rather than justice became the goal of our special agents and Government lawyers.

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There is a practical as well as a moral side to this question. In addition to the criminal sanction, there is a statute imposing a civil penalty for fraud amounting to 50 percent of the tax deficiency. The elements comprising civil fraud are no different from those constituting criminal fraud. The distinction intended by Congress must have been one of degree—the gradation of guilt in terms of amounts concealed, methods, circumstances, and the quality of proof. Criminal fraud must be proved beyond a reasonable doubt rather than by a mere preponderance of the evidence. Thus, we need not only men of courage and conscience but also men of experience and judgment who will know where to draw the line. This Nation has been fortunate, despite widespread attempts at tax evasion by men of otherwise unblemished reputation, that the crime of tax fraud has not yet become respectable and judges usually impose jail sentences when convictions are obtained. For this, much credit must go to the Government officials who have selected for prosecution mainly the open-and-shut cases and the more shocking cases, and have thereby kept the courts from becoming flooded with so many cases of trivial or borderline character as would tend to make the offense assume the character of a mere misdemeanor in the eyes of the public who make up the juries and of the judges who impose sentence. This duty of selection imposes the gravest of responsibilities upon the public officials concerned and is, of course, open to abuse. Nevertheless, we cannot abandon the task to the courts and run the risk of having income tax enforcement shattered in the way prohibition enforcement ultimately was.

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The role of the Department of Justice Tax Division in making this selection has been paramount. There in recent years it has been possible for reputable attorneys to learn in reasonable concrete terms what the charges were against their clients and to present evidence to meet those charges in an effort to demonstrate either that their client was not guilty or that the Government's proof was not strong enough to promise conviction or that for other good reasons the particular case ought to be disposed of without prosecution. I cannot emphasize too strongly the feeling that exists among nearly all of the tax lawyers of my acquaintance that for the most part the Tax Division has been staffed with honest, intelligent men who have done, on the whole, a good job in the performance of this difficult task.

Many of us would regard it as a great loss to the sound administration of the tax laws if the Criminal Section of the Tax Division were abolished and cases were referred for prosecution directly from the field offices of the Bureau of Internal Revenue to the United States attorneys. The work of this section has been the principal influence toward uniform treatment of taxpayers throughout the country and one of the principal safeguards against the local pressures which make it so difficult to indict the kind of respectable business and professional men who, unfortunately, in recent years have let themselves degenerate into tax evaders. If the Tax Division of the Department of Justice were not breathing down the necks of the United States attorneys and advising them which cases to prosecute, in my opinion there would be fewer prosecutions of the big, important tax cases, involving figures powerful in the business and political community, than there is today and more prosecution of the small fry who get caught at their inept attempts at chiseling.

Our main complaint has been the unwillingness of the Bureau to state publicly the policies and procedures which govern its handling of fraud cases. Tax lawyers have wanted to know what the rules were so that they might honestly and ably represent their clients within the orbit of those rules. Informally, Bureau officials have repeatedly indicated a desire that their investigators and attorneys respect the constitutional rights of persons under investigation, that they avoid unnecessary injury to the reputation of a suspect until such time as a decision has been made to prosecute, that taxpayers should not be discouraged from seeking the advice of counsel at any stage, etc. Yet, in the absence of any published regulations or instructions, agents in the field from time to time appear to have violated the Bureau's high principles, and taxpayers' representatives have had nothing to which they could refer for the purpose of making the special agent adhere to the proper standards. The result has been uneven practices in different parts of the country, occasional accusations of sharp practice by the Bureau, occasional injustice, and occasional injury to the Government's ability to carry a case through to successful prosecution, as, for example, in the Liebster case in Philadelphia, where the very informality of the Bureau's prodedures made

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243 it possible for the taxpayers to obtain relief by insinuations of entrapment. The cure, in my view, is not to abandon such policies as voluntary disclosure, which was involved in the Liebster case, but to adopt open and explicit standards against which the conduct of both the taxpayer and the investigation agents can be measured.

Many of us view with regret the abandonment of what is known as the voluntary disclosure policy. We think it is a casualty of the Bureau's lack of candor and explicitness in defining what constitutes a voluntary disclosure for purposes of obtaining immunity from prosecution. Although the task is not without its difficulties, I see no reason why the Bureau could not issue regulations precisely describing at what procedural stage an investigation begins and stating exactly what the taxpayer must do to win immunity from prosecution. Since the policy was the Bureau's own creation, it could set up whatever safeguards it needed to prevent taxpayers from taking unfair advantage of the policy and, at the same time, it could establish guideposts so that honest attorneys and frightened or reformed taxpayers could take advantage of the policy with confidence. Under such a policy, properly administered, hundreds of thousands of dollars will be paid into the Treasury which would otherwise escape detection. We are all aware that no matter how many special agents the Government employs, it can have only sample enforcement. Scores, if not hundreds, escape for each one that gets caught. To collect its taxes, therefore, the Government must rely not only upon its enforcement machinery but primarily upon the integrity of the taxpaying public and, secondly, upon its fear. In my opinion, the threat of prosecution is one of the most effective sanctions available—one that should not be weakened for the sake of any immediate increase in revenue, for in the long the Government would lose. I do not believe, however, that the sanction is weakened by an opportunity for voluntary disclosure if it is known that such disclosure is futile after the Government has begun investigating a taxpayer, especially since a person making voluntary disclosure usually ends up paying not only the full tax due but also interest and a 50-percent fraud penalty. It does not matter whether the taxpayer makes disclosure because he learns that a customer or a patient of his is being investigated and the trail may lead to him or whether he gets religion. We are dealing not with a moral question but with a practical problem of raising revenue. We know that even when it has such collateral leads, the Bureau can follow through and catch up with only a small portion of those who would take advantage of an opportunity to make voluntary disclosure.

Because of the mistakes and transgressions of a small minority of our public officials, we find an increasing timidity among honest and able public officials with respect to assuming responsibility for difficult decisions. This could lead to a bureaucratic paralysis which would seriously harm the effectiveness of our Government and grossly injure all of us who have to deal with our Government—whether as taxpayers, as businessmen, or as servicemen. The abandonment by the Treasury of its voluntary disclosure policy, and perhaps, too, of its recognition of health as an element of decision in the processing of a tax-fraud case, is not the constructive or courageous way out. The Bureau should be encouraged to grapple with its difficult problems and not to run from them.

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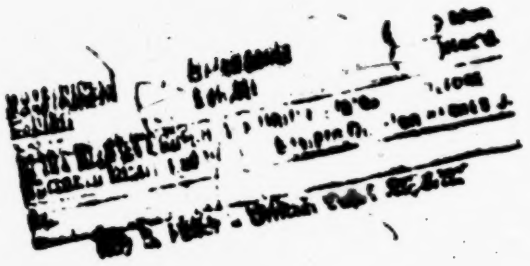


Def Ex. 3

Office Memorandum • UNITED STATES GOVERNMENT

TO : Special Agent Samuel Krame

DATE: October 16, 1951

FROM : Ernest J. Samber, Assistant Collector

SUBJECT: Shotwell Manufacturing Company

In compliance with your request for a statement from me regarding the Shotwell Manufacturing Company, the following are the facts in the case:

On or about March 15, 1948, at the time I was Chief Field Deputy, Leon J. Busby, a certified public accountant personally known to me, came in to my office and said that he had a problem he would like to discuss with me relating to a client of his, and that he would like to have my advice.

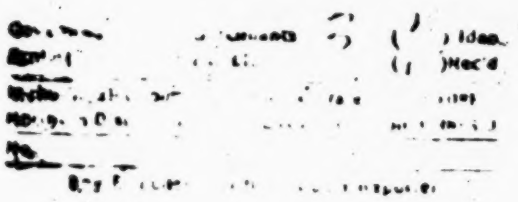
Mr. Busby said that he was not at liberty to disclose the name of his client at this time, but that the client had engaged in the sale of its manufactured product at a price in excess of ceiling prices and that the client had used the funds so obtained to purchase raw materials needed in their manufacturing process for prices in excess of ceiling prices.

He also stated that whenever possible an arrangement would be made between his client and a broker to sell this broker a shipment of the finished product in exchange for an equivalent amount of raw material. Mr. Busby's client was fully aware that this broker would be forced to sell the finished product for a price in excess of ceiling prices and would be required to pay a price in excess of ceiling prices for the raw material he had agreed to furnish Mr. Busby's client.

This condition existed during the time of sugar rationing, and his client now desired to file amended tax returns and have the matter adjusted with the Internal Revenue Department. However, he did not know and his client did not know the extent of the operations, and therefore, he was unable to assemble the accurate figures necessary to file the amended return.

Mr. Busby said the money obtained from over-the-ceiling sales was in currency and was kept in a safe deposit box and that each time it became necessary to purchase raw materials at over-the-ceiling prices, currency was taken from the safe deposit box and used for that purpose only.

After sugar rationing ended, the money left in the safe deposit box was taken into the corporation books and records and declared as income.



Special Agent Samuel Krane October 16, 1951

I told Mr. Busby that until such time as he was able to obtain accurate figures, his client could not file an amended return, as the amended return would be just as inaccurate as the original return. I suggested that Mr. Busby call all the employees and agents of his client together and obtain statements from each one of them outlining the extent of their individual activity, and from these individual statements he should reconstruct a record of the over-the-ceiling purchases, sales and trades. After this record had been prepared, I suggested that he contact the office of the Internal Revenue Agent in Charge and request an audit of the client's tax returns.

Mr. Busby left my office that day without disclosing the name of his client and without committing himself as to his future action.

After he left, I called Revenue Agent Ralph Johnson on the telephone and gave him the problem and told him what my reply had been. He said that under the circumstances he thought I had given the taxpayer as good an answer as was possible.

Within a few days, Mr. Busby brought Byron Cain, also personally known to me, into my office and told me that Mr. Cain was the President of the Shotwell Manufacturing Company and the Shotwell Manufacturing Company was the client whose case he had discussed with me previously.

Mr. Cain told me practically the same story that Mr. Busby had related previously and I gave Mr. Cain the same suggestion that I had given Mr. Busby. They agreed that they would follow my advice and left my office.

About three or four weeks later, Mr. Cain called me and said that he had had various meetings with the individuals of the Shotwell Manufacturing Company that had any connection with the over-the-ceiling transactions, and that they had reconstructed the figures to the best of their ability and were ready to turn them in to the Internal Revenue Department. He wanted to turn them over to me, but I told him that the Collector's Office had no jurisdiction in the audit of corporation tax returns. He then asked me if I would make the necessary arrangements to have the corporation returns audited.

I told him I would call the office of the Internal Revenue Agent and let him know later. I called Revenue Agent Ralph Johnson and asked if he would make arrangements to have the corporation returns audited. He told me he would do so and I called Mr. Cain and told him to hold the reconstructed figures in his possession and a Revenue Agent would call on the corporation to audit the tax returns and the entire facts and figures should be presented to the Revenue Agent charged with the responsibility for making the audit.

Government Exhibit | Defendants Exhibit — ( ) Iden. ( ) Rec'd.

In the District Court of the United States, Northern District of Illinois, Eastern Division — BEFORE BARNES J.

No.

Ray E. Fuller - Official Court Reporter

INTELLIGENCE UNIT

CHICAGO

(NAME OF DIVISION)

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Post Office Box 1101
Chicago 90, Illinois
July 1, 1948

SI-Special
SI:HLC

RECEIVED
[illegible] 1948
[illegible] Unit
Int. Rev.
New York Division

Examined, Approved and forwarded to Treasury District No. 2

JUL 1 1948

Special Agent in Charge
Treasury District No. 9

Mr. A. P. Madden
Special Agent in Charge
Intelligence Unit
Treasury District No. 9
Chicago, Illinois

In re: General Confections, Incorporated
Hillsdale, New Jersey
Eatsum Food Products Company
19 Rector Street
New York, New York
Shotwell Manufacturing Company
3501 West Potomac Avenue
Chicago, Illinois

Reference is made to a telephone call received on June 21, 1948, from Special Agent Walter F. Murphy of the New York Division, requesting that certain records and information relating to transactions between General Confections, Incorporated, Eatsum Food Products Company, and the Shotwell Manufacturing Company, be obtained from the Shotwell Manufacturing Company.

The offices of the Shotwell company were visited in the afternoon of June 21, 1948, and on subsequent days, and the following records were obtained and are enclosed herewith:

About thirty days later, Mr. Cain called me and asked if I knew when the Revenue Agent would call. I told him not to be impatient, that the Revenue Agents had a terrific work load and the best thing for him to do was to sit back and wait, and the audit would be taken care of in the regular course of business.

About thirty or sixty days later, he called again and said it was very important to him that the examination be conducted immediately. He intimated that the corporation had some refinancing to do or wanted to make some change in their financial structure, and they were desirous of having this income tax examination completed before proceeding with this proposed change in the financial structure of the corporation.

I again called Revenue Agent Johnson and asked him if he could expedite the examination of the return. He was a little uncertain at first regarding the case, but then he remembered it and said that I had given him the wrong name; that I had told him the name of the corporation was the Shotwell Candy Company, and they had no record of the Shotwell Candy Company and that he had done nothing about having the returns audited.

I told him that the correct name of the taxpayer was the Shotwell Manufacturing Company and that the taxpayer was anxious to have the returns examined because of some proposed change in their financial structure. Mr. Johnson promised me that he would secure the return and assign it for immediate investigation.

That was the last I heard of the case until about a year later, when Mr. Cain called me and said that they had had three Agents, each making a separate investigation, and he wanted to know if there was anything I could do to expedite the closing of the case.

I suggested that he contact Mr. Wright and explain his problem to him. About a week later, Mr. Cain called me again and said he had had an interview with Mr. Wright, and asked me if I could find out the reason why the case could not be brought to a conclusion.

I talked with Mr. Wright and he advised me that the reason the case was not progressing was that Mr. Cain and other employees of the Shotwell Manufacturing Company would not disclose persons to whom the over-the-ceiling money was paid, and that the case would not be closed until the employees of the Shotwell Manufacturing Company cooperated with their Government and disclosed the names of the individuals to whom these over-the-ceiling payments were made.

I conveyed this information to Mr. Cain and he contended that they did not know the names of any of the individuals except a certain Dr. Roe in th. Board of Trade Building, and inasmuch as he felt this was a fictiti us name and he would appear ridiculous in giving a statement of this nature, he had declined to do so, and he was unable to furnish the information requested.

Special Agent Samuel Krane October 16, 1951

I told him there was nothing further that I could do and that is the last time that I have seen Mr. Cain.

This statement is made entirely from memory, and represents my best judgment of the facts. I have reviewed the case with Revenue Agent Marmel eight or nine months ago, and have tried to check dates with Revenue Agent Ralph Johnson, and I believe them to be accurate.

(signed) Ernest J. Sauber

52 CR 113

Government Exhibit | Defendants Exhibit 4
In the District Court of the United States, Northern District of Illinois, Eastern Division
No.
Roy E. Fuller — Official Court Reporter

Def. Ex. 4

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
INTELLIGENCE UNIT

Chicago 90, Illinois

September 22, , 19 48

Collector of Internal Revenue,
Chicago,
Illinois

Will you please furnish this office with the income tax filing record of the following taxpayer for the years indicated:

Name: Shotwell Manufacturing Company

Address: (Residence)

(Business) 3801 West Potomac Avenue, Chicago, Illinois

Year	Serial Number	Date Forwarded to Bureau
1943		
1944		
1945		
1946		
1947		

Sam Krane
Special Agent Sam Krane

Approved: A P Madden
Special Agent in Charge

Collector of Internal Revenue

678

3344103

Government Exhibit — Defendants Exhibit 5 — ( ) Iden. ( ) Rec'd.
In the District Court of the United States, Northern District of Illinois, Eastern Division BEFORE BARNES J.
No.
Ray E. Potter - Official Court Reporter

Def Ex: 5

June 21, 1948.

Telephone message from Walter Murphy,
New York Division.

Urgent you make contact immediately with Shotwell Manufacturing Company, North Adams Street, Chicago, preferably through Stanley Craslan, comptroller, and request:

#1 - All sales invoices to General Confections, Hillsdale, New Jersey and 40 West - 170th Street, New York City, March 5 to December 31, 1946.

#2 - Same to Eatsum Foods, 19 Rector Street, New York City, 1944 - 1945.

#3 - Record including warehouse receipts showing transfer of two cars each of chocolate and sugar from Shotwell to General Confections in April, 1946.

#4. - Details of $75,000 loaned on mortgage by Byron Cain of Shotwell to General Confections.

(Although no prior knowledge should be disclosed the inquiry should contrive to develop the subsequent sale of the mortgage on January 22, 1948, to Janet Moran co-owner with Eddie Urban of Hapercorn Candy Company. Janet Moran is the sister of Dave Lubben former partner in Eatsum whose testimony is thus sought to be induced.

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General Confections, et al.
Hillsdale, New York.

Byron Cain
Estown Foods
Stanley Graalam
General Confections
Hapercorn Candy Company
Dave Lubben
Janet Moran
Shotwell Manufacturing Company
Eddie Urban

Files searched on above names 6-21-45 by E.K. — record:

Closed special report - S/A. E. L. Olsen - 10-31-45 - re: Roy Hankermayer, David G. Lubben, Rittenhouse Candy Company, Inc., New York City, New York.

(ddw)

cc: S/A. E. B. Stroh

INTERNAL REVENUE SERVICE

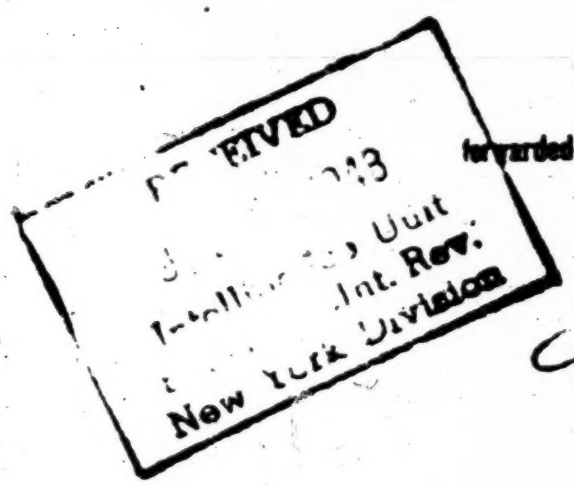
INTELLIGENCE UNIT

CHICAGO

(NAME OF DIVISION)

Post Office Box 1101
Chicago 90, Illinois
July 1, 1948

SI-Special
SI:HCG



Examined. Approved and forwarded to Treasury District No. 2

JUL 1 1948

Special Agent in Charge
Treasury District No. 9

Mr. A. P. Madden
Special Agent in Charge
Intelligence Unit
Treasury District No. 9
Chicago, Illinois

In re: General Confections, Incorporated
Hillsdale, New Jersey
Eatsum Food Products Company
19 Rector Street
New York, New York
Shotwell Manufacturing Company
3501 West Potomac Avenue
Chicago, Illinois

Reference is made to a telephone call received on June 21, 1948, from Special Agent Walter F. Murphy of the New York Division, requesting that certain records and information relating to transactions between General Confections, Incorporated, Eatsum Food Products Company, and the Shotwell Manufacturing Company, be obtained from the Shotwell Manufacturing Company.

The offices of the Shotwell company were visited in the afternoon of June 21, 1948, and on subsequent days, and the following records were obtained and are enclosed herewith:

Folder #1. Copies of all Shotwell Manufacturing Company sales invoices to the Eatsum Food Products Company for the years 1944, 1945, and 1946, together with copies of all sales invoices to General Confections, Incorporated, for the year 1946;

Folder #2. All Shotwell Manufacturing Company checks issued to David G. Lubben for the years 1944, 1945, 1946, and 1947, together with relevant vouchers;

Folder #3. Shotwell Manufacturing Company accounts receivable ledger cards for the Eatsum Food Products Company, and General Confections, Incorporated; a copy of the contract of sale of the capital stock of the Haberhorn Candy Company to the Shotwell Manufacturing Company; a letter, dated December 15, 1947, from General Confections, Incorporated, to the Shotwell Manufacturing Company, and a letter, dated February 18, 1948, from Foses, Katcher and Driessen to Byron Cain.

SI-Special

H. S. Graflund, vice-president of the Shotwell Manufacturing Company, stated that he had no knowledge of any transfers of chocolate or sugar in April 1946, by the Shotwell Manufacturing Company to General Confections, Incorporated. A search of the Shotwell files failed to disclose any record of such transfers. Mr. Graflund also stated that such a transaction could not have occurred without the knowledge and approval of Byron Cain, president of the Shotwell Manufacturing Company, and/or Frank Huebner, sales manager, who are presently in New York, New York, and who will be interviewed when they return to Chicago next week. However, 21 Shotwell invoices to Eatsum and to General Confections during 1945 and 1946 cover merchandise which was shipped to consignees other than Eatsum or General Confections. Relevant bills of lading and shipping records are attached to these invoices, which are enclosed in Folder #1.

The following information relating to a $75,000 loan by Byron Cain to General Confections was furnished by Mr. Graflund and was substantiated by records examined:

On June 13, 1947, The Sterling National Bank and Trust Company of New York loaned $75,000 to General Confections, Incorporated. Payment of the loan was guaranteed by Byron Cain, who deposited with The Sterling National Bank and Trust Company, as collateral, $85,000 United States of America 7/8% Certificates of Indebtedness, Series A - 1948. Mr. Cain received chattel and real estate mortgages, dated June 13, 1947, signed by General Confections, Incorporated, and Saddle River Farms, Incorporated. These mortgages were recorded on June 14, 1947, at the office of the Clerk of Bergen County, New Jersey, and were deposited by Mr. Cain in a custody account at The Sterling National Bank and Trust Company.

In February 1948, General Confections defaulted on the loan and The Sterling National Bank and Trust Company requested payment from Mr. Cain, who then signed a personal note to the bank for the unpaid balance of $67,000. On March 9, 1948, this note was paid by Mr. Cain. In February 1948, Mr. Cain released the mortgages received from General Confections, Incorporated, and Saddle River Farms, Incorporated (see letter from Poses, Katcher and Driesen in Folder #3), as a result of the purchase by the Shotwell Manufacturing Company of the outstanding stock in the Haberkorn Candy Company. Details of this transaction are contained in the sales contract enclosed in Folder #3.

The following information is being submitted in the belief that it may be relevant to the inquiry being conducted by the New York office:

David G. Lubben, in addition to being a customer of the Shotwell Manufacturing Company, acted as its salesman, on a commission basis. Until 1947, commissions were paid to Mr. Lubben in the form of checks (Folder #2); during 1947, commissions earned by Mr. Lubben were paid in the form of credits to the account of General Confections, Incorporated (see ledger sheets in Folder #3).

In December 1947, General Confections, Incorporated, transferred to the Shotwell Manufacturing Company the balance of a purchase contract with the Wilbur Suchard Chocolate Company (see letter in Folder #3). The transfer of this contract resulted in a profit of $11,294.38 to General Confections. This profit was received by General Confections as a result of payments made by Shotwell to the Wilbur Suchard Company for the account of General Confections. It will be noted that whereas Shotwell charged General Confections for specific payments to Wilbur Suchard, the aggregate of these charges was credited to General Confections by a journal entry (see ledger sheets).

Additional information relating to the cancellation of the mortgages herein referred to will be forwarded to the New York office at such time as Byron Cain returns to Chicago.

The enclosed Shotwell records were obtained with the understanding that they would be returned within a reasonable time; it is, therefore, requested that these records be returned to this office as soon as possible.

It is recommended that this report and enclosures be forwarded to the Special Agent in Charge at New York for the attention of Special Agent Murphy.

Sam Krane
Sam Krane
Special Agent

Enclosures
Folders #1, #2, #3

Exhibit 8
In the District Court of the United States
Northern District of Illinois, Eastern Division
Mary E. Fuller - Official Court Reporter

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

INTELLIGENCE UNIT

INTERNAL REVENUE

CHICAGO
(Name of Division)

Chicago 90, Illinois,
P. O. Box 1101,
August 30, 1950.

AUG 31 PM 3 13

INTELLIGENCE UNIT

PERSONAL AND CONFIDENTIAL
DLO-MED

AIR MAIL

Mr. W. H. Woolf,
Chief, Intelligence Unit,
Washington, D. C.

Dear Mr. Woolf:

Reference is made to your conversation over the telephone with Special Agent D. L. Olsen requesting certain information regarding the Shotwell Manufacturing Company. The income tax liability of this corporation for the years 1944, 1945 and 1946, has been under continuous investigation by the office of the Internal Revenue Agent in Charge, Chicago, since about September, 1948. While a special agent has not actively participated in the investigation, this office has been kept informed of developments. I understand, however, that a request soon will be made for the cooperation of a special agent.

CHICAGO
(Name of Division)

Chicago 90, Illinois,
P. O. Box 1101,
August 30, 1950.

AUG 31 PM 3 13

INTELLIGENCE UNIT

PERSONAL AND CONFIDENTIAL
DLO-MED

AIR MAIL

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There is attached a copy of a memorandum, bearing today's date, prepared by Special Agent Sam Krane setting out certain information regarding the Shotwell Manufacturing Company. That corporation manufactures candy. Substantial sales were made to Lubben and his corporations. The report of Special Agent James C. Twohig, referred to in Special Agent Krane's memorandum, is not attached. A copy of it probably is available in your office. It bears case number SI-35743-F and is dated April 6, 1950.

Byron Cain, who, with his associates, owns the Shotwell Manufacturing Company, is a large real estate operator and owns many very valuable real estate properties in Chicago.

Very truly yours,

A. [illegible]
Special Agent in Charge.

Enclosure:
Memorandum

5684

Will have

for assgnee. filing

of file in case

35745 F you may

care to have under stand.

in Byron Cain and

Shotwell Manufac

turing Co.

Def 5 & 8-A

Chief, Intelligence M

August 31, 1950

TO: Mr. D. A. Bolich
FROM: W. H. Woolf

You may be interested in reading the attached personal letter of Special Agent in Charge Madden, dated August 30, 1950, concerning the Shotwell Manufacturing Company.

Attachment

SEP [illegible]

Attorney [illegible]

Motion A/B 9/6/51

By 54-8-B

Defendants' Ex. 8—Suppression Hearing 3165

5688 DEFENDANTS' EXHIBITS 9-10-11-12
Filed Feb. 19, 1954
(Stamped)
Internal Revenue
1950 Aug 31 PM 3 13
Intelligence Unit

Mr. D. L. Olsen, Special Agent
Mr. Sam Krane, Special Agent
Shotwell Manufacturing Company
3501 Potomic
Chicago, Illinois

August 30, 1950
SK:my

The Shotwell Manufacturing Company case came to this office as a result of a telephone call received from Walter Murphy, Special Agent, New York Division, on June 21, 1948, requesting that certain inquiries relating to transactions between the Shotwell Company and General Confections, Inc., Hillsdale, New Jersey, and Eatsum Food Products Company, New York, New York, be made that same day. Accordingly, on June 21, 1948, I went to the Shotwell Company and requested the desired information which was obtained and forwarded to the New York Division office by letter dated July 1, 1948. One of the matters included in Mr. Murphy's request, namely the purchase by David Lubben and Edward Urban of the Haberkorn Candy Company, Chicago, caused me to interview Edward Urban, partner in Close and Company, Chicago, on July 15, 1948. Mr. Urban furnished some details of that transaction which information was forwarded to the New York office on August 31, 1948.

On August 20, 1948, Edward Urban, his brother Frank Urban, partners in the firm of Close and Company, and their attorney Joseph F. Solon, 1 North La Salle Street, Chicago, appeared at the office of the Internal Revenue Agent in Charge, Chicago, where they made a purported voluntary disclosure to Group Chief R. Williams of the receipt of approximately $121,000 of over-invoice payments from David Lubben which had not been previously reported on their income tax returns.

Information relating to the purported disclosure by the Urbans of the receipt of over-invoice monies from David Lubben was submitted to the New York Division office by

letter dated August 31, 1948. In that letter it was suggested that possibly similar over-invoice payments were received by the Shotwell Manufacturing Company from David Lubben, and the New York Division office was requested to make appropriate inquiries, relating thereto, of Mr. Lubben. Responsive to this letter, Special Agent James J. Twohig, by letter dated September 13, 1948,
informed this office that he was in receipt of informa-
5687 tion to the effect that the Shotwell Company had made
a disclosure to the Revenue Agent's office at Chicago of the receipt of $528,000 of previously unreported income from David Lubben. Upon receipt of this letter inquiry was immediately made at the office of the Internal Revenue Agent in Charge, Chicago, regarding such disclosure by the Shotwell Company as this office previously had no knowledge thereof. The inquiry at the office of the Internal Revenue Agent in Charge, Chicago, disclosed that Internal Revenue Agent J. M. Lima (Ralph Johnson's group) was conducting an examination of the 1946 corporate income tax return of the Shotwell Manufacturing Company. Shortly thereafter a conference was had in the office of Group Chief Ray Williams where Mr. Williams, Group Chief Ralph Johnson, Internal Revenue Agent Joe Lima, and myself, were present, At that conference I learned that the Shotwell Company through its accountant, Leon Busby, and Byron Cain, president, had informed Internal Revenue Agent Lima of over-invoice charges and unbilled shipments to David Lubben's firms and that the monies received from that source were in turn disbursed in order to purchase certain raw materials and that such purchases were not recorded on the books of the Shotwell Company. At the conference it was stated that a recapitulation of these charges, payments received, and disbursements made, had been furnished to Internal Revenue Agent Lima and a copy of same is attached hereto as exhibit 1.

The recapitulation sheet shows that during the years 1944, 1945, and 1946, the Shotwell Company made unrecorded charges to Lubben aggregating $435,600.54 for unbilled shipments and over-invoice charges. The recapitulation sheet shows that only $378,159.24 of the total charges of $435,600.54 was collected from Lubben, the difference being an error in billing of $8,826.40 and $48,614.90 which remained when a final settlement was made with Lubben. The recapitulation sheet also shows that $372,261.24 of

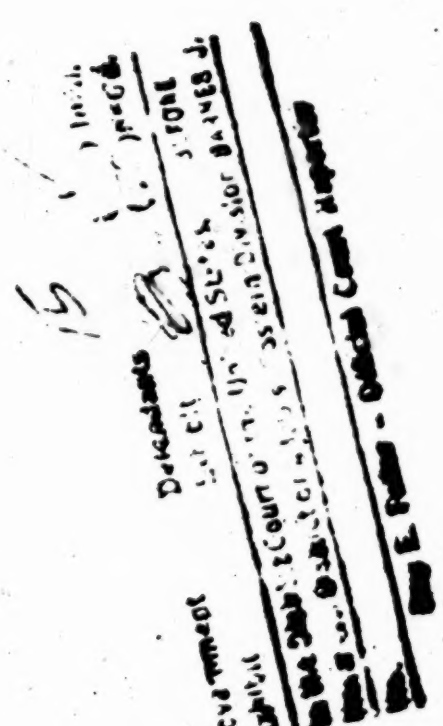
$378,159.24 collected from Lubben was disbursed for unrecorded purchases. The balance of $5,898 was deposited in the Shotwell Company account and was credited to an account titled "Advances to Employees".

Shortly after the conference referred to above, held in September, 1948 in Group Chief Ray Williams' office, the case was transferred in the Revenue Agent's office to Group Chief Williams and to Internal Revenue Agent Charles J. Mammel who has since that date continuously conducted an examination of the returns of the Shotwell Com-
5688 pany for the years during which said over-invoice payments were received from David Lubben. Internal Revenue Agent Charles J. Mammel has kept me informed of the progress of his investigation.

It is my understanding that the Shotwell Company's position is that no taxable income resulted to it from the receipt of the money from Lubben as they contend that said monies were all disbursed for purchases which were not recorded on its books. However, other than the information contained in the recapitulation sheet submitted to Internal Revenue Agent Lima, the Shotwell Company has refused to submit any specific detailed information relative to the alleged disbursements and Byron Cain, President of Shotwell Company, has stated that such information will not be furnished at any time.

It is my understanding that the Shotwell Company also contends that they have made a voluntary disclosure of these unrecorded transactions to the Bureau of Internal Revenue by virtue of said information having been given orally by Leon Busby, accountant for the Shotwell Company, to Chief Field Deputy Ernest Sauber, Collector of Internal Revenue, Chicago. An examination of the records in the office of the Internal Revenue Agent in Charge, Chicago, shows that the 1946 corporate income tax return of the Shotwell Company, was received by that office on December 11, 1947, assigned to Group Chief Granahan on December 16, 1947, transferred to Group Chief Ralph Johnson on July 21, 1948, and then shortly thereafter transferred to Group Chief Ray Williams. Inasmuch as the specific date on which the alleged disclosure of the unrecorded transactions by Leon Busby to Chief Field Deputy Ernest Sauber is not known to me, I cannot state whether this information was submitted to Mr. Sauber prior to

1936, and 1940 to 1945 Inc. RAR (1)



Exhibit

SHOTWELL MFG. CO., THE
3501 West Potomac Avenue

STATUTE OF LIMITATIONS EXPIRES

DIVISION 1120 CHICAGO FIELD EXAM.

FORM NO OF RETURN OFF. INTERVIEW

the date when the 1946 income tax return was received by the office of Internal Revenue Agent in Charge for examination.

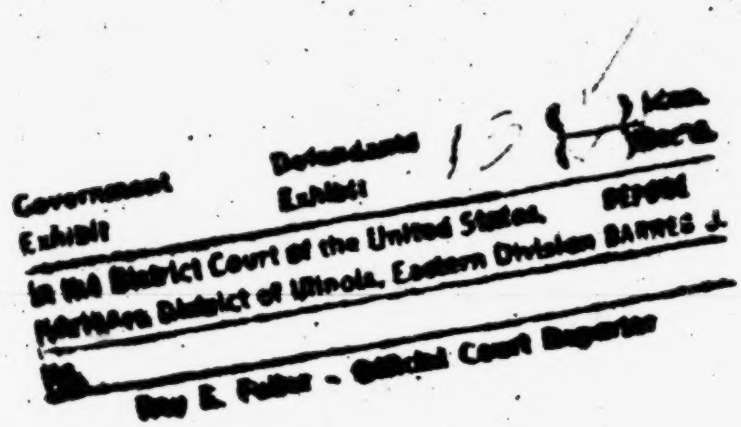
Considerable correspondence has been received from and forwarded to the New York Division of this Unit by this office relative to the Shotwell and Close and Company cases. Enclosed with a letter dated April 6, 1950, from Special Agent James J. Twohig, is a memorandum of an interview had by Special Agents Cordes and Twohig with David Lubben at the office of the Intelligence Unit, New York, New York, on March 7, 1950. Internal Revenue Agent Charles J. Mammel, Chicago, was also present and participated in this interview. This memorandum which is attached hereto as exhibit 2 relates statements
5689 made by Lubben relative to a meeting had by Lubben and his attorney with Byron Cain and Pat Grace, attorney for Cain. I was informed by Special Agent Twohig when he was in Chicago in December 1949 that Pat Grace was a member of a New York law firm of Grace and Grace which is reputed to be an influential law firm.

I understand that in 1941 or 1942 A. H. Shotwell was the principal stockholder in the Shotwell Manufacturing Company and that the company was then in financial difficulties. Harold E. Sullivan, Chicago, was the attorney for the company.

In either 1941 or 1942 a reorganization was effected whereby all of the old stock was exchanged for new stock. All of the new preferred stock (non-voting) was issued to Mr. Shotwell together with common stock. Fifty-one per cent of the new common stock was issued to Byron Cain, Harold E. Sullivan and Homer Triplett, a partner with Byron Cain in several real estate ventures.

Messrs. Cain, Sullivan, and Triplett paid no money for their stock, receiving the stock in exchange for their assuming management of the company, lending their credit standing so that a loan could be obtained from a bank for working capital, and to induce creditors to grant extensions on outstanding liabilities. Mr. Triplett subsequently sold his stock to Cain and Sullivan for approximately $35,000.

Sometime in 1944 or 1945, the corporation from accumulated earnings purchased all of the preferred stock from Mr. Shotwell and retired it.



ACCOUNTS RECEIVABLE

Sales, 11/9/44 - 12/31/44 (Price adjustment)			$ 29,837.00
Less, corrections, invoices			
#54263, shown $ 5,401.00 should be	$ 1,080.20		
54388, " 5,632.00	1,126.40		
$11,033.00	$ 2,206.60	8,826.40	
Net sales, 1944			$ 21,010.60
Collections, 1944			11,700.00
Balance due, 12/31/44			9,310.60
Sales, 1945: (Price adjustment)			
1/1/45 - 5/31/45		91,495.30	
6/7/45 -11/28/45 (Unverified approximation)		85,786.30	
11/28/45-12/31/45		26,823.30	204,105.10
			213,415.70
Collections, 1945			198,429.84
Balance due, 12/31/45			14,985.86
Sales, 1946:			
Price adjustments	$135,923.80		
Unbilled shipments	65,734.64	201,658.44	
Less, items uncollected due to financial difficulties		48,614.90	
Net sales, 1946			153,043.54
			168,029.40
Collections, 1946			166,023.40
Balance due, 12/31/46			$ -0-

CASH ACCOUNT

5691

DEFENDANTS' EXHIBIT 14
Filed February 19, 1954
(Stamped)
Internal Revenue
1950 Sep. 29 AM 9 18
Intelligence Unit

U. S. TREASURY DEPARTMENT
Internal Revenue Service
Chicago, Illinois
September 19, 1950

Intelligence Unit
Chicago
(Name of division)
SI—Special
SK:vn

(Stamped: Report Examined, approved and forwarded to Chief Intelligence Unit. Sep 19 1950
A..P. Maabin (sic) Special Agent in Charge Chicago Division)

Chief, Intelligence Unit
Bureau of Internal Revenue
Washington 25, D.C.

In re: Shotwell Manufacturing Company
3501 West Potomac Avenue
Chicago, Illinois
Income Tax: Years 1944-1947

The Internal Revenue Agent in Charge, Chicago, Illinois, has requested that this office cooperate in a joint investigation of the income tax liability of Shotwell Manufacturing Company, Chicago, for the years 1944 to 1947, inclusive.

The investigation conducted by the internal revenue agent has disclosed that the Shotwell Manufacturing Company failed to report the receipt of approximately $400,000 of over-invoice payments from the sale of candy during the years 1944, 1945, and 1946. Officers of the Shotwell Manufacturing Company have acknowledged to the internal revenue agent the receipt of the unreported income but contend that unreported disbursements in a like amount were made in connection with the purchase of certain raw materials used in the manufacture of candy. The officers of the Shotwell company have refused to identify the recipients of the claimed disbursements or to submit evidence to substantiate such payments.

It is requested, therefore, that a case jacket be issued authorizing an investigation of the income tax liability of the Shotwell Manufacturing Company for the years 1944, 1945, 1946, and 1947.

/s/ Sam Krane
Sam Krane
Special Agent

	20 Tons @	3000 —	60.000
	1945		Fwd 204100
Choc.	—	45.000	
Milk	10 mo	20.000	
Corn Syrup		12.000	
Cocoa Butter substitute		30.000	
Sugar	dext	37.000	
Cocoa	beans	24.000	
Salt	Egg	18.000 —	
			194.000
	Carry over		10.100
		1946	168600

FORM [illegible] REV 10 45
230M [illegible] CHOOLEY 88491
PRINTED [illegible] S. A

TRANSPORTATION RECEIPT

DUPLICATE

TO TREASURY DEPARTMENT OF CONTRACTING AIR LINE

DATE [illegible] 194

I THE AUTHORIZED HOLDER OF THE AIR TRAVEL CARD OR HOLDER OF AN AIR TRAVEL ORDER BEING AN OFFICER DIRECTOR PARTNER OR EMPLOYEE OF THE SUBSCRIBER OR IF THE SUBSCRIBER IS OTHER THAN AN INDIVIDUAL OF THE SUBSCRIBER'S EMPLOYEE OR A MEMBER OF THE IMMEDIATE FAMILY OF THE SUBSCRIBER IS AN INDIVIDUAL HEREBY ACKNOWLEDGE RECEIPT OF THE FOLLOWING DESCRIBED TICKETS PAYMENT FOR WHICH IS SUBJECT TO TERMS OF AGREEMENT WITH THE SUBSCRIBER

IK 17359 N 574460
BYRON A CAIN
THE SHOTWELL MFG C

PRINT NAME OF CARD HOLDER OR ORDER HOLDER | CODE | ACCOUNT | SERIAL

PRINT NAME OF SUBSCRIBER

TICKETS FORM NO.	TICKET NO.	FOR TRANSPORTATION FROM	TO	VIA	MARK OUT TERM NOT APPLICABLE	GROSS VALUE	FOR ACCOUNTING DEPT. USE
132	3	[illegible]			ONE WAY ~~ROUND TRIP~~	$ 11 [illegible]	
					ONE WAY ROUND TRIP	$	
					ONE WAY ROUND-TRIP	$	
					FEDERAL TAX ON TRANSPORTATION OF PERSONS ___%	$ 1 65	
FORM NO.	TICKET NO.	EXCESS BAGGAGE CHARGES FROM	TO	VIA	LBS. RATE	$	
					FEDERAL TAX ON TRANSPORTATION OF PROPERTY ___%	$	
					TOTAL	$ 12 65	

THIS IS YOUR INVOICE

PLEASE MAKE PAYMENTS TO

AMERICAN AIRLINES INC.

210 S. BOSTON AVE.

TULSA 3, OKLAHOMA

NAMES OF USERS AS SHOWN ON ONE TRIP AIR TRAVEL ORDER | ONE TRIP ORDER NO.

I AGREE TO USE THE ABOVE TICKETS FOR MY OWN TRANSPORTATION ONLY OR, IF ISSUED IN CONNECTION WITH A ONE TRIP AIR TRAVEL ORDER, ONLY FOR PERSONS NAMED ON THE ORDER.

X SIGNED Byron A Cain

SIGNATURE OF CARD HOLDER OR HOLDER OF ONE TRIP ORDER

THE SIGNATURE OF THE CARD HOLDER OR ORDER HOLDER CORRESPONDS WITH THAT ON THE AIR TRAVEL CARD OR ONE TRIP AIR TRAVEL ORDER.

TICKET AGENT W E C AGENT NUMBER 700 ISSUING OFFICE L A

ISSUING AIRLINE TRANSCONTINENTAL & WESTERN AIR, INC.

Net sales, 1944			$ 21,010.60
Collections, 1944			11,700.00
Balance due, 12/31/44			9,310.60
Sales, 1945: (Price adjustment)			
1/1/45 - 5/31/45		91,495.30	
6/7/45 -11/28/45 (Unverified approximation)		85,786.30	
11/28/45-12/31/45		26,823.30	204,105.10
			213,415.70
Collections, 1945			198,429.84
Balance due, 12/31/45			14,985.86
Sales, 1946:			
Price adjustments	$135,923.80		
Unbilled shipments	65,734.64	201,658.44	
Less, items uncollected due to financial difficulties		48,614.90	
Net sales, 1946			153,043.54
			168,029.40
Collections, 1946			166,023.40
Balance due, 12/31/46			$ -0-

32-1-103

CASH ACCOUNT

	1944	1945	1946
RECEIPTS (Collections)	$ 11,700.00	$198,429.84	$168,029.40
Balance forwarded	-0-	11,700.00	16,129.84
	11,700.00	210,129.84	184,159.24
DISBURSEMENTS:			
Chocolate		45,000.00	-0-
Milk		30,000.00	15,000.00
Corn syrup		12,000.00	87,775.00
Cocoa beans		22,000.00	-0-
Cocoa bean deal		30,000.00	-0-
Sugar deal		37,000.00	54,825.00
Sales expenses and unallocated		18,000.00	20,661.24
TOTAL DISBURSEMENTS	-0-	196,000.00	178,261.24
CASH BALANCE	$ 11,700.00	$ 16,129.84	5,898.00
DEPOSITED IN BANK 7/25/46			$ 5,898.00

qa/44.13
id. - Exhibit #1

Defts Ex 19

TO Uptown National BANK
NAME OF BANK
Chicago
NAME OF BRANCH
Chicago, Ill.
BANK ADDRESS

COUNTER CHECK

DATE March 3 1948

PAY TO THE ORDER OF MURIEL E. FULTON TRUSTEE

N. P. 1-1920

$2,500.00

TWO THOUSAND FIVE HUNDRED AND NO/100 - - - - - - - - - - - - - - - - - - DOLLARS

J.C.U. 6-1

IN PAYMENT OF Deposit on Bigelow property 25 Via Lum Palmer

Byron Cain

TELEPHONE 7731

SERVICE LINE STANDARD COUNTER CHECK FORM 6001

Defts Ex 19a

BYRON A. CAIN
4546 BROADWAY

No. 2228

CHICAGO, 3/11 1948

PAY TO THE ORDER OF Cash $300.00

Three Hundred 00 DOLLARS

UPTOWN NATIONAL BANK
OF CHICAGO
BROADWAY AND LAWRENCE
CHICAGO, ILLINOIS

1-300 1-300

Byron A Cain

Defts Ex 19b

TO MERCHANTS NATIONAL BANK OF CHICAGO
NAME OF BANK
CHICAGO, ILLINOIS
NAME OF BRANCH

BANK

COLLECTION 20 1948

950

COUNTER CHECK

DATE March 12, 1948

N.P. 2-3

PAY TO THE ORDER OF MURIEL E. FULTON, TRUSTEE

$22,500.00

1936, and 1940 to 1945 Inc. RAR

Government Exhibit

Exhibit

SHOTWELL MFG. CO., THE
3501 West Potomac Avenue
Chicago 51, Illinois

STATUTE OF LIMITATIONS EXPIRES

DIVISION 1120 CHICAGO — FIELD EXAM.
FORM NO OF RETURN — OFF. INTERVIEW
FILING DISTRICT 1st ILLINOIS — CORRESP. AUDIT

7-8 YEAR AND SERIAL NO.	KIND OF TAX OR PENALTY	CLAIMS	REPORT AS SUBMITTED	APPROVED REPORT	DECISION
1946 AA 4103920 A					
TOTALS			~~7 [illegible] 5~~		

GRADE OF CASE
E ___ A ___ D ___ S
TIME
ORIG: D ___ H ___
ADD'L: D ___ H ___
ERRORS
C ___ T ___
COPIES ___

GROUP OR SECT. ~~FG~~ 9RW DATE ~~12/10/47~~ 2-4-49
TO CONF. SECT.
EXAMINER
REL. CASES, REF. CASES, REVIEWER'S NOTES, ETC.
ASS'N'D REPT REC'D AGR.
RET'D TO EXAM'R ___ REC'D ___ AGR.
APP'D REV'R
PREL. NOTICE PROT. ___ DEF. ___ AGR.
EXT.
INF. DEM RET'D PD.
INF. CONF BY [illegible] 12/11/47 AGR.

Charles Mannell 7/1/49
~~Refd by [illegible]~~ 8

Form 1947 EXAMINATION RECORD CARD
TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE
(Revised Aug. 1946)

DISPOSED OF
CLOSED: E 13 E 14 E 6 : E 15 E 7 : TR'D: E 29 : TO BUR.: E 28 : PET'N E 10 E 11 E 12 E 13
CLOSED: B ___ C ___ D ___ TR'D: B ___ C ___ TO BUR.: C

5692

Corn	Oil meal	20.000		
Sugar	beet	37.000		
Soya	bean	22.000		
Salt	Esy	18.000		
				194.000
	Carry over			10.100
			1946	168600
				178.600
Corn	Syrup	87.336		
Milk		75.000		
Sugar		54876		
Soya	Esy	21.000		

Government Exhibit — Defendants Exhibit 16 — Iden. — Rec'd.

In the District Court of the United States, Northern District of Illinois, Eastern Division — BEFORE BARNES J.

No.

Roy E. Fuller - Official Court Reporter

338.16

5693

VALIDATION STAMP

DATE 11 14

CITY - ISSUANCE

AZCTC

AGENT

UNIVERSAL AIR TRAVEL PLAN
TRANSPORTATION RECEIPT OF
WESTERN AIR LINES, Inc.

SERIAL NO. — NAME OF CARD HOLDER OR CARD HOLDER

NAME OF SUBSCRIBER — ACCT. CO.

DUPLICATE—TO TREASURY DEPARTMENT OF CONTRACTING AIRLINE

A 17359 N 574460
F CY A CAIN
THE SHOTWELL MFG CO

TICKETS		FOR TRANSPORTATION	VIA	CHECK ITEM APPLICABLE		CHARGES	RATE OF EX. CY.
FORM NO.	TICKET NO.	FROM					
172	116957	2	WAL TWA	OW / RT	OJ / CT	FARE $ 107 95	
				RT	CT	TAX $ 16 19	
				OW		FARE $	
				RT	CT	TAX $	
				OW	OJ	FARE $	
				RT		$	

EXCESS BAGGAGE CHARGES

FORM NO.	TICKET NO.	FROM	VIA	LBS	KGS	RATE		
							FARE	$
							TAX	$
							FARE	$
							TAX	$

NAMES OF USERS - IF OTHER THAN CARD HOLDER — IN CONNECTION OF USERS WITH SUBSCRIBERS

ATO NO

TOTAL $ 126 14

I HEREBY ACKNOWLEDGE RECEIPT OF THE TICKET(S) DESCRIBED HEREIN, AND CERTIFY THAT THE SERVICE(S) FOR WHICH TICKET(S) WAS REQUESTED, AND THAT SUCH SERVICE(S) WILL BE PERFORMED IN ACCORDANCE WITH APPLICABLE TARIFFS.

8005

x [signature]

SIGNATURE

(USE OF ONE TRIP ORDER)

AMF
910 S. BOSTON AVE
TULSA 3, OKLAHOMA

PRINTED IN U.S.A.

CHICAGO, 3/11 1948

PAY TO THE ORDER OF Cash $300.00

Three Hundred Too — DOLLARS

UPTOWN NATIONAL BANK
OF CHICAGO
BROADWAY AND LAWRENCE
CHICAGO, ILLINOIS

Raymond Adams

Dept Ex 1948

TO MERCHANTS NATIONAL BANK OF CHICAGO — BANK

COUNTER CHECK

CHICAGO, ILLINOIS — BRANCH

COLLECTION 20 1948 9-50 7

DATE March 12, 1948

PAY TO THE ORDER OF MURIEL E. FULTON, TRUSTEE

N.P. 2-3

I.N.P.

$22,500.00

Twenty two thousand five hundred and no/100 — DOLLARS

T.P.

IN PAYMENT OF purchase of Bigelow property as per agreement.

SIGN HERE Raymond Adams

ADDRESS

TELEPHONE

Dept Ex 19 C

TO MERCHANTS NATIONAL BANK OF CHICAGO — BANK

COUNTER CHECK

CHICAGO ILLINOIS — BRANCH

DATE March 12, 1948

PAY TO THE ORDER OF RAYMOND CHE

$ 500.00

Five hundred and no/100 — DOLLARS

SIGN HERE Raymond Adams

IN PAYMENT OF

ADDRESS

TELEPHONE

Government Exhibit
Defendants Exhibit
19 D
Iden.
Rec'd.
In the District Court of the United States, Northern District of Illinois, Eastern Division
BEFORE
Re.
Ray E. Fuller - Official Court Reporter

Def Ex 19d

March 13, 1948

Mr. Joseph Kuper
120 S. La Salle Street
Chicago, Illinois

Dear Mr. Kuper:

Mr. Cain was back in Chicago for several days and left again yesterday for California.

During his visit here we discussed your submission of the Abbell Hotels in detail, but have come to the conclusion that we are not interested in expanding our interest in hotel property at this time.

We thank you for having thought of us in this connection and for the information you furnished us.

Very truly yours,

CAIN AND CULHANE, INC.

In the Northern
Re. Ray E. Fuller - O-

March 13, 1948

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120 S. La Salle Street
Chicago, Illinois

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We thank you for having thought of us in this connection and for the information you furnished us.

Very truly yours,

CAIN AND CULHANE, INC.

Martin A. Culhane

MAC:mm

19E

Government Exhibit — Defendants Exhibit — (✓) 1483 — 1428

In the District Court of the United States — Northern District of Illinois — Eastern Division

No.

Ray E. Fuller — Official Court Reporter

Deft's 19e

COMMERCIAL
RESIDENTIAL
INDUSTRIAL
FARMS

JOSEPH KUPER & SON

MORTGAGE COUNSELORS
ESTABLISHED 1926
120 SOUTH LASALLE STREET
PHONE RANDOLPH 5600
CHICAGO 3, ILLINOIS

DIRECT CORRESPONDENT
FOR LIFE INSURANCE
AND TRUST FUNDS

February 20, 1948

Gov. Ex. 43

Cain and Culhane, Inc.
4545 North Broadway
Chicago, Illinois

Attention: Mr. Culhane

Dear Mr. Culhane:

The enclosed set-up is a brief memorandum and summary outlining the hotels that make up the Abbell Chain. We feel that this is self-explanatory.

However, since there is no hard and fast rule that says that the prospective purchaser would have to buy all of these hotels, it occurred to the writer that your people might be interested in the purchase of the four commercial hotels, namely, the Alexandria of Los Angeles, the Willard of Washington, D. C., the De Soto of St. Louis, and the Paramount of New York. If this were done, their cost per room would be approximately $6,500, which in my opinion is very much in line with prices being paid for similar properties. The above price is based on 1803 rooms at a sale price of $11,750,000. The askind price is based on the terms of 20% cash and the balance in paper. If it were possible to come up with all cash to the present liens, we feel confident that this price can be reduced somewhat.

Deft's 19e

COMMERCIAL
RESIDENTIAL
INDUSTRIAL
FARMS

JOSEPH KUPER & SON
MORTGAGE COUNSELORS
ESTABLISHED 1926
120 SOUTH LASALLE STREET
PHONE RANDOLPH 5600
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We have complete up-to-date information and would be very happy to place same at your disposal if you feel that the proposition has any interest for your clients.

There is also a possibility that we may persuade the present owners to lease these houses providing the lessees are a strong group financially and of very good reputation in connection with the management of similar houses. I would like to get your reaction to the above at an early date.

Yours very truly,

Joseph Kuper

JOSEPH KUPER

JK:mb

SOUTHSIDE OFFICE - HYDE PARK 7484

Government Exhibit
Defendants Exhibit
In the District Court of the United States
Northern District of Illinois, Eastern Division
No.
Max E. Fuller - Official Court Reporter

Dft 19f

ABELL HOTELS

I. Total Sales Price	$ 18,900,000.00
Mortgage Balances October 31, 1947	9,900,000.00
Equity above Present Mortgages	$ 6,000,000.00
Cash Payment	3,100,000.00
Balance in Purchase Money Mortgages	$ 2,900,000.00
II. Net Annual Profit Before Interest, Depreciation and Amortization	$ 2,120,000.00
Annual Mortgage Principal and Interest Payments	1,015,295.00
Balance of Earnings Available for Distribution to Investors	$ 1,104,705.00
Annual Mortgage Principal and Interest Payments on Purchase Money Mortgages - $2,900,000.00	644,463.00
Cash Balance	$ 460,242.00
Percentage of earnings available to cash investment earned for six years	19.33% per year
Percentage of earnings available to cash investment earned after sixth year	35.65% per year

Total repayment of cash investment in approximately 5 1/5 years.

Government Exhibit
Defendants Exhibit
In the District Court of the United States
Northern District of Illinois, Eastern Division
No.
Max E. Fuller - Official Court Reporter

Dft 19f

ABELL HOTELS

I. Total Sales Price	$ 18,900,000.00
Mortgage Balances October 31, 1947	9,900,000.00
Equity above Present Mortgages	$ 6,000,000.00
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Annual Mortgage Principal and Interest Payments	1,015,295.00
Balance of Earnings Available for Distribution to Investors	$ 1,104,705.00
Annual Mortgage Principal and Interest Payments on Purchase Money Mortgages - $2,900,000.00	644,463.00
Cash Balance	$ 460,242.00
Percentage of earnings available to cash investment earned for six years	19.33% per year
Percentage of earnings available to cash investment earned after sixth year	35.65% per year

Total repayment of cash investment in approximately 5 1/5 years.

Note: Page 3184 is blank

Deft 19g

52 CR 143

Def't 19-h

Government Exhibit
Defendant's
Rec'd
In the District Court of the United States BEFORE
Northern District of Illinois Eastern Division JAMES B.
Ray E. Fuller - Official Court Reporter

JOSEPH KUPER & SON

MORTGAGE COUNSELORS
ESTABLISHED 1928
120 SOUTH LA SALLE STREET
PHONE RANDOLPH 6656
CHICAGO 3, ILLINOIS

COMMERCIAL
RESIDENTIAL
INDUSTRIAL
FARMS

DIRECT CORRESPONDENT
FOR LIFE INSURANCE
AND TRUST FUNDS

January 13, 1948

Cain & Culhane, Inc.
4645 North Broadway
Chicago, Illinois

Attention: Mr. Culhane

Dear Mr. Culhane:

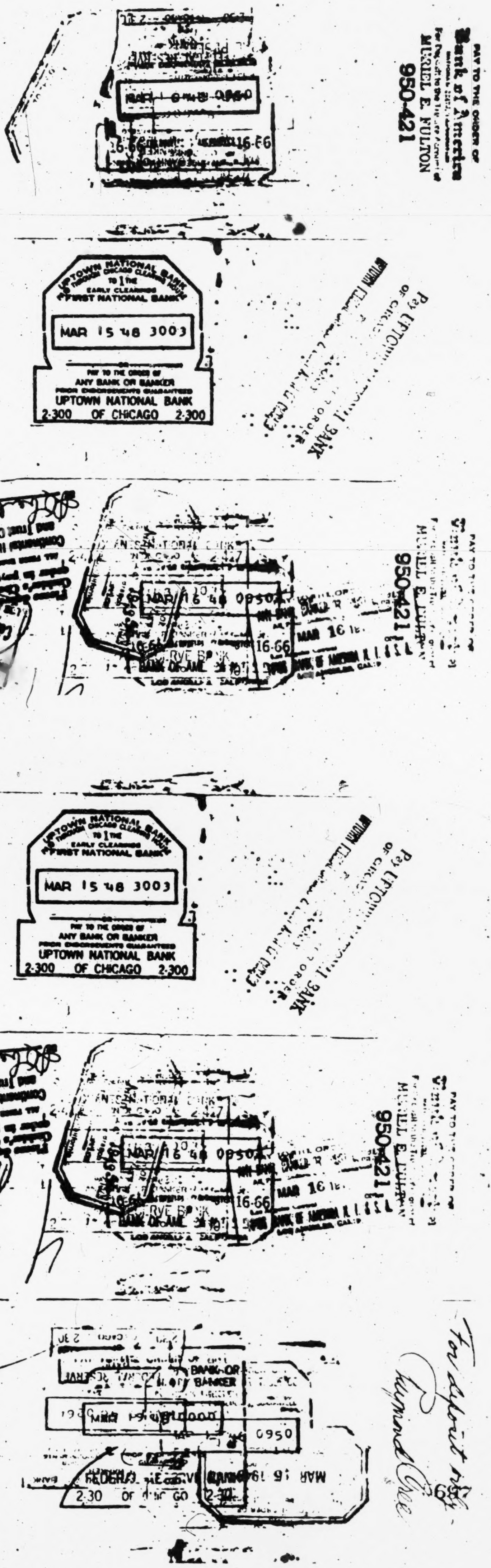
.....we are writing to inquire if your organization would be interested in receiving a sales listing of a hotel chain consisting of four prominent commercial hotels and three very fine resort hotels.

.....these hotels consist of 2,219 rooms.

.....all necessary appurtenances and facilities for efficient management.

.....complete modern furniture and furnishings.

.....taken as a group, these hotels will show approximately 20% net


PAY TO THE ORDER OF
Bank of America
MURIEL E. FULTON
950-421
UPTOWN NATIONAL BANK
OF CHICAGO
MAR 15 48 3003
PAY TO THE ORDER OF
ANY BANK OR BANKER
UPTOWN NATIONAL BANK
2-300 OF CHICAGO 2-300
MAR 16 48 0950
16-66
MAR 16
950-421

19G
Government Exhibit
Defendants Exhibit
In the District Court of the United States, Northern District of Illinois, Eastern Division
No.
Ray E. Potter - Official Court Reporter

Note: Page 3182 is blank.

MEMORANDUM

RE. ABBELL HOTELS

The following data on the Abbell Hotels is respectfully submitted.

(1) Estimated Annual Earnings and Sales Price

	Estimated Annual Earnings Before Mortgage Interest and Depreciation	Total Sales Price	Payment to be made in Cash	Payment to be made in Paper
Arrowhead Springs Hotel	$ 350,000.00	$ 3,100,000.00	$ 400,000.00	$ 2,700,000.00
Alexandria Hotel	500,000.00	3,250,000.00	800,000.00	2,450,000.00
De Soto Hotel	175,000.00	1,200,000.00	300,000.00	900,000.00
Paramount Hotel	500,000.00	3,750,000.00	600,000.00	3,150,000.00
Stanley Hotel	50,000.00	475,000.00	125,000.00	350,000.00
Summit Hotel	60,000.00	475,000.00	125,000.00	350,000.00
Willard Hotel	475,000.00	3,650,000.00	750,000.00	2,900,000.00
Total	$ 2,120,000.00	$ 15,900,000.00	$ 3,100,000.00	$ 12,800,000.00

(2) Total Rooms in Hotel, Gross Earnings and Mortgage Balances

	Total Rooms in Hotel	Total Rentable Rooms - Guests	Gross Earnings from all Sources Month of October 1947	Gross Earnings from all Sources Period Ending October 31, 1947	Mortgage Balances as at October 31, 1947
Arrowhead Springs Hotel - C.A.L.	166	156	$ 49,508.33	$ 782,281.26 Nine Months	$ 2,427,248.20
Alexandria Hotel	484	478	136,629.30	1,186,025.56 Nine Months	1,624,830.33
De Soto Hotel	216	239	89,698.78	760,836.53 Nine Months	595,466.97
Paramount Hotel - N.Y.C.	620	603	123,067.67	980,659.48 Nine Months	2,741,864.53
Stanley Hotel	155	145	(1)	180,628.71 Six Months	178,250.00
[illegible]	85	88	25,322.83	[illegible]	[illegible]

Estimated annual earnings and sales price

	Estimated Annual Earnings Before Mortgage Interest and Depreciation	Total Sales Price	Payment to be made in Cash	Payment to be made in Paper
Arrowhead Springs Hotel	$ 350,000.00	$ 3,100,000.00	$ 400,000.00	$ 2,700,000.00
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De Soto Hotel	175,000.00	1,200,000.00	300,000.00	900,000.00
Paramount Hotel	500,000.00	3,750,000.00	600,000.00	3,150,000.00
Stanley Hotel	50,000.00	475,000.00	125,000.00	350,000.00
Summit Hotel	60,000.00	475,000.00	125,000.00	350,000.00
Willard Hotel	475,000.00	3,650,000.00	750,000.00	2,900,000.00
Total	$ 2,120,000.00	$ 15,900,000.00	$ 3,100,000.00	$ 12,800,000.00

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	Total Rooms in Hotel	Total Rentable Rooms - Guests	Gross Earnings from all Sources: Month of October 1947	Gross Earnings from all Sources: Period Ending October 31, 1947		Mortgage Balances as at October 31, 1947
Arrowhead Springs Hotel - CAL.	166	156	$ 49,508.33	$ 782,281.26	Nine Months	$ 2,427,248.20
Alexandria Hotel	484	478	136,629.50	1,186,025.56	Nine Months	1,624,830.33
De Soto Hotel	216	239	69,698.78	760,836.53	Nine Months	595,166.97
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Stanley Hotel	155	145	(1)	180,628.71	Six Months	178,250.00
Summit Hotel	95	88	25,322.83	206,919.82	Five Months	245,914.06
Willard Hotel - WASH. D.C.	453	413	107,868.72	1,763,117.84	Ten Months	2,091,479.89
Total	2,219	2,122	$ 612,095.62	$ 5,860,469.20		$ 9,904,613.98

Notes:

(1) The Stanley Hotel season runs from Decoration Day to Labor Day inclusive. The above figures show the gross receipts for the current season.

(2) The Summit Hotel is open the year round. The active season months are June, July, August and September.

(3) The Arrowhead Springs Hotel is open the year round. The winter season runs from January through May inclusive. The summer season runs from July 1 through Labor Day.

(4) In all hotels those rooms which are not available for rental to guests are used for the following purposes: Public meeting rooms and/or offices, hotel administration and employee's quarters.

Cain & Culhane, Inc.
4545 North Broadway
Chicago, Illinois

Attention: Mr. Culhane

Dear Mr. Culhane:

.....we are writing to inquire if your organization would be interested in receiving a sales listing of a hotel chain consisting of four prominent commercial hotels and three very fine resort hotels.

.....these hotels consist of 2,219 rooms.

.....all necessary appurtenances and facilities for efficient management.

.....complete modern furniture and furnishings.

.....taken as a group, these hotels will show approximately 20% net after all charges.

.....they will repay total capital investment within five years on today's earnings.

.....total sales price, $15,900,000.

.....terms of approximately 20% cash can be arranged.

.....we would appreciate your reaction by return mail.

Yours very truly,

JOSEPH KUPER

JK:mb

Def Ex. 20
Rec'd

Books of original entry, 1943-1947:

General Ledger
General Journal
Cash Disbursement
Officers and Employees Expense Ledger

All records pertaining to any dealings with David Lubben, General Confections Inc. or Entsum Food Products Company:

Ledger cards
Invoices
Cancelled Checks
Shipping Tickets
Bills of Lading
Record of Lubben or Shotwell Sales Representative

Vouchers, cancelled checks, vendors' invoices, receiving reports for purchases of chocolate, sugar, corn syrup, starches, corn sugar and sweetened condensed milk.

Chocolate: October, November and December 1940, thru 1947

Sugar: 1941 thru 1947

Corn Syrup; starches, corn sugar: 1940, 1941, 1943, 1944, 1945, 1946

Sweetened Condensed Milk: 1941 thru 1947

Bank Statements— 1943-1947.

Busby and Curry audit analysis working papers. 1942 thru 1947

Sugar application on allotments for 1941 here. Sugar certificates, deposit slips, bank statements, cancelled sugar checks and tolling agreements. The sugar deposits included our own allotment, government contract allotment, Post Exchange allotment, and county population increase-from 1942 to 1947.

Government contracts for here and pudding powder.

All Haberkorn records and correspondence

Cash remittance advice-1945 and 1946

Detailed analysis of materials purchased, including summary of ledger accounts and elimination of items other than material; 1942, 1944, 1945, 1946 and 7 months ending July 31, 1947.

Sugar: 1941 thru 1947

Corn Syrup; starches, corn sugar: 1940, 1941, 1943, 1944, 1945, 1946

Sweetened Condensed Milk: 1941 thru 1947

Bank Statements— 1943-1947.

Busby and Curry audit analysis working papers. 1942 thru 1947

Sugar application on allotments for 1941 here. Sugar certificates, deposit slips, bank statements, cancelled sugar checks and tolling agreements. The sugar deposits included our own allotment, government contract allotment, Post Exchange allotment, and county population increase-from 1942 to 1947.

Government contracts for here and pudding powder.

All Haberkorn records and correspondence

Cash remittance advice-1945 and 1946

Detailed analysis of materials purchased, including summary of ledger accounts and elimination of items other than material; 1942, 1944, 1945, 1946 and 7 months ending July 31, 1947.

Recapitulation of purchases of raw material by vendor:

Sugar, corn syrup, chocolate - 1941 and 1943 thru 1947:
Sugar - 1943, 1944, 1945, 1946, 1947
Chocolate - 1943, 1944, 1945, 1946, 1947
Corn syrup - 1943, 1944, 1945, 1946, 1947
Condensed milk - 1941, 1943, 1944, 1945, 1946, 1947
Other raw materials - 1943, 1944, 1945, 1946, 1947

Reclassification of purchases erroneously classified in ledger.

Recapitulation of purchases by kind of material - 1943, 1944, 1945, 1946, 1947.

Analysis of Raw Materials used by Inventory Method.

Reconciliation of Book Inventories and Purchases to tax returns.

Computation of chocolate allotment and comparison with purchases.

Computation of sugar allotment.

5/ 13

tember term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry, to wit:

448

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney come also the defendants The Shotwell Manufacturing Company by its counsel and the individual defendants in their own proper persons and by their counsel and the Court being fully advised in the premises it is

Ordered that the defendants' motion to strike certain testimony, the motion of defendants The Shotwell Manufacturing Company and Harold E. Sullivan for judgment of acquittal, the motion of defendants The Shotwell Manufacturing Company, Byron E. Cain and Frank J. Huebner for judgment of acquittal as to Count 1 of the Indictment be and the same are hereby denied come now the Jury and Alternate Juror heretofore elected, empaneled and sworn herein for the trial of this cause and trial of this cause proceeds and at the close of the evidence on behalf of the Government the defendant Harold E. Sullivan by his counsel enters herein his motion showing that the case is concluded as to him and for severance and for judgment of acquittal at the close of all evidence as to him and that he be discharged which motion is denied, the defendants' opening statements are heard and on motion of the defendants by their counsel the Jury is polled with respect to a newspaper article and radio broadcast mentioned in the defendants' motion, the trial proceeds and during the hearing of evidence on behalf of the defendants the hours of adjournment having arrived it is

Ordered that the Jury and Alternate Juror be permitted to separate until October 2, 1953 at 10 o'clock A. M.

449 And afterwards, to wit, on the 13th day of October, 1953, being one of the days of the regular October term of said Court, in the record of proceedings there-

Analysis of sugar rationing by deposit basis, disbursement basis, and schedule showing sugar received prior to receipt of ration.

Analysis of purchases - allotment - usage - raw materials 1943 to July 31, 1947

Copies of Corporation Federal Income Tax returns - 1942 - 1947 inclusive.

574 A

of, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry, to wit:

450

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendants the Shotwell Manufacturing Company by its counsel and the individual defendants in their own proper persons and by their counsel and the Jury and Alternate Juror heretofore elected, empaneled and sworn herein for the trial of this cause also come the trial proceeds and during the hearing of further evidence for the defendants the defendants by their counsel enter their motion to amend and supplement paragraph 4 of their motion to dismiss the Indictment and the Court being fully advised it is

Ordered that said motion be and the same is hereby denied the trial proceeds and at the close of all the evidence the defendant Harold E. Sullivan by his counsel moves for a judgment of acquittal and the Court having heard the arguments of counsel ruling on said motion is reserved and the defendant The Shotwell Manufacturing Company by its counsel moves for a judgment of acquittal and the defendants Byron A. Cain and Frank J. Huebner by their counsel move for a judgment of acquittal as to Count 1 of the Indictment and the Court being fully advised it is

Further ordered that said motions be and the same
451 are hereby denied and the hour of adjournment having arrived it is

Further ordered that the Jury and Alternate Juror be permitted to separate until October 14, 1953 at 10 o'clock A. M.

511 And on the same day, to wit, the 17th day of October, 1953 came the defendants by their attorneys and filed in the Clerk's office of said Court their certain Requests For Instructions To The Jury On Behalf Of The Defendants in words and figures following, to wit:

Note: Page 3188 is blank

512 State of Illinois }
County of Cook } ss.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

REQUESTS FOR INSTRUCTIONS TO THE JURY ON BEHALF OF THE DEFENDANTS.

Defendants herein, The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner, request the court to give to the jury certain instructions, incorporated herein, and labeled defendants' requested instructions, one (1) through ....
Dated: October 13, 1953.

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney

Byron A. Cain and Frank J. Huebner,
By Vincent O'Brien
Their attorneys

Harold E. Sullivan,
By William T. Kirby
His attorneys.

513 And on the same, to wit, the 17th day of October, 1953 there were filed in the Clerk's office of said Court certain Instructions Requested By Defendants in words and figures following, to wit:

514 The jury are instructed that the instructions given to them in this case are the instructions of the court and the law of the case which must govern them. (*Granted*)

515 Preliminary to your being sworn to act as jurors in this case, you were examined by the court as to your competency and qualifications to act as jurors in this case. As part of such examination each of you answered all questions put to you by the court. Your answers showed that you were competent and qualified to act as jurors on the faith and truth of your answers. The answers you then

428 And afterwards on, to wit, the 30th day of September, 1953, came the Defendants, Byron A. Cain, Frank J. Huebner And The Shotwell Manufacturing Company, by their attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

429

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION

The defendants, Byron A. Cain, Frank J. Huebner and The Shotwell Manufacturing Company, a corporation, hereby move that a judgment of acquittal be entered as to Count I of the indictment on the ground that the evidence adduced by the Government is insufficient to sustain a conviction.

Byron A. Cain and Frank J. Huebner
By Vincent O'Brien
Their Attorney

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney

430 And on the same day, to wit, the 30th day of September, 1953 came the Defendant, The Shotwell Manufacturing Company, A corporation, by its attorneys and filed in the Clerk's office of said Court its certain Motion in words and figures following, to wit:

431

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION

Defendant The Shotwell Manufacturing Company, a corporation, hereby moves that a judgment of acquittal be entered as to Counts I and II of the indictment on the

MICRO CARD

TRADE MARK ®

15 7

15-57

MB

BENDER & COMPANY

ground that the evidence adduced by the Government is insufficient to sustain a conviction.

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney.

432 And on the same day, to wit, the 30th day of September, 1953 came the Defendant, Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Motion For Acquittal At The Close Of The Government's Case in words and figures following, to wit:

433 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION OF HAROLD E. SULLIVAN FOR ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE

Now comes Harold E. Sullivan, one of the defendants, at the close of the evidence for the prosecution, and moves that a judgment of acquittal of the offenses charged in the indictment and each of them be entered, and that he be discharged.

Harold E. Sullivan
by: William T. Kirby
His Attorney

434 And on the same day, to wit, the 30th day of September, 1953 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

435

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION

The defendants, Harold E. Sullivan, Byron A. Cain, Frank J. Huebner and The Shotwell Manufacturing Com-

pany, a corporation, hereby move that the following testimony be stricken on the ground that said testimony is immaterial and irrelevant:

1. Testimony of the witness Lubben that he made over-invoice payments in currency, to the defendant, Huebner.

2. Testimony of the witness Lubben, that part of an over-invoice payment was applied to the payment of a personal obligation of the defendant, Cain.

3. Testimony of the witness Lubben relating to checks which he allegedly tendered to the defendants Cain and Huebner, which checks were allegedly payable to Cain, Huebner and Sullivan.

436 4. Testimony of the witness Krasne relating to the delivery of a piece of jewelry to the defendant Cain, which jewelry was allegedly paid for with currency delivered to Krasne by Lubben.

5. Testimony of the witness Feldman, insofar as that testimony relates to the over-invoice payments alleged to have been made, in currency, by Lubben to the defendant, Huebner.

The defendants further move to strike all exhibits—checks, cash disbursement slips, expense account vouchers, and books of account—introduced in support and substantiation of the above described testimony.

Byron A. Cain and Frank J. Huebner
By Vincent O'Brien
Their Attorney

Harold E. Sullivan
By William T. Kirby
His Attorney

The Shotwell Manufacturing Company
By Thomas C. McConnell
Its Attorney

437 And on the same day, to wit, on the 30th day of September, 1953, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry, to wit:

made to such questions in regard to your competency, qualifications, fairness, lack of prejudice and freedom from passion and sympathy, are as binding upon you now as they were then, and should so remain until you are finally discharged from further consideration in this case. It would be improper and unlawful for any of you to disregard the answers that rendered you competent jurors. (*Granted*)

516 You are the sole judges of the facts of this case. Responsibility rests upon you to determine the facts of this case under the law as the court may give it to you, uninfluenced by any expression of opinion that the court has made or may hereafter make upon matters of fact. The court has not intended at any time during the trial of this case and does not intend at any time to express any opinion on any matter of fact and if the court has expressed or does express any opinion on any matter of fact, you are at liberty to disregard such opinion and it is your duty to disregard it if it is different from your opinion. (*Granted*)

517 You should not consider any evidence in arriving at a verdict which you have heard but which the court has afterwards stricken from the record, nor should you consider any evidence which has been offered and which the court has refused to receive. You are to disregard all statements of witnesses which the court ordered stricken out, if any. Such statements are not evidence in the case and must not be considered by you. You should not draw any inference whatever from the fact that attorneys in the case have objected during the progress of the trial to questions asked and answers made by witnesses. It is the right of the attorney on either side to object to the introduction of testimony. Such objections raise questions of law to be decided by the court only. (*Granted*)

518 During the trial evidence has been admitted as applying only to a certain defendant. You may consider that evidence as to the only defendant in reference to whom it was admitted, but not as to any other defendant or defendants. (*Granted*)

519 This matter comes before you upon an indictment in which it is charged, in two counts, that the defendants, Byron A. Cain, Frank J.J. Huebner, Harold E. Sullivan, and

The Shotwell Manufacturing Co., a corporation, have committed certain offenses under the laws of The United States. The mere fact that the defendants have been indicted is not to be considered by you as any evidence of guilt; an indictment is merely the means by which each defendant is brought into court to answer the charges made. The indictment does not give rise to any presumption of guilt because under our laws, it is a mere accusation, and also because every defendant who is accused of a crime is presumed to be innocent. Such presumption of innocence remains with him throughout the entire trial, through the arguments of counsel and until you have retired to the jury room to deliberate on your verdict. Each of the defendants here is entitled to the benefit of that presumption and it is for each of you alone to determine, after you have heard all the evidence, the arguments of counsl and these instructions, whether or not the guilt of any one or more defendants has been established beyond a reasonable doubt. (*Granted*)

520 The jury are the sole judges of the credibility of the witnesses, what weight should be given to the testimony of each witness, and in determining their credibility you may take into consideration their interest, bias or prejudice, if any, as shown by the evidence, their relationship to the parties, the probability or improbability of their story, together with all other facts and circumstances in evidence which is your judgment adds to or detracts from the weight of their testimony. (*Granted in Substance*)

521 If you believe from the evidence that any witness in this case has knowingly and wilfully testified falsely on this trial to any matter material to the issues in this case, you are at liberty to disregard the entire testimony of such witness except insofar as you find that it has been corroborated by other credible evidence or by facts and circumstances proven on the trial. (*Granted*)

522 In considering this case and in passing upon your verdict you are not required to set aside your own common observation and experience as men and women in the affairs of life, but, on the other hand, you have a right upon consideration of all the evidence in this case, in the light of your own common observation and experience as men and women in the affairs of life, to say where the truth lies upon any material fact in this case. (*Granted*)

438

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney come also the defendants The Shotwell Manufacturing Company by its counsel and the individual defendants in their own proper persons and by their counsel and the Jury and Alternate Juror heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and after the hearing of further evidence for the Government the Government rests its case with the exception of certain evidence to be submitted and thereupon the defendants by their counsel enter herein their motion to strike certain testimony and the defendants Harold E. Sullivan and The Shotwell Manufacturing Company by their counsel enter herein their motion for a judgment of acquittal and the defendants The Shotwell Manufacturing Company, Byron Cain and Frank J. Huebner by their counsel enter herein their motion for a judgment of acquittal as to Count 1 of the Indictment and the Court having heard the arguments of counsel on said motions ruling thereon is deferred by the Court and the hour of adjournment having arrived it is

Ordered that the Jury and Alternate Juror be permitted to separate until October 1, 1953 at 10 o'clock A. M.

439 And afterwards on, to wit, the 1st day of October, 1953 came the Defendant Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Motion For Severance in words and figures following, to wit:

440

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION OF HAROLD E. SULLIVAN FOR SEVERANCE

Now comes Harold E. Sullivan, one of the defendants herein and shows that this matter is concluded as to him, all of the proof being in, but is not concluded as to the other defendants;

Wherefore, a severance is prayed, so that the case of Harold E. Sullivan may now be concluded.

Harold E. Sullivan
by: William T. Kirby
His Attorney

441 And on the same day, to wit, the 1st day of October, 1953 came the Defendant Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Motion For Acquittal At The Close Of All The Evidence in words and figures following, to wit:

442

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION OF HAROLD E. SULLIVAN FOR ACQUITTAL AT THE CLOSE OF ALL OF THE EVIDENCE

Now comes Harold E. Sullivan, one of the defendants, at the close of all of the evidence, and moves that a judgment of acquittal of the offenses charged in the indictment and each of them be entered, and that he be discharged.

Harold E. Sullivan
by: William T. Kirby
His Attorney

523 The defendants and each of them have entered pleas of not guilty to this indictment and to each count of it. The effect of the pleas of not guilty is to deny each material allegation of such count of the indictment and to place on the Government the burden of proving each material allegation of each count of the indictment as to each defendant by competent and believable evidence beyond and to the exclusion of every reasonable doubt. If the Government has filed to prove, as to any defendant, each material allegation of each count of the indictment or either of them, beyond and to the exclusion of a reasonable doubt, or if you are in doubt as to whether the Government has so proven each material allegation of each count of the indictment, or either of them, as to any defendant, then it is your duty to acquit that defendant as to such count or counts of the indictment as to which the Government has failed to make such proof beyond a reasonable doubt. (*Granted in Substance*)

524 Each of thesee ounts is a separate and distinct charge against each defendant, and it is necessary that you consider each count of the indictment separately and that you consider the guilt or innocence of each of the defendants separately as to each count. It is just as though you were trying eight separate cases. You must take up and consider separately each of these cases as you find that the evidence bears on each of them. Your verdict must be unanimous as to each count and as to each defendant regarding which you render a verdict. (*Granted*)

525 Part of the evidence before you is what is known as circumstantial evidence. Circumstantial evidence is that sort of evidence by which the inference of an unknown fact is drawn from the existence of known facts. Circumstantial evidence should be received and acted upon with the utmost caution and before you are warranted in convicting upon circumstantial evidence there must be such a well connected and unbroken chain of circumstanes as to exclude all other reasonable hypotheses but that of guilt. "Hypothesis" means simply supposition or theory. The attendant circumstances must not only be consistent with guilt but they must also be inconsistent with innocence. (*Withdrawn*)

526 Since each of the individual defendants is charged with wilfully and knowingly attempting to defeat or

evade a large part of the taxes due and owing to the United States from the corporate defendant, by the filing or causing to file of false or fraudulent income tax returns for the corporate defendant, you must find such a defendant not guilty unless you are satisfied by the evidence beyond and to the exclusion of a reasonable doubt that he caused erroneous income tax returns to be filed by the corporate defendant in a wilful and knowing attempt to defeat and evade a large part of taxes which were due and owing to The United States from the corporate defendant and which such individual defendants knew were so due and owing. (*Revised by Counsel and Granted as Revised*)

527 The intent in this case is one of the essential elements. It is not sufficient for you to find that the return was erroneous and that there was an intent to file a return that was actually erroneous. You must find a defendant not guilty unless you are satisfied by the evidence beyond and to the exclusion of a reasonable doubt, that he or it had the specific wrongful intent required for conviction, that is to say, actual knowledge of the existence of the obligation to pay the tax and the wrongful intent to evade it. In considering whether any one or more of the defendants had this specific wrongful intent to evade taxes due and owing to The United States from the orporate defendant for the years 1945 and 1946 you may consider all the circumstances connected with the filing of the income tax returns for those years. (*Granted in Substance*)

528 The crime for which the defendants are charged in either count of the indictment requires the Government to prove, beyond a reasonable doubt, that such defendant had the specific intent to violate the provisions of the federal income tax law in the manner charged in such count. It is not sufficient for the Government to show that any such defendant intended to violate the OPA or any other federal law unless the Government also shows that said defendant also intended to violate the federal income tax law. (*Granted in Substance*)

529 The specific intent to violate the provisions of the federal income tax law which must be proven beyond all reasonable doubt as to any defendant is not equivalent to, or proven simply by proof of a specific intent to violate the OPA law or any other federal law. (*Granted in Substance*)

443 And on the same day, to wit, the 1st day of October, 1953 came the Defendants, Harold E. Sullivan, Byron A. Cain and Frank J. Huebner by their attorneys and filed in the Clerk's office of said Court their certain Motion, And Affidavit of Frank J. Huebner in words and figures following, to wit:

444

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION

The defendants, Harold E. Sullivan, Byron A. Cain and Frank J. Huebner, hereby renew and supplement their motion for a mistrial orally presented to the Court in the above-entitled cause at the opening of court September 25, 1953, predicated upon the publication in the Chicago Daily Tribune, in its morning paper for Friday, September 25, 1953, of the article heretofore offered and received in evidence as Defendants' Exhibit A of September 25, 1953.

And by way of supplement, said defendants aver that at the conclusion of the morning session of September 25, 1953, the Court made the statement and gave the directions to the jurors as will more fully appear from the transcript of the record in the above-entitled cause, but that the nature of said article is such that its prejudicial effect could not be cured by said directions or instructions, or by any other direction or instruction.

Also, by way of supplement, these defendants say that the substance of said article was broadcast over a Chicago radio station to the public on Friday, the 26th day of September, 1953.

445 Defendants represent that the said article and its publication, aforesaid, is prejudicial in its nature as a matter of law to the said defendants, and to each of them, and would so prejudice any of the jurors who may have read said article or have heard the said broadcast.

In the alternative, the said defendants say that such of said jurors who may have read the said article, or heard the said broadcast, may have in fact been prejudiced in

such manner as to make it impossible for said defendants to receive a fair trial.

Wherefore, said defendants ask that the Court poll the jury to ascertain: First, which if, any of said jurors have read the said article or heard the said broadcast; and, Second, to ascertain whether such as have done so, or any of them, are thereby prejudiced so that they cannot give the defendants a fair trial.

In partial support of said motion, said defendants attach hereto the affidavit of Frank J. Huebner.

Byron A. Cain and Frank J. Huebner
By Vincent O'Brien
Their Attorney

Harold E. Sullivan
By William T. Kirby
His Attorney

446

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

State of Illinois
County of Cook—ss.

AFFIDAVIT

Frank J. Huebner, being first duly sworn on oath deposes and says that on Friday, the 25th day of September, 1953, he heard a broadcast over Chicago radio station WGN of a news item purporting to summarize the same subject matter as is involved in the newspaper article mentioned in the above and foregoing motion, but that he was unable at the time to make notes as to the precise statements which were made in said broadcast.

Frank J. Huebner

Subscribed and sworn to before me this 29th day of September, 1953.
(Seal) Alexander Neuman
Notary Public

447 And on the same day, to wit, on the 1st day of October, 1953, being one of the days of the regular Sep-

530 The questions is, members of the jury, whether you are convinced from all the evidence that there were taxes due the Government for the years in question in amounts substantially higher than those reported and paid by the corporate defendant to the Government, and whether you are further convinced from all the evidence that there was a wilful attempt by the defendants in such years to evade or defeat any substantial part of such income tax by filing or causing to file false and fraudulent returns for the corporate defendant for said years. (*Revised by Counsel and as Revised Granted in Substance*)

531 You must acquit the defendants if you find that although the corporation had income which it did not report, the defendants, in good faith, did not believe such income to be taxable. Mere failure to report income in the absence of a specific wrongful intent is not a crime. The knowledge of the existence of the obligation and a wrongful intent to evade it is of the essence, and unless you are convinced beyond and to the exclusion of a reasonable doubt that this essential of the charge existed, your verdict must be not guilty. (*Withdrawn by Counsel*)

532 The net income figure on a tax return is normally the result of a rather extensive series of computations. For purposes of this case, however, these computations can be considerably simplified. For purposes of this case, you may assume that the taxable net income of the corporate defendant for the years in question was the difference between the corporation's receipts from sales (that is to say, its income) and the cost of the goods sold. (*Granted in Substance*)

533 If the sales were understated, and if the cost of goods sold was correctly stated, the taxable net income of the corporate defendant was understated by the amount, if any, that the sales were understated. However, if both the sales and the cost of goods sold were understated, then the net income was understated only to the extent, if any, that the understatement of sales exceeded the understatement of the cost of goods sold. In other words, unreported expenditures for goods sold or used in the manufacturing process offset unreported sales. For example, if a corporation fails to report $100,000 of

sales, and if it correctly reports all of its costs, then the taxable net income of the corporation has been understated by $100,000. On the other hand, if the corporation also fails to report $100,000 expended for goods sold or used in the manufacturing operations then both the taxable net income and the tax due have in face been correctly reported. (*Granted in Substance*)

534 The testimony as to the cash payments made to the corporation depends upon the credability of the Government witnesses who gave that testimony. You have already been instructed regarding the factors which you may consider in passing upon the creditability of a witness. In this connection, you are again instructed that if you find that a witness has lied to you as to any material matter, then you are at liberty to disregard all of his, or her, testimony, except insofar as you find that it has been corroborated by other creditable evidence or by facts and circumstances proven on the trial. (*Granted in Substance*)

535 The only issue on trial before you is that contained in the indictment which charges the defendants with attempting to evade income taxes owed by the Shotwell Manufacturing Co., a corporation. The indictment does not accuse the individual defendants—Byron Cain, Harold Sullivan and Frank Huebner—of attempting to evade income taxes owed by them personally, nor is such issue before you. Any cash payments made by Eatsum, Reserve Trading and General Confections may be considered in support of the Government's case only if they constituted taxable income to Shotwell Manufacturing Co., a corporation. To the extent you find from all the evidence that any cash payments for overages were received by individual defendants for their own benefit then to such extent such payments would constitute income to such individual defendants, and did not constitute taxable income to the corporation itself, namely, Shotwell Manufacturing Company. (*Modified by Counsel and Given by the Court as Modified*)

536 You must not permit any violations of the other laws by the defendants to prejudice you against them or any of them. The fact, if it be a fact, that the defendants or some of them committed offenses against the price control laws of The United States creates no presumption that such defendant or defendants com-

mitted the offenses here charged against him or them. (*Granted in Substance*)

537 The question of the civil liability of the corporate defendant for taxes due for the years 1945 and 1946 is not in question. It is not an issue in this ca It is not to be considered by you in determining the issues in this case. The outcome of this case in no wise effects the Government's rig to proceed against the corporate defendant or the individual defendants in civil proceedings if it believes any additional taxes may be due to the Government from any one or more of them. (*Granted in Substance*)

538 To the extent, if any, that the jury may find, if it does, from all the evidence that overage payments were in fact made, the mere fact that overages were paid is not sufficient to warrant a conviction. It is also necessary to warrant a conviction that payments of such overage be found to have been made under such circumstances, and in such a manner, that they constituted income to the corporate defendant ratner than income to the individual defendants or any or either of them for their own use and benefit. (*Withdrawn by Counsel*)

539 The Government has introduced into evidence many records which purport to be records kept by David Lubben in connection with his various enterprises. The defendants have produced witnesses who testified that many of these records were not in existence at the time they were supposed to have been made and that they were subsequently made by Lubben for the purpose of blackmailing the defendants. As the sole judges of the weight to be given the evidence, if you believe, from the testimony ,that any of these records were fabricated by Mr. Lubben, you are at liberty to disregard all of the records involved except insofar as you find that some of them have been corroborated by other credible evidence or by facts and circumstances proven on the trial. (*Granted in Part*)

540 The summaries made by witnesses have no independent value as evidence. Such summaries are entitled to weight as evidence only to the same extent that you choose to give weight to the testimony of the wit-

nesses or the books and records upon which the summaries are based. If you choose to disregard as evidence all or a part of the testimony of such witnesses or of the correctness of such books and records, then you must likewise disregard so much of the summaries of the witnesses as are based on the testimony of such witnesses and the books and records you decide to disregard. (*Modified by Counsel as Indicated and Granted as Modified*)

541 Testimony as to conversations with any one defendant is to be considered by you only as to such defendant and may not be considered by you as to other defendants not present even though other defendants are mentioned therein. (*Granted*)

542 You are instructed that if you find from all the evidence that the persons, partnerships, or corporations which are alleged to have made overceiling payments to officers or employees of the corporate defendant knew, or should have known, at the time that any one or more of such payments were made, that the officer or employee receiving the payment did not intend to pay the money over to the corporate defendant, then such payment or payments as were not actually paid over to the corporation did not constitute taxable income to the corporate defendant. (*Withdrawn upon No. 22 Being Given*)

543 If you find that cash payments, in substantial amounts, were made to officers and agents of the corporate defendant by Eatsum, Reserve Trading and General Confections, and that these payments constituted, in substantial amounts, income to the corporate defendant, you must then consider whether such income was offset by unreported payments made by the corporate defendant for goods sold or used in its manufacturing operations. The taxable net income of a corporation is essentially its sales (or income) minus the cost of the goods sold. In consequence, unreported costs of goods sold offset unreported income for purposes of determining taxable net income. (*Granted in Substance*)

544 The cost of goods sold is such an offset even if that cost represents overceiling payments. That is

to say, if a business concern bought raw material at overceiling prices during the OPA period, it is entitled to deduct, as a cost of goods sold, the entire purchase price, both ceiling price and overceiling premium. The corporation is therefore entitled, in determining its net income for the years 1945 and 1946, to an offset or deduction for any unreported overceiling premiums which it paid for raw material purchased by it during the years 1945 and 1946. The corporation is entitled to this offset or deduction even though the unreported payment was not made to the seller of the goods. For example, if corn refineries would not sell corn syrup to the corporation unless the corporation would procure (or cause to be sold) a certain amount of corn to them at ceiling prices, overceiling premiums paid for the corn so procured and so sold to the refineries is deductible as a part of the cost of the corn syrup obtained from the refineries. (*Granted in Substance*)

545 You are further instructed that although in the years 1945, 1946 and 1947 the Treasury Department held that overceiling payments for raw materials were not deductible as a part of the cost of goods sold, the courts have since held that they may be so deducted and that it was always the law that they could be deducted, and accordingly the Treasury abandoned its position and acquiesced in such court decisions after the indictment was returned in this case, and it is the law that such payments are deductible as part of the cost of goods sold. Therefore, you are instructed that in determining the corporation's net taxable income for the years 1945 and 1946, you must deduct such sums as you may find were paid out by the corporation for procurement of raw materials as part of the cost of goods sold, even though such sums represented overceiling payments, and even though the Treasury Department was not permitting such deductions for the taxable years 1945 and 1946 at the time that the returns for those years were filed by The Shotwell Manufacturing Company. (*Granted in Substance*)

546 In determining whether the corporate defendant made such unrecorded overceiling payments for raw material purchased, you may consider circumstantial evidence. Thus, you may consider conditions in the corn syrup industry and in the grain markets when determin-

ing whether the corporate defendant in fact made overceiling payments for the procurement of corn as claimed by the defendants. Similarly, you may consider circumstantial evidence in determining the dollar amount of any overceiling premiums which the corporate defendant may have paid for the procurement of corn required to obtain corn syrup or other corn products. (*Modified by Counsel Granted in Substance*)

547 If you find from the evidence that there were "trade deals" by which the corporate defendant sold some of its merchandise at ceiling in return for the sale to it by the customer or some third party, of raw materials at ceiling prices, you are instructed that no income to the corporation resulted therefrom. (*Granted*)

548 Since The Shotwell Manufacturing Co., a corporation, is charged with wilfully and knowingly attempting to evade, by the filing of false and fraudulent returns, the income taxes which it owed to The United States for the years 1945 and 1946, you must acquit it unless you are satisfied, beyond and to the exclusion of a reasonable doubt, not only that it filed erroneous returns which understated its taxable net income but also that it knew, at the time the returns were filed, that they fraudulently understated its taxable net income. Now since a corporation may act or obtain information only through its officers and agents, the law generally imputes to a corporation the knowledge which its officers obtained in the course of the performance of their duties. However, the knowledge of an officer or agent is not imputed to a corporation as to matters regarding which the interests of the agent or officer are adverse to those of the corporation. Thus, if any officer of the corporate defendant was diverting cash payments into his own pocket, as to those payments his interests were adverse to those of the corporate defendant, with the result that his knowledge of the receipt of the payments is not imputed to it. In consequence, if you conclude from all the evidence that any one or more officers of the corporate defendant diverted cash payments to his or their personal use, then you must acquit the corporate defendant unless you find that some other responsible officer whose interest was not adverse know that its taxable net income was intentionally understated on its returns for

the purpose of avoiding a tax which he knew the corporation owed. (*This was submitted as an alternative to Request No. 56. The Court having Granted Request No. 56 in Substance, No Ruling Was Requested on this Request*)

549 It is not necessary that the Government prove evasion of all the taxes charged in the indictment. It is necessary, however, in order to warrant a conviction as to any one of the defendants that the Government prove beyond a reasonable doubt that the income taxes reported and paid by the corporate defendant were intentionally understated by a substantial amount. Thus, all of the defendants must be acquited under Count I of the indictment unless you are satisfied beyond a reasonable doubt that the taxes owing to The United States with respect to the corporate defendant's income for the year 1945 were understated by a substantial amount. Similarly, all of the defendants must be acquited under Count II of the indictment unless you are satisfied beyond a reasonable doubt that the taxes owing to the United States from the corporate defendant for the year 1945 were understated by a substantial amount. (*Granted in Substance*)

550 The corporate income taxes levied by the federal government were imposed upon the "net income" of a corporation. In effect, therefore, the requirement that the Government prove that the income tax owing by the corporate defendant is understated by a substantial amount, means that the Government must prove that the tax return of the corporate defendant understated its taxable net income by a substantial amount. Thus, all of the defendants must be acquited under Count I of the indictment if you believe that the taxable net income of the corporate defendant for the year 1945 was not substantially greater than that shown on its return for that year. Similarly, all the defendants must be acquitted under Count II of the indictment unless you believe that the taxable net income of the corporate defendant for the year 1946 was substantially greater than that shown on its return for that year. (*Granted in Substance*)

551 In determining whether the defendants, Byron A. Cain, Harold E. Sullivan, Frank J. Huebner, and The Shotwell Manufacturing Co., or any one or more of

them, had this specific intent to defeat or evade taxes owing to The United tSates, at the time that the tax returns of the corporate defendant were filed, you may take into account evidence showing the corporation of the defendants with Government agents during their investigation of the affairs of the corporate defendant. In considering the evidence relating to such corporation, or the lack of it, you may take into account the fact that throughout the period during which that investigation was conducted, the Treasury took the position that overceiling payments made for raw materials were not deductible as a part of the cost of goods sold. That is to say, it was then the position of the Treasury Department itself that overceiling payments by the corporate defendant, and the identity of the person or persons to whom such payments were made, were irrelevant insofar as the tax liability of the corporate defendant was concerned. (*Granted in Substance*)

552 In determining whether the defendants, Byron A. Cain, Harold E. Sullivan, Frank J. Huebner and The Shotwell Manufacturing Co. or any one or more of them had a specific intent to defeat or evade taxes owing to The United States from the corporate defendant at the time the tax returns of the corporate defendant for the years 1945 and 1946 were filed, you may take into account, together with all other evidence bearing on the issue of intent, the actions of the defendants pursuant to the voluntary disclosure policy. (*Granted in Substance*)

553 Evidence of good character and reputation is competent evidence in favor of a defendant as tending to show that he would not be likely to commit a crime alleged against him in the indictment. If the jury believes from all the evidence, that prior to the alleged commission of the alleged crime, any defendant had always borne a good reputation as a man of honesty and integrity among his acquaintances and in the community, this is a fact to be considered by the jury with all the other evidence in the case in determining the question whether the witnesses who testified to facts tending to incriminate that defendant, were mistaken or had testified falsely. (*Granted in Substance*)

554 You are instructed that the good reputation of a defendant for honesty and integrity may itself be

sufficient to raise a reasonable doubt as to that defendant's guilt. (*Granted*)

555 In addition to these eight verdicts, that is to say, a separate verdict as to each defendant on each count of the indictment, you should also return three special findings. These findings will consist of answers —yes or no—to the following questions:

1. Did the corporate defendant, during the year 1945, pay out for corn or other raw materials all of the money paid over to it by the officers and agents who received over-invoice payments?

2. Did the corporate defendant, during the year 1946, pay out for corn or other raw materials all of the money paid over to it by the officers and agents who received over-invoice payments and/or payments for unreported sales?

3. Were all payments, if any, made during the year 1946 for unreported sales paid over to the corporate defendant by the officers or agents receiving such payments?

4. Did Lubben believe, during the time that he or his companies were making over-invoice payments for goods purchased from the corporate defendant, that such payments were going, in whole or in part, to one or more of the individual defendants rather than to the corporate defendant? (*Denied*)

556 The mere fact that the defendant was an officer and director of the company did not charge him with knowledge of the contents of the books and records of said corporation, and he cannot be charged with knowledge of any of the entries on said books in the absence of proof of actual knowledge. (*Granted in Substance*)

557 You Are Hereby Instructed that an officer of a Corporation cannot be held criminally responsible for the criminal acts of a corporation which are performed through other officers and agents who are not acting under his direction and control. (*Granted in Substance*)

558 You are instructed that the fact that any of the defendants was an officer and director of the Shotwell Manufacturing Company during a portion or during all of the time here involved is not itself proof of willful

and knowing intent to defraud the Government. A director or officer is not bound by the acts or representations of other officers or employees unless and until it is shown that he knowingly and willfully intended to adopt such act. Nor is an officer or director criminally accountable for the acts of other officers or agents of the Shotwell Manufacturing Company unless such acts were done at his direction or under his control. (*Modified by Counsel and as Modified Granted in Substance*)

559 You Are Hereby Instructed that before an officer of a corporation, no matter how great his responsibility, may be found guilty of a crime involving specific criminal intent or guilty knowledge, it is essential that that officer of the corporation actually and personally do the acts constituting the offense, or that they be done under his direction and control and with knowledge that they are being performed. Therefore, you may not find any of the defendants here guilty of the offenses charged in the indictment merely because he was an officer of the corporation, no matter how great his responsibility, unless you first find that he actually and personally did the acts constituting the offense or that they were done by his direction, under his control and with actual knowledge. (*Granted in Substance*)

560 You Are Hereby Instructed that the offsenses charged in the indictment requires the specific intent to willfully evade income taxes with knowledge, and you may not find any of the defendants guilty of the offenses charged in the indictment merely because he was an officer of the corporation, no matter how great his responsibility, nor may he be held criminally liable for the acts of the corporation performed through other officers or agents who were not acting under his direction and control and with knowledge of those acts. (*Granted in Substance*)

561 The Jury is instructed that it is their duty to consider each defendant separately and to bring in a separate verdict of "Guilty" or "Not Guilty" as to each defendant, and as to each count with which he stands charged in the indictment. (*Granted*)

562 You are justified in your consideration of the evidence in drawing reasonable inferences from proven facts, but inference cannot be based on inference. A finding of guilt cannot rest on pure conjecture nor is

merely some evidence sufficient. A verdict of guilty must be based on substantial evidence which leaves an abiding conviction that the accused is guilty. Guilt must be established by competent evidence beyond a reasonable doubt, and, in the absence of such evidence or where the evidence is as consistent with innocence as with guilt, no conviction can properly be had. (*Granted in Substance*)

563 The guilt of an accused is not to be inferred because the facts proven are consistent with his guilt, but on the contrary, before there can be a verdict of guilty you must believe from all the evidence, and beyond a reasonable doubt that the facts proven are inconsistent with his innocence. If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the one of innocence. (*Granted in Substance*)

564 You Are Instructed that where a conviction for a criminal offense is sought upon circumstantial evidence the prosecution must not only show by evidence beyond a reasonable doubt that the alleged facts and circumstances are true but it must appear that such facts and circumstances are true but it must appear that such facts and circumstances are incompatible with any reasonable hypothesis other than that of the guilt of the accused. Unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt the defendant must be acquitted. Evidence of facts that are as consistent with innocence as they are with guilt is insufficient to warrant a conviction. In order to warrant a conviction on circumstantial evidence all the circumstances must be consistent with each other, consistent with the hypothesis that the accused is guilty, and inconsistent with the hypothesis that he is innocent. Where the conclusion from the circumstances proven permits any rational conclusion of innocence, there is no proof of guilt. If you find, upon an impartial consideration of all the evidence in the case, that there are two reasonable theories supported by the evidence, and that one of such theories is consistent with the guilt of a defendant and that the other of such theories is consistent with the innocence of that defendant, then the law makes it your duty to adopt that theory which is consistent with the innocence

of said defendant and to find that defendant not guilty. (*Granted in Substance*)

565 The court instructs the jury that a defendant is under no obligation to testify in his own behalf and that his neglect to testify shall not raise any presumption against him, or any of the other defendants.

The court instructs the jury that they shall not consider the failure of any of the defendants to testify in this case nor shall they draw any presumption of the guilt of any defendant because of his failure to testify. (*Modified as Indicated by Counsel, Granted as Modified*)

566 If you find from all of the evidence that at the time of the filing of the corporate income tax returns for the years 1945 and 1946, respectively, any individual defendant or defendants in good faith believed that all unreported income of the corporation for those years had been disbursed for unreported expenditures for raw materials, then you must find such individual defendant or defendants not guilty even though you also find that all of such unreported income of the corporate defendant had not, in fact, been so expended. (*Modified by Counsel and as Modified Granted in Substance*)

567 In considering your verdict, if you find after due deliberation that you can agree on the guilt or innocence of any defendant or defendants and cannot agree on the guilt or innocence of other defendant or defendants, you are instructed that you may render your verdict as to the defendant or defendants upon whose guilt or innocence you can agree. (*Granted*)

568 From the standpoint of the corporate defendant, the Shotwell Manufacturing Company, there is one question which requires special consideration; that is, whether the conduct of the individual defendants is to be considered the conduct of the corporation. I must instruct you as to the applicable law governing this question.

A corporation is a distinct legal entity. Since it is impersonal, it must have officers and agents to act for it, and in determining whether a corporation is liable for the acts of persons as its agents, precisely the same principles apply as if the corporation were a natural person who employed an agent or agents to act for him.

The general rule is that any act done, or admission or declaration made, within the agent's scope of authority

is binding upon his principal. This general rule has been applied in a situation where the agent was not expressly authorized by his principal to do what was done or to say what was said but where he had, at least, apparent authority, and a third person believed he was acting for his principal and not for himself. The reason for this rule is that in such a situation, where the agent is acting merely for his principal, it is presumed that anything done or said by the agent while so acting is the same as if it were said or done by the principal.

However, there is a well recognized exception to the general rule, and that is when an agent has a personal interest in the transaction which is adverse or inconsistent with that of his principal. Then the agent's conduct, admission or declaration cannot be considered as the principal's. For when an agent does something or says something in his own interests and against the interests of his principal, what such agent does or says cannot be considered the deeds or statements of his principal.

569-570

It is up to you to decide whether or not these individual defendants did or said the things which the Government alleges they did, if at all, for their own personal interests, or whether they were acting in the interests of the corporation; that is, in the interests of all of the stockholders collectively. Unless you are convinced beyond a reasonable doubt that the individual defendants were not acting in their own individual interests, you cannot consider their conduct or admissions as binding upon the corporation.

In order to find the Shotwell Manufacturing Company guilty of an attempt to evade taxes, you must be convinced beyond a reasonable doubt not only that there was a tax due and owing but also that the corporation had knowledge of this obligation and wrongfully intended to evade payment.

Therefore, if you find that the individual defendants, or any of them, in any transaction or transactions had a personal interest adverse to that of the corporation, then whatever guilty knowledge or wrongful intent, if any, was possessed by that defendant or defendants with respect to the transaction or transactions cannot be imputed to the corporation. (*Granted in Substance*)

571 And, to wit, on the 16th day of October, 1953, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry, to wit:

572 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney come also the defendants The Shotwell Manufacturing Company by its counsel and Byron A. Cain, Harold E. Sullivan and Frank J. Huebner in their own proper persons and by their counsel and the Jury and Alternate Juror heretofore elected, empaneled and sworn herein for the trial of this cause also come and the Jury now having heard all the evidence adduced, the arguments of counsel and instructions of the Court it is

Ordered that Rose E. Blondin, Alternate Juror, be and she is hereby excused from further service as a juror in this case and the Jury retire to their rooms in charge of sworn marshals to consider their verdict and afterwards return into open Court and render their verdict and upon their oath do say:

"We, the Jury, find the defendant, The Shotwell Manufacturing Company, guilty as charged in the first count of the indictment and we find said defendant guilty as charged in the second count of the indictment" and

"We, the Jury, find the defendant, Byron A. Cain, guilty as charged in the first count of the indictment and we find the said defendant guilty as charged in the second count of the indictment" and

573 "We, the Jury, find the defendant Harold E. Sullivan, guilty as charged in the first count of the indictment and we find said defendant guilty as charged in the second count of the indictment" and

"We, the Jury, find the defendant Frank J. Huebner, guilty as charged in the first count of the indictment and we find the said defendant guilty as charged in the second count of the indictment"

whereupon on motion of counsel for the defendants that the Jury be polled the Clerk inquires of each and every juror: "Is this now your verdict?" to which inquiry each and every juror replied in the affirmative and it is

Ordered by the Court that this cause be and the same is hereby continued to October 17, 1953 at 10:00 A. M. for disposition and it is

Further Ordered by the Court that the bonds of the defendants heretofore filed shall remain in full force and effect.

574 And on the same day, to wit, the 16th day of October, 1953 there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to wit:

575 UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * * *

We, the Jury, find the defendant, The Shotwell Manufacturing Company, Guilty as charged in the first count of the indictment and we find said defendant Guilty as charged in the second count of the indictment and

We, the Jury, find the defendant, Byron A. Cain, Guilty as charged in the first count of the indictment and we find the said defendant Guilty as charged in the second count of the indictment and

We, the Jury, find the defendant Harold E. Sullivan, Guilty as charged in the first count of the indictment and we find said defendant Guilty as charged in the second count of the indictment and

We, the Jury, find the defendant Frank J. Huebner, Guilty as charged in the first count of the indictment and we find the said defendant Guilty as charged in the second count of the indictment.

LeRoy J. Ryan, Foreman
Ruth L. Schiller
John E. Jooch
Ethel A. Gassen
Francis R. Scheibert
Margaret Cafinegro

Arthur Amodeo
Anthony Massau
Stanley M. Grzywacz
Helen Gajewski
Harry Marschak
Jean F. Lawler

576 And afterwards on, to wit, the 17th day of October, 1953 came the Defendants, jointly and severally by their attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

577 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION.

All of the defendants, jointly and severally, move:

1. That the imposition of sentence be deferred pending the filing of their motions for acquittal notwithstanding the verdict, for new trial, and in arrest of judgment, whether the time for filing said motions be extended or not.

2. That the time for the filing of said motions be extended for an additional five days beyond the time required by the Federal Rules of Criminal Procedure for the filing of such motions.

3. That the bail heretofore furnished in theabove-entitlede ause be continued until the hearing and determination of the said motions for new trial and in arrest of judgment, or until the failure of any defendant to file the same within the time provided.

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney

Byron A. Cain and Frank J. Hnebner,
By Vincent O'Brien
Their Attorney

Harold E. Sullivan
By William T. Kirby
His Attorney

578 And on the same day, to wit, the 17th day of October, 1953 came the Defendant, Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Motion For Acquittal in words and figures following, to wit:

579 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

(Caption—No. 52 CR 143)

MOTION OF HAROLD E. SULLIVAN FOR ACQUITTAL

Now comes Harold E. Sullivan, one of the Defendants herein, at the close of all of the evidence, and moves that a judgment of acquittal of the offsenses charged in the indictment and each of them be entered and that he be discharged for the following reasons:

1. That there is no evidence that the defendant, Harold E. Sullivan, willfully, and intentionally attempted to evade the payment of the Income Taxes of the Shotwell Manufacturing Company as charged in the indictment.

2. That there is insufficient evidence to submit any of the issues to the jury with respect to the defendant Harold E. Sullivan in that all of the evidence tending to prove that the defendant Harold E. Sullivan willfully, knowingly and intentionally sought to defeat the payment of the Income Taxes of the Shotwell Manufacturing Company, as charged in the indictment, is purely circumstantial and there are one or more reasonable hypotheses under the evidence which supports a reasonable inference that the

580 deefndant, Harold E. Sullivan did not willfully, knowingly and intentionally seek to evade the payment of the Income Taxes of the Shotwell Manufacturing Company, even if the Government's proof is to be taken as true.

3. That the evidence against the defendant, Harold E. Sullivan is as consistent with innocence as it is with guilt.

4. That there is no substantial evidence even consid-

ering all the evidence in the light most favorable to the Government that the defendant, Harold E. Sullivan willfully, knowingly and intentionally sought to evade the payment of the Income Taxes of the Shotwell Manufacturing Company.

5. That there is no evidence, circumstantial or direct, which tends to prove that the defendant, Harold E. Sullivan, was an active and efficient actor or participant in the filing of the Shotwell Manufacturing Company's Income Tax Return for the years 1945 and 1946, nor that he had any knowledge of the circumstances surrounding the filing of the Shotwell Manufacturing Company's Income Tax Returns for said years.

6. That there is not sufficient evidence to warrant his conviction in that the Government has failed to prove facts sufficient to constitute a prima facia case; and further has failed to prove any criminal intent on the part of the defendant, Harold E. Sullivan.

Harold E. Sullivan
By: William T. Kirby
His Attorney

581 And on the same day, to wit, on the 17th day of October, 1953, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following three (3) entries, to wit:

582 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

This day comes the United States by the United States Attorney come also the defendants the Shotwell Manufacturing Company by its counsel and Byron A. Cain, Harold E. Sullivan and Frank J. Huebner in their own proper persons and by their counsel and the motion of defendant Harold E. Sullivan for a judgment of acquittal hereby is taken under advisement by the Court

583 Nordbye, J. October 17, 1953

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

On this 17th day of October, 1953, came the attorney for the Government and the defendant by its counsel.

It Is Adjudged that the defendant has been convicted upon its plea of not guilty and a verdict of guilty of the offense of attempting to defeat and evade the payment of taxes (Section 145(b), Internal Revenue Code; 25 U.S.C. Section 145(b) and the Court having asked the defendant whether it has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant forfeit and pay to the United States of America a fine in the sum of Ten Thousand Dollars ($10,000.00) on each of Counts 1 and 2 of the Indictment and costs of prosecution to be taxed.

Gunnar H. Nordbye
United States District Judge

October 17, 1953

584

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

On motion of the defendants by their counsel it is

Ordered that leave be and is hereby given to the defendants to file motions for acquittal notwithstanding the verdict, for a new trial and in arrest of judgment within ten days from this date and on motion of the defendants by their counsel it is

Further Ordered that execution of sentences be and the same is hereby stayed pending disposition of said motions and that the bonds of the defendants heretofore filed stand in full force and effect and it is

Further Ordered that in the event the defendants' motions are denied and appeals are taken, the appeal bonds are hereby fixed at the sum of Five Thousand Dollars as to each defendant

585 And on the same day, to wit, on the 17th day of October, 1953, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

586

UNITED STATES DISTRICT COURT
Northern District of Illinois, Eastern Division

* * (Caption—No. 52 CR 143) * *

On the 17th day of October, 1953 came the attorney for the government and the defendant appeared in person and[1] by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of attempting to defeat and evade the payment of taxes (Section 145(b), Internal Revenue Code; 26, U.S.C. Section 145(b). as charged[3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Three (3) Years on each of Counts 1 and 2 of the Indictment and that he forfeit and pay to the United States 1 and 2 and that the terms of imprisonment shall run concurrently and that the defendant shall stand committed until said fines are paid or otherwise discharged by due process of law

It Is Adjudged that[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve

as the commitment of the defendant.

Gunnar H. Nordbye
United States District Judge

The Court recommends commitment to:[6]
October 17, 1953

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

587 And on the same day, to wit, on the 17th day of October, 1953, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

588

Judgment and Commitment

UNITED STATES DISTRICT COURT
For the
Northern District of Illinois, Eastern Division

• • (Caption—No. 52 CR 143) • •

On the 16th day of October, 1953 came the attorney for the government and the defendant appeared in person

and[1] by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of attempting to defeat and evade the payment of taxes (Section 145(b), Internal Revenue Code; 26, U.S.C. Section 145(b). as charged[3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Three (3) Years on each of Counts 1 and 2 of the Indictment and that he forfeit and pay to the United States of America a fine in the sum of Five Thousand Dollars ($5,000) on each of said Counts 1 and 2 and that the terms if imprisonment shall run concurrently and that the defendant shall stand committed until said fines are paid or otherwise discharged by due process of law

It Is Adjudged that[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Gunnar H. Nordbye,
United States District Judge.

The Court recommends commitment to:[6]
October 17, 1953

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecu-

tively when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

589 And afterwards on, to wit, the 26th day of October, 1953 came the Defendants, The Shotwell Manufacturing Company, a corporation, Byron A. Cain and Frank J. Huebner, by their attorneys, and filed in the Clerk's office of said Court their certain Motion For A New Trial in words and figures following, to wit:

590

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION FOR A NEW TRIAL

Now come the defendants, The Shotwell Manufacturing Company, a corporation, by Thomas C. McConnell, its attorney, and Byron A. Cain and Frank J. Huebner, by Vincent O'Brien, their attorney, severally, and move the Court for a new trial on each count of the indictment, on the following grounds:

1. The Court erred in sustaining the plaintiff's demurrer to the defendants' motion as amended for the dismissal of the indictment and in denying said motion as amended.
2. The Court erred in denying the defendants' additional motion to dismiss the indictment.
3. The Court erred in denying the defendants' motion to amend and supplement Section 4 of the motion to dismiss.
4. The Court erred in denying the defendants' written motion as amended to suppress evidence.
5. The Court erred in making the finding of fact and in holding the propositions of law incident to its denial of defendants' said motion to suppress evidence.
6. The Court erred in failing to grant the motion of

defendants, filed September 2, 1953, (R746) for the
591 production of certain statements of Government witnesses, in so far as the statement of Daniel Tobias is concerned.

7. In its voir dire examination of the jury, the Court erred in failing to interrogate concerning the following matters, as suggested in writing by the defendants:

(a) Whether any juror was solicited to become a member of the panel, or whether any juror himself caused his name to be submitted to the Jury Commissioners or anyone else as a prospective juror?

(b) Whether the jur have read anything in the newspapers concerning this case or the defendants, and, if so, whether they thereby gained any impressions which might have a bearing one way or the other on their consideration of this case?

(c) Any defendant in a criminal case as a matter of right may or may not take the stand as he chooses. Should any defendant in the case at bar elect not to take the stand and to testify whether that would be a circumstance which would in any way influence his verdict?

8. The Court erred in denying the motion of the defendants for a mistrial, made at stenographic transcript page 1320, based upon Lubben's statement in the presence of the jury that "these payments were admitted last December," etc.

9. The Court erred in failing to grant defendants' motion for mistrial, filed September 27, 1953, based on a newspaper article prejudicial as a matter of law and shown at Record 3155-57 to have been read by one of the jurors.

10. The Court erred in denying, at Record 3059, the motion of the defendants, presented in writing at
592 Record 2989, to strike certain testimony given by the witnesses Lubben, Krasne and Feldman.

11. The Court erred in admitting any part of the Cain testimony given at the disclosure hearing.

12. The Court erred in excluding certain portions of the testimony of Cain at the disclosure hearing which his attorney asked be read to the jury along with the portions which counsel for the Government asked be so

read. (Record 3019-3055). The Court's statement for the Record 4745-47, the Court's memorandum at 4748-4756, and the defendants' exceptions at 4757-4758, are related to the same matter..

13. The Court erred in ruling that the supposed admissions by Cain at the disclosure hearing were admissible against the corporate defendant.

14. The Court erred in failing to grant the defendants' motion, made at Record 1812, to strike the testimony of Heitman as to payment of $10,000 in 1945. (Record 2983-87)

15. The Court erred in failing to admit in evidence the Cunningham affidavit, Defendants' Exhibit 53. (Record 4193)

16. The Court erred in denying the defendants' motion to strike Lubben's testimony as to a payment of $36,148.35. (Record 2988)

17. The Court erred in denying the twice made motions of said defendants that a judgment of acquittal be entered as to Count I of the indictment on the ground that the evidence adduced by the Government was insufficient to sustain a conviction, an in denying the further motion of the defendant corporation for judgment of acquittal as to Count II of the indictment on the same ground.

18. The Court erred in unduly restricting the scope of defendants' cross-examination of the witness Lubben
593 and of other witnesses, and the Court erred in rejecting certain evidence proffered by the defendants, and in denying offers of proof made on their behalf having to do with the following matters:

(a) The credibility of the witness.

(b) The motives of the witness.

(c) The verity of the books and records maintained by the witness or company or companies with which the witness was identified.

(d) The financial position and history of Lubben, and his expenditures as bearing upon the question as to whether he retained for his own use cash withdrawn from his companies. (Record 1366-84 et al.)

19. The Court erred in taking into consideration the evidence adduced before it on the motion to suppress, and in attempting to limit the defendants on the trial of the general issue to matters which in its judgment were con-

sistent with its recollection of the evidence at the prior hearing. (Record 1079, 1121-41)

20. The Court erred in unduly and improperly restricting the scope of the defendants' proof as to the voluntary disclosure policy of the Treasury Department, and as to action taken by them in attempted compliance therewith, (Record 4158, et seq.) and in its ruling on Defendants' Exhibits 96, 97, and 98.

21. The Court erred in preventing the defendants from proving the disclosure policy and their compliance with the conditions thereof as part of the surrounding circumstances which they were entitled to establish for the purpose of explaining supposed admissions at the disclosure hearing, as to which the Court permitted the plaintiff to make proof, and as to which it permitted the plaintiff
594 on cross-examination to utilize certain documents allegedly submitted by Busby subsequent to the making of their disclosure.

22. Under the circumstances, the Court erred in giving its instructions to the jury on the subject matter of disclosure, in that it thereby limited the jury's consideration of the entire subject matter to the issue of intent.

23. The Court erred in permitting the plaintiff to use in evidence or for purposes of direct examination or cross-examination, any of the documents supplied to the plaintiff after the disclosure made by and on behalf of the defendants to Agents of the Treasury Department.

24. Having erroneously limited the defendants' disclosure evidence and its consideration by the jury to the narrow issue of intent, and having permitted the plaintiff to avail itself of certain of the evidence at the prior disclosure hearing on the sole doctrine of testimonial admissions for the purpose of showing unreported taxable income as of the time of the alleged disclosure, the Court erred in permitting the plaintiff on cross-examination and otherwise to go into matters having to do with premium payments as distinguished from premium receipts, matter which was utterly irrelevant in so far as the determination of additional tax was concerned, and matter which had nothing to do with either the issue of intent or the supposed admission of unreported receipts. Under the law then in effect, and having in mind the defendants expressed willingness to pay upon receipt of a bill and the Treasury's position as expressed to them that there could

be no deduction for payouts, the plaintiff's examination of the witnesses Busby and Cain was immaterial, irrelevant and, prejudicial insofar as it involved an inquiry into the subject of payouts, whether on the issue of intent or on the doctrine of admissions.

595 25. In charging the jury, the Court erred when it spoke of payments made as money due to Shotwell, thereby ignoring the point that as a matter of law mere proof of payment to officers of a company under the circumstances at bar, is insufficient to show that the payments constituted income to Shotwell, except to the extent and over the period during which moneys were deposited in the corporation's boxes. Also, and to the extent that there could as a matter of law be any issue of fact on the proof at bar, the Court by said charge foreclosed the issue of fact as to whether the payments were income to Shotwell.

26. The Court further erred in its charge to the jury in erroneously assuming that knowledge by an officer that payments were not recorded on the books was equivalent to knowledge or would support an inference of knowledge that they were not adequately dealt with on the income tax returns.

27. In its charge to the jury, the Court undertook to summarize the defendants' contentions, but in so doing completely omitted all reference to their contention that the initial transactions in the indictment period had to do with trade deals as to which there were no overages.

28. The Court erred in failing to give defendants' Instruction 22 in substance as it was suggested. At Record 5359, the Court interpolated into said instruction the statement "but payments to a corporation and received by it for goods sold by it on the so-called black market do constitute revenue for tax purposes." And the Court erroneously interpolated other matters in the giving of said instruction in such way as to dilute it beyond the point of any real significance or adequacy.

29. The Court erred in failing to charge the jury that they must consider not only what overages were paid by Lubben, but what portion of those overages, on the

596 basis of the Government's evidence, constituted income to Shotwell.

30. The Court also erred in failing to charge the jury, with respect to any balance of overages that might have

existed over and above what was paid out for corn, that they must determine what portion, if any, of that balance constituted taxable income to Shotwell.

31. The Court erred in failing to charge the jury in substance as requested by defendants' suggested Instructions 45 and 47.

32. By the latter portion of its charge at Record 5386-5388, the Court, for all practical purposes, nullified its preceding instructions and purported to substitute an inadequate and over-simplified statement of the issues in a manner patently prejudicial to the defendants, which in no way could be avoided or cured by the mere interpolation of the words: "in light of these instructions,"—meaning the preceding instructions. In so doing, the Court erred and its action in this respect was tantamount to a direction to the jury to find the defendants guilty.

33. As shown by the record, the defendants complied with the provisions of Rule 30, having to do with the filing of written requests for instructions. The Court passed upon the requests as so made and informed counsel of its proposed action prior to the arguments to the jury. The substance, form and order of the Court's charge to the jury, however, was such as to make it impossible for the defendants fully to state their objections in the short time allowed before the retirement of the jury. The instructions were not given in the order in which requested; they were not given in the language requested; there were interpolations by the Court between instructions, and even within the context of individual instructions, in such manner as to charge or affect the meaning of the instructions,
and in such way as to make it difficult and even im-
597 possible to determine whether the instructions which were to be given, were in fact given. The Court attempted to summarize the issues, and to some extent, the evidence. The summaries were not complete, and sometimes inaccurate. The adverse effect was not avoided by the Court's statement that the jurors should rely on their own recollections where those were at variance. Some of the jurors may have had no recollections on the matters involved. The defendants submit that the procedure employed was contrary to the intent and spirit of Rule 30.

34. The defendants assert errors in the Court's rulings on evidence in the following specific respects:

(1) The Court erred in admitting in evidence as Government exhibits the cash checks, cash authorization slips, memoranda and markedup invoices which were received over the objections of the defendants that they were unauthorized, self-serving and not binding upon the defendants and that insufficient foundation had been laid.

(2) (Record 431) In admitting invoices 18-A and B, of 1944, which were beyond the scope of the bill of particulars,—not cured by statement that the cash was received in 1945 since the company was then on an accrual basis.

(3) (Record 495) Government Exhibit 27-A, received over the same objection.

(4) (Record 628-29) Government Exhibit 73, over objection that insufficient foundation laid to explain absence of original and that only the face of the check and not the reverse side was available.

(5) (Record 710-716) Government Exhibit 157, 157-A, B, and C, over the objection that they were outside the bill of particulars.

(6) (Record 723, 764) Government Exhibit 158, 158-B, and (Record 760-764) the whole 158 series and 159, 598 159-A and 159-B, over objection that they were transactions with General Confections and are not included within the bill of particulars.

(7) (Record 770) Government Exhibit 160, over objection that it was not connected up.

(8) (Record 927-29) That inquiry as to Lubben's income tax statements was immaterial.

(9) (Record 930) In sustaining the plaintiff's objection to the defendants' question: "Did you have any investment at that time?"

(10) (Record 934) In sustaining the Government's objection to the question as to the profits of Eatsum Food Products as a subsidiary of Burry Biscuit Company.

(11) (Record 927) In sustaining objection to question whether said company while such subsidiary was in a black market operation.

(12) (Record 935) In sustaining objection to question whether Lubben engaged in black market transactions while working for Burry Biscuit Company.

(13) (Record 936) In sustaining objection as to price paid by Lubben to Burry-Biscuit by Eatsum Food Products.

(14) (939-40) In ruling that terms of purchase by Lubben from Burry Biscuit were immaterial.

(15) (942-43) In sustaining objection to question as to how much was paid to Lubben by Giglio for a one-half interest in Eatsum Food Products.

(16) (Record 971) In sustaining objection to question as to how Lubben resold goods purchased above ceiling prices from Cramer.

(17) (Record 1108-09) In not permitting Lubben to answer what money he drew out of the cash box.

(18) (Record 1166) In holding the indictment of Giglio to be irrelevant.

(19) (Record 1250) In holding Lubben's purchase of sugar certificates about which he testified before the Kefauver Committee immaterial.

599 (20) (Record 1260) In sustaining objections to questions to Lubben as to delivery of corn in 1947.

(21) (Record 1357) In not permitting witness Lubben to answer question based upon what Sproull & Schrolz had said.

(22) (Record 1384) In holding evidence re Lubben's tax return irrelevant and inadmissible.

(23) (Record 1393) In not permitting Lubben to testify re Defendants' Exhibit 21-A.

(24) (Record 1394-97) And the same as to Defendants' Exhibits 21-B, C, and D, re loans and exchanges.

(25) (Record 1502) In not permitting Lubben to answer if he had a partisan interest which caused him to volunteer.

(26) (Record 1593) In denying defendants' motion to strike the testimony of Mrs. Krasne re jewelry.

(27) (Record 1629) In not permitting the witness Moran to answer whether his wife received cash moneys from Lubben, or to testify to transactions between his wife and Stone involving cash, or to the cash box at Haberkorn Candy Co.

(28) (Record 1638) In refusing to strike the testimony concerning four checks totaling $20,000.00, etc.

(29) (Record 1655) In not permitting witness Moran to answer what he knew about Lubben's sister buying $67,500.00 mortgage.

(30) (Record 1710) In refusing to permit the defendants to interrogate the witness Davidson as to Lubben's dealings with Cramer.

(31) (Record 1712-14) In not permitting the witness Davidson to tell that Lubben told him he needed money to make tax payments, etc.

(32) (Record 1704, 1730) In refusing to permit Davidson to say what he told Lubben when Lubben asked him what a disclosure was.

(33) (Record 1801) In not permitting the witness Heitman to answer whether in 1945 he was paid from cash boxes as much as $30,000.00.

600 (34) In admitting recap sheets identified by Miss Feldman not correlated to the books and records which they attempted to substantiate. (Exhibit 40-E, in reference to checks 40-40-B, and 40-D for vouchers 29-A and 29-B, 30-A to D, inclusive, 32-A, 33-A, 34-A, B, and C, 35-A-H, inclusive, 36-A, 37-A, 38-A and B, and 39-A (Record 2048), and Exhibit 55-B, in reference to check Exhibit 55 in payment for invoices 49-A, 51-A and B (Record 2120).

(35) In overruling the objections at Record 2185 to the testimony of Miss Feldman in reference to Government Exhibits 100-102, in that the documents were not prepared by her, or under her direction, and she was not even employed by the company at the time, and that she was without personal knowledge (Record 2186).

(36) In unduly restricting the cross-examination of the witness Feldman in an effort to determine the amount of money received by Lubben in cash (Record 2322), and in reference to Lubben's 1945 and 1946 income tax returns (Record 2379).

(37) In overruling the defendants' objections to the testimony of the witness Graflund as to conversations with Cain (Record 2615-16).

(38) In overruling the defendants' objections to the stockholdings of the individual defendants and their families and relatives (Record 2674).

(39) In permitting the witness Ericson to testify to matters not within his knowledge (Record 2748), and in permitting him to testify to instructions given him by one of the three individual defendants without specifying which defendant and in spite of his testimony that he could not so testify (Record 2751, 2765, 2767).

(40) In permitting counsel for the Government to ask leading and suggestive questions and to assume facts in

dispute in questioning the witness Ericson (Record 2753, 2758, 2761).

601 (41) In overruling defendants' objections to Mammel's testimony when the computation to which he testified was based on conflicting evidence and the questions were not phrased in hypothetical form (Record 2824), and in failing to sustain persistent objections to his testimony because it was beyond the bill of particulars (Record 2832-2840), and in failing to grant defendants' motion to strike his testimony (Record 2841).

(42) In overruling defendants' objections to the hypothetical question given to the witness Ruggaber (Record 2860).

(43) In sustaining plaintiff's objection to defendants' hypothetical question asked of the witness Mammel (Record 2860, 2867, 2872).

(44) In refusing to permit the defendants to examine Ruggaber as to the regulations upon which his computation of tax in the hypothetical question were based (Record 2875).

(45) In voluntarily sustaining an objection when none was made by the plaintiff, and thereby indicating the Court's support of the testimony of the witness and opposition to the defendants' attempted contentions (Record 2880-81).

(46) (Record 3213) In sustaining plaintiff's objection to the question to the witness Hogan re trade deals.

(47) (Record 3234) In granting plaintiff's motion to strike Hogan's answer as to what his secretary told him about Lubben's attempt to bribe her.

(48) (Record 3235) In sustaining plaintiff's motion to strike Hogan's answer as to what a large customer said to him about Lubben.

(49) (Record 3248-50) In sustaining plaintiff's objections to questions propounded to the witness Cohen re black market price for corn, and (Record 3266) to question to Cohen re disposition of corn by-products, and (Record 3271) to the question whether Cohen knew
602 Ryan was the man who paid overage for raw corn, and (Record 3271-72) to the question as to scope of Cohen's black market dealings.

(50) (Record 3363-64) In striking the portion of Cramer's testimony regarding the $15,000.00 "loan" to Lubben.

(51) (Record 3397-99) In sustaining objection to question whether witness Rose knew price which Lubben paid for house in New Jersey, and in rejecting defendants' following offer of proof as to expenditures known by the witness Rose to have been made by Lubben.

(52) (Record 3544) In overruling defendants' objection to question whether Meyer was satisfied with Lubben's explanation at time entry made, and (Record 3556) question whether Meyer was now satisfied after looking at certain invoices that a certain $27,000.00 check was used to buy candy.

(53) (Record 3588) In overruling defendants' objections to Government's Exhibit 169 certified statement by Sproull & Sholz).

(54) (Record 3611) In overruling defendants' objection to argumentative question directed at Meyer.

(55) (Record 3626) In sustaining plaintiff's objection to "leading" questions on redirect of Meyer.

(56) (Record 3651-52) In sustaining objection on redirect of Meyer to question as to how much money charged to Lubben in the first instance was later included as income on his personal tax return, and (Record 3653) in sustaining objection to question relating to Lubben tax return.

(57) (Record 3736-37) In ruling that Government counsel might see memoranda prepared by Meyer for defense counsel, and in permitting him to see them although they were later returned.

(58) (Record 3820) In overruling defendants' objection to question to Beren as to when cash box came into use.

603 (59) (Record 3920-23) In sustaining objection to question to witness Robinson about how corn was obtained for the grain deals.

(60) (Record 3993) In striking the testimony of the witness Ducorsky as immaterial.

(61) (Record 4062-63) In sustaining plaintiff's objection to question to witness Adam regarding corn deals.

(62) (Record 4092-4100) In overruling defendants' objections to cross-examination of Hausman beyond the scope of his direct examination.

(63) (Record 4105) In overruling objection on Hausman's recross as to whether he had seen evidence supporting certain entries.

(64) (Record 4111-17) In sustaining objections to Pratt's testimony and also to directive regarding premium paid by United States for corn.

(65) (Record 4134-35) In sustaining objection to defendants Number 76 series of exhibits except those parts expressly referring to Shotwell, and in rejecting defense contention that all of the series admissible as bearing on the market. Also in overruling offer of proof re same (Record 4140-41).

(66) (Record 4148) In sustaining objection to question to witness Dunlap as to reasons for abandonment of voluntary disclosure policy.

(67) (Record 4148-51) In stating the scope of the disclosure issue and in sustaining objection to questions regarding nature of disclosure policy.

(68) (Record 4157-58) In sustaining objections to direct question to Dunlap regarding difficulties in administration of such policy, and in rejecting offer of proof through such witness regarding the same (Record 4159-68).

604 (69) (Record 4250-54, 4801) In sustaining objection to defense Exhibits 79, 80 and 81—documents produced by Penick & Ford showing many instances of procurement of corn in which no identifying notation was made on the contract with the elevator, and that, therefore, the instances of procurement by Shotwell might have exceeded those shown by the contracts produced had the underlying memoranda records been available, and in rejecting Defendants' Exhibit 99 (Record 4906).

(70) (Record 4263) In overruling defendants' objection on Horan cross as to whether anyone in Penick & Ford received a premium from Shotwell.

(71) (Record 4371) In refusing to permit 1952 acquiescence by the Commissioner in the Sullenger decision to be read into the record.

(72) (Record 4272-73) In refusing to admit Code sections granting to other departments access to income tax returns.

(73) (Record 4479) In overruling the objection to Government Exhibits 185, and (Record 4483) Government Exhibit 186, and (Record 4474) the objection to piecemeal questioning of Cain regarding the disclosure and said exhibits.

(74) (Record 4832-33) In sustaining plaintiff's objection to defense Exhibits 100-101, as to companies regarding which there was no testimony that they had a quota arrangement with Shotwell. This ruling deprived the defendants of the opportunity to submit a base to the jury on the question of allocations which they were endeavoring to do so as to assume that of the total syrup purchased by them in 1945-1946, an amount equal to 80% of the total quantity purchased in 1941 was by allocation, and that the excess was through the procurement of raw corn.

(75) (Record 4881) In sustaining the objection to defense Exhibits 103 and 106.

605 (76) (Record 4885-86) In overruling defendants' objection to question which allegedly was based on misleading summary of Hausman testimony.

(77) (Record 4899) In denying motion to strike Government Exhibit 185.

(78) (Record 4984) In overruling objection to Government Exhibit 186.

(79) (Record 4987-88) In overruling objection to Government Exhibits of the 189 series; similarly (Record 4999-5001), in overruling objection that said documents were not properly rebuttal evidence.

35. (Record 5075) The Court erred in denying the motions for acquittal.

36. The Court erred in entering the judgments against these defendants, and each of them, on each count of the indictment.

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney

Byron A. Cain and Frank J. Huebner
By Vincent O'Brien
Their Attorney

606 And on the same day, to wit, the 26th day of October, 1953 came the Defendants, The Shotwell Manufacturing Company, Byron A. Cain, and Frank J. Huebner, by their attorneys, and filed in the Clerk's office of said Court their certain Motion In Arrest Of Judgment in words and figures following, to wit:

607

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION IN ARREST OF JUDGMENT.

The defendants, The Shotwell Manufacturing Company, a corporation, by Thomas C. McConnell, its attorney, and the defendants, Byron A. Cain and Frank J. Huebner, by Vincent O'Brien, their attorney, severally move the Court to arrest the judgment because the Court is without jurisdiction or right to conduct a trial of the general issue since it should have granted the motion of the defendants to dismiss the indictment, including that part of their motion which sought to bar the action by reason of immunity from criminal prosecution on account of the voluntary disclosure aforesaid.

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney

Byron A. Cain and Frank J. Huebner,
By Vincent O'Brien
Their Attorney

608 And on the same day, to wit, the 26th day of October, 1953 came the Defendants, The Shotwell Manufacturing Company, Byron A. Cain and Frank J. Huebner, by their attorneys, and filed in the Clerk's office of said Court their certain Motion For Judgment Of Acquittal Notwithstanding The Verdict in words and figures following, to wit:

609

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION OF THE DEFENDANTS, THE SHOTWELL MANUFACTURING COMPANY, A CORPORATION, BYRON A. CAIN and FRANK J. HUEBNER, FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT.

The defendants, The Shotwell Manufacturing Company, a corporation, by Thomas C. McConnell, its attorney, and the defendants, Byron A. Cain and Frank J. Huebner, by Vincent O'Brien, their attorney, severally move for judgment of acquittal notwithstanding the verdict, on the following grounds, to-wit:

1. The Court erred in denying their motion to amend Section 4 of their motion to dismiss as amended.

2. The Court erred in denying their motion to dismiss as it was amended, and in later denying their additional motion to dismiss.

3. The Court erred in denying their motion to suppress evidence.

4. The Court erred in entertaining and in permitting the use of material evidence encompassed in their motion to suppress evidence as aforesaid.

5. The Court erred in receiving in evidence on the trial of the general issue any part of the testimony
610 or evidence adduced at the hearing of the motion to suppress evidence.

6. The evidence adduced at the trial is insufficient to sustain a conviction of any of said defendants of the offense charged in either count of the indictment.

7. There is no evidence showing that the corporation in fact received unreported income as charged, except such as was received and administered by non-defendant officers and employees of said corporation, as to all of which the uncontradicted evidence is that such receipts were paid out as part of the cost of materials for goods sold by the corporation, and thus did not constitute taxable income. On the facts at bar, there is on presumption

of law that other receipts, if any, by individual defendants constituted income to the corporation. The evidence adduced by the plaintiff affirmatively indicates that such other receipts were intended for and received by such officers for their own use and benefit.

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney
Byron A. Cain and Frank Huebner,
By Vincent O'Brien
Their Attorney

611 And on the same day, to wit, the 26th day of October, 1953 there was filed in the Clerk's office of said Court a certain Notice in words and figures following, to wit:

612

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

NOTICE.

To: Mr. Otto Kerner, Jr.
United States Attorney
Chicago, Illinois

You Are Hereby Notified that we are today filing with the Clerk of the United States District Court, Northern District of Illinois, Eastern Division, the following motions on behalf of the defendants, The Shotwell Manufacturing Company, a corporation, Byron A. Cain and Frank J. Huebner: Motion in arrest of judgment; motion for judgment of acquittal notwithstanding the verdict, and motion for a new trial, copies of which are herewith handed to you.

Thomas C. McConnell
Vincent O'Brien
Attorneys for said Defendants

Received a copy of the above and foregoing notice, together with copies of the motions therein referred to, this 26th day of October, 1953.

Otto Kerner, Jr. by E. Tillotson
United States District Attorney

613 And afterwards on, to wit, the 30th day of November, 1953 came the Defendants, The Shotwell Manufacturing Company, Byron A. Cain and Frank J. Huebner, by their attorneys, and filed in the Clerk's office of said Court their certain Motion in words and figures following to wit:

614

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION.

The defendants, The Shotwell Manufacturing Company, a corporation, Byron A. Cain and Frank J. Huebner, by their attorneys, move that the judgments rendered against them on the 17th day of October, 1953, be vacated until the hearing and determination of their motions for acquittal, for new trial, and in arrest of judgment.

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney
Byron A. Cain and Frank J. Huebner
By Vincent O'Brien
Their Attorney

615 And afterwards, to wit, on the 12th day of November, 1953, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry, to wit:

616

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois

* * (Caption—No. 52 CR 143) * *

The defendants The Shotwell Manufacturing Company, a corporation, Byron A. Cain and Frank J. Huebner, by their attorneys, have moved the Court that the present bail be continued until the filing of notice of appeal within the time allowed by law.

After due consideration,

It is Ordered: That said motion be, and the same hereby is, granted.

Dated this 12th day of November, 1953.

Enter:

Gunnar H. Nordbye
United States District Judge.

617 And afterwards on, to wit, the 30th day of November, 1953 filed in the Clerk's office of said Court a certain Memorandum Decision Of The Court in words and figures following, to wit:

618

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * * (Caption—No. 52 CR 143) * * *

MEMORANDUM DECISION.

The above-named defendants filed a motion to suppress all evidence obtained from them by the agents of the Government subsequent to their alleged disclosure in January, 1948, and the motion involves not only the suppression of any statements or admissions made by any of the defendants, but also all information and data obtained from the books, records, and documents belonging to the corporate defendant. The Court heard the evidence submitted by the defendants in support of their motion, and that offered by the Government in opposition thereto. At the close of the hearing on November 21, 1952, the Court announced that the motion would be denied and an order of denial was thereupon entered upon the minutes of the

court. The Court reserved the right, however, to file a memorandum or formal findings of fact and conclusions of law in the event it later seemed necessary or advisable. The trial of the matter now having been concluded and the jury having found all of the defendants guilty on
619 both counts of the indictment, the Court desires to set forth in a memorandum his views with reference to the motion to suppress.

It is the defendant's position that the use of any information divulged to the agents of the Government by the defendants or obtained by the agents of the Government from the books, records and documents belonging to the corporate defendant after their alleged voluntary disclosure, would be a violation of their rights under the Fourth and Fifth Amendments to the Constitution of the United States.

Defendants rely upon the former voluntary disclosure doctrine as enunciated in various public announcements of the officials of the Treasury Department and the Bureau of Internal Revenue. The so-called doctrine must be culled from the many statements, press releases and pronouncements of the officials in that no formal regulations or procedures in this regard were adopted by the Treasury Department or the Bureau of Internal Revenue. Reference to isolated statements made by various government officials as to what had to be done by a tax evader to obtain immunity in a tax prosecution may be entirely misleading. Considerable difficulty has been encountered in applying the so-called doctrine because of the many versions and interpretations which may be gleaned from press reports and public pronouncements attributed to various government officials charged with the enforcement of the income tax laws. And without attempting to formulate the doctrine in concise language from a reading of the various pronouncements referred to by the defendants and upon which they contend they relied in making their disclosure, it seems evident therefrom that at least the doctrine contemplated a situation where a taxpayer confesses his wilfull tax evasion to one or more of the designated government agents before any investigation is commenced by the Government and evidences his good faith by aiding and assisting the Government in obtaining the payment of the taxes due.

620 When Mr. Cain and Mr. Busby, the latter being the Shotwell Company's accountant, conferred with Mr.

Sauber, the then Chief Deputy Collector for the First Internal Revenue District of Illinois, they merely indicated to him that there were unreported receipts obtained by the Shotwell Company in black market operations which were completely offset by unreported deductions for raw materials. And to the end that an amended tax return might be filed disclosing that situation, they sought the aid and advice of Mr. Sauber. Both Mr. Cain and Mr. Busby maintained to Mr. Sauber that the premium receipts were washed out, so to speak, by the premium payments made in connection with the goods that were sold and to the extent that there was any difference as between premium receipts and premium payments, such balance was reported in the 1946 corporation income tax return. There was no disclosure of an intentional tax violation or any disclosure of an intent to defraud the Government. Cain contended that he assumed in good faith that the premium receipts were offset by the premium payments made, and hence no taxes were due. Moreover, he contended that he did not know of any contrary ruling by the Treasury Department until Mr. Busby told him of such ruling. At most, therefore, the disclosure assumed to indicate nothing more than that there was a necessity of filing amended tax returns so that the corrected receipts and corrected payments for goods manufactured might be set forth therein and thus reconcile the items of net profits which had already been reflected in the net income for 1946. At no time during any of the alleged disclosure did the defendants disclose any unreported net income.

Defendants heretofore made a motion to dismiss the indictment on substantially the same grounds urged herein. This motion was heard by Judge Barnes and denied. In the affidavit in support of said motion submitted by Mr. Cain, it appears that he stated that he and his associates always maintained that the defendant corporation owed no tax over and above the amount reported in the 621 1945 and 1946 income tax statements. The claimed willingness of the defendants to pay any tax due the Government upon the assumption that the Commissioner's ruling regarding the non-deductibility of black market payments for raw materials required such tax payment, did not constitute an admission of a wilfull tax evasion. At most, according to the position of the defendants, the

situation which was presented to Mr. Sauber was due to misunderstanding on their part resulting from their alleged good-faith belief that such payments were deductible and hence there were no additional taxes due the Government. Mr. Cain's gesture of accepting Mr. Lubben's figures of the total amount of overages paid to Shotwell and then fabricating fictitious payments for raw material to offset such receipts, indicates the entire absence of good faith in defendant's alleged disclosure. If they feared some civil assessment for a tax deficiency because the Treasury Department at that time had refused to recognize deductions for black market payments for the purchase of goods, nevertheless they indicated their reservation of the right to challenge such ruling. Consequently, it seems clear that here we have no disclosure of anything on which these defendants could be prosecuted. There was no admission of any tax fraud or any intent to violate the tax laws of the Government.

If the Government is to promise immunity, it must be in a situation where there is disclosed a wrongdoing on the part of the taxpayer, not merely a disclosure of good-faith errors in his return. Obviously, if the situation is one where there is no wrongdoing and no tax due the Government, there can be no dependency upon immunity under the so-called voluntary disclosure doctrine. If the defendents' alleged disclosure of the factual situation were true, there could be no criminal prosecution.

The very purpose of the voluntary disclosure doctrine was to obtain the payment of taxes of which the Government has been defrauded. The doctrine necessarily
622 contemplates a contrite taxpayer who confesses his fraud and evidences good faith in aiding and assisting the Government in obtaining the payment of the taxes due. This basic element of a voluntary disclosure within the enunciated government policy is entirely lacking here. As indicative of the lack of good faith on the part of the defendants, the evidence discloses that some of the records which would be illuminating and helpful in determining the true situation with reference to defendants' black market operations were destroyed at the instance of Mr. Cain, and no bona fide attempt was made by any of the defendants to reconstruct destroyed or incomplete records in order to determine the amount and the persons to whom

any premium payments were made for raw materials. The figures which were submitted to the Government agent in this regard were admittedly fictitious and submitted solely for the purpose of indicating that premium receipts were completely wiped out by the premium payments. In fact, the evidence indicates that Mr. Cain, during the various conferences with the Government agents, took the position that he would not under any circumstances disclose to whom any premium payments were made by Shotwell for raw materials, and thus he attempted to foreclose any investigation by the Government as to the verity of the claim of such payments.

The defendants urge that, under the so-called voluntary disclosure doctrine, the question of immunity does not rest in the discretion of the Government officials, but that there is an open promise of immunity by the Government in the event the taxpayer by his voluntary disclosure comes within the purview of the announced doctrine. But if that view is sound, defendants have, under the evidence submitted, fallen far short of presenting a factual basis for the application of the doctrine by the Court.

In addition, defendants urge that any disclosure made, written or otherwise, and the evidence obtained therefrom, must be suppressed because such disclosure was in-
623 duced by a promise of immunity, express or implied, by the Government agents. I am convinced from the evidence produced on the motion that no promise of immunity was held out to these defendants, or any of them, by any representative of the Government when these alleged disclosures were made, or at any other time. Moreover, I am satisfied that there were no representations by any Government representative which would lead these defendants to believe that the alleged disclosure would be considered a voluntary disclosure within the purview of the voluntary disclosure doctrine. And the evidence will not sustain a finding that any Government representative held out to the defendants, or any of them, that there would be no criminal prosecution by reason of the so-called voluntary disclosure.

And, in passing, reference may be made to the results of the trial on the merits which took place in September and October, 1953, when the jury found, and the evidence convincingly established, that large sums of black market

receipts received by the Shotwell Company were never paid out for raw materials on the black market or elsewhere during 1945 and 1946. The jury's verdict of guilty necessarily requires a finding that a substantial tax over and above that which was paid by the Shotwell Company for 1945 and 1946 was due the Government by reason of the unreported premium receipts received by Shotwell during 1945 and 1946. What a travesty it would be if, under such circumstances, immunity should be granted to the defendants because of the alleged disclosure which had only one purpose and that was to mislead and to misinform the Government agents of the true facts. False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine.

I find, therefore, that the defendants have failed to
624 sustain the burden of proof in establishing that a voluntary disclosure was made by them within the purview of the so-called voluntary disclosure doctrine. In view of this finding, I do not find it necessary to make any finding as to the exact date when the Government first commenced its investigation of the Shotwell Company's income taxes for the years in question.

The above may be considered as the Court's findings of fact on defendants' motion to suppress, and the same may be and is hereby made a part of the order of this Court of November 21, 1952, denying defendants' motion to suppress.

An exception is reserved to the defendants.

Dated this 28th day of November, 1953.

Enter:

Gunnar H. Nordbye
United States District Judge.

625 And, to wit, on the 28th day of November, 1953, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following four (4) entries, to wit:

626

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER DENYING MOTION OF THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, AND FRANK J. HUEBNER FOR A NEW TRIAL.

The defendants The Shotwell Manufacturing Company, Byron A. Cain, and Frank J. Huebner have filed a motion severally for a new trial on each count of the indictment on the grounds indicated in their notice of motion. Some 79 grounds are urged in support thereof. The Court does not deem it necessary to comment upon the numerous grounds urged in support of the motion. Suffice it to say that any error or irregularity which may have occurred during the trial did not affect the substantial rights of the defendants. These defendants were accorded a fair trial, and on the evidence the jury was fully justified in finding them guilty beyond a reasonable doubt. The verdict of the jury should not be disturbed by this Court. Therefore,

It Is Ordered: That said motion be and the same hereby is in all things denied.

An exception is reserved.

Dated this 28th day of November, 1953.

Enter:

Gunnar H. Nordbye
United States District Judge

627

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER DENYING MOTION OF DEFENDANTS SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, AND FRANK J. HUEBNER TO ARREST JUDGMENT.

The defendants The Shotwell Manufacturing Company, Byron A. Cain, and Frank J. Huebner severally move the Court to arrest the judgment because the Court is without

jurisdiction or right to conduct a trial of the general issue since it should have granted the motion of the defendants to dismiss the indictment.

The Court having given due consideration to said motion.

It Is Hereby Ordered: that the said motion be and the same hereby is in all things denied.

An exception is reserved.

Dated this 28th day of November, 1953.

Enter:

Gunnar H. Nordbye

United States District Judge.

In the United States District Court

Northern District of Illinois

Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER DENYING MOTION OF DEFENDANTS THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, AND FRANK J. HUEBNER FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT.

The defendants The Shotwell Manufacturing Company, Byron A. Cain, and Frank J. Huebner severally move for judgment of acquittal notwithstanding the verdict on the grounds set forth in said notice of motion.

After due consideration,

It Is Hereby Ordered: That said motion be and the same is in all things denied.

An exception is reserved.

Dated this 28th day of November, 1953.

Enter:

Gunnar H. Nordbye

United States District Judge.

629

In the United States District Court

Northern District of Illinois

Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER.

The defendants The Shotwell Manufacturing Company,

Byron A. Cain, and Frank J. Huebner move this Court that the judgments rendered against them on the 17th day of October, 1953, be vacated until the hearing and determination of their motions for acquittal, for new trial, and in arrest of judgment.

The Court having duly considered said motion,

It Is Ordered: That the same be and hereby is in all things denied.

An exception is reserved.

Dated this 28th day of November, 1953.

Enter:

Gunnar H. Nordbye
United States District Judge.

630 And on the same day, to wit, on the 28th day of November, 1953, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry, to wit:

631

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER DENYING MOTION OF DEFENDANT HAROLD E. SULLIVAN FOR JUDGMENT OF ACQUITTAL.

This cause came before the Court on the motion of defendant Harold E. Sullivan for acquittal notwithstanding the verdict of the jury. The Court deferred ruling on the motion, and now has considered the briefs filed by the movant and the Government in opposition thereto.

At the outset, it is evident that the jury found from the evidence that the Shotwell Company had received as income substantial sums of so-called black-market money during the years 1945 and 1946 which was not expended for raw materials, and hence it constituted taxable income. This money was in no way reflected on Shotwell's books, and although a portion of it may have been expended, as defendants contend for raw corn, the jury's verdict re-

quires a finding that a substantial part of the money paid by Lubben to Shotwell during these years was utilized by Shotwell for other purposes. Moreover, it seems evident from the jury's finding herein that they believed that Lubben was telling the truth when he recounted his deal-
632 ings with these defendants.

In considering the sufficiency of the evidence as to defendant Sullivan, we commence, therefore, with the premise that all of the over-ceiling payments thus made by Lubben during the years 1945 and 1946 constituted income to Shotwell. The individual defendants concede that all moneys received from Lubben constituted income to Shotwell, but their position is that all of the money was obtained by Shotwell during a limited period in 1945 and 1946 in order to facilitate the purchase of raw corn for Shotwell's benefit. While Sullivan denies that he had anything to do with the cash box which was maintained by Shotwell for corn purchases, he admits that he knew of these over-ceiling payments, and it is his position that Shotwell had to accept them in order to stay in business. He contends that the company needed such extra moneys in order to enable it to buy raw corn at over-ceiling prices and to ship the corn to manufacturers, and thus obtain the critical material of corn syrup with which to manufacture candy. Under the evidence, the jury was fully justified in finding that a substantial portion of the payments made to Shotwell was never used for the purchase of raw corn and that the defense of Sullivan, as well as the other defendants, that all of such income was utilized for such purposes was utterly unpersuasive and palpably a subterfuge to cover up the machinations of these individual defendants. When it is recognized that the jury found that substantial sums of overages paid were never used to buy raw corn and never recorded, all of the circumstances justify a finding beyond a reasonable doubt that Cain, Huebner and Sullivan obtained in some method substantial sums for their own use from these over-ceiling payments which were made to Shotwell by Lubben. Moreover, that Sullivan admitted receiving some of the cash thus paid is a perfectly reasonable inference to be drawn from the conversation that he had with Lubben in September or
October of 1946. It is true that Lubben, when he
633 first related this conversation with Sullivan, stated

that it occurred when he tendered the three checks, Government Exhibits 14, 14-a and 14-b. Later, before cross-examination, however, he stated that he was mistaken as to the date of the meeting with Sullivan and that the conversation with him took place later in the year when he was having difficulty in making some of his payments to Shotwell. His so-called recanting did not, as defendant Sullivan contends, destroy the credibility or weight of his testimony in this regard. On the contrary, the demeanor and attitude of Lubben under the circumstances tended to strengthen one's belief that he was honestly and faithfully relating the conversation which had taken place, but as to which, in first giving this testimony, he was mistaken as to the time and the circumstances. In any event, it seems clear that the jury must have believed Lubben's testimony in this regard. Now, this conversation with Sullivan as related by Lubben disclosed that Sullivan knew that these over-ceiling payments in violation of the O.P.A. laws were not recorded on Shotwell's books. This is apparent; otherwise, he would not have been concerned as to whether such data appeared on Lubben's books. Sullivan knew, as a lawyer, that if Shotwell's books reflected over-ceiling payments, he, as well as Cain and Huebner, might be involved in civil and possibly criminal proceedings. Moreover, it is quite apparent from Sullivan's own testimony during the trial that he was fully aware that none of these over-ceiling payments were recorded on Shotwell's books. On page 4665 of the record appear the following questions and answers when Sullivan was examined:

"Q. Didn't you know it would have to be kept off the books or the OPA investigators would locate it?

A. That was true after—that wasn't true after June of 1945 when the OPA went off, or am I right—1946, June 30th.

634 Q. How about the period prior to that?

A. Certainly it had to be kept off the books or you would be subject to perhaps additional trouble. I know that now. I didn't know it then. I don't believe.

Q. Well, are you sure?

A. Am I sure about what?

Q. You said you don't believe you knew it then. Are you sure you didn't know it then?

A. I don't ever remember discussing it. I am not positive.

Q. Of course you knew that if it was off the books for OPA purposes, it was also off the books for Internal Revenue purposes, didn't you?

A. Not necessarily. Not necessarily."

These equivocal answers are fairly subject to only one interpretation, and that is that Sullivan was fully aware of the fact that Lubben's transactions with reference to over-ceiling payments were not recorded on the books of the Shotwell Company, and as attorney for the company he was fully cognizant of the reasons for such non-recording. Sullivan's contention that he assumed in good faith that all of the cash received in over-ceiling payments was disbursed for raw corn is not convincing in view of the testimony as to the period over which these payments extended, and in view of the testimony given by Lubben to the effect that Sullivan admitted that he was utilizing some of these payments for his own use. What else could Sullivan have been referring to if Lubben correctly recounted this conversation? Lubben stated in his testimony that Sullivan said to him when Sullivan had been assured that these over-ceiling transactions had not been recorded on Lubben's books, "Well, Dave, you know how it is. You have a place in New Jersey, farm in New Jersey. This money I have been using in my farm—I am getting a new driveway put in—that is the only way I can do it today with the tax situations the way they are." In view of
635 the circumstances related at the trial, the jury was fully justified in finding that Sullivan must have known that all the over-ceiling moneys received by Shotwell were not going for the purchase of raw corn if he himself was the recipient of a portion of it. And Lubben's testimony as to this admission of Sullivan is entirely consistent with the overwhelming weight of the testimony. One could not hear the testimony in this case without obtaining an abiding conviction that the overages paid by Lubben to Shotwell began in late 1944, not when the corn shortage developed in late 1945, as Sullivan contends. And the jury was fully justified in concluding from the evidence that a substantial part of such payments to Shotwell was appropriated by Sullivan, Cain and Huebner for their own use. The evidence reflects that in 1945 Shotwell

received over $177,000 and in 1946 over $276,000 by way of over-ceiling payments from Lubben. All such over ceiling payments by Lubben to Shotwell were made in cash, and Sullivan was cognizant in that fact. If Sullivan was aware of any cash overages being made, he must have been aware, contrary to his contention, of all the cash overages paid to Shotwell which extended from late in 1944 to and including all of 1946. Any other deduction from the testimony is wholly untenable.

Sullivan was attorney and a director of Shotwell in 1945 and Executive Vice President and attorney in 1946, and in 1946 Cain and his family and Sullivan and his family owned some 65 percent of the common stock. Cain, Huebner and Sullivan were the three dominant executives of this company. Sullivan was paid a salary by Shotwell of $30,000 in each of the years 1945 and 1946. The amount of Sullivan's salary during the years in question, and all of the circumstances disclosed by the evidence, fairly indicate that he must have played a dominant part in the affairs of the company. He testified that he talked to Huebner about the plan of having Lubben pay over-636 ceiling prices for candy sold to him by Shotwell in order to buy raw corn, and he contended on the witness stand that Shotwell's cash on hand could not be utilized for that purpose on account of the tax obligations of Shotwell and hence the money had to be obtained from over-ceiling sales to Lubben. While the alleged reasons for obtaining the over-ceiling payments were obviously untrue; the circumstances indicate that Sullivan was not a mere figure-head. As an Executive Vice President, he was active with Cain and Huebner in formulating the policies of the company. And Ericson, superintendent of Shotwell in 1945 and 1946, stated that, although his memory was not clear as to the officials present when the unbilled shipments plans was inaugurated to cover up Shotwell's over-ceiling violations, he was clear that he would not have shipped except on instructions of Cain, Sullivan or Huebner.

The jury was justified in finding that Sullivan, Cain and Huebner knew that a substantial part of the over-ceiling payments would not be recorded on the books of the company and was not used for purchases of raw corn, and that they knew that, in view of the circumstances, it would

logically follow that such sums would not be reflected in the 1945 and 1946 tax returns of the company. In order to find otherwise, a jury would have to be extremely naive and credulous.

Under all the evidence, direct and circumstantial, it seems uncontroverted that Sullivan knew that the income of Shotwell diverted to him would never be included in Shotwell's income tax returns. How could any reasonable person expect any other result if he was a party to a scheme and plan to divert unrecorded corporate income surreptitiously to his own use? Under these circumstances, the Court concludes that a reasonable-minded jury could find beyond a reasonable doubt that Sullivan intentionally and knowingly participated in and aided a scheme and plan, with reference to a substantial portion of
637 these over-ceiling payments made by Lubben to Shotwell, which would exclude such payments from the income reflected in the tax returns of the Shotwell Company for the years 1945 and 1946.

Defendant Sullivan urges with great earnestness that the evidence, direct and circumstantial, does not constitute substantial proof of his guilt, as distinguished from merely some evidence or a scintilla of evidence which may point thereto. But the question of substantial evidence is not to be determined merely by the quantity of the evidence introduced with reference to the defendant. Concededly, the various transactions of Lubben with the Shotwell Company over the period of years in question with reference to the overages paid and the circumstances thereof as related in the testimony, refer to Sullivan far less than to defendants Huebner and Cain. But notwithstanding the comparative paucity of the evidence which refers directly to Sullivan and his complicity in the offenses charged, the direct and circumstantial evidence which does appear is substantial and fully susceptible of a finding that it is consistent only with that of guilt. In passing upon the motion for acquittal, the Court, in view of the verdict of the jury, must consider the evidence in the most favorable light to the Government and must also recognize that when circumstantial evidence is strong and convincing, it may become an entirely satisfactory basis upon which to find a verdict of guilt.

In this proceeding there was a mass of testimony to consider and many intricate legal questions to solve, and

before determining defendant Sullivan's motion for acquittal, the Court deemed it advisable to defer such ruling until further consideration could be given to the question presented. Upon such further consideration and reflection, I am clear that the jury's verdict as to this defendant should not be disturbed. I conclude, therefore, that the motion of defendant Sullivan for acquittal must be denied.

It is so ordered.

638 An exception is reserved.

Sentence will be imposed on December 7, 1953 at ten o'clock A.M., at Chicago, Illinois.

Dated this 28th day of November, 1953.

Enter:

Gunnar H. Nordbye
United States District Judge

639 And afterwards, to wit, on the 7th day of December, 1953, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry, to wit:

640

UNITED STATES DISTRICT COURT
For the
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

JUDGMENT AND COMMITMENT

On this 7th day of December, 1953 came the attorney for the government and the defendant appeared in person and[1] by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of attempting to defeat and evade the payment of taxes (Section 145(b), Internal Revenue Code 26, U.S.C. Section 145(b), as charged[3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Three (3) Years on each of Counts 1 and 2 of the Indictment and besides that he forfeit and pay to the United States of America a fine in the sum of Two Thousand Five Hundred Dollars ($2,500.00) on each of said Counts 1 and 2 and that the terms of imprisonment shall run concurrently and that the defendant shall stand committed until said fines are paid or otherwise discharged by due process of law.

It Is Adjudged that[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Gunnar H. Nordbye
United States District Judge.

The Court recommends commitment to:[6]
December 7, 1953

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number ____" if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

641 And on the same day, to wit, the 7th day of December, 1953 came the Defendant Harold E. Sullivan by

his attorneys and filed in the Clerk's office of said Court his certain Motion for Pre-Sentence Investigation in words and figures following, to wit:

642

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION FOR PRE-SENTENCE INVESTIGATION.

Now comes the defendant Harold E. Sullivan and moves under Rule 32c of the Rules of Criminal Procedure, that a pre-sentence investigation be made and that under Rule 32c of the Rules of Criminal Procedure probation be granted.

Harold E. Sullivan,
Defendant

By William T. Kirby
His Attorney

643 And on the same, to wit, the 7th day of December, 1953 came the Defendant, Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Motion For Entry Of Order As To Time For Filing A Motion For A New Trial in words and figures following, to wit:

644

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION FOR ENTRY OF ORDER AS TO TIME FOR FILING A MOTION FOR A NEW TRIAL.

Now comes the defendant, Harold E. Sullivan and shows that heretofore on October 17th, 1953, the following occurred as appears from pages 5481 and 5482 of the Record:

"By Mr. Kirby: Now, your Honor, with respect to the defendant Sullivan, may all of the same orders appear—apply, I should say, in the event the motion for acquittal is denied, but with the time being extended?

By the Court: If the motion for acquittal is denied, but with the time being extended?

By the Court: If the motion for acquittal is denied, then I will impose sentence on defendant Sullivan and I will make such order then. I think I will make such orders then as I think necessary.

By Mr. Kirby: We can take it up then. The only problem that it presents is this: That the statute with respect to a motion for a new trial does key it, your Honor, to the date of the verdict and therefore, could we have an extension—

By the Court: Well, I haven't any objection to an order extending your right to make a motion for a
645 new trial within ten days after I impose sentence on the defendant Sullivan, if I deny your motion for acquittal."

That there should have been entered in the Clerk's Docket as of that date an order allowing the defendant Sullivan an order extending the right of the defendant Sullivan to make a motion for a new trial to any date prior to ten (10) days after imposition of sentence on the defendant Sullivan, but that through inadvertence such order was not entered and that it should be entered nunc pro tunc as of October 17, 1953.

Wherefore this defendant prays that such an order be entered as of October 17, 1953.

Harold E. Sullivan
Defendant

By William T. Kirby
His Attorney

646 And on, to wit, the 30th day of November, 1953 came the Defendant, Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Motion For A New Trial And Receipt Of Service, Attached Thereto, in words and figures following, to wit:

647

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MOTION OF HAROLD E. SULLIVAN FOR A NEW TRIAL.

The defendant, Harold E. Sullivan, files this motion for a new trial pursuant to the terms of the order of October 17, 1953, extending the time for filing said motion for a new trial, and without waiving any other motions; the defendant moving for a new trial for the following reasons:

1. The Court erred in denying the defendant Sullivan's motion for acquittal made at the conclusion of the Government's case.

2. The Court erred in denying Sullivan's motions made at the conclusion of the Government's case that Sullivan

   a. Be permitted to rest his case, and

   b. Be granted a judgment of acquittal, and

   c. If such acquittal be not granted, then be allowed a severance so as to go to the jury on the record as it then stood against the defendant Sullivan.

648 3. The Court erred in denying defendant Sullivan's motion for acquittal made at the conclusion of the evidence.

4. The verdict is contrary to the weight of the evidence.

5. The verdict is not supported by substantial evidence.

6. The Court erred in admitting documentary evidence for the Government not made by the defendant Sullivan or by or under any control, authority or knowledge of the defendant Sullivan, or under circumstances making same binding or admissible against defendant Sullivan.

7. The Court erred in admitting testimony of witnesses as to the alleged acts and statements of persons, made out of the presence of Sullivan and not under circumstances making same binding or admissible against defendant Sullivan.

8. The Court erred in admitting testimony of witnesses on matters as to which objections were made by counsel for the defense.

9. The Court erred in sustaining objections to questions put by counsel for the defense on cross examination of the Government's witnesses.

10. The Court erred in sustaining objections to cross examination of counsel for the defense which cross examination sought to use the contents of documents marked "Defendant's Exhibits".

649 11. The defendant Sullivan was substantially prejudiced and deprived of a fair trial by reason of, amongst other things, the attorney for the Government arguing the case against all of the defendants by the use of evidence which was not admitted against the defendant Sullivan.

12. The defendant Sullivan was substantially prejudiced and deprived of a fair trial by reason of, amongst other things, the admission into evidence of material not competent or admissible against Sullivan and which material had a prejudicial effect against Sullivan not cured by any instruction and which material the Government knew would be used and would prejudice Sullivan.

13. The Court erred in refusing to admit documentary evidence tendered by the defense.

14. The Court erred in restricting the defense in the proofs that were sought to be made with respect to the disclosure question.

15. The Court erred in the summarization of the positions of the Government and of the defendants (and particularly of the defendant Sullivan) which was given in the Court's charge.

16. The Court erred in instructing the jury that the presumption of innocence only remains until such time as "the Government has established his guilt beyond a reasonable doubt", which instruction starts at Transcript 5316.

650 17. The Court erred in its summary by repeated reference to the arrangements as being made between the Shotwell Company and Lubben and by repeated reference to the monies coming to Shotwell.

18. The Court erred in its summary at Transcript 5325 in referring to a "conference with the defendants Cain, Sullivan and Huebner" at the Pennsylvania Hotel

early in 1945; when there was no such conference; and this is particularly important in view of the question of the time when Sullivan first had any business conferences, or knowledge of business conferences with Lubben, as to overage payments.

19. The Court erred in summarizing the Government's contention, and again in summarizing the defendant's contention, in leaving out all specification of the start of the "trade" deals, although such deals were unquestioned at least in the beginning and were important.

20. The Court erred in its summary of the contentions of the defendant in that such summary is incomplete, inaccurate in some respects, and overlooked important matters relied upon, at least by the defendant Sullivan, as to the limited matters covered by the proof as to him.

21. The Court erred in his summary of the defendant's position particularly when the Court discussed with the jury the Cain admissions made orally and in writing, such errors consisting not only in the summary itself not stating fully the situation relating to such admissions orally and in writing, but further the jury would assume from the Court's including those matters in his gen-
651 eral discussion of the position of the defendants that such matters were binding upon or admissible against or could be considered in connection with the defendant Sullivan, although such matters had expressly not been offered by the Government with respect to the defendant Sullivan and were not in any way competent or in the record as against him.

22. The Court erred in his summary to the jury of the factual matter, particularly at the final summary beginning at page 5354 where he attempted to summarize the whole position of the defendants but that summary is incomplete and is particularly objectionable so far as the defendant Sullivan is concerned.

23. The Court erred in referring (at page 5347) to simply the language of the statute, for that is misleading in that form, particularly as coupled with the language defining a "person", making reference to its officers and certain duties of officers, and the coupling with the language of the aiding and abetting statute.

24. The Court erred in quoting verbatim the Aiding and Abetting Statute, as it did at Transcript 5348.

25. The Court erred in its instructions with respect to intent, and what proof would be sufficient to show intent, such instructions allowing improper presumptions to be made and improper inferences to be made.

26. The Court erred in its instruction with respect to the question of the money received in and paid out by the Shotwell Company in that said instruction does
652 not place the burden of proof upon that issue upon the Government but could be understood by the jury to put the burden of proof upon that issue upon the defendant.

27. The Court erred in the instructions given, with respect to the instruction, in its nature peremptory, given with respect to any excess of overages and not distinguishing as to the personal knowledge and intent of the individual defendants on such question.

28. The Court erred giving the instruction starting at page 5357 to the effect that the price to Shotwell included both the invoice amount and the over-ceiling amount.

29. The Court erred in giving the instruction at page 5361 that the violation of the OPA laws might be considered to show intent to violate the tax laws.

30. The Court erred in its instructions with respect to the disclosure and particularly in stating that such evidence (which had not been received with respect to the defendant Sullivan) might be considered as to the intent of the defendants, including Sullivan, to violate the income tax laws.

31. The Court erred in its instructions with respect to the so-called disclosure and its effect, particularly as it might affect the defendant Sullivan.

32. The Court erred in instructing the jury that the real question for them to decide was whether there was a willful intent by the defendants or any of them, allowing the jury to understand that the final question being posed to them by the Judge's charge could be resolved
653 against all or any one of the defendants if they found any one of the defendants to have the requisite willful intent.

33. The Court erred in giving the instruction with respect to any books, records or memoranda that may have been falsified in that the court merely advised the jury

that they should then scrutinize the remainder carefully, instead of advising the jury that the remainder might be disregarded except as they might be corroborated by other credible evidence.

34. The Court's instruction with respect to what circumstantial evidence may be was in error so far as the defendant Sullivan was concerned because it would allow the jury to believe they might consider acts, declarations or circumstances that relate to others against Sullivan even though not admissible against Sullivan.

35. The Court erred in giving the instruction with respect to the importance of the case to the Government and the Government's great concern, etc.

36. The Court erred in the final summary of what it stated to be the "controlling issues" in that so far as the defendant Sullivan is concerned, the definition is far broader and includes facts far greater than those facts applicable to the case of the defendant Sullivan.

37. The Court erred in refusing to make corrections of his charge in the respects to which such corrections were requested by counsel, starting at page 5394 of the record.

654 38. The Court erred in failing to distinguish in any way the case so far as the defendant Sullivan is concerned from the case so far as the other defendants were concerned; and as long as the Court was undertaking to summarize what the evidence was, the failure to so summarize the difference as to the status of the proof was error as to Sullivan.

39. The Court erred in its summary of facts in that while it stressed what was said by Graflund about the memorandum of in-and-out money at the cash box, there was no mention made at all of the testimony with respect to the memorandum by Gladys Morrill; the one who actually kept it.

40. The Court erred in its summary of the evidence in that although the Court called attention to certain deficiences in the proof of the defense because of the absence of records or memoranda, there was no such calling attention to glaring deficiencies in the records relied upon by the Government, particularly the entire absence of records that could be called book records of the Lubben companies other than the proprietorship.

41. The verdict of the jury and the rapid voting of eight verdicts show that it was reached as a result of

considering the evidence of all matters received as being applicable equally to all of the defendants, and that the jury did not separately and fully consider the limited evidence with respect to the defendant Sullivan and the verdict is not fair and proper; and as further grounds for a new trial, the defendant Sullivan hereby adopts
655 and repeats as fully as though set out herein all of those grounds numbered (one) through (34), both inclusive (and including sub-paragraphs through 79 of 34) set out in the Motion for a New Trial filed on behalf of the defendants, The Shotwell Manufacturing Company, Byron A. Cain and Frank J. Huebner.

And the defendant Sullivan prays that, if need be, leave be given to amend this Motion upon the argument thereof.

Harold E. Sullivan, Defendant
By William T. Kirby

656 In the District Court of the United States
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

RECEIPT OF SERVICE.

Received, a copy of the above and foregoing Motion of Harold E. Sullivan for a New Trial, this 30th day of November, A.D. 1953.

Otto Kerner, Jr.
U. S. Attorney
by E. Tillotson

657 And afterwards on, to wit, the 7th day of December, 1953 came the Defendant Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Motion To Arrest Judgment in words and figures following, to wit:

658

In the United States District Court
Northern District of Illinois

* * (Caption—No. 52 CR 143) * *

MOTION OF HAROLD E. SULLIVAN TO ARREST JUDGMENT.

Now comes Harold E. Sullivan and moves the Court to arrest judgment on the grounds set forth in the Motion

of defendants Shotwell Manufacturing Company, Byron A. Cain and Frank J. Huebner to arrest judgment.

Harold E. Sullivan,
Defendant
By William T. Kirby
His Attorney

659 And on the same day, to wit, the 7th day of December, 1953 came the Defendant Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Mition For Judgment Of Acquittal Notwithstanding The Verdict in words and figures following, to wit:

660

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

(Caption—No. 52 CR 143)

MOTION OF HAROLD E. SULLIVAN FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT.

Now comes Harold E. Sullivan and moves for judgment of acquittal notwithstanding the verdict on the grounds set forth in the motion of defendants Shotwell Manufacturing Company, Byron A. Cain and Frank J. Huebner for judgment of acquittal notwithstanding the verdict.

Harold E. Sullivan,
Defendant
By William T. Kirby
His Attorney

661 And on the same day, to wit, on the 7th day of December, 1953, nunc pro tunc as of October 17, 1953 being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

662

In the United States District Court
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

ORDER ON MOTION AS TO THE TIME FOR FILING A MOTION FOR NEW TRIAL.

It appearing that through inadvertence the order herein set out was not entered on October 17, 1953, although ordered to be entered by this Court.

It Is Ordered that the following order be entered nunc pro tunc as of October 17, 1953:

It Is Ordered that the time within which the defendant Sullivan may make a motion for a new trial is extended to any time prior to ten (10) days after imposition of sentence on the defendant Harold E. Sullivan.

Enter his 7th day of December, 1953.

Gunnar H. Nordbye
United States District Judge

663 And on the same day, to wit, on the 7th day of December, 1953, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following entry, to wit:

664

In the United States District Court
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

This cause coming on for hearing on the motion of the defendant Harold E. Sullivan for a new trial come the parties by their counsel and the defendant Harold E. Sullivan in his own proper person and the Court having heard the arguments of counsel and being fully advised it is

Ordered that the motion of the defendant Harold E. Sullivan for a new trial be and the same hereby is denied and an exception of the defendant is reserved.

665 And afterwards on, to wit, the 31st day of December, 1953 there was filed in the Clerk's office of said

Court a certain Memorandum Of The Court in words and figures following, to wit:

666

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

MEMORANDUM ON ORDER DENYING MOTION OF DEFENDANT HAROLD E. SULLIVAN FOR A NEW TRIAL.

On December 7, 1953, defendant Harold E. Sullivan made a motion for a new trial which the Court, after a hearing, denied. An order of denial was entered as of that day. At the time the order denying the motion was made, the Court stated that he reserved the right to file a memorandum which would be made a part of the order. This memorandum is made in accordance with that reservation. A statement of the Court's views as to some of the matters urged in support of the motion may be helpful.

667 Counsel contends that the Court unduly restricted the cross-examination of David Lubben, the principal witness for the Government. It appears that Lubben was on the witness stand for some six and one-half days. The Court permitted a wide latitude in his cross-examination as to all relevant matters which were at issue herein. But, as to certain fields of cross-examination, it became apparent that the defendants were attempting to inject collateral and irrelevant matters into the record which could only becloud the issues which the jury would be required to determine. Moreover, in considering any limitation upon the cross-examination of Lubben, it should be remembered that all of the defendants, including Sullivan, admitted that Shotwell received substantial overceiling payments of money from Lubben. The important questions in so far as Lubben's testimony was concerned were the amount of the payments, their duration, and to whom and the circumstances under which they were made. In my opinion, all the defendants were accorded full opportunity to cross-examine Lubben as to all material issues, and counsel were permitted to explore relevant transaction which Lubben claimed he had had with these defendants and with any others, which may

have had any tendency to bear upon his credibility or his motives with respect to the testimony which he gave at this trial.

Defendant Sullivan contends that the Court's instruction as to the presumption of innocence was incorrect. First, it may be observed that no exception was taken by him to the language which the Court used in so instructing the jury, and secondly, it seems clear that the belated criticism of the language is entirely devoid of any substance. Reference is also made to the portion of the charge in which the jury were instructed as to the admitted violation of the O.P.A. laws by each of the defendants and the consideration which the jury might accord
668 to that fact. In this respect, the jury were instructed as follows (pp. 5360-61, record):

"Those defendants are not charged with the violation of any OPA law, and an intent to violate the tax laws cannot be proven simply because there was an intent to violate the OPA law, or any other Federal law.

"The fact that the OPA laws were admittedly violated may be considered by you in so far as such circumstances may throw light upon the conduct of the parties, their failure to keep adequate books and records of the overpayments, and to explain or throw light upon their conduct in handling these transactions, and with reference to the question of intent or lack of intent to wilfully violate the tax laws.

"The fact that the OPA laws were admittedly violated may be considered by you in so far as such circumstances may throw light upon the conduct of the parties, their failure to keep adequate books and records of the overpayments, and to explain or throw light upon their conduct in handling these transactions, and with reference to the question of intent or lack of intent to wilfully violate the tax laws.

"The fact, if it be a fact, that the defendants, or some of them, committed offenses against the price control laws of the United States creates no presumption that such defendant or defendants committed the offenses here charged against him or them."

No exception was taken by defendant Sullivan to the language used by the Court in this instruction. However,

his criticism now is directed to the statement by the Court that the jury might consider the O.P.A. violations with reference to the question of intent or lack of intent to wilfully violate the tax laws. It seems evident that the portion of the instructions referred to, however, could not be considered as prejudicial to this defendant. It was the position of all of the defendants at the trial that the reason the over-ceiling payments were not entered on Shotwell's books was due to the fact that they knew that they were violating the O.P.A. laws, and they all contended that the absence of such entries on Shotwell's books was not due to any attempt on their part to con-
669 ceal the receipts from the Government as income of the corporation. That is, all of the defendants urged that they assumed that the over-ceiling payments made by Shotwell for raw materials would offset the receipts that Shotwell received from Lubben, and hence no tax was due the Government. Whether the O.P.A. violations and the manner in which they were handled on the books of the company or otherwise had any bearing upon the question of intent of these defendants to violate the tax laws was clearly within the province of the jury.

The motion for new trial stresses the summarization made by the Court in the instructions to the jury and although it is recognized that the Court's only purpose was to aid and assist the jury in arriving at a fair and just verdict, it is urged that the summarization nevertheless was incomplete as to the defendant Sullivan. Now, the Court realizes that Appellate Courts have on various occasions scrutinized carefully the trial court's attempt in its instructions in criminal cases to summarize the contentions of the parties. Undoubtedly, the Court must be scrupulously careful so that any summary of the evidence, or a statement of the positions of the parties, will be entirely impartial and devoid of any leaning one way or another which might influence the jury. However, a court's instructions to a jury should be something more than a mere statement of the abstract principles of law which are applicable to the issues involved. If juries are to decide cases intelligently they should have a clear understanding of the issues of fact which they are to decide, and this is particularly true in a long, protracted trial of some five weeks' duration. The Court's only purpose,

therefore, in attempting to summarize the contentions of the parties was to crystallize and clarify the issues which the jury would be required to determine. It should be noted that the Court took pains to admonish
670 the jury that the Court had not attempted to cover every detail of the defendants' testimony or their contentions herein, and specifically instructed them that if the Court's summations did not coincide with the jury's recollection or understanding of the testimony, or their deductions therefrom, they were to disregard what the Court had stated and rely entirely and exclusively upon their own recollection. Defendant Sullivan urges, however, that the Court, in stating the contentions of the defendants, failed to indicate in sufficient detail Sullivan's position as distinguished from the other defendants. He also contends that the Court failed to indicate that some of the summarization did not apply to defendant Sullivan because the portion of the summarization was not based upon testimony which had been received as to defendant Sullivan. Specific reference is made to the statement in the Court's instructions with respect to the alleged payments by Lubben to Huebner, and Huebner's alleged statements to Lubben as to the division of the moneys that were paid to him from time to time. But, in this connection, it should be remembered that one of the issues before the jury was whether these payments constituted income to Shotwell or whether they were made for the benefit of the individual defendants. The question, therefore, as to whether such payments constituted income to Shotwell was an issue as to Sullivan as well as to the other defendants. This portion of the instruction was made with specific reference to that question, and was couched in the following language (p. 5759, Record):

> " * * * In determining the issues of this case you have a right to take into consideration the manner in which such transactions involving overages were entered on the books of the Lubben companies in so far as they were entered and you have a right to take into consideration any records kept by Shotwell and also the testimony regarding the suggested division of the overages which were paid, together with all other facts and circumstances which may throw any light as to whether or not those overages constituted income to Shotwell.

671 "I charge you that to the extent that you find from the evidence that any cash payments for overages were received by individual defendants for their own benefit, then to such extent such payments would constitute income to such individual defendants and did not constitute taxable income to the Shotwell Manufacturing Company."

During the trial as the occasion required, this Court, at the request of counsel for defendant Sullivan, repeatedly stated to the jury that certain testimony was not competent and not received as to defendant Sullivan, and no exception was taken to the Court's rulings upon such objections, nor as to the manner in which the Court informed the jury that they should consider such testimony as being incompetent and not received as to defendant Sullivan. The Court in its instructions to the jury used the following language (p. 5366, Record):

"Any statement or act of any of the defendants not in the presence of another defendant is not binding upon the absent defendants, even though one or more of the defendants were mentioned in the conversation, nor are such matters competent evidence against any other defendant not present. I have limited, you will observe, certain evidence during the trial, from time to time, as being competent only as to certain defendant or defendants, that is, by way of example, what Mr. Huebner, or Mr. Cain may have said or done in the absence of Mr. Sullivan would not be binding or competent as to Mr. Sullivan. Likewise, what Mr. Huebner may have said or done not in the presence of Cain would not be binding on Cain, and what Mr. Cain may have said in the absence of Huebner would not be binding on Huebner."

This Court has no reason to assume that the jury did not give full effect to this admonition when it considered the summarizations made by the Court in its instructions and when it considered the sufficiency of the evidence as to defendant Sullivan's guilt.

Defendant Sullivan in his motion for a new trial also refers to the alleged prejudice arising as to him by the receipt in evidence of Cain's testimony, which was given by Cain on the motion to suppress. The jury were in-
672 formed at the time the testimony was received that the evidence was not admissible as to the defendant

Sullivan, and there is no reason to assume that any prejudice was created in the jurors' minds as to Sullivan by reason of the receipt of such evidence. When the motion to suppress was made before this Court, it was joined in by defendant Sullivan and made on his behalf as well as on the part of all the defendants. Cain's testimony on the motion to suppress was offered on behalf of all of the defendants, including Sullivan. And it should be noted that Cain's testimony at the hearing on the motion to suppress was substantially the same as that given at the trial. In any event, the testimony was admissible as to Cain and due precautions were taken to make it clear to the jury that the alleged admissions of Cain were not received as to defendant Sullivan.

Both Cain and Sullivan at the trial admitted certain over-ceiling payments to Shotwell by Lubben, but denied that they totaled the amount claimed. They both contended that all of the payments had been used to purchase raw corn and that no tax therefore was due the Government, and they denied any wilfull attempt to evade or defeat Shotwell's 1945 and 1946 taxes by filing or causing to be filed a false and fraudulent tax return for those years or either of them. Consequently, it should be emphasized that the position of the defendants at the trial with respect to their defense was substantially the same. Any attempt by the Court to make separate summaries for each defendant under the circumstances was not warranted and would have been more confusing than enlightening.

The Court is not unmindful that, in a protracted trial where there are several defendants, a jury has a substantial burden in keeping in mind the evidence which may have been admitted as to one defendant and not
673 received as to another defendant. The Court, however, gave to the jury in substance every instruction requested by defendant Sullivan and no request was made prior to the giving of the instructions that the Court should attempt to call to the jury's attention the various items of evidence which were not received as to defendant Sullivan. I am convinced that the verdict of guilty as to the defendant Sullivan was not due to the jury's inability to distinguish between evidence which was competent as to him and the evidence which was incompetent or inadmissible as to him. The instructions in

this regard were as explicit as defendant Sullivan requested, and when it is remembered that essentially the defendants took the same position in meeting the Government's proof on the controlling issues, the Court's instructions were sufficiently complete. And it should be noted that the Court made it clear that the case of each defendant was to be decided separately and as to each count (p. 5385, Record):

> "I have already indicated that these counts constitute a separate and distinct charge against each defendant and that it is necessary that you consider each count of the indictment separately and that you consider the guilt or innocence of each defendant separately as to each count. In reality, it is just as though you were trying eight separate cases, because we have four defendants, and we have two counts as to each. You must take up and consider separately each of these cases as you find the evidence bears upon each of them. Your verdict, of course, must be unanimous as to each count and as to each defendant regarding whom you render a verdict."

When the Court stated that "You must take up and consider separately each of these cases as you find the evidence bears upon each of them", the jury must have understood that they could not consider any evidence which was not received as to any one of the defendants on trial.

That the Court made it clear to the jury that the burden rested upon the Government to prove the guilt of each of these defendants beyond a reasonable doubt seems too apparent for serious question. The Court's charge
674 is replete with admonishments to the jury as to the burden which rested upon the Government to establish the guilt of each defendant as the law requires. The mere fact that the Court commented upon defendant's contention as to the disposition, for instance, of the moneys received from Lubben, and told the jury that if all of these over-ceiling payments received from Lubben were paid out for raw materials, there could be no tax due the Government therefrom and the defendants must be found not guilty, could not be construed as an inference that the burden shifted in anyway to the defendants to prove their innocence.

The instruction as to circumstantial evidence was couched in language which was almost verbatim with that requested by the defendant Sullivan. And in applying that instruction to the guilt or innocence of defendant Sullivan, the jury must have understood that they could only consider the circumstantial evidence which was applicable to his case.

Defendant Sullivan did not request a severance until the Government had rested. There was no way that the Court could grant the motion at that time without palpable prejudice to the remaining defendants. Moreover, the defendant Sullivan was given access to substantially all of the evidence that the Government introduced at the trial through pre-trial procedure which was accorded to all of the defendants with unusual latitude. Lubben's deposition was taken, as well as the other principal witnesses who appeared for the Government. All the books and records that the Government introduced at the trial were made available to the defendants prior to the trial. There was therefore not the slightest element of surprise which appeared in the Government's proof, and when defendant Sullivan failed to make a timely motion for severance, his failure to so move was with full knowledge of the nature and character of the Government's proof.

675 Comment has not been made on every ground urged by defendant Sullivan for a new trial, but it is my considered judgment that this defendant had a fair trial by an impartial jury, that the competent evidence admissible as to him was sufficient for the jury to find beyond a reasonable doubt that he was guilty of the offenses charged in the indictment, and that any error or irregularities which may have occurred during the trial as to him did not affect his substantial rights and do not constitute grounds for the granting of a new trial.

Let this memorandum be made a part of the Court's order of December 7, 1953, denying defendant Sullivan's motion for a new trial. It is so ordered.

Dated this 30th day of December, 1953.

Enter:

Gunnar H. Nordbye

United States District Judge

676 And, to wit, on the 7th day of December, 1953, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following three (3) entries, to wit:

677

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER DENYING MOTION OF HAROLD E. SULLIVAN FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT

The defendant Harold E. Sullivan having moved for judgment of acquittal notwithstanding the verdict on the grounds set forth in the motion of defendants Shotwell Manufacturing Company, Byron A. Cain and Frank J. Huebner for judgment of acquittal notwithstanding the verdict;

After due consideration,

It Is Hereby Ordered, that said motion be and the same is in all things denied.

An exception is reserved.

Dated, this 7th day of December, 1953.

Enter: Gunnar H. Nordbye
United States District Judge

678

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption No. 52 Cr. 143) • •

ORDER DENYING MOTION OF DEFENDANT HAROLD E. SULLIVAN TO ARREST JUDGMENT

The defendant Harold E. Sullivan having moved the Court to arrest the judgment on the grounds set forth in the motion of defendants Shotwell Manufacturing Company, Byron A. Cain, and Frank J. Huebner to arrest judgment; and

The Court having given due consideration to said motion,

It Is Hereby Ordered: that the said motion be and hereby is in all things denied.

Exception is reserved.

Dated this 7th day of December, 1953.

Enter: Gunnar H. Nordbye
United States District Judge

689

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

This cause coming on for hearing on the motion of the defendant Harold E. Sullivan for a pre-sentence investigation come the parties by their counsel and the defendant Harold E. Sullivan in his own proper person and the Court having heard the arguments of counsel and being fully advised it is

Ordered that the motion of the defendant Harold E. Sullivan for a pre-sentence investigation be and the same hereby is denied.

680 And on the same day, to wit, the 7th day of December, 1953 came the Defendant Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Motion For Continuance Of Bail in words and figures following, to wit:

681

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION FOR CONTINUANCE OF BAIL

Now comes the defendant, Harold E. Sullivan by his attorney, William T. Kirby, and moves the Court that the present bail be continued until the filing of Notice of Appeal within the time allowed by law; and that such bail be in the amount of Five Thousand Dollars ($5,000.00), after Notice of Appeal.

Harold E. Sullivan,
Defendant

By William T. Kirby
His Attorney

682 And on the same day, to wit, the 7th day of December, 1953 came the Defendants, Byron A. Cain, Frank J. Huebner and The Shotwell Manufacturing Company, a corporation, by their attorneys, and filed in the Clerk's office of said Court their certain Motion For An Order Directing That Defendants' And Plaintiff's Exhibits Be Sent To The Court Of Appeals In Lieu Of Copies Thereof in words and figures following, to wit:

683

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

MOTION OF CERTAIN DEFENDANTS FOR AN ORDER DIRECTING THAT DEFENDANTS' AND PLAINTIFF'S EXHIBITS BE SENT TO THE COURT OF APPEALS IN LIEU OF COPIES THEREOF.

The defendants, Byron A. Cain, Frank J. Huebner and the Shotwell Manufacturing Company, a corporation, by their attorneys, move for the entry of an order directing that such of the following material:

1. Exhibits introduced into evidence by either the defendants or the plaintiff at the trial of the above entitled case, or at any preliminary hearing in said case, and
2. Exhibits which were marked for identification by either the defendants or the plaintiff, at either the trial of the above entitled case or at any preliminary hearing in said case, but which the Court refused to receive in evidence,

as may be designated by a defendant or by the plaintiff as part of the record on appeal, and for which no copy is

684 And on the same day, to wit, on the 7th day of December, 1953, being one of the days of the regular December term of said Court, in the record of proceedings

thereof, in said cause, before the Honorable Gunnar H. Nordbye, District Judge, appears the following two (2) entries, tc wit:

685

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption--No. 52 CR 143) • •

ORDER FOR CONTINUANCE OF BAIL

The defendant Harold E. Sullivan, by his attorney William T. Kirby having moved the Court that the present bail be continued until the filing of Notice of Appeal by him within the time allowed by law, and that such bail be in the amount of Five Thousand Dollars ($5,000.00); after Notice of Appeal,

After due consideration,

It Is Ordered: That said motion be and the same is hereby granted.

Dated, this 7th day of December, 1953.

Enter: Gunnar H. Nordbye
United States District Judge

686

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

ORDER

On motion of the defendants, Byron A. Cain, Frank J. Huebner and the Shotwell Manufacturing Company, a corporation:

It Is Ordered that such of the following material:

1. Exhibits introduced into evidence by either the defendants or the plaintiff at the trial of the above entitled case, or at any preliminary hearing in said case, and
2. Exhibits which were marked for identification by either the defendants or the plaintiff, at either the trial of the above entitled case or at any preliminary hearing in said case, but which the Court refused to receive in evidence,

as may be designated by a defendant or by the plaintiff as

part of the record on appeal, and for which no copy
687 is substituted prior to the certification of such record by the clerk of this Court, shall be delivered to the clerk of this Court by the party or parties having possession thereof, and shall be transmitted by the clerk of this Court to the clerk of the United States Court of Appeals, to be retained by the said clerk for inspection and use by the Court of Appeals on any appeal from the judgments herein until final disposition of such appeals and then to be returned to this Court.

Enter:

Gunnar H. Nordbye
Judge

Dated: December 7, 1953.

688 And Afterwards on the 19th day of February, 1954, there were filed in the Clerk's office of said Court certain Government's Exhibits, in words and figures following, to wit:

1, 1A, 2-5, 6A-6B, 7, 10A-10F, 13, 14-14C, 23-23B, 24-24A, 25-25D, 26-26B, 27-27A, 28, 29B, 30, 30A-30D, 31-31E, 32-32A, 33-33A, 34-34C, 35-35H, 36-36A, 37-37A, 38-38B, 39-39A, 40-40E, 41-41A, 42-42A, 43, 44-44D, 45, 46-46A, 47-47B, 48, 49-49A, 50-50A, 51-51-B, 52-52B, 53-53A, 54-54A, 55-55C, 56-56B, 57-57A, 58-58A, 59-59A, 60-60B, 61-61B, 62-62A, 63-63B, 64-64B, 65-65C, 66-66C, 67-67B, 68-68A, 69-69A, 70-70A, 71-71A, 72-72A, 73-73A, 74-74A, 75-75A, 76-76A, 77-77A, 78-78A, 79-79A, 80-80A, 81-71A, 82-82A, 83-83A, 84-84A, 85-85A, 86-86A, 88-88A, 89-89A, 90-90A, 91-91A, 92-98, 100-102, 103-103A, 104-104A, 105-105A, 106-106A, 107-107A, 108-108A, 109-109A, 110-110A, 111-111B, 112, 113-113B, 114-114B, 115-115A, 116-116A, 117-117A, 118-118A, 119-119A, 120, 121-121F, 122-122A, 122C-122D, 123-123A, 124-124A, 125-125C, 126-126D, 127-132, 133-133B, 146-149, 151-152, 153-153A, 154, 155-155A, 156-156A, 157-157C, 158-158B, 159-159B, 160-160A, 160C, 162, 163-167, 168-168B, 169, 175-175A, 176, 177-177B, 178-178A, 185-187, 188A-188C, 189-189E, 200, 200C, 202, 203, 213, 214; and Government's Exhibits received in evidence at the hearing on November 12, 13 and 21, 1952, on defendants' motion to suppress certain evidence 1-5;

And On The Same Day the 19th day of February, 1954, there were filed in the Clerk's office of said Court certain Defendants' Exhibits, in words and figures following, to

wit: Exhibits received in evidence at the trial:
1A-1D, 6, 7, 8A-8D, 9-13, 14A-14B, 15A-15E, 15H-15J, 17A-17C, 18A-18B, 21A-21E, 36, 37, 38A-38M, 49-52, 54-59, 60A-60B, 61-611, 62-62M, 63-63A, 64A-64H, 64J-64N, 64T-64U, 65J. 66A-66S, 66V, 66W-66Y, 67A-67W, 69, 70-71, 72-73 (charts), 75A-75Z, 75AA, 77A-77W, 82-87, 91, 93, 94, 95-95B, 96-98, 100D, 100E, 100G, 102, 107, 108;
Defendants' Exhibits for Identification:
2-5, 19, 20A-20D, 26, 27, 28A-28D, 29A-29H, 31-35, 39-42, 53, 64W, 65A-65F, 65 K, 65N, 65P, 65Q-65X, 74, 76A-76H, 79-81, 88-90, 95C-95E, 99-99C, 100A-100C, 100F, 100H-100M, 101, 103-106; and Defendants' Exhibits received in evidence at the hearing on November 12, 13, and 21, 1952, on defendants' motion to suppress certain evidence 1, 19A-19H, 20.

689 And on, to wit, the 3rd day of December, 1953 came the Defendants, Respectively, The Shotwell Manufacturing Company, Byron A. Cain and Frank J. Huebner, by their respective attorneys, and filed in the Clerk's office of said Court their certain and respective Notice Of Appeal (Clerk's Certificate Of Mailing Attached Thereto) in words and figures following, to wit:

690

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

THE UNITED STATES OF AMERICA, Plaintiff, vs. THE SHOTWELL MANUFACTURING COMPANY, a corporation BYRON A. CAIN, HAROLD E. SULLIVAN, and FRANK J. HUEBNER, Defendants.	No. 52 CR 143

NOTICE OF APPEAL

Name and Address of Appellant:
The Shotwell Manufacturing Company
c/o Wallace R. Sallo
231 South LaSalle Street
Chicago 4, Illinois

Name and Address of Appellant's Attorney:
Thomas C. McConnell
134 South LaSalle Street
Chicago 3, Illinois

Offense:

Violation (in two counts) of Section 145(b) of the Internal Revenue Code with regard to the tax returns of the appellant for the years 1945 (Count I) and 1946 (Count II).

Judgment:

Judgment entered October 17, 1953, for a fine of $10,000.00 against The Shotwell Manufacturing Company on each of Counts I and II, and for costs of suit, etc.

I, the above-named appellant, hereby appeal to
691 the United States Court of Appeals for the Seventh Circuit from the above-entitled judgment.

The Shotwell Manufacturing Company
By Thomas C. McConnell
Its Attorney

December 3, 1953.

692

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

THE UNITED STATES OF AMERICA, Plaintiff, vs. THE SHOTWELL MANUFACTURING COMPANY, a corporation BYRON A. CAIN, HAROLD E. SULLIVAN, and FRANK J. HUEBNER, Defendants.	No. 52 CR 143

NOTICE OF APPEAL

Name and Address of Appellant:
Byron A. Cain,
1155 Mohawk
Wilmette, Illinois

Name and Address of Appellant's Attorney:
Vincent O'Brien
105 South LaSalle Street
Chicago 3, Illinois

Offense:

Violation (in two counts) of Section 145(b) of the Internal Revenue Code with regard to the tax returns of The Shotwell Manufacturing Company for the years 1945 (Count I) and 1946 (Count II).

Judgment:

Entered October 17, 1953, committing the said Byron A. Cain for three years and fining him in the sum of $5,000.00 on each of Counts I and II, the terms of imprisonment to run concurrently.

I, the above-named appellant, hereby appeal to
693 the United States Court of Appeals for the Seventh Circuit from the above-stated judgment.

Vincent O'Brien
Attorney for the Appellant,
Byron A. Cain

December third, 1953.

694

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
THE SHOTWELL MANUFACTURING COMPANY, a corporation BYRON A. CAIN, HAROLD E. SULLIVAN, and FRANK J. HUEBNER,
Defendants.
No. 52 CR 143

NOTICE OF APPEAL

Name and Address of Appellant:

Frank J. Huebner
6619 West North Avenue
Oak Park, Illinois

Name and Address of Appellant's Attorney:

Vincent O'Brien
105 South LaSalle Street
Chicago 3, Illinois

Offense:

Violation (in two counts) of Section 145(b) of the Internal Revenue Code with regard to the tax returns

of The Shotwell Manufacturing Company for the years 1945 (Count I) and 1946 (Count II).

Judgment:

Entered October 17, 1953, committing the said Frank J. Huebner for three years and fining him in the sum of $1,000.00 on each of Counts I and II, the terms of imprisonment to run concurrently.

I, the above-named appellant, hereby appeal to
695 The United States Court of Appeals for the Seventh Circuit from the above-named judgment.

Vincent O'Brien
Attorney for the Appellant,
Frank J. Huebner

December third, 1953.

United States of America)
Northern District of Illinois) ss.

696

• • (Caption—No. 52 CR 143) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on December 3, 1953, in accordance with Rule 73(b) of the Federal Rules of Civil and Criminal Procedure, a copy of the foregoing Notices of Appeal were mailed to:

Hon. Kenneth J. Carrick, Clerk
U. S. Court of Appeals, Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

Hon. Otto Kerner, Jr.
U. S. Attorney
450 U. S. Court House
Chicago 4, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 3rd day of December, 1953.

Roy H. Johnson
Clerk
By Beverly V. Peters
Deputy Clerk

(Seal)

697 And, on the same day, to wit, on the 3rd day of December, 1953, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable J. S. Perry, District Judge, appears the following entry, to wit:

698

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

ORDER.

Upon the respective motions of defendants, Byron A. Cain and Frank J. Huebner, by their attorney, Vincent O'Brien, the United States Attorney being present in open court by Edward J. Calihan, Jr.,

It Is Ordered that the bonds now respectively tendered in open court by the defendants Cain and Huebner, each in the sum of $5,000.00, be and they are hereby approved and ordered filed instanter.

And it appearing to the Court that the defendants, The Shotwell Manufacturing Company, Byron A. Cain and Frank J. Huebner, have today filed their respective notices of appeal within the time required by law.

It Is Ordered that the sentences respectively imposed in the above-entitled cause on October 17, 1953, that The Shotwell Manufacturing Company be fined $10,000. on each of Counts I and II and for costs of suit; that Byron A. Cain be fined $5,000. on each of Counts I and II; and that Frank J. Huebner be fined $1000. on each of said Counts, be and each of them is hereby stayed pending disposition of said appeals and until the further order of the Court upon such disposition.

Enter:

J. S. Perry
Judge

Dated: Dec. 3, 1953.

699 And on the same day, to wit, the 3rd day of December, 1953 there were filed in the Clerk's office of said Court two (2) certain Bonds, Re: Byron A. Cain anld Frank J. Huebner, in words and figures following, to wit:

700

Power of Attorney

No. 222

Know All Men By These Presents:

That the United Pacific Insurance Company, a corporation of the State of Washington, having its principal offices in the city of Tacoma, Washington, pursuant to authority granted by By-Law No. 37-A of its By-Laws, which reads as follows:

"The President, any Executive Vice-President, any other Vice-President, any Assistant Vice-President, or any Resident Vice-President of this Corporation, shall have authority to appoint in writing such attorneys-in-fact as the business of the Company may require, and to authorize such attorneys-in-fact, and each of them, to execute on behalf of the Company, any bonds, recognizances, stipulations, contracts of indemnity and other undertakings of like character, or to exercise any lesser number of said powers as hereinbefore set forth.

"Said appointments shall be attested by the Secretary or an Assistant Secretary of this Corporation under its seal. The President, any Executive Vice-President, any other Vice-President, any Assistant Vice-President, or any Resident Vice-President may revoke any appointment made pursuant hereto, and revoke any and all authority conferred by any such appointment."

does hereby nominate, constitute and appoint

Wm. Markheim or C. W. Olson, Jr. or Robert F. Olson or Robert Shannon its true and lawful Attorney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed,

a recognizance or bail bond to be filed in the District Court of the United States of America within the State of Illinois, provided, however, that no such bond shall exceed the total sum of ten thousand dollars ($10,000.00).

The execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Tacoma, Washington, in their own proper persons.

In Witness Whereof, the United Pacific Insurance Company has caused these presents to be signed by its Resident Vice-President and its corporate seal to be hereto

affixed, duly attested by its Assistant Secretary, this 15th day of September 1952.

United Pacific Insurance Company
By Fred Jacobsen (Seal)
Fred Jacobsen, Resident Vice-President

Attest: Walter Landsberg
Walter Landsberg, Assistant Secretary

State of Illinois } ss.
County of Cook }

On this 15th day of December 1952, before me, the undersigned, a Notary Public in and for the State of Illinois, duly commissioned and sworn, personally appeared Fred Jacobsen and Walter Landsberg to me known to be the Resident Vice-President and Assistant Secretary, respectively, of United Pacific Insurance Company, the corporation that executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

Glenna Jarrell
Notary Public in and for the State of Illinois, residing at Chicago, Illinois
My Commission Expires Nov. 1, 1955

701

Know all Men by these Presents, That Byron A. Cain State of Illinois as principal, and United Pacific Insurance Company By: William Markheim, Attorney-in-fact 2600 Leland Avenue, Chicago State of Illinois, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand Dollars ($5000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this day of , In the Year of our Lord, One thousand nine Hundred and fifty three.

Whereas, lately on the 17th day of October, 1953, at the October Term of the United States District Court for the Northern District of Illinois Eastern Division, in a cause pending in said Court between the United States of America, Plaintiff, and Byron A. Cain, Defendant, a judgment and sentence were rendered against said Byron A. Cain and the said Byron A. Cain having filed in the office of the Clerk of said United States District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit from the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and whereas said appeal is to operate as a supersedeas upon filing of this bond.

Now the Condition of Said Obligation Is Such, That if the said Byron A. Cain shall appear in person in the United States Court of Appeals for the Seventh Circuit on the day of , A. D. 19 , of the October Term 1953, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Court of Appeals for the Seventh Circuit, in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed and if he shall appear for trial in the United States District Court for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Court of Appeals for the Seventh Circuit, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

And in the event that default be made in the condition of this writing obligatory as herein provided, it shall be lawful for and the undersigned irrevocably authorize and empower the United States Attorney of said District, whoever he may be, or any Assistant United States Attorney of said District, or any Attorney authorized to appear in the United States District Court of said District, to appear for us in the said United States District Court at any time thereafter and confess a judgment in the amount of this obligation, together with costs, in favor of the United States of America and against

the undersigned, without process and without a trial by jury, the undersigned hereby waiving the right of a trial by jury, and we do hereby waive and release all errors which may intervene in any such proceedings, and consent to the immediate issuance of execution upon said judgment, and we do hereby ratify and confirm all that said attorney may do by virtue hereof.

If this bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the United States District Court or the Northern District of Illinois, Eastern Division against each of the undersigned jointly and severally for the amount above stated together with interests and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

Byron A. Cain (Seal)
4545 Bdway Chgo (Seal)
United Pacific Insurance Co. (Seal)
By: Wm. Markheim (Seal)

Signed and acknowledged before me this 3rd day of December 1953.

William E. Keeley, Jr.
Deputy Clerk

Approved:
J. S. Perry
United States District Judge

Approved:
Daniel P. Ward
Asst. U. S. Attorney

702

Power of Attorney

No. 224

Know All Men By These Presents;

That the United Pacific Insurance Company, a corporation of the State of Washington, having its principal offices in the city of Tacoma, Washington, pursuant to authority granted by By-Law No. 37-A of its By-Laws, which reads as follows:

"The President, any Executive Vice-President, any other Vice-President, any Assistant Vice-President, or any Resident Vice-President of this Corporation, shall have authority to appoint in writing such attorneys-in-fact as the business of the Company may require, and to

authorize such attorneys-in-fact, and each of them, to execute on behalf of the Company, any bonds, recognizances, stipulations, contracts of indemnity and other undertakings of like character, or to exercise any lesser number of said powers as hereinbefore set forth.

"Said appointments shall be attested by the Secretary or an Assistant Secretary of this Corporation under its seal. The President, any Executive Vice-President, any other Vice-President, any Assistant Vice-President, or any Resident Vice-President may revoke any appointment made pursuant hereto, and revoke any and all authority conferred by any such appointment."

does hereby nominate, constitute and appoint

Wm. Markheim or C. W. Olson, Jr. or Robert F. Olson or Robert Shannon its true and lawful Attorney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed,

a recognizance or bail bond to be filed in the District Court of the United States of America within the State of Illinois, provided, however, that no such bond shall exceed the total sum of ten thousand dollars ($10,000.00).

The execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Tacoma, Washington, in their own proper persons.

In Witness Whereof, the United Pacific Insurance Company has caused these presents to be signed by its Resident Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 15th day of September 1952.

United Pacific Insurance Company
By Fred Jacobsen (Seal)
Fred Jacobsen, Resident Vice-President

Attest: Walter Landsberg
Walter Landsberg, Assistant Secretary

State of Illinois)
County of Cook) ss.

On this 15th day of December 1952, before me, the undersigned, a Notary Public in and for the State of Illinois, duly commissioned and sworn, personally appeared Fred Jacobsen and Walter Landsberg to me known

to be the Resident Vice-President and Assistant Secretary, respectively, of United Pacific Insurance Company, the corporation that executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

Glenna Jarrell
Notary Public in and for the State of Illinois,
residing at Chicago, Illinois
My Commission Expires Nov. 1, 1955

703

Know all Men by these Presents, That Frank J. Huebner State of Illinois as principal, and United Pacific Insurance Company By: William Markheim, Attorney-in-fact 2600 Leland Avenue, Chicago State of Illinois, as sureties, are held and firmly bound unto the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this day of , In the Year of our Lord, One thousand nine Hundred and fifthy three.

Whereas, lately on the 17th day of October, 1953, at the October Term of the United States District Court for the Northern District of Illinois Eastern Division, in a cause pending in said Court between the United States of America, Plaintiff, and Frank J. Huebner, Defendant, a judgment and sentence were rendered against Frank J. Huebner and the said Frank J. Huebner having filed in the office of the Clerk of said United States District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit from the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and whereas said appeal is to operate as a supersedeas upon filing of this bond.

Now the Condition of Said Obligation Is Such, That if the said Frank J. Huebner shall appeal in person in the United States Court of Appeals for the Seventh Circuit

on the day of , A. D. 19 , of the October Term 1953, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Court of Appeals for the Seventh Circuit, in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed and if he shall appear for trial in the United States District Court for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Court of Appeals for the Seventh Circuit, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

And in the event that default be made in the condition of this writing obligatory as herein provided, it shall be lawful for and the undersigned irevocably authorize and empower the United States Attorney of said District, whoever he may be, or any Assistant United States Attorney of said District, or any Attorney authorized to appear in the United States District Court of said District, to appear for us in the said United States District Court at any time thereafter and confess a judgment in the amount of this obligation, together with costs, in favor of the United States of America and against the undersigned, without process and without a trial by jury, the undersigned hereby waiving the right of a trial by jury, and we do hereby waive and release all errors which may intervene in any such proceedings, and consent to the immediate issuance of execution upon said judgment, and we do hereby ratify and confirm all that said attorney may do by virtue hereof.

If this bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the United States District Court or the Northern District of Illinois, Eastern Division against each of the undersigned jointly and severally for the amount above stated together with interests and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

Frank J. Huebner
6619 W. North Av.
Oak Pk. Ill. (Seal)
United Pacific Insurance Co. (Seal)
By: Wm. Markheim (Seal)
Attorney-in-Fact

Signed and acknowledged before me this 3rd day of December, 1953.
William E. Keely, Jr.
Deputy Clerk

Approved:
J. S. Perry
United States District Judge

Approved:
Daniel P. Ward
Asst. U. S. Attorney

704 And afterwards on, to wit, the 14th day of December, 1953 came the Defendant, Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Notice Of Appeal (Clerk's Certificate Of Mailing Attached Thereto) in words and figures following, to wit:

705

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
THE SHOTWELL MANUFACTURING COMPANY, a corporation, BYRON A. CAIN, HAROLD E. SULLIVAN and FRANK J. HUEBNER,
Defendants.
No. 52 CR 143

NOTICE OF APPEAL

Name and Address of Appellant:
Harold E. Sullivan
1140 Romona Road
Wilmette, Illinois

Name and Address of Appellant's Attorney:
William T. Kirby
1 North LaSalle Street
Chicago 2, Illinois

Offense:
Violation (in two counts) of Section 145(b) of the Internal Revenue Code with regard to the tax returns of The Shotwell Manufacturing Company for the years 1945 (Count I) and 1946 (Count II).

Judgment:
Entered December 7, 1953, committing the said Harold E. Sullivan for three years and fining him in the sum of $2,500.00 on each of Counts I and II, the terms of imprisonment to run concurrently.

I, the above-named appellant, hereby appeal to
706 the United States Court of Appeals for the Seventh Circuit from the above-stated judgment.

William T. Kirby
Attorney for the Appellant
Harold E. Sullivan.

December 14, 1953.

707

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on December 14, 1953, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Honorable Otto Kerner, Jr., U. S. Atty.
450 U. S. Court House
Chicago 4, Illinois

Honorable Kenneth J. Carrick, Clerk
U. S. Court of Appeals, Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 14th day of December, 1953.

Roy H. Johnson
Clerk

By Gizella Butcher
Deputy Clerk

(Seal)

708 And on the same day, to wit, on the 14th day of December, 1953, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable J. S. Perry, District Judge, appears the following entry, to-wit:

709

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division
* * (Caption—No. 52 CR 143) * *

ORDER

Upon the motion of Defendant Harold E. Sullivan, by his attorney William T. Kirby, the United States Attorney by Edward J. Calihan, Jr., being present in open Court,

It Is Ordered that the bond now tendered in open court by said defendant Sullivan in the sum of Five Thousand ($5,000.00) Dollars be and it is hereby approved and ordered filed instanter.

And it appearing to the court that the defendant Sullivan has today filed his Notice of Appeal within the time required by law,

It Is Ordered that the sentences respectively imposed upon him in the above entitled cause on December 7, 1953 that he be fined $2,500.00 on each of Counts I and II be and each of them is hereby stayed pending disposition of said Appeal and until further order of the Court upon such disposition.

Enter, this 14th day of December 1953.

J. S. Perry
United States District Judge

710 And on the same day, to wit, the 14th day of December, 1953 came the Defendants-Appellants, The Shotwell Manufacturing Company, a corporation, Byron A. Cain and Frank J. Huebner, by their attorneys and filed in the Clerk's office of said Court their certain Designation Of Contents Of Record On Appeal To The Court Of Appeals For The Seventh Circuit in words and figures following, to wit:

711

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 52 CR 143) • •

DESIGNATION OF CONTENTS OF RECORD ON APPEAL TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Clerk of the United States District Court, Northern District of Illinois, Eastern Division.

The Defendant-Appellants, The Shotwell Manufacturing Company, a corporation, Byron A. Cain, and Frank J. Huebner, hereby designate the following as the portions of the record, proceedings and evidence to be contained in the record on their appeal to the United States Court of Appeals for the Seventh Circuit:

1. Placita.
2. Statement required by Rules 10(b) of the Rules of the United States Court of Appeals.
3. Indictment, filed March 14, 1952.
4. Appearance of Harold Sullivan by Edward J. Hess, filed March 17, 1952.
5. Appearance of The Shotwell Manufacturing Co., Cain and Huebner, by Edward J. Hess, filed March 26, 1952.
6. Appearance of Vincent O'Brien as additional counsel for defendants, filed April 15, 1952.
7. Bill of Particulars, filed May 19, 1952.
8. Defendants' motion to dismiss indictment, filed June 2, 1952.
9. Order entered June 2, 1952, for rule on Government to file answer, if any, to defendants' motion

712 to dismiss within three days.

10. Demurrer of plaintiff to motion to dismiss indictment, filed June 5, 1952.
11. Defendants' motion for one hearing on motion to dismiss, filed June 11, 1952.
12. Order entered June 13, 1952, overruling and denying motion of defendants for one hearing on their motion to dismiss.
13. Amendment to motion of defendants to dismiss the indictment, filed June 23, 1953.

14. Order entered June 23, 1952, granting leave defendants to file instanter amendment to their motion to dismiss the indictment; order Government's demurrer to stand and defendants' motion to dismiss the indictment overruled and denied. On motion Government order cause set for arraignment and plea and to set for trial on June 26, 1952.
15. Order by agreement cause advanced for arraignment and plea and to set for trial to June 24, 1952. Defendants waive reading of indictment and enter pleas of not guilty. Order Government's motion to set cause for trial continued to September 9, 1952 at 2:00 P. M., entered June 24, 1952.
16. Transcript of proceedings had before Judge Barnes on June 19, 20, 23, and 24, 1952, filed July 8, 1952.
17. Subpoena duces tecum issued to The Shotwell Manufacturing Company, filed September 4, 1952.
18. Objections of the defendants and their motion to quash subpoena duces tecum issued to The Shotwell Manufacturing Company, returnable August 6, 1952, and affidavit, filed August 15, 1952.
19. Designation of Chief Justice of the United States of Honorable Gunnar H. Nordbye, U. S. Judge District of Minnesota, to try case, filed August 18, 1952.
20. Order entered September 9, 1952, setting cause for trial December 1, 1952.
21. Order entered September 16, 1952, denying objections of defendants to subpoena duces tecum issued to The Shotwell Manufacturing Company and that defendants produce documentary evidence.
22. Motion of defendants for a subpoena for production of documentary evidence pursuant to Rule 17 of the Federal Rules of Criminal Procedure, filed October 6, 1952.
23. Order entered October 3, 1952, that defendants' motion for discovery and inspection, defendants' motion for subpoena for production of documentary evidence and defendants' motion to set for hearing their motion to suppress and for issuance of subpoena set for hearing October 17, 1952.

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24. Motion of defendants to suppress certain evidence, etc., filed October 6, 1952.
25. Order entered October 17, 1952, on defendants' motion under Rule 17 for subpoena for production of documentary evidence that subpoena duces tecum issue.
26. Order entered October 17, 1952, on defendants' motion for discovery and inspection pursuant to Rule 16 granting said motion in part and overruling in part.
27. Order entered October 31, 1952, setting hearing on defendants' motion to suppress certain evidence and for hearing November 12, 1952, and order subpoena duces tecum to issue directing plaintiff to produce certain documents at said hearing.
28. Order entered November 12, 1952, cause called for hearing on defendants' motion to suppress certain evidence. Order leave defendants to file instanter amendment to motion to suppress certain evidence.
29. Amendment to motion of defendants to suppress evidence, etc., filed November 12, 1952.
30. Motion of defendants to have plaintiff produce certain manuals, directives, etc., filed November 21, 1952.
31. Order entered November 21, 1952, overruling and denying defendants' motion for production certain manuals, directives, etc.
32. Transcripts of proceedings before Judge Nordbye on November 12, 13, and 21, 1952.
33. Order entered November 21, 1952, overruling and denying defendants' motion to suppress evidence.
34. Motion of defendants for continuance, filed November 24, 1952.
35. Order entered November 25, 1952, on motion defendants that cause continued for trial to December 9, 1952.
36. Affidavit of Gerome J. Leone, filed December 26, 1952.
37. Objections of the defendants to affidavit of Gerome J. Leone, filed December 26, 1952.

38. Transcript of proceedings before Judge Nordbye at Duluth, Minnesota, December 3, 1952.
39. Order dated December 3, 1952, from District of Minnesota, Fifth Division, taking Government motion for continuance under advisement, filed December 12, 1952.
714 40. Order entered December 24, 1952, leave to withdraw appearance of Edward J. Hess and Vincent O'Brien attorneys for defendants Byron A. Cain and Harold E. Sullivan, and that appearance of Thomas C. McConnell as attorney for Byron A. Cain and William T. Kirby for Harold E. Sullivan be entered of record.
41. Motion of defendants to dismiss under Rule 48 (b), filed December 26, 1952, because of Government's delay.
42. Order entered December 26, 1952, that defendants' motion to dismiss under Rule 48(b) overruled and denied and on motion of Government order cause continued for trial to April 6, 1953. Order examination of certain records under order of October 31, 1952 deferred until March 9, 1953.
43. Order entered January 29, 1953, and memorandum, amending order of October 31, 1952.
44. Motion of plaintiff to reset date for trial to April 20, 1953, filed April 6, 1953.
45. Affidavit of Arthur B. Cunningham, filed April 6, 1953.
46. Transcript of record before Judge Nordbye April 3, 1953, filed April 30, 1953.
47. Order entered April 3, 1953, continuing case for trial to April 20, 1953.
48. Motion of Government for continuance and affidavit of Arthur B. Cunningham, filed April 20, 1953.
49. Transcript of proceedings before Judge Nordbye, April 17, 1953 (Vol. I and II), filed June 1, 1953.
50. Order entered April 17, 1953, continuing cause for trial to September 8, 1953.
51. Order entered July 14, 1953, resetting cause for trial from September 8, 1953 to September 14, 1953.

52. Motion for leave to file additional motion of the defendants in the nature of a special plea in bar to dismiss the indictment, filed July 28, 1953.
53. Additional motion of the defendants in the nature of a special plea in bar to dismiss the indictment, filed July 28, 1953.
54. Copy of letter to Judge Nordbye, dated March 30, 1953, from Vincent O'Brien, filed September 14, 1953.
55. Order entered July 28, 1953, granting leave to defendants to file additional motion to dismiss, and denying said motion.

715 56. Motion of defendants to amend and supplement paragraph 4 of their motion to dismiss the indictment and affidavit, and Exhibits D and E, filed September 14, 1953.

57. Motion of William J. Giglio with affidavits and copies subpoenas, filed September 14, 1953.
58. Order entered September 16, 1953, granting motion to quash subpoenas duces tecum served on Giglio.
59. Order entered September 14, 1953, leave to Vincent O'Brien to withdraw his appearance as attorney for The Shotwell Manufacturing Company and leave to Thomas C. McConnell to enter his appearance for said defendants; leave to Thomas C. McConnell to withdraw his appearance as attorney for Byron A. Cain and leave Vincent O'Brien to enter his appearance for said defendant.
60. Motion of Cain, Huebner and Shotwell for judgment of acquittal on Count I, filed September 30, 1953.
61. Motion of Shotwell for judgment of acquittal on Counts I and II, filed September 30, 1953.
62. Motion of Sullivan for judgment of acquittal, filed September 30, 1953.
63. Motion of Sullivan, Cain, Huebner and Shotwell that certain testimony be stricken, etc., filed September 30, 1953.
64. Order entered September 30, 1953, deferring ruling on motion to strike certain testimony and motions defendants Sullivan and Shotwell for

judgment of acquittal and motion Shotwell, Cain and Huebner for judgment of acquittal as to Count I.

65. Motion defendant Sullivan for severance, filed October 1, 1953.
66. Motion defendant Sullivan for acquittal, filed October 1, 1953.
67. Motion of defendants for mistrial, etc., filed October 1, 1953.
68. Orders entered October 1, 1953: denying defendants' motion to strike certain testimony; denying motion defendants Sullivan and Shotwell for judgment of acquittal; denying motion Cain and Huebner for judgment of acquittal as to Count I; denying motion defendant Sullivan showing that case is concluded as to him and for severance and defendant Sullivan motion at close of all evidence as to him for judgment of acquittal and that he be discharged. Jury polled with respect to a newspaper article and radio broadcast mentioned in defendants' motion.
69. Orders entered October 13, 1953: denying motion of defendants to amend and supplement paragraph 4 of their motion to dismiss the indictment. At close of all the evidence defendant Sullivan moves
716 for judgment of acquittal. Arguments heard and concluded. Ruling on said motion reserved. Defendant Shotwell moves for judgment of acquittal and defendants Cain and Huebner move for a judgment of acquittal as to Count I and said motions denied.
70. Pages from Cain's testimony, 143 to and including 226 (Exhibit C), filed October 17, 1953.
71. Defendants' request for instructions, filed October 17, 1953.
72. Defendants' requested instructions, filed October 17, 1953.
73. Order entered October 16, 1953: The court instructs the jury. Alternate Juror Rose E. Blondin discharged. Marshal sworn. Jury retired to consider its verdict. Jury returns verdict finding defendants guilty as charged in both counts of the indictment. Jury polled and affirm their verdict.

74. Verdict, returned October 16, 1953.
75. Motion of defendants to defer imposition of sentences, re bail, etc., filed October 17, 1953.
76. Orders entered October 17, 1953: Motion of Sullivan for judgment of acquittal taken under advisement. Order defendant Shotwell fined $10,000 on each of Counts I and II and costs. Defendant Cain committed to the custody of the Attorney General for a period of 3 years and fined $5,000 on each of Counts I and II. Terms of imprisonment to run concurrently. Defendant Huebner committed to custody of Attorney General for a period of three years and fined $1,000 on each of Counts I and II. Terms of imprisonment to run concurrently. Leave to defendants to file motions for acquittal notwithstanding the verdict, for new trial and in arrest of judgment within 10 days. On motion of defendants execution of sentence stayed pending disposition of motions. Present bond stands. Order in event defendants' motions are denied and appeals are taken, the appeal bonds are fixed at $5,000 as to each defendant.
77. Judgment and commitment as to Frank J. Huebner, entered October 17, 1953.
78. Judgment and commitment as to Byron A. Cain, entered October 17, 1953.
79. Motion of Shotwell, Cain and Huebner for new trial, filed October 26, 1953.
80. Motion of Shotwell, Cain and Huebner in arrest of judgment, filed October 26, 1953.
81. Motion of Shotwell, Cain and Huebner for judgment of acquittal notwithstanding the verdict, filed October 26, 1953.

717 82. Notice re preceding three motions, filed October 26, 1953.

82a. Motion Shotwell, Cain and Huebner that judgments rendered against them be vacated until determination motions of acquittal, etc., filed November 30, 1953.
83. Order dated November 12, 1953, that present bail be continued until the filing of notice of appeal.
84. Findings of the Court on defendants' motion to suppress, made a part of the Court's order of

November 21, 1952, denying defendants' motion to suppress, dated November 28, 1953.

85. Order dated November 28, 1953, denying motion of Shotwell, Cain and Huebner for a new trial.
86. Order dated November 28, 1953, denying motion of Shotwell, Cain, and Huebner to arrest judgment.
87. Order dated November 28, 1953, denying motion for judgment of acquittal notwithstanding the verdict of Shotwell, Cain and Huebner.
88. Order dated November 28, 1953, denying motion of Shotwell, Cain, and Huebner that judgment rendered against them on October 17, 1953, be vacated until hearing and determination of their motions for acquittal, etc.
89. Order denying motion of defendant Sullivan for acquittal notwithstanding the verdict, dated November 28, 1953.
90. Order defendant Sullivan committed three years and fined $2500.00 on each Counts I and II. Sentence to run concurrently; defendant to stand committed until fine paid. On motion present bond to stand until filing notice of appeal. Appeal bond fixed $5,000.00, entered December 7, 1953.
91. Motion defendant Sullivan for pre-sentence investigation filed December 7, 1953.
92. Motion defendant Sullivan for order as to time for filing motion for new trial, filed December 7, 1953.
93. Motion of defendant Sullivan for new trial, filed November 30, 1953.
94. Motion of defendant Sullivan to arrest judgment, filed December 7, 1953.
95. Motion of defendant Sullivan for judgment of acquittal notwithstanding the verdict, filed December 7, 1953.
96. Order time within defendant Sullivan may make motion for new trial extended to any time prior to 10 days after imposition of sentence. Order entered nunc pro tunc as of 10-17-53.
97. Order entered December 7, 1953, denying motion defendant Sullivan for new trial.

718 98. Order entered December 7, 1953, denying motion defendant Sullivan for judgment of acquittal notwithstanding the verdict.

99. Order entered December 7, 1953, denying motion defendant Sullivan to arrest judgment.

100. Order entered December 7, 1953, denying motion defendant Sullivan for pre-sentence investigation.

101. Motion for continuance of bail, filed December 7, 1953.

102. Order for continuance of bail, entered December 7, 1953.

103. Order entered December 7, 1953, directing defendants' and plaintiff's exhibits to be sent to Court of Appeals in lieu of copies.

104. The following Government exhibits received in evidence at the trial:

1, 1A, 2-5, 6-68, 7, 10-10F, 13, 14-14C, 23-23B, 24-24A, 25-25D, 26-26B, 27-27A, 28, 29-29B, 30, 30A-30-D, 31-31E, 32-32A, 33-33A, 34-34C, 35-35H, 36-36A, 37-37A, 38-38B, 39-39A, 40-40E, 41-41D, 42-42A, 43, 44-44D, 45, 46-46A, 47-47B, 48, 49-49A, 50-50A, 51-51B, 52-52B, 53-53A, 54--54A, 55-55C, 56-56B, 57-57A, 58-58A, 59-59A, 60-60B, 61-61B, 62-62A, 63-63B, 64-64B, 65-65C, 66-66C, 67-67B, 68-68A, 69-69A, 70-70A, 71-71A, 72-72A, 73-73A, 74-74A, 75-75A, 76-76A, 77-77A, 78-78A, 79-79A, 80-80A, 81-81A, 82-82A, 83-83A, 84-84A, 85-85A, 86-86A, 87-87A, 88-88A, 89-89A, 90-90A, 91-91A, 92-98, 100-102, 103-103A, 104-104A, 105-105A, 106-106A, 107-107A, 108-108A, 109-109A, 110-110A, 111-111B, 112, 113-113B, 114-114B, 115-115A, 116-116A, 117-117A, 118-118A, 119-119A, 120, 121-121F, 122-122D, 123-123A, 124-124A, 125-125C, 126-126D, 127-132, 133-133B, 146-149, 151-152, 153-153A, 154, 155-155A, 156-156A, 157-157C, 158-158B, 159-159B, 160-160A, 160C, 162, 163, 165-167,
719 168-168B, 169, 175-175A, 176, 177-177B, 178-178A, 185-187, 188-188C, 189-189E, 200-200C, 202-211, 213, 214.

105. The following defendants' exhibits received in evidence at the trial:

1-1D, 6, 7, 8A-8D, 9-13, 14A-14B, 15A-15E, 15H-15J, 17A-17C, 18A-18B, 21A-21E, 36, 37, 38A-38M,

49-52, 54-59, 60A-60B, 61-61I, 62-62M, 63-63A, 64A-64H, 64J-64N, 64T-64V, 65J ,66A-66S, 66V, 66W-66Y, 67A-67W, 69, 70-73, 75A-75Z, 75AA, 77A-77W, 83-87, 91, 93, 94, 95A-95B, 96-98, 100D, 100E, 100G, 102, 107, 108, C.

106. The following defendants' exhibits which were marked for Identification at the trial, but which were not received in evidence:
2-5, 15F-15G, 16, 19, 20A-20D, 22, 25-27, 28A-28D, 29A-29H, 30-35, 39-43, 53, 64V-64X, 64BB-64DD, 65A-65F, 65K, 65N, 65P, 65Q-65X, 74, 76A-76H, 79-82, 88-90, 95C-95E, 99-99C, 100A-100C, 100F, 100H-100M, 101, 103-106, A, B.

107. The following defendants' exhibits received in evidence at the hearing on November 12, 13 and 21, 1952, on defendants' motion to suppress certain evidence:
1-20.

108. The following Government exhibits received in evidence at the hearing on November 12, 13 and 21, 1952, on defendants' motion to suppress certain evidence:
1-5.

109. Notice of appeal of Shotwell Manufacturing Company, filed December 3, 1953.

110. Notice of appeal of Byron A. Cain, filed December 3, 1953.

111. Notice of appeal of Frank J. Huebner, filed December 3, 1953.

112. Order entered December 3, 1953, approving bonds of Cain and Huebner and staying sentences pending disposition of appeal.

720 113. Bond of Byron A. Cain, filed December 3, 1953.

114. Bond of Frank J. Huebner, filed December 3, 1953.

115. Notice of appeal of Harold E. Sullivan, filed December 14, 1953.

116. Order entered December 14, 1953, approving bond of Sullivan and staying sentences pending disposition of appeal.

117. Bond of Harold E. Sullivan, filed December 14, 1953.

118. Transcripts of proceedings September 14 to October 17, both inclusive, and December 7, 1953.
119. This designation of contents of record.
120. Any additional designation of record filed by the defendant Sullivan.
121. Any additional designation of record filed by the plaintiff.
122. Statement of points, filed December 14, 1953, by defendants Shotwell, Cain and Huebner.
123. Any additional statement of points filed by the defendant Sullivan.

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney

Byron A. Cain and Frank J. Huebner,
By Vincent O'Brien
Their Attorney

Received a copy of the above and foregoing Designation of Contents of Record this 14th day of December, 1953.

Otto Kerner, Jr.
By E. Tillotson
United States Attorney for the Northern District of Illinois, Eastern Division

721 And on the same day, to wit, the 14th day of December, 1953 there was filed in the Clerk's office of said Court a certain Bond On Appeal, re Harold E. Sullivan in words and figures following, to wit:

722

Power of Attorney

No. 223

Know All Men By These Presents:

That the United Pacific Insurance Company, a corporation of the State of Washington, having its principal offices in the city of Tacoma, Washington, pursuant to authority granted by By-Law No. 37-A of its By-Laws, which reads as follows:

"The President, any Executive Vice-President, any other Vice-President, any Assistant Vice-President, or any Resident Vice-President of this Corporation, shall have authority to appoint in writing such attorneys-in-

fact as the business of the Company may require, and to authorize such attorneys-in-fact, and each of them, to execute on behalf of the Company, any bonds, recognizances, stipulations, contracts of indemnity and other undertakings of like character, or to exercise any lesser number of said powers as hereinbefore set forth.

"Said appointments shall be attested by the Secretary or an Assistant Secretary of this Corporation under its seal. The President, any Executive Vice-President, any other Vice-President, any Assistant Vice-President, or any Resident Vice-President may revoke any appointment made pursuant hereto, and revoke any and all authority conferred by any such appointment."

does hereby nominate, constitute and appoint

Wm. Markheim or C. W. Olson, Jr. or Robert F. Olson or Robert Shannon its true and lawful Attorney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed,

a recognizance or bail bond to be filed in the District Court of the United States of America within the State of Illinois, provided, however, that no such bond shall exceed the total sum of ten thousand dollars ($10,000.00).

The execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Tacoma, Washington, in their own proper persons.

In Witness Whereof, the United Pacific Insurance Company has caused these presents to be signed by its Resident Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 15th day of September 1952.

United Pacific Insurance Company
By Fred Jacobsen (Seal)
Fred Jacobsen, Resident Vice-President

Attest: Walter Landsberg
Walter Landsberg, Assistant Secretary

State of Illinois }
County of Cook } ss.

On this 15th day of December 1952, before me, the undersigned, a Notary Public in and for the State of Illinois, duly commissioned and sworn, personally appeared Fred Jacobsen and Walter Landsberg to me known to be the Resident Vice-President and Assistant Secretary, respectively, of United Pacific Insurance Company, the corporation that executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

Glenna Jarrell
Notary Public in and for the State of Illinois,
residing at Chicago, Illinois
My Commission Expires Nov. 1, 1955

723

Know All Men by these Presents, That Harold E. Sullivan State of Illinois as principal, and United Pacific Insurance Company By: William Markhiem, Attorney-in-fact 2600 Leland Avenue, Chicago State of Illinois, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand Dollars ($5000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this day of ; In the Year of our Lord, One thousand nine Hundred and fifty three.

Whereas, lately on the 17th day of October, 1953, at the October Term of the United States District Court for the Northern District of Illinois Eastern Division, in a cause pending in said Court between the United States of America, Plaintiff, and Harold E. Sullivan, Defendant, a judgment and sentence were rendered against said Harold E. Sullivan and the said Harold E. Sullivan hav-

ing filed in the office of the Clerk of said United States District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit from the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and whereas said appeal is to operate as a supersedeas upon filing of this bond.

Now the Condition of Said Obligation Is Such, That if the said Harold E. Sullivan shall appear in person in the United States Court of Appeals for the Seventh Circuit on the day of , A. D.. 19 , of the October Term 1953, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Court of Appeals for the Seventh Circuit, in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed and if he shall appear for trial in the United States District Court for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Court of Appeals for the Seventh Circuit, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

And in the event that default be made in the condition of this writing obligatory as herein provided, it shall be lawful for and the undersigned irrevocably authorize and empower the United States Attorney of said District, whoever he may be, or any Assistant United States Attorney of said District, or any Attorney authorized to appear in the United States District Court of said District, to appear for us in the said United States District Court at any time thereafter and confess a judgment in the amount of this obligation, together with costs, in favor of the United States of America and against the undersigned, without process and without a trial by jury, the undersigned hereby waiving the right of a trial by jury, and we do hereby waive and release all errors which may intervene in any such proceedings, and consent to the immediate issuance of execution upon said

judgment, and we do hereby ratify and confirm all that said attorney may do by virtue hereof.

If this bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the United States District Court or the Northern District of Illinois, Eastern Division against each of the undersigned jointly and severally for the amount above stated together with interests and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

Surety Sworn, by James F. Kuchta, Dep. Clerk. Dec 14, 1953.

Signed and acknowledged before me this 14 day of 1953.

James F. Kuchta
Dep. Clerk

Harold E. Sullivan (Seal)
7 So. Dearborn St. Chgo

United Pacific Insurance Co. (Seal)
By: Wm. Markheim (Seal)
Attorney-in-fact

Approved:
J. S. Perry
United States District Judge

Approved
Daniel P. Ward
Asst. U. S. Attorney

724 And afterwards on, to wit, the 15th day of December, 1953 there were filed in the Clerk's office of said Court certain Transcripts Of Proceedings Had on September 14 to October 7, 1953 inclusive and December 7, 1953, Before The Honorable Gunnar H. Nordbye, Judge in words and figures following, to wit:

(Reproduced at pages 720-3076)

725 And afterwards on, to wit, the 23rd day of December, 1953 came the Defendant, Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Designation Of Contents Of Record On Appeal To The Court Of Appeals For The Seventh Circuit in words and figures following, to wit:

726

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 52 CR 143) * *

DESIGNATION OF CONTENTS OF RECORD ON APPEAL TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Clerk will please prepare the record on appeal of Harold E. Sullivan to the Court of Appeals for the Seventh Circuit, taken by notice of appeal filed by him December 14, 1953.

The defendant-appellant, Harold E. Sullivan, requests that there be but one record prepared for the said Court of Appeals in respect of his appeal and those theretofore perfected in the same cause by his co-defendants, The Shotwell Manufacturing Company, a corporation, Byron A. Cain, and Frank J. Huebner.

Defendant-appellant, Harold E. Sullivan, therefore designates the following as the portions of the record, proceedings and evidence to be contained in the record on said appeal, to-wit:

1. All of the items specified in the Designation of Record heretofore filed by his co-defendants with the Clerk of the United States District Court in the above-entitled cause.

2. Motion for acquittal filed by the defendant Sullivan on October 17, 1953.

Harold E. Sullivan,
By William T. Kirby
His Attorney

727 Received a copy of the above and foregoing Designation of Contents of Record this 23rd day of December, 1953.

Otto Kerner, Jr. by E. Tillotson
United States Attorney for the
Northern District of Illinois,
Eastern Division.

728 And on, to wit, the 14th day of December, 1953 came the Defendants Appellants, The Shotwell Manufacturing Company, et al., by their attorneys and filed in

the Clerk's office of said Court their certain Statement Of Points On Which Defendants-Appellants Intend To Rely In Their Appeal To The United States Court Of Appeals For The Seventh Circuit in words and figures following, to wit:

729

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—52 CR 143) * *

STATEMENT OF POINTS ON WHICH DEFENDANTS-APPELLANTS, THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN and FRANK J. HUEBNER INTEND TO RELY IN THEIR APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. The Court erred in sustaining the plaintiff's demurrer to the defendants' motion as amended for the dismissal of the indictment and in denying said motion as amended.

2. The Court erred in denying the defendants' additional motion to dismiss the indictment.

3. The Court erred in denying the defendants' motion to amend and supplement Section 4 of the motion to dismiss.

4. The Court erred in denying the defendants' written motion as amended to suppress evidence.

5. The Court erred in making the findings of fact and in holding the propositions of law incident to its denial of the defendants' said motion to suppress evidence.

6. The Court erred in denying the motion of the defendants for a mistrial based upon Lubben's statement in the presence of the jury that "these payments were admitted last December," etc.

730 7. The Court erred in failing to grant defendants' motion for mistrial, filed September 27, 1953, based on a newspaper article prejudicial as a matter of law and shown to have been read by one of the jurors.

8. The Court erred in denying the motion of the defendants presented in writing to strike certain testimony given by the witnesses Lubben, Krasne, and Feldman.

9. The Court erred in admitting any part of the Cain testimony given at the disclosure hearing.

10. The Court erred in excluding certain portions of the testimony of Cain at the disclosure hearing which his attorney asked be read to the jury along with the portions which counsel for the Government asked be so read. (Record 3019-3055) The Court's statement for the record at Record 4745-47, the Court's memorandum at 4748-4756, and the defendants' exceptions at 4757-4758, are related to the same matter.

11. The Court erred in ruling that the supposed admissions by Cain at the disclosure hearing were admissible against the corporate defendant.

12. The Court erred in failing to grant the defendants' motion, made at Record 1812, to strike the testimony of Heitman as to payment of $10,000 in 1945. (Record 2983-87)

13. The Court erred in failing to admit in evidence the Cunningham affidavit, Defendants' Exhibit 53. (Record 4193)

14. The Court erred in denying the defendants' motion to strike Lubben's testimony as to a payment of $36,148.35. (Record 2988)

15. The Court erred in denying the twice made motions of said defendants that a judgment of acquittal be entered as to Count I of the indictment on the ground that the evidence adduced by the Government was insufficient to sustain a conviction, and in denying the further motion of the defendant corporation for judg-
731 ment of acquittal as to Count II of the indictment on the same ground.

16. The Court erred in unduly restricting the scope of defendants' cross-examination of the witness Lubben and of other witnesses, and the Court erred in rejecting certain evidence proffered by the defendants, and in denying offers of proof made on their behalf having to do with the following matters:

(a) The credibility of the witness.

(b) The motives of the witness.

(c) The verity of the books and records maintained by the witness or company or companies with which the witness was identified.

(d) The financial position and history of Lubben and his expenditures as bearing upon the question as to whether he retained for his own use cash withdrawn from his companies. (Record 1366 et seq.)

17. The Court erred in taking into consideration the evidence adduced before it on the motion to suppress, and in attempting to limit the defendants on the trial of the general issue to matters which in its judgment were consistent with its recollection of the evidence at the prior hearing. (Record 1079-1121-41)

18. The Court erred in unduly and improperly restricting the scope of the defendants' proof as to the voluntary disclosure policy of the Treasury Department, and as to action taken by them in attempted compliance therewith (Record 4158, et seq.), and in its ruling on Defendants' Exhibits 96, 97, and 98.

19. The Court erred in preventing the defendants from proving the disclosure policy and their compliance with the conditions thereof as part of the surrounding circumstances which they were entitled to establish for the purpose of explaining supposed admissions at the dis-
732 closure hearing, as to which the Court permitted the plaintiff to make proof, and as to which it permitted the plaintiff on cross-examination to utilize certain documents allegedly submitted by Busby subsequent to the making of their disclosure.

20. Under the circumstances, the Court erred in giving its instructions to the jury on the subject matter of disclosure, in that it thereby limited the jury's consideration of the entire subject matter to the issue of intent.

21. The Court erred in permitting the plaintiff to use in evidence or for purposes of direct examination or cross-examination, any of the documents supplied to the plaintiff after the disclosure made by and on behalf of the defendants to Agents of the Treasury Department, including among others Government's Exhibits 185 and 186.

22. Having erroneously limited the defendants' disclosure evidence and its consideration by the jury to the narrow issue of intent, and having permitted the plaintiff to avail itself of certain of the evidence at the prior disclosure hearing on the sole doctrine of testimonial admissions for the purpose of showing unreported taxable income as of the time of the alleged disclosure, the Court erred in permitting the plaintiff on cross-examination and otherwise to go into matters having to do with premium payments as distinguished from premium receipts, matter which was utterly irrelevant in so far as

the determination of additional tax was concerned, and matter which had nothing to do with either the issue of intent or the supposed admission of unreported receipts. Under the law then in effect, and having in mind the defendants expressed willingness to pay upon receipt of a bill and the Treasury's position as expressed to them that there could be no deduction for payouts,
733 the plaintiff's examination of the witness Busby and Cain was immaterial, irrelevant and prejudicial insofar as it involved an inquiry into the subject of payouts, whether on the issue of intent or on the doctrine of admissions.

23. In charging the jury, the Court erred when it spoke of payments made as money due to Shotwell, thereby ignoring the point that as a matter of law mere proof of payment to officers of a company under the circumstances at bar, is insufficient to show that the payments constituted income to Shotwell, except to the extent and over the period during which moneys were deposited in the corporation's boxes. Also, and to the extent that there could as a matter of law be any issue of fact on the proof at bar, the Court by said charge foreclosed the issue of fact as to whether the payments were income to Shotwell.

24. The Court further erred in its charge to the jury in erroneously assuming that knowledge by an officer that payments were not recorded on the books was equivalent to knowledge or would support an inference of knowledge that they were not adequately dealt with on the income tax returns.

25. In its charge to the jury, the Court undertook to summarize the defendants' contentions, but in so doing completely omitted all reference to their contention that the initial transactions in the indictment period had to do with trade deals as to which there were no overages.

26. The Court erred in failing to give defendants' Instruction 22 in substance as it was suggested. At Record 5359, the Court interpolated into said instruction the statement "but payments to a corporation and received by it for goods sold by it on the so-called black market do constitute revenue for tax purposes." And the Court erroneously interpolated other matters in the giving of said instruction in such way as to dilute it beyond
734 the point of any real significance or adequacy.

27. The Court erred in failing to charge the jury

that they must consider not only what overages were paid by Lubben, but what portion of those overages, on the basis of the Government's evidence, constituted income to Shotwell.

28. The Court also erred in failing to charge the jury, with respect to any balance of overages that might have existed over and above what was paid out for corn, that they must determine what portion, if any, of that balance constituted taxable income to Shotwell.

29. The Court erred in failing to charge the jury in substance as requested by defendants' suggested Instructions 45 and 47.

30. By the latter portion of its charge at Record 5386-5388, the Court, for all practical purposes, nullified its preceding instructions and purported to substitute an inadequate and over-simplified statement of the issues in a manner patently prejudicial to the defendants, which in no way could be avoided or cured by the mere interpolation of the words: "in light of these instructions,"—meaning the preceding instructions. In so doing, the Court erred and its action in this respect was tantamount to a direction to the jury to find the defendants guilty.

31. As shown by the record, the defendants complied with the provisions of Rule 30, having to do with the filing of written requests for instructions. The Court passed upon the requests as so made and informed counsel of its proposed action prior to the arguments to the jury. The substance, form and order of the Court's charge to the jury, however, was such as to make it impossible for the defendants fully to state their objections in the short time allowed before the retirement of the jury. The instructions were not given in the order in which requested; they were not given in the language re-
735 quested; there were interpolations by the Court between instructions, and even within the context of individual instructions, in such manner as to change or affect the meaning of the instructions, and in such way as to make it difficult and even impossible to determine whether the instructions which were to be given, were in fact given. The Court attempted to summarize the issues, and to some extent, the evidence. The summaries were not complete, and sometimes inaccurate. The adverse effect was not avoided by the Court's statement that the jurors should rely on their own recollections where those

were at variance. Some of the jurors may have had no recollections on the matters involved. The defendants submit that the procedure employed was contrary to the intent and spirit of Rule 30.

32. The Court erred in instructing the jury that the presumption of innocence only remains until such time as "the Government has established his guilt beyond a reasonable doubt", which instruction starts at Record 5316.

33. The Court erred in its summary by repeated reference to the arrangements as being made between the Shotwell Company and Lubben and by repeated reference to the moneys coming to Shotwell.

34. The Court erred in his summary to the jury of the factual matter, particularly at the final summary beginning at page 5354, where he attempted to summarize the whole position of the defendants, but that summary is incomplete.

35. The Court erred in its instruction with respect to the question of the money received in and paid out by the Shotwell Company in that said instruction does not place the burden of proof upon that issue upon the Government but could be understood by the jury to put the burden of proof upon that issue upon the defendant.

36. The Court erred in its instructions with respect to intent, and what proof would be sufficient to show
736 intent, such instructions allowing improper presumptions to be made and improper inferences to be made.

37. The Court erred in the instructions given, with respect to the instruction, in its nature peremptory, given with respect to any excess of overages and not distinguishing as to the personal knowledge and intent of the individual defendants on such question.

38. The Court erred in giving the instructions starting at page 5357 to the effect that the price to Shotwell included both the invoice amount and the overceiling amount.

39. The Court erred in giving the instruction at page 5361 that the violation of the OPA laws might be considered to show intent to violate the tax laws.

40. The Court erred in refusing to make corrections of its charge in respect of the matters objected to by the defendants.

41. The Court erred in admitting certain evidence adduced by the plaintiff over the objections of these defendants.

42. The Court erred in ruling that inquiry by the defendants as to Lubben's income tax statements was immaterial.

43. The Court erred in improperly curtailing the scope of the cross-examination of the plaintiff's witness Lubben.

44. The Court erred in denying defendants' motion to strike the testimony of the witnesses Krasne and Mammel.

45. The Court erred in improperly restricting the scope of the cross-examination of the witnesses Moran, Davidson, Heitman, and Feldman.

46. The Court erred in permitting the witness Ericson to testify to matters not within his knowledge (Record 2748), and in permitting him to testify to instructions given him by one of the three individual defendants without specifying which defendant and in spite of his testimony that he could not so testify. (Record 275, 2765, 737 2767)

47. The Court erred in permitting counsel for the Government to ask leading and suggestive questions and to assume facts in dispute in questioning the witness Ericson. (Record 2753, 2758, 2761)

48. The Court erred in excluding certain evidence tendered by defendants and in striking portions of the testimony of defendants' witnesses.

49. The Court erred in rejecting various offers of proof made on behalf of the defendants.

50. The Court erred permitting the plaintiff to cross-examine defendants' witnesses beyond the scope of the subject matter of their direct examination.

51. The Court erred in sustaining plaintiff's objections to questions propounded to witnesses for the defendants on their direct examination.

52. The Court erred in sustaining objections to questions to the witness Dunlap as to reasons of abandonment of the voluntary disclosure policy, and in sustaining objections to direct questions to the witness Dunlap regarding difficulties in administration of such policy, and in rejecting defendants' offer of proof through such witness regarding the same.

53. The Court erred in admitting testimony of witnesses as to the alleged acts and statements of persons, made out of the presence of Cain and Huebner and not under circumstances making same binding or admissible against them.

53. The Court erred in admitting testimony of witnesses on matters as to which objections were made by counsel for the defense.

54. The Court erred in sustaining objections to questions put by counsel for the defense on cross examination of the Government's witnesses.

55. The Court erred in refusing to admit docu-
738 mentary evidence tendered by the defense:

56. The Court erred (Record 4250-54, 4801) in sustaining objection to defense Exhibits 79, 80 and 81—documents produced by Penick & Ford showing many instances of procurement of corn in which no identifying notation was made on the contract with the elevator, and that, therefore, the instances of procurement by Shotwell might have exceeded those shown by the contracts produced had the underlying memoranda records been available, and in rejecting Defendants' Exhibit 99 (Record 4906).

57. The Court erred (Record 4371) in refusing to permit 1952 acquiescence by the Commissioner in the Sullenger decision to be read into the record.

58. The Court erred (Record 4272-73) in refusing to admit Code sections granting to other departments access to income tax returns.

59. The Court erred (Record 4479) in overruling the objection to Government Exhibits 185, and (Record 4483) Government Exhibit 186, and (Record 4474) the objection to piecemeal questioning of Cain regarding the disclosure and said exhibits.

60. The Court erred (Record 4832-33) in sustaining plaintiff's objection to defense Exhibits 100-101, as to companies regarding which there was no testimony that they had a quota arrangement with Shotwell. This ruling deprived the defendants of the opportunity to submit a base to the jury on the question of allocations which they were endeavoring to do so as to assume that of the total syrup purchased by them in 1945-1946, an amount equal to 80% of the total quantity purchased in 1941 was by allocation and that the excess was through the procurement of raw corn.

61. The Court erred in denying motion to strike Government Exhibit 185. (Record 4899)

739 62. The Court erred in overruling objection to Government Exhibit 186. (Record 4984)

63. The Court erred in overruling objection to Government Exhibits of the 189 series (Record 4987-88); similarly (Record 4999-5001) in overruling objection that said documents were not properly rebuttal evidence.

64. The verdict is contrary to the weight of the evidence.

65. The verdict is not supported by substantial evidence.

66. The Court erred in denying the motion for acquittal.

67. The Court erred in entering the judgments against these defendants, and each of them, on each count of the indictment.

68. The Court erred in denying the motion of these defendants for a new trial, in arrest of judgment, and for acquittal notwithstanding the verdict.

69. The Court erred in its rulings during the hearing on defendants' motion to suppress evidence in November of 1952, as follows:

(a) In restricting the scope of the direct examination of the witness Cain by holding that it was not concerned with an explanation as to why the defendants could not say to whom premium payments had been made. Independently, the Court erred in permitting the witness Cain to be interrogated on cross examination notwithstanding such ruling, and also because it was irrelevant and immaterial because of the Commissioner's ruling that no deductions could be made on that account.

(b) In excluding certain evidence tendered by the defendants.

(c) In admitting certain evidence tendered by the plaintiff.

740 (d) In permitting the plaintiff to cross examine the witness Cain on the subject matter as to whether at the time of the filing of the returns in question the witness considered that there was an attempt to defeat and evade the payment of taxes owed by Shotwell Manufacturing Company.

(e) In permitting the cross examination of the witness Cain on the subject as to whether the witness did

or did not consider that in fact an additional tax was owing to the Government.

(f) In failing to grant the defendants' motion to strike the testimony of the witness Doe.

(g) In sustaining plaintiff's objection to certain cross examination of the witness Mammel.

(h) In overruling defendants' objections to testimony of plaintiff's witness Twohig concerning an examination of the tax returns of Lubben or any of his companies.

(i) In permitting the witness Holz to testify to the privilege or prerogative of a field agent over defendants' objection that the manual theretofore requested had not been made available.

(j) In denying the motion of the defendants' filed November 21, 1952, for the items therein mentioned in paragraphs (a), (b), (c), and (d).

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney
Byron A. Cain and Frank J. Huebner,
By Vincent O'Brien
Their Attorney

741 Received a copy of the above and foregoing Statement of Points on which Defendants-Appellants, The Shotwell Manufacturing Company, Byron A. Cain and Frank J. Huebner intend to rely in their appeal, this 14th day of December, 1953.

Otto Kerner, Jr. by E. Tillotson
United States Attorney
Northern District of Illinois,
Eastern Division

742 And afterwards on, to wit, the 23rd day of December, 1953 came the Defendant-Appellant, Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Statement Of Points On Which He Intends To Rely On His Appeal To The United States Court Of Appeals For The Seventh Circuit in words and figures following, to wit:

743

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—52 CR 143) • •

STATEMENT OF POINTS ON WHICH DEFENDANT-APPELLANT, HAROLD E. SULLIVAN, INTENDS TO RELY ON HIS APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. All of the points specified in the Statement of Points heretofore filed in the above-entitled cause by the defendants-appellants, The Shotwell Manufacturing Company, a corporation, Byron A. Cain, and Frank J. Huebner.

2. The Court erred in denying the defendant Sullivan's motion for acquittal made at the conclusion of the Government's case.

3. The Court erred in denying the defendant Sullivan's motions made at the close of the Government's case that Sullivan be permitted to rest his case, be granted a judgment of acquittal, or, in the alternative, be allowed a severance so as to go to the jury on the record as it then stood against the defendant Sullivan.

4. The Court erred in denying the defendant Sullivan's motion for acquittal made at the conclusion of all of the evidence.

5. The Court erred in admitting documentary evidence for the Government not made by the defendant Sullivan or by or under any control, authority or knowledge of the defendant Sullivan, or under circumstances making same binding or admissible against defendant Sul-
744 livan.

6. The Court erred in admitting testimony of witnesses as to the alleged acts and statements of persons, made out of the presence of Sullivan and not under circumstances making same binding or admissible against defendant Sullivan.

7. The Court erred in sustaining objections to cross examination of counsel for the defense which cross examination sought to use the contents of documents marked "Defendant's Exhibits".

8. The defendant Sullivan was substantially prejudiced and deprived of a fair trial by reason of, amongst other things, the attorney for the Government arguing the case against all of the defendants by the use of evidence which was not admitted against the defendant Sullivan.

9. The defendant Sullivan was substantially prejudiced and deprived of a fair trial by reason of, amongst other things, the admission into evidence of material not competent or admissible against Sullivan and which material had a prejudicial effect against Sullivan not cured by any instruction and which material the Government knew would be used and would prejudice Sullivan.

10. The Court erred in restricting the defense in the proofs that were sought to be made with respect to the disclosure question.

11. The Court erred in its summarization of the positions of the Government and of the defendants, particularly as to the defendant Sullivan during its instructions to the jury.

12. In instructing the jury the Court erred in referring to a "conference with the defendants Cain, Sullivan and Huebner" at the Pennsylvania Hotel early in 1945, when there was no such conference; and this is particularly important in view of the question of the time when Sullivan first had any business conferences, or knowledge of business conferences with Lubben, as to overage 745 payments.

13. The Court erred in summarizing the Government's contention, and again in summarizing the defendant's contention, in leaving out all specification of the start of the "trade" deals, although such deals were unquestioned at least in the beginning and were important.

14. In instructing the jury the Court erred in the summary of the contentions of the defendant in that such summary was incomplete, inaccurate and in important respects overlooked matters relied upon by the defendant Sullivan.

15. The Court erred in his summary of the defendant's position particularly when the Court discussed with the jury the Cain admissions made orally and in writing, such errors consisting not only in the summary itself not stating fully the situation relating to such admissions orally and in writing, but further the jury would assume

from the Court's including those matters in his general discussion of the position of the defendants that such matters were binding upon or admissible against or could be considered in connection with the defendant Sullivan, although such matters had expressly not been offered by the Government with respect to the defendant Sullivan and were not in any way competent or in the record as against him.

16. The Court erred in his summary to the jury of the factual matter, particularly at the final summary beginning at page 5354 where he attempted to summarize the whole position of the defendants but that summary is incomplete and is particularly objectionable so far as the defendant Sullivan is concerned.

17. The Court erred in referring (at page 5347) to simply the language of the statute, for that is misleading in that form, particularly as coupled with the language defining a "person", making reference to its officers and certain duties of officers, and the coupling 746 with the language of the aiding and abetting statute.

18. The Court erred in quoting verbatim the Aiding and Abetting Statute, as it did at Transcript 5348.

19. The Court erred in its instructions with respect to the disclosure and particularly in stating that such evidence (which had not been received with respect to the defendant Sullivan) might be considered as to the intent of the defendants, including Sullivan, to violate the income tax laws.

20. The Court erred in its instructions with respect to the so-called disclosure and its effect, particularly as it might affect the defendant Sullivan.

24. The Court erred in instructing the jury that the real question for them to decide was whether there was a willful intent by the defendants or any of them, allowing the jury to understand that the final question being posed to them by the Judge's charge could be resolved against all or any one of the defendants if they found any one of the defendants to have the requisite willful intent.

22. The Court erred in giving the instruction with respect to any books, records or memoranda that may have been falsified in that the Court merely advised the jury that they should then scrutinize the remainder carefully, instead of advising the jury that the remainder might be disregarded except as they might be corroborated by other credible evidence.

23. The Court's instruction with respect to what circumstantial evidence may be was in error so far as the defendant Sullivan was concerned because it would allow the jury to believe they might consider acts, declarations or circumstances that relate to others against Sullivan even though not admissible against Sullivan.

747 24. The Court erred in giving the instruction with respect to the importance of the case to the Government and the Government's great concern, etc.

25. The Court erred in the final summary of what it stated to be the "controlling issues" in that so far as the defendant Sullivan is concerned, the definition is far broader and includes facts far greater than those facts applicable to the case of the defendant Sullivan.

26. The Court erred in refusing to make corrections of its charge in the respects to which such corrections were requested by counsel, starting at page 5394 of the record.

27. The Court erred in failing to distinguish in any way the case so far as the defendant Sullivan is concerned from the case so far as the other defendants were concerned; and as long as the Court was undertaking to summarize what the evidence was, the failure to so summarize the difference as to the status of the proof was error as to Sullivan.

28. The Court erred in its summary of facts in that while it stressed what was said by Graflund about the memorandum of in-and-out money in the cash box, there was no mention made at all of the testimony with respect to the memorandum by Gladys Morrill, the one who actually kept it.

29. The Court erred in its summary of the evidence in that although the Court called attention to certain deficiencies in the proof of the defense because of the absence of records or memoranda, there was no such calling attention to glaring deficiencies in the records relied upon by the Government, particularly the entire absence of records that could be called book records of the Lubben companies other than the proprietorship.

30. The verdict of the jury and the rapid voting of eight verdicts show that it was reached as a result
748 of considering the evidence of all matters received as being applicable equally to all of the defendants, and that the jury did not separately and fully consider the

limited evidence with respect to the defendant Sullivan, and the verdict is not fair and proper.

31. There is no evidence that the defendant Sullivan willfully and intentionally attempted to evade the payment of the income taxes of The Shotwell Manufacturing Company as charged in the indictment.

32. There was insufficient evidence to submit any of the issues to the jury with respect to the defendant Sullivan in that all of the evidence tending to prove that the defendant Sullivan willfully, knowingly and intentionally sought to defeat the payment of the income taxes of The Shotwell Manufacturing Company, as charged in the indictment, is purely circumstantial and there are one or more reasonable hypotheses under the evidence which supports a reasonable inference that the defendant Sullivan did not willfully, knowingly and intentionally seek to evade the payment of the income taxes of The Shotwell Manufacturing Company even if the Government's proof is to be taken as true.

33. The evidence against the defendant Sullivan is as consistent with innocence as it is with guilt.

34. There is no substantial evidence even considering all the evidence in the light most favorable to the Government that the defendant Sullivan willfully, knowingly and intentionally sought to evade the payment of the income taxes of The Shotwell Manufacturing Company.

35. There is no evidence, circumstantial or direct, which tends to prove that the defendant Sullivan was an active and efficient actor or participant in the filing of The Shotwell Manufacturing Company's income tax return for the years 1945 and 1946, nor that he had any
749. knowledge of the circumstances surrounding the filing of The Shotwell Manufacturing Company's tax returns for said years.

36. There is not sufficient evidence to warrant conviction of the defendant Sullivan in that the Government has failed to prove facts sufficient to constitute a prima facie case, and further has failed to prove any criminal intent on the part of the defendant Sullivan.

37. The Court erred in admitting testimony of witnesses on matters as to which objections were made by counsel for the defense.

38. The Court erred in sustaining objections to ques-

tions put by counsel for the defense on cross examination of the Government's witnesses.

39. The Court erred in refusing to admit documentary evidence tendered by the defense.

40. The Court erred in instructing the jury that the presumption of innocence only remains until such time as "the Government has established his guilt beyond a reasonable doubt", which instruction starts at Transcript 5316.

41. The Court erred in its summary by repeated reference to the arrangements as being made between the Shotwell Company and Lubben and by repeated reference to the monies coming to Shotwell.

42. The Court erred in its instructions with respect to intent, and what proof would be sufficient to show intent, such instructions allowing improper presumptions to be made and improper inferences to be made.

43. The Court erred in its instruction with respect to the question of the money received in and paid out by the Shotwell Company in that said instruction does not place the burden of proof upon that issue upon the Government but could be understood by the jury to put the burden of proof upon that issue upon the defendant.

750 44. The Court erred in the instructions given, with respect to the instruction, in its nature peremptory, given with respect to any excess of overages and not distinguishing as to the personal knowledge and intent of the individual defendants on such question.

45. The Court erred giving the instruction starting at page 5357 to the effect that the price to Shotwell included both the invoice amount and the over-ceiling amount.

46. The Court erred in giving the instruction at page 5361 that the violation of the OPA laws might be considered to show intent to violate the tax laws.

47. The Court erred in its instructions at page 5347 in citing Section 145a, that being the misdemeanor statute, and the jury would believe that they could convict of a felony if the defendants had violated the misdemeanor section.

48. The Court erred in failing to grant the defendant Sullivan a new trial with appropriate provision for his severance.

49. The Court erred in entering judgment against the defendant Sullivan.

Harold E. Sullivan
By William T. Kirby
His Attorney

Received a copy of the above and foregoing Statement of Points on which Defendant-Appellant, Harold E. Sullivan, intends to rely on his appeal, this 23rd day of December, 1953.

Otto Kerner, Jr. by E. Tillotson
United States Attorney
Northern District of Illinois
Eastern Division

751 And afterwards on, to wit, the 24th day of December, 1953 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

752

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

(Caption—52 CR 143)

MOTION

Now come the defendants in the above-entitled cause, by Vincent O'Brien, one of their attorneys, and ask the Court that an order be entered herein directing the Clerk of this Court to transmit with the record on appeal herein to the United States Court of Appeals for the Seventh Circuit, all original transcripts of proceedings had in the above-entitled cause which are on file in his office for use on the appeal of said defendants in said Court.

The Shotwell Manufacturing Company,
Byron A. Cain, Harold E. Sullivan,
and Frank J. Huebner, Defendants,
By Vincent O'Brien,
One of the attorneys of record
for said defendants.

753 And on the same day, to wit, on the 24th day of December, 1953, being one of the days of the regular

December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable J. S. Perry District Judge, appears the following entry, to wit:

754

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—52 CR 143) * *

ORDER

On motion of defendants by one of their attorneys, Vincent O'Brien,

It Is Ordered that the Clerk of this Court be, and he hereby is directed to transmit with the record on appeal herein to the United States Court of Appeals for the Seventh Circuit all original transcripts of proceedings had in the above-entitled cause which are on file in his office for use on the appeal of said defendants in said Court.

Enter:
Perry
Judge

Dec. 24, 1953.

755 And afterwards on, to wit, the 7th day of January, 1954 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

756

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—52 CR 143) * *

MOTION

The defendants, The Shotwell Manufacturing Company, a corporation, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, by their attorneys, hereby move the Court that the time within which they may docket their appeals in the Court of Appeals for the Seventh Circuit, may be extended for a reasonable time after

January 12, 1954, which date is forty days from the date of the filing of the first of the notices of appeal herein, the last of said notices of appeal having been filed on December 14, 1953 by the defendant Harold E. Sullivan.

The Shotwell Manufacturing Company,
a corporation,
By Thomas C. McConnell
Its Attorney
Byron A. Cain and Frank J. Huebner,
By Vincent O'Brien
Their Attorney
Harold E. Sullivan,
By William T. Kirby
His Attorney

757 And on the same day, to wit, on the 7th day of January, 1954, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable J. S. Perry District Judge, appears the following entry, to wit:

758

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—52 CR 143) * *

ORDER

On motion of the defendants, The Shotwell Manufacturing Company, a corporation, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, on good cause shown,

It Is Ordered that the time within which said defendants may docket their appeals in the Court of Appeals for the Seventh Circuit, be and it is hereby extended to the 1st day of March, 1954.

Enter:
J. S. Perry
Judge

Dated: January 7, 1954.

759 And afterwards, to wit, on the 6th day of February, 1954, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Gunnar H. Nordbye District Judge, appears the following entry, to wit:

760

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—52 CR 143) * *

ORDER DENYING MOTION OF DEFENDANT HAROLD E. SULLIVAN TO CORRECT RECORD UNDER RULE 75h.

There has been presented to this Court a motion of Harold E. Sullivan wherein he seeks to correct the record in the above-entitled proceeding in the manner indicated in his motion. The motion is directed to the portion of the record reflecting certain remarks of the Court made on December 7, 1953, immediately prior to the sentencing of the defendant Sullivan, and after the Court had heard and denied his motion for a new trial.

When the transcript of the proceedings at the hearing was presented to this Court by the court reporter, several corrections were made therein because of palpable errors of the reporter in recording the proceedings. Among the corrections made in the record by the Court is the one defendant Sullivan refers to in his present mo-
761 tion. The original transcript as submittted by the reporter contained the following statement of the Court (p. 5593):

> "In my opinion, even though the evidence may be comparatively speaking so much scantier or at least not as complete as it was with reference to Huebner and Cain, I think there was evidence in the record beyond a reasonable doubt to sustain the jury's verdict."

The Court corrected the above quoted portion so as to eliminate the words "so much" in the second line. The record was thereafter corrected by the court reporter accordingly. The defendant Sullivan seeks in his motion to have the record again corrected so as to leave in the words "so much", as reflected in the original transcript.

The correction referred to by the Court was made so as to correct an error in the record and to conform the record with the Court's recollection with what he had stated at the time. In any event, the record as corrected by the Court in the manner indicated correctly states and

reflects the Court's characterization of the evidence as to the defendant Sullivan.

It follows, therefore, that defendant Sullivan's motion must be, and the same hereby is, denied. It is so ordered.

Dated this 6th day of February, 1954.

Enter:

Gunnar H. Nordbye
United States District Judge

762 And afterwards on, to wit, the 8th day of February, 1954 came the Defendant Harold E. Sullivan by his attorneys and filed in the Clerk's office of said Court his certain Motion To Correct Record Under Rule 75h in words and figures following, to wit:

763

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—52 CR 143) * *

MOTION OF DEFENDANT HAROLD E. SULLIVAN TO CORRECT RECORD UNDER RULE 75h.

Now comes the defendant Harold E. Sullivan and moves under Rule 75h of the Rules of Civil Procedure, applicable equally to criminal cases, to have the record at page 5593 corrected to truly disclose what occurred in the District Court and as grounds therefor shows:

1. At record 5593 the Court was addressing the defendant Sullivan, after the conclusion of the arguments for a new trial and the remarks permitted to the defendant Sullivan prior to sentencing. The record as originally written by the Court Reporter contains these two sentences on pages 5593 and 5594:

> "In my opinion, even though the evidence may be comparatively speaking so much scantier or at least not as complete as it was with reference to Huebner and Cain, I think there was evidence in the record beyond a reasonable doubt to sustain the jury's verdict. At least, as I have indicated in my order denying the motion for acquittal and after prolonged and protracted consideration, I have concluded that I should not disturb it and under those circumstances,

I have no other alternative but to impose sentence."

764 2. Sometime thereafter Roy E. Fuller, the official reporter, circulated to those who were getting the record certain revised pages with this notation:

"The attached pages have been revised as requested by Judge Nordbye."

3. In the revised pages 5593 and 5594 the quoted sentences now read as follows:

"In my opinion, even though the evidence may be comparatively speaking scantier or at least not as complete as it was with reference to Huebner and Cain, I think there was evidence in the record beyond a reasonable doubt to sustain the jury's verdict. At least, as I have indicated in my order denying the motion for acquittal and after prolonged and protracted consideration, I have concluded that I should not disturb it and under those circumstances, I have no other alternative but to impose sentence."

and the only change in the quoted sentences is to leave out the words "so much."

4. The quantum of proof with respect to the defendant Sullivan, and the Court's characterization of it, is material to the defendant Sullivan and he asks that the record be corrected so as to leave i. the words "so much" on page 5593 as they originally and accurately appeared in the record.

Harold E. Sullivan
By William T. Kirby
His Attorney

State of Illinois }
County of Cook } ss.

William T. Kirby, being first duly sworn on oath, deposes and says that he has read the foregoing motion and that the matters and things therein set forth are true.

William T. Kirby

Subscribed and sworn to before me this 3rd day of February, 1954.

Jeannette J. Messitt
Notary Public
(Seal)

765 State of Illinois }
County of Cook } ss.

Roy E. Fuller, being first duly sworn on oath deposes and says that he is the official court reporter, that as to the sixth (6th) line from the bottom of page 5593, the reporter's notes read "comparatively speaking so much scantier or at least • • •".

Affiant further states that the Court upon reviewing the transcript directed that the above words "so much" be deleted; and this direction was, in accord with customary practice, complied with as to all copies of the transcript.

Further affiant sayeth not.

Roy E. Fuller

Subscribed and sworn to before me this 2nd day of February, 1954.

Joseph S. Guyette
Notary Public
(Seal)

766 And afterwards on, to wit, the 10th day of February, 1954 came the Appellee, United States Of America, by its attorneys and filed in the Clerk's office of said Court its certain Information Pursuant To Rule 10(c) Of The United States Court Of Appeals For The Seventh Circuit in words and figures following, to wit:

767

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—52 CR 143) • •

INFORMATION PURSUANT TO RULE 10(c) OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The appellee in the above entitled cause is the United States of America.

The attorneys of record for the appellee are Irwin N. Cohen, United States Attorney, and Edward J. Calihan, Jr., Assistant United States Attorney, Room 450 United States Court House, Chicago 4, Illinois.

United States of America
By: Irwin N. Cohen
United States Attorney

768 And afterwards on, to wit, the 25th day of February, 1954 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation And Authorization Re Exhibits in words and figures following, to wit:

769

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division
• • (Caption—52 CR 143) • •

STIPULATION.

It Is Hereby Stipulated And Agreed by and between the parties hereto, by and through their attorneys, that Government's Exhibits 6, 10, 41-B, 41-C, 41-D, 99, 122 B, 188, 189, 204-211, and Defendants' Exhibit 64V, which were designated by defendants in their Designation of Contents of Record on Appeal to the Court of Appeals for the Seventh Circuit in Items 104 and 105 and 106 may be omitted from the record to be filed with said Court.

It Is Further Stipulated And Agreed that Government's Exhibit 164, and Defendants' Exhibit 95 may be included in the record.

Irwin N. Cohen
Attorney for Plaintiff
Vincent O'Brien
One of the Attorneys of record for certain Defendants

770

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division
• • (Caption—52 CR 143) • •

To: Mr. Roy H. Johnson,
Clerk of the United States District Court
Northern District of Illinois, Eastern Division

Insofar as certain items of the Designation of Record on Appeal to the Court of Appeals for the Seventh Circuit are concerned, you are hereby authorized as follows:

Item 105: You may omit Defendants' Exhibit 1. The Designation should read 1A-1D, instead of 1-1D.

Item 106: You may omit Defendants' Exhibits 15F, 15G, 16, 22, 25, 30, 43, 64X, and 64BB-64DD.

You may omit Defendants' Exhibit A. It is already in the record at page 2116 of the Report of Proceedings.

You may omit Exhibit B. It is already in the record as Item 48 of the Designation.

All of the exhibits you are authorized to omit were not received in evidence, except as explanation is made.

Exhibit 82, which the Designation indicates was not received in evidence, should be removed from Item 106, and inserted in Item 105, as such exhibit was received in evidence.

Item 70: Reading as follows: "Pages from Cain's testimony, 143 to and including 226 (Exhibit C), filed October 17, 1953" should not have included all pages between 143 to 226.

771 The document in the record should correspond to the document as filed. This item is the same as Exhibit C designated at Item 105 of the Designation and, therefore, Exhibit C, designated in Item 105, may be omitted.

Vincent O'Brien
One of the Attorneys of record
for certain Defendants

772 United States of America } ss.
Northern District of Illinois }

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designations of the Appellants, and the Stipulation and Authorization of the Parties filed in this Court in the cause entitled: United States of America, Plaintiff vs. The Shotwell Manufacturing Company, a corporation, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner, Defendants, No. 52 CR 143, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the Original Exhibits and the Transcripts Of Proceedings which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 26th day of February, 1954.

Roy H. Johnson
Clerk

By Gizella Butcher
Deputy Clerk

(Seal)

In the United States Court of Appeals for the Seventh Circuit

No. 11108

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THE SHOTWELL MANUFACTURING COMPANY, DEFENDANT-APPELLANT

No. 11109

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BYRON A. CAIN, DEFENDANT-APPELLANT

No. 11110

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANK J. HUEBNER, DEFENDANT-APPELLANT

No. 11111

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HAROLD E. SULLIVAN, DEFENDANT-APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Opinion

June 15, 1955

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.*

Shotwell Manufacturing Company, a corporation (sometimes herein referred to as Shotwell) and Byron A. Cain, Frank J. Huebner and Harold E. Sullivan, its officers, were indicted on two counts on March 14, 1952, for allegedly wilfully and knowingly attempting to defeat and evade a large part of the income taxes due and owing by Shotwell

to the United States of America for the calendar years 1945 and 1946, in violation of section 145 (b) of the Internal Revenue Code,[1] in that defendants filed and caused to be filed false and fraudulent tax returns for said corporation.

After trial on pleas of not guilty, the jury found all of the defendants guilty on both counts. Judgments of conviction were entered on the verdict, Shotwell was fined $10,000 on each count, the individual defendants were sentenced to three years' imprisonment on each count (to run concurrently), Cain was fined $5,000 on each count, Huebner was fined $5,000 on each count, and Sullivan was fined $2,500 on each count. The defendants have severally appealed.

The errors relied on arise out of the alleged insufficiency of the evidence to support the verdict; the failure of the court to sustain defendants' motions to dismiss; the failure of the court to sustain motions to suppress documents and information prepared or furnished by defendants for the government during an alleged disclosure; certain rulings on evidence and instructions; and denial of motions for new trial.

1. The trial court was correct in denying the defendants' two motions to dismiss the indictment, in the nature of special pleas in bar. These motions were based on the theory that defendants had acquired immunity from criminal prosecution by making a "voluntary disclosure," in reliance upon an announced policy of the Treasury Department not to prosecute in cases where such a disclosure had been made.

There was no statutory basis for the alleged promises of immunity announced by the various Treasury Department officials.[2] Thus the making of a voluntary disclosure by the defendants was no legal bar to a criminal prosecution. Only an act of Congress could create such immunity. In the absence of statute, a defendant cannot enforce such a promise and "cannot by law plead such facts in bar of any indictment against him, nor avail himself of it upon his trial. * * *" *Whiskey Cases*, 99 U. S. 594, 595, 25 L. Ed. 399, 400.

Defendants contend, however, that there is a statutory basis for the voluntary disclosure policy in the power of the Secretary of the Treasury to compromise any civil or

[1] 26 U. S. C. A. § 145 (b).

[2] "At the outset, it is most important to point out that this policy of the Bureau of Internal Revenue not to recommend criminal prosecution where the taxpayer had made a voluntary disclosure before the investigation started, had no basis either in statute, rule or regulation." Balter, *Fraud Under Federal Tax Law*, Second Ed. 1953, p. 102.

criminal case under § 3761 of the Internal Revenue Code of 1939.[3] This same argument was squarely met and disposed of in *U. S. v. Lustig*, 163 F. 2d 85, 89,[3a] where the court said:

> "The compromise statute[4] affords no shield to one who has violated the tax laws unless there has actually been a compromise. See *Botany Worsted Mills v. United States*, 278 U. S. 282, 49 S. Ct. 129, 73 L. Ed. 379. It is not even claimed here that there was more than an offer to make a compromise. None of the formalities prescribed by the statute and treated by the Supreme Court as necessary to effect a compromise were observed. *Botany Worsted Mills v. United States, supra*, 278 U. S. at pages 288–289, 49 S. Ct. 129, 73 L. Ed. 379. There was no issue of fact for court or jury as to whether a contract of compromise had been made. Accordingly there is no merit in the defense of immunity."

The language of the *Lustig* opinion is fully applicable to the case at bar. The Treasury Department officials did not have the power to confer immunity on persons making voluntary disclosures, defendants' voluntary disclosure was not a statutory compromise of a criminal case and did not entitle them to immunity, and the motions to dismiss the indictment were properly denied.

2. A timely motion by defendants, supported by affidavits, and later amended, was made before trial to suppress certain evidence in the possession of the government. The motion averred that the evidence had been produced by defendants in reliance on a promise of immunity. More specifically, it averred that the Bureau of Internal Revenue, through the Secretary of the Treasury, the Commissioner of Internal Revenue, and other responsible treasury officials thereunto duly authorized, publicly offered and held out to all of those whose income tax returns contained omissions or misstatements, that there would be immunity from criminal prosecution in any case where the taxpayer who filed such return would come forward before investigation had been initiated and acknowledge the existence in such return of omissions for misstatements, and the Treasury Department in such case would merely assess such unpaid tax, interest, civil penalties, if any, as might thereafter be determined to be due, and that said offer was and had

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[3] 26 U. S. C. A. § 3761.
[3a] Cert. den. 332 U. S. 775.
[4] 26 U. S. C. A. § 3761.

been in full force and effect. The motion likewise set forth that such timely acknowledgement was made to a responsible officer or agent of the Treasury Department in January 1948 of the returns of Shotwell for the years mentioned in the indictment; that the defendants informed said agents of the Treasury Department, among other things, that said returns contained omissions and misstatements in that they intentionally failed to include, under the heading of gross sales, all or part of the sums received by Shotwell through sales of goods, and they failed also to include under the heading of "costs of goods sold," various payments made by defendants for said goods, which receipts and payments were in excess of the ceiling prices [5] as set by the laws and regulations of the United States at the time such goods were purchased. It was also stated in the motion that the defendants at said times stated that Shotwell, through its officers, was ready, able and willing to pay such unpaid tax, interest and civil penalties, if any, as might be determined to be due after inspection and investigation by the agents of the Bureau of Internal Revenue. The motion also set forth that, at the time of the disclosure, Shotwell's over-the-ceiling payments for raw material were not deductible as a part of the cost of goods sold, under the rulings of the Commissioner.

The motion also averred that the officers and agents of the Treasury Department acknowledged the sufficiency and timeliness of the disclosure, and that the defendants, at the request of said officers, caused to be made available to them the books and records of Shotwell, and the individual defendants communicated to them information in their possession materially related to said omissions and misstatements and not available to such officers and agents through said corporate books and records, which information could not have been obtained from the individual defendants in any manner in view of their constitutional privilege and rights, and also that the defendants caused certain accountants to be employed to assist the said agents in obtaining the facts. Shotwell thus incurred and paid auditing charges in excess of $20,000.

The motion also set forth in substance that in pursuance of the foregoing, the Treasury officials examined the corporate books, records and data, and made copies thereof continuously over a period of more than four years preceding the return of

[5] Fixed pursuant to 50 U. S. C. A. App. § 902 (1944 ed.)

the indictment, and did not advise the defendants that said disclosure was untimely or insufficient, or that criminal prosecution was or had been contemplated, or that it might be recommended; that, notwithstanding the foregoing, said officials shortly before the proceedings before the grand jury which resulted in the indictment herein repudiated the said offer so relied and acted upon by the defendants, without granting to them any hearing or conference, and without communicating to them the amount which, upon such inspection, the Bureau of Internal Revenue had determined to be due, and without affording Shotwell or said officers on its behalf, an opportunity to pay such amount. The motion charged that the said actions of the Bureau of Internal Revenue constituted an improper inducement of a confession or admission of facts upon which a criminal prosecution might be based and an illegal search and seizure of the books, papers and records of the defendants, and that, in consequence, the admission in evidence of all books, records, papers and statements so obtained, and any copies thereof or data procured therefrom as a result of information obtained therefrom, would violate the rights of the defendants under the fourth and fifth amendments to the constitution of the United States.

A hearing was held on the motion to suppress. The following is a statement of the facts proved, including only those facts shown by the government's evidence wherever there was a conflict.

Leon J. Busby, a certified public accountant under the laws of Illinois, was a member of the firm of Busby and Oury, located in Chicago. Beginning in 1942 that firm did the general auditing work at Shotwell for the purpose of certifying financial statements used in credit channels. The firm prepared Shotwell's income tax returns, installed efficiency systems, and did other matters of a general accounting nature.

In January 1948, at the request of defendant Cain, Busby made a trip with Stanley Gratlund, vice-president and comptroller of Shotwell, to the plant of General Confections Company in New York, to determine whether a loan of $50,000 to General Confections, requested by David G. Lubben, would be financially secure. Having made a cursory survey, he reported to the Shotwell officers, including Gratlund and defendants Cain and Huebner, that the survey did not justify such a loan.

Although Busby was active in the supervision of the auditing work for Shotwell, he did not know that Shotwell had received over-ceiling or premium payments. During this trip Graflund told him of that condition. In reporting on January 11, 1948, to Cain and Sullivan, Busby recommended against making the load, and told of Graflund's revelation about the collection of over-ceiling prices for candy sold by Shotwell to General Confections, that Graflund had said that he did not know how much the over-ceiling payments were, and that he (Graflund) also thought "the money had been paid out by Shotwell." Busby said that he told Cain and Sullivan that, while it might not be that Shotwell was in a serious position, they should file an amended return to get the matter on record, and they discussed it for a while. Cain and Sullivan readily admitted the over-ceiling payments. They asked Busby "whether or not it would be in order to discuss the matter with the department." Busby told them that he thought it would and that, even if they made the disclosure, which was, in his opinion, the customary thing to do, "there probably would be nothing to it except that it would clear Shotwell of omissions from the tax returns." Busby directed their attention to the fact that it was a common thing to make disclosures to the department, and in so doing he did not see that there were any serious consequences, and that "there wouldn't be any critical attitude of the department towards them."

This discussion about making a disclosure occurred off and on between these men for a couple of weeks. They assigned Busby to communicate with the department, after having discussed the possibility of sending a lawyer.

About March 15, 1948, Busby went to the office of the Chief Deputy Collector in Chicago, Ernest Sauber, and told Sauber that he had a client which had been engaged in over-ceiling sales and over-ceiling purchases, which were not reflected in its books, that the client "wants to clean up some omissions from his tax return," that he [Busby] had been asked to prepare amended returns; that he had been unable to ascertain the exact figures and he did not know how he could prepare amended returns without having the figures, and he asked Sauber's advice on how to proceed. In response to Sauber's inquiry, Busby said that these transactions were handled all in cash, the part representing the over-ceiling payments was kept in a cash box, which cash was used to make over-ceiling purchases; that said transactions to a large extent "washed each other";

that when it was no longer necessary to make over-ceiling sales and purchases, the balance in the cash box was taken into the corporate records and declared as income for the year that the OPA ceiling ceased to exist. Busby told Sauber that "we wanted to go into the matter and have the agent come out and examine the situation and see what the real condition was and if there was any net amount due to the Government we wanted to pay it."

Sauber told Busby that he could not prepare amended returns on the basis of his then knowledge, and suggested that Busby get statements from every individual at Shotwell who had anything to do with these transactions, and therefrom reconstruct the figures necessary for an accurate return, and after the figures had been reconstructed to ask the internal revenue agent's office to audit the Shotwell return. On this occasion Sauber advised Busby that if the disclosure was timely and the facts that he had related to Sauber were correct, the latter policy of the Bureau should not be applied.

The next day Busby met Cain, Huebner and Sullivan and told them that Sauber recommended that one of the officers come forward and disclose the identity of the taxpayer and "that if this were done, they should proceed to determine as nearly as possible how much was involved, and he saw no reason why there should be any trouble with respect to criminal prosecution in case of timely disclosure." Sauber had said that either an officer of the company or its representative could make the disclosure. Busby also told the individual defendants that Sauber said that there was no need for amended returns. Cain, president of Shotwell, told Busby to go to the collector's office and "disclose the whole affair, the whole details."

On one of various visits of Busby to Sauber's office, Sauber asked if Busby knew how much was involved, and when given a negative answer and told that Shotwell had no specific records from which that could be determined, Sauber suggested that Busby gather "such information as we could from any memorandum or memory and summarize it on a form, and in the meanwhile he would contact the office of the agent in charge and have an auditor come out and work with us for the purpose of substantiating or getting together the true facts as nearly as could be accomplished." Sauber said that he would have the Agent in Charge, Mr. Wright, send out an agent to verify the summarization, or to help compile it. He said that the

Agent "was to cover an examination of the books which would include just about a routine audit, verification of the tax returns; that he would examine the books and any other data that we had to submit to him."

Within a week Busby brought Cain into Sauber's office and said that Shotwell was the client that he had referred to in the previous meeting. Cain then told Sauber the same story that Busby had told him, and that "they did not know how to proceed in order to correct their tax returns." Sauber gave Cain the same advice he had given Busby, and told him "to ask for an audit of their returns."

Cain told Sauber that he had two boys in school and he was worried about publicity, and Sauber said that there would be no publicity on the case, that the only time an income tax case received publicity was when there was an indictment. Sauber told Cain that in his opinion this was strictly a civil case and that it was not a criminal case, and that he had nothing to worry about so far as publicity was concerned.

About thirty days thereafter (latter part of April 1948), Cain telephoned to Sauber and said that his advice had been followed, a meeting of all Shotwell people connected with the black market transactions had been held, and that figures had been prepared which he would like to come in and turn over to Sauber. The latter said that he had no jurisdiction in the case, that corporation returns were handled by the Revenue Agent's office, which he should call and request an audit of the Shotwell returns. At Cain's request, Sauber called the Revenue Agent's office. Ralph Johnson, the group chief in that office agreed to do it. Johnson said he would schedule the returns for audit. Sauber said the cases had not been assigned for audit to any particular agent.

Thirty days later and several times thereafter, Cain called Sauber and stated that no one had come from the department. He was very insistent that the audit be started. Sauber learned by inquiry at the Revenue Agent's office that there had been delays there due to misunderstanding in regard to the name of Shotwell. Sauber reported this fact to Cain.

From 1945 through 1948, the procedure in the office of the Collector of Internal Revenue in regard to corporate returns was that after returns were filed with the collector they were sent to the Bureau at Washington for statistical purposes and for clarification purposes. The Bureau would make a survey of the returns and select those which it believed were worthy

of examination in the field. They were then sent to the office of the Internal Revenue Agent in Charge and there was a further classification made of those returns in the local office. Those returns which a local office believed required investigation were retained, sent to the record section where an office card record was made and then they would be sent to the various groups for investigation by their agents.

As to the Shotwell return for 1945, the card record fails to show on what date it was determined that the return should be audited or investigated. What the card does show, as interpreted by Holz, a government witness, is as follows: On January 15, 1947, the 1945 income tax return and the 1945 excess profits tax return of Shotwell were assigned to Group Chief Magnus for audit in the field, and Magnus assigned them to Agent Korman on January 20, 1947. Korman filed a report on August 5, 1947, and either then or later an agreement was signed consenting to the assessments of deficiencies such agreement specifying that the taxpayer waived his right to petition the tax court, and consenting to an immediate assessment of the deficiencies. This may have occurred at any time from August 8, 1947 to September 26, 1947, when the card record indicates that the case was disposed of.

As to the 1946 Shotwell return, the card record indicates that on December 11, 1947, the card was made out, and that on December 16, 1947, the return was assigned to Group Chief Granahan for investigation in the field by one of his agents, which means for an audit. On July 22, 1948, the card indicates the return was sent to Group Chief Johnson, and then on February 4, 1949, to Group Chief Williams, now deceased. The record is silent as to when any investigation or audit commenced as to the 1946 Shotwell return.

In 1949 Cain called Sauber and reported that three men had been auditing the Shotwell returns, and asked what could be done to expedite the closing of the case. Sauber referred him to Wright, Internal Revenue Agent in Charge. A week later Cain told Sauber that he had seen Wright and had "gotten nowhere" with him, and requested Sauber to find out what the difficulty was. After talking to Wright, Sauber advised Cain that the difficulty was Shotwell "would not tell the Government to whom the over-the-ceiling purchase payments had been paid, and until such time as the Shotwell Manufacturing Company would tell the Government or identify the persons receiving the over-the-ceiling purchase payments, the

case would not be closed, that they would be required to cooperate with the Government before they would consider closing the case."

Cain then told Sauber "he could not identify the persons receiving these payments; the only persons that he knew of was a Dr. Doe in the Board of Trade Building, that someone had sent some money to, and that he himself thought it was a fictitious name and he would not appear ridiculous naming a Dr. Doe, and that was the only person he knew that had received any of these payments, and he would not reveal that name because he himself thought it was fictitious."

All corporate records were made available to revenue agents Krane and Mammel.

Revenue agent Krane came to work at the Shotwell plant in June or July 1948, and he came in from time to time over a long period of time. In July, 1948, Busby, having prepared a tentative schedule, gave it to the revenue agent when he appeared at the plant to examine the books.*

On February 7, 1949, revenue agent Mammel was given the *Shotwell* case. He had nothing to do with a decision as to whether there should be a recommendation of prosecution. The discretion in that regard was vested in the Intelligence Office, and he was not in that office. Although he could recommend a prosecution, those vested with authority could refuse to prosecute. In March of 1949, he talked to defendant Cain and told Cain that there might possibly be prosecution and therefore he (Mammel) had to do a perfect job in his investigation [of the accounts of Shotwell] so that he would not have to do the work over again. He did not tell Cain that he considered what they had done constituted a voluntary disclosure.

Early in 1951, Cain and Sullivan visited Wright and discussed the case in detail, at which time Cain stated that he wanted a bill. Wright again assured them "that he would check into it and see if a bill could be brought forth." Cain asked Wright if they "couldn't get the tax matter settled."

Prior to the indictment on March 14, 1952, the defendants were never notified what amount of tax the Bureau of Internal Revenue had determined was due.

On May 28, 1945, former Secretary of the Treasury Morgenthau stated at a press conference that "some taxpayers who

*This compilation was introduced in evidence by the government at the trial.

have failed to declare their full income and pay the tax due may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started."

On August 21, 1945, former Secretary of the Treasury Vinson stated through the press: "No one is going to jail for an honest mistake in filling out his tax return. Treasury policy even permits the wilful evader to escape prosecution if he repents in time. The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return * * *. Monetary penalties may be imposed for delinquency, for negligence and for fraud, but the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out.'"

On October 15, 1945, the then Commissioner of Internal Revenue "stressed the bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases."

On May 14, 1947, the chief counsel of the Bureau of Internal Revenue said in the course of an address: "The law requires the prosecution of the tax evader and that is what the Department recommends to the Attorney General. There is one important exception to that. * * * The Department has always encouraged voluntary disclosures. * * * The making of a voluntary disclosure is a simple thing. The taxpayer or his legal agent can go before any official of the Bureau of Internal Revenue or any of its field offices—whether it is the collector, a deputy collector, a revenue agent, a special agent, or any other responsible Treasury officer. There is no special form for making the disclosure. The simple statement that 'I have filed false tax returns and I want to make the government whole,' would constitute a complete disclosure. * * *"

The government's brief sets forth the following as the reasons the district court denied the motion to suppress:

The Treasury's voluntary disclosure policy required (1) the disclosure of a tax deficiency, (2) an admission that the taxes

due had been wilfully evaded, and (3) good faith cooperation with the government thereafter in determining the amount of taxes due. The court made the following findings of fact: that appellants had never disclosed unreported income; that they had consistently denied any intent to evade taxes; that, far from showing good faith, they had attempted to deceive the revenue agents during the investigation; and that no government official had represented to appellants that their alleged disclosure would result in immunity from criminal prosecution.

In seeking to sustain the action of the district court in denying defendants' motion to suppress certain evidence, the government in its brief relies upon the reasons given by the district court, and adds that, "although the taxpayer who made a voluntary disclosure was not entitled to immunity from prosecution, an entirely different question would, of course, arise if the disclosure was made fully and fairly and in reliance on the policy, and if the action of the investigating agents gave the taxpayer good reason to believe that the Treasury would not recommend prosecution." The government contends that "that question has been determined adversely to appellants by the trial court's findings of fact, amply supported by the evidence summarized above, to the effect that the testimony at the suppression hearing indicated an entire absence of good faith on the part of appellants and no misleading actions or improper inducement on the part of the Government representatives."

It is obvious that both the district court and government counsel concede the existence of the Treasury Department's voluntary disclosure policy, and that the policy itself had valid legal standing. The differences of opinion here pertain to the application of the policy to this case.

(a) The evidence shows that defendants did disclose unreported taxable income. Their admission that they had omitted from Shotwell's return, over-the-ceiling receipts for candy sold, revealed income which should have been considered in fixing its tax, according to the Treasury Department's ruling that illegal payments for goods purchased were not deductible for tax purposes.

(b) While they coupled a disclosure of unreported income with a *legal* suggestion that that income was not taxable because it was offset by disbursements substantially equivalent thereto for over-the-ceiling purchases of raw material, con-

trary to the then legal contentions of the Treasury Department, they did disclose the *facts*. The voluntary disclosure policy referred to the disclosure of facts, and not to the disclosure of the legal contentions of a taxpayer's lawyer. Actually the legal contention made by the defendants at that time was not fantastic or unreasonable. This is established by the department's later reversal of its stand on such offsetting illegal disbursements, and its adoption of the same view that defendants suggested as to the law.[7] Therefore defendants' contention did not cast any doubt upon their good faith in making their disclosure of facts.

Nor was bad faith on their part evidenced by their conduct after making their offer of disclosure. They cooperated to the extent that they were able, and in complete compliance with the policy of the department. The insistence of the revenue agents that defendants go beyond their duty of disclosing facts material to the determination of their unreported tax liability, by informing the government of the names of the persons to whom they paid over-the-ceiling prices for raw materials, was met with a refusal by defendants. This refusal was not inconsistent with a full disclosure of relevant facts on their tax liability. First, in the various statements of the voluntary disclosure policy, there is no suggestion or requirement that a taxpayer must furnish information for the prosecution of others, except insofar as that information may be incidental to a determination of his own tax liability, and, secondly, in view of the government's position that payments by defendants of over-the-ceiling prices were not germane to the computation of defendants' tax liability, the identification of the persons receiving those payments was irrelevant. It can hardly be contended that a taxpayer, who comes in and admits that he incorrectly reported his income for tax purposes, can be required to become an informer against persons who may be criminally liable in transactions which are not pertinent to his tax liability.

We therefore hold that defendants' inability or refusal to name the recipients of Shotwell's illegal disbursements, did not show that their offer of disclosure was in bad faith.

(c) When confronted with defendants' admission that Shotwell had intentionally omitted taxable income from its 1945 and 1946 income tax returns, and an expressed willingness to

[7] The Commissioner later acquiesced in court decisions which held such deductions allowable.

pay what was due, and to cooperate with the Bureau of Internal Revenue in taking whatever steps were necessary to establish the amount thereof, the responsible heads of the Bureau in Chicago not only said nothing to indicate that the offer was rejected, but, in complete harmony with the policy of the Treasury Department in regard to voluntary disclosures, accepted the cooperation of the defendants and thereby obtained access to Shotwell's books and records, and conducted investigations which continued until an indictment was filed in the district court.

From March 1948, when defendants made their disclosure to Chief Deputy Collector Sauber, until March 14, 1952, when the indictment was filed, defendants were led to believe by the government representatives that the course which they were pursuing would avert their criminal prosecution. At the March 15, 1948, conference between Busby and Sauber, when the nature of the income omissions was frankly outlined by Busby, Sauber said that, if the disclosure was timely and the related facts were correct, he saw no reason why the immunity from criminal prosecution policy of the Bureau should not be applied. Later Sauber told Cain, who was worried about publicity, that there would be no publicity in this case, that the only time an income tax case received publicity was when there was an indictment. He expressed the opinion that this was strictly a civil case, and not a criminal case, and that Cain had nothing to worry about so far as publicity was concerned. This statement is corroborative of defendants' contention that immunity from such prosecution had been offered in return for a voluntary disclosure under the department's policy.

Early in 1951, Agent in Charge Wright told the defendants, who repeated prior requests that they be given a bill for their taxes so they could pay it, that he would check into the matter and see if a bill could be brought forth. As late as October 1951, Wright's assistant, Oscar Olson, told Cain that he had nothing to worry about at all.

These expressions from the representatives of the government, paralleling the Treasury Department's policy not to "recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return," conclusively show that responsible government officials, from cabinet level to local level,

had represented to defendants that their disclosure would result in immunity from criminal prosecution.

The government does not effectively support its contentions when it says that "As early as February 1949, Cain was told by the examining agents that prosecution was possible." This is because first, Mammel, who is the agent who made such a statement, had no authority to decide who should be prosecuted and, secondly, if this were to be an announcement of intention by the government to prosecute the defendants, it came almost a year after the disclosure had been made by the defendants and accepted by the revenue officials, and long after the government, by means of the disclosure, had obtained information and records which it used in the prosecution of this case.

(d) The government seems to contend in this court that when the defendants made their disclosure they should have used words indicating that they had perpetrated a fraud upon the government or, as otherwise expressed, that they had wilful intent to evade taxes. Their disclosure showed that they knew they had over-ceiling income, and that they had intentionally not reported it. That was all that was necessary. Nothing in the pronouncement of the policy required them, in making a disclosure, to use the language of a lawyer in characterizing their failure to report taxable income.

The application of the disclosure policy is not conditioned upon the officers of the corporate taxpayer exhibiting to the representatives of the Commissioner of Internal Revenue a contrite spirit. It is not required by the policy that they appear in sackcloth and ashes and seek absolution from the internal revenue agent, or that he occupy the office of father confessor. When the taxpayer's representatives avail themselves of this policy they are not seeking moral forgiveness. The transaction is entirely amoral, one side seeking to avoid the criminal penalties which they have risked by their incomplete or erroneous return of income, and the government agents being engaged in the mundane purpose of collecting federal taxes.

We hold that as against this attack of the government, the disclosure by defendants was not defective.

(e) In a footnote in its brief in this court, the government makes an oblique attack upon the timeliness of defendant's disclosure. We think the facts in evidence show that when the disclosure was made, no investigation involving the over-

ceiling income of Shotwell during the taxable years had been started or even suggested or contemplated by the government. The disclosure was timely.

When the revenue agents get the scent and are in pursuit of the miscreant, it is too late for him to seek the protection of the Treasury Department's voluntary disclosure policy. Until then its door is open and the welcome mat is out.

(f) There is no inconsistency between the voluntary disclosure and the statement by Cain that the defendants would contest an assessment when made. That is the right of any taxpayer who would question the method of determining his tax assessment. By making a disclosure of facts upon which an assessment can be made, a taxpayer is not deprived of his right to be heard on the method used in making the assessment.

We hold that defendants made a valid voluntary disclosure in reliance upon promises of immunity. The evidence thereby obtained by the government stands on the same footing as an oral or a written confession induced by such a promise. The use of such evidence at the trial was a violation of each defendant's privilege against being compelled in any criminal case to be a witness against himself, as guaranteed by the fifth amendment to the constitution of the United States.

It therefore follows that the court erred in denying the motion, as amended, to suppress such evidence. The use of that evidence at the trial makes it necessary to reverse the conviction of the defendants.

In view of the fact that a retrial will be required in this case, we find it unnecessary to rule on defendant Sullivan's contention that the district court erred in overruling his motion for a separate trial made at the close of the government's case-in-chief. Upon his retrial he is free to make a timely motion for severance. We express no opinion as to what the ruling thereon should be.

Inasmuch as important and substantial evidence should have been suppressed, the case must be retried. It is unnecessary to express an opinion as to whether the remaining evidence upon the trial below did or did not establish defendant's guilt, or to pass upon the other errors relied upon.

For the reasons hereinbefore set forth, the judgments of the district court are reversed, with instructions to sustain defendant's motion as amended to suppress evidence, and to retry the case.

REVERSED AND REMANDED WITH INSTRUCTIONS.

LINDLEY, *Circuit Judge*, Dissenting.

I regret that I cannot agree with the result reached in the majority opinion.

Disregarding the merits of the suppression question for the moment, it seems to me the majority fails to define clearly its interpretation of the Bureau's voluntary disclosure policy. The legal issue involved on this phase of the case seems to me to require an explicit determination of just what that policy is, whereas the language of the majority, I think, leaves the resolution of that question in doubt.

As to the merits of the order denying suppression, in the first place, I believe that the majority has overlooked the nature of the issues raised by the motion to suppress. These include the legal question of interpretation of the Government's voluntary disclosure pronouncements and, in addition, the question of fact as to whether defendants made a voluntary disclosure within the purview of the announced policy. And if these two issues should be resolved in defendant's favor, a further question then arises, in the light of the reported cases, of whether evidence given to the Treasury officials in reliance on the disclosure policy will be suppressed. That question is by no means settled. Compare *Centracchio v. Garrity*, 198 F. 2d 382, 388, cert. denied, 344 U. S. 866 (CA 1), with *In re Liebster*, 91 F. Supp. 814.

Reverting to the legal question of interpretation of the policy statements, it seems to me the majority opinion turns on an assumption that any action by a taxpayer which advises a Treasury official that a tax return previously filed by him is incorrect or incomplete, is a sufficient disclosure. Paraphrasing the language in part, the majority opinion seems to hold that any word which is sufficient to put the Treasury bloodhounds on the scent of a fraudulent return is a sufficient disclosure, irrespective of what facts are revealed to or concealed thereby from the government and irrespective of what roadblocks the taxpayer may thereafter erect in the way of a determination of the true facts surrounding the fraudulent return. Then, as I construe the majority's expressions, any evidence that the taxpayer may thereafter surrender to treasury agents must be suppressed, if criminal prosecution is recommended when the fraudulent omission is discovered.

Such a broad statement of the doctrine, I think, is an unwarranted interpretation of the Treasury policy. The Wen-

chel statement, upon which defendants place principal reliance, when considered in its entirety, carries with it the clear implication that the disclosure contemplated must be a full disclosure of all facts bearing on the false return. Secretary Snyder's statement, issued about 10 days after the Wenchel statement, after referring to the long existent policy, concluded that the application of the policy to a particular taxpayer "presumes, of course, that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability."

Furthermore, I think the broad interpretation on which the majority opinion rests ignores persuasive judicial pronouncements bearing on this question. The Court of Appeals for the First Circuit in the *Centracchio* case, *supra*, said at 198 F. 2d at page 389: "If it be assumed * * * that evidence disclosed to the Treasury officials on the faith of the announced voluntary disclosure policy, and in compliance with its conditions, should be excluded from evidence in a subsequent criminal trial, it would seem that the taxpayer would have to satisfy the court that he made a voluntary, good faith disclosure of all data necessary to a correct computation of his income tax deficiencies, and that he made such disclosures, before an investigation was under way." And in *In re Monroe*, 110 F. Supp. 507, aff'd 215 F. 2d 81, cert. denied 348 U. S. 914 (CA–5), the court defined the disclosure policy as containing the specification that the disclosure must be "a complete, fair and honest disclosure, and not a portion." While these authorities are not binding on us, the reasonable interpretation adopted by the jurists who penned those opinions is entitled to our respect and deserving of our serious consideration. See also *Chieftain Pontiac Corp.* v. *Julian*, 209 F. 2d 657 (CA–1).

The question, basically, is what would the average taxpayer understand, after reading the Treasury statements, as to what would constitute a sufficient disclosure thereunder. The trial court, consistently with the pronouncements made in *Centracchio* and *Monroe*, applied the rule of reason that a "disclosure" requires a good faith disclosure of all facts pertinent to the fraudulent return. This, I believe, is a correct analysis of the policy as announced and, insofar as the majority opinion is based on a less restrictive rule, I respectfully dissent.

The second point on which I believe the majority falls into error is in its treatment of the suppression question as one wholly of law. It seems to me that the majority attempts to

try the factual issues *de novo* and fails to give the requisite weight to the trial court's findings of fact which are essential elements of the question under review.

The weight to be accorded by a court of appeals to such findings has been variously defined. In *Roberson* v. *United States*, 165 F. 2d 752, at 754 (CA–6), the court pointed out that "the finding of the trial court on a preliminary question of fact should not be reversed on appeal if it be fairly supported by the evidence." In *Nichols* v. *United States*, 176 F. 2d 431 (CA–8), the court said at page 432: "The facts as determined by the trial court are supported by evidence * * * and are binding on this Court." And in *Cannon* v. *United States*, 166 F. 2d 85 (CA–5), the court's language was, at pages 86–87: "It cannot be said that the judge's findings on this question were without substantial support. Therefore we will not disturb those findings."

In each of these cases, the findings to which reference was had were made by the trial court in ruling on a motion to suppress evidence allegedly obtained by an illegal search and seizure. While these decisions, as well as the subsequently adopted rule which embodies the then existing case law,* pertain only to the classic search and seizure question rather than to the Treasury's voluntary disclosure doctrine, the proceeding to suppress the evidence is the same and the same procedural rules should be applied. If adequate evidence supports the findings upon which the trial court's ruling is based, we cannot disturb those findings. See *White* v. *United States*, 194 F. 2d 215, 217, cert. denied, 343 U. S. 930.

In its memorandum decision denying defendants' motion, the district court found that defendants had not sustained the burden of proving that a sufficient voluntary disclosure within the purview of the announced policy had been made by them. It found that there had been "no disclosure of an intentional violation or * * * of an intent to defraud the Government" in view of defendants' position, which they maintained at all times, that no tax liability could arise from Shotwell's failure to report black-market receipts, since such receipts and corresponding black-market disbursements by the company "washed-out" each other, and that the disclosure to Sauber was merely an admission of omissions in Shotwell's

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*Federal Rules of Criminal Procedure 41 (e), effective October 20, 1949, 18 U. S. C. A. See note to subdivision (e), Notes of Advisory Committee on Rules, 18 U. S. C. A. p. 463.

1945 and 1946 returns which were based on defendants' alleged good-faith belief that no added tax liability arose from the company's black-market operations.

As bearing on defendants' proof as to their good faith in the so-called disclosure the court found that such records of the cash transactions in the black-market operations as the corporation had, had been destroyed on instructions of Cain prior to the initial conferences between Shotwell's agents and Sauber; that no bona fide efforts were made by defendants to reconstruct such destroyed records so as to enable the government to determine the amount of tax due, and that figures contained in work sheets turned over to Treasury agents as a part of the alleged disclosure were admittedly fictitious. The court found further that no promise of immunity had been held out to defendants by any representative of the government at any time, and that nothing was done by any agent of the Bureau to lead defendants to believe that the alleged disclosure was accepted as adequate or that there would be no criminal prosecution on account thereof.

Unless we can say that these findings are so lacking in evidentiary support as to require that they be set aside, we have no choice but to affirm the order denying the motion to suppress evidence. A brief recital of the facts underlying this litigation and a brief summary of the evidence before the court at the proceeding on the suppression motion sufficiently demonstrate, in my opinion, that the findings of the court, were amply supported.

When Busby, and later Cain, first approached Sauber, each reported that during the taxable years 1945 and 1946, Shotwell had sold large quantities of candy to Lubben, or to Lubben's companies, at a premium price above the established OPA ceiling for the commodity. These shipments were invoiced to the buyer at the established ceiling price, and payments therefor at those prices were recorded on Shotwell's books and duly reported on its tax returns. The buyer was billed separately for the above-ceiling portions of the purchase prices. These payments were received by defendants in cash and were neither recorded on the company's books nor reported for income tax purposes. At the same time, it was reported that the cash thus received was paid out by Shotwell as above-ceiling premium prices for the raw materials which it needed, such as corn syrup and chocolate. On the basis of the representations thus made, Sauber, at that time, expressed

his opinion that the facts disclosed strictly a civil matter. The indictments were returned after several years of investigation, during which time Shotwell employed Busby, an accountant, to work with the federal agents.

But the above facts tell only a part of the story on which the trial court's findings are based. The evidence adduced at the suppression hearing indicates that Shotwell's black-market operations were more extensive than those first disclosed to Sauber. For example, Sauber was not advised that Shotwell, during the taxable period, made other black market sales of goods on which no part of the transaction was reflected on the company's books. Allusion has previously been made to other evidentiary facts bearing on the sufficiency of the alleged disclosure, namely, the fact that all records which reflected black-market operations were destroyed by defendants before they approached the Treasury officials and the fact that work papers and supposed summaries of the unreported income turned over to the agents were admittedly fictitious. Furthermore, defendants have maintained at all times that alleged black-market disbursements totalling hundreds of thousands of dollars were paid out by them, without the benefit of any receipts, to faceless men who were unknown to defendants. At all times during the investigation they refused to advise Treasury agents as to who had received these disbursements. They took the position that to whom such payments were made was none of the Bureau's business, while at the same time fictitious figures were inserted in accounting data given to the agents which purportedly reconstructed the financial history of Shotwell's black-market dealings.

The point to be stressed is that on the record before us we cannot say that the evidence does not support the finding of the trial court that no sufficient disclosure was made. We cannot say that the court's conclusion that "False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine" is an erroneous legal statement or that the hypothecated facts included in this statement are not descriptive of the proofs made in this case. Two factual questions were presented to the court below, namely, what was disclosed, and, was the disclosure prompted by the taxpayer's reliance on the announced policy or by some other motive best known to him? The trial

tribunal has found that, at most, only a partial disclosure was made; that good-faith cooperation with Treasury agents was lacking, and that such lack of good faith disclosed a purpose to mislead the agents. These findings are adequately supported by the evidence. It is not within our province to second-guess the trial court on factual questions.

In my opinion we cannot overturn the court's further finding that no promise of immunity was held out to defendants or that no other representations were made, which reasonably led them to believe that no criminal prosecution was contemplated. Sauber's opinion, which he expressed during his initial meeting with Cain, that this was strictly a civil matter, was based on the latter's original statement that black-market income not reported for the taxable years was "washed-out" by black-market expenditures which was, as the court below found, a partial disclosure only of the true facts of the case. The oral testimony as to statements made at various times by Treasury agents that no prosecution was intended,—that defendants had nothing to worry about,—are disputed by the agents' testimony. Thus this finding is based, in large measure, on the trial court's ruling on the credibility of witnesses.

On the record as a whole, I cannot escape the conviction that the court's interpretation of the voluntary disclosure statements as requiring such a complete disclosure and good-faith effort as to enable the internal revenue agents to assess the additional tax due is a correct interpretation of the offer held out to taxpayers in the Treasury policy statements. Believing that the court's findings of fact are unassailable, I would affirm the decision denying defendant's motion to suppress the evidence and proceed to consider the merits of the appeal.

In the United States Court of Appeals for the Seventh Circuit

Before Hon. WALTER C. LINDLEY, *Circuit Judge*; H. H. NATHAN SWAIM, *Circuit Judge*; Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*.

No. 11108

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THE SHOWELL MANUFACTURING COMPANY, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Judgment

June 15, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to sustain defendant's motion as amended to suppress evidence, and to retry the case.

In the United States Court of Appeals for the Seventh Circuit

Before Hon. WALTER C. LINDLEY, *Circuit Judge*; Hon. H. NATHAN SWAIM, *Circuit Judge*; Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*.

No. 11109

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BYRON A. CAIN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Judgment

June 15, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to sustain defendant's motion as amended to suppress evidence, and to retry the case.

In the United States Court of Appeals for the Seventh Circuit

Before Hon. WALTER C. LINDLEY, *Circuit Judge*; Hon. H. NATHAN SWAIM, *Circuit Judge*; Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*.

No. 11110

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANK J. HUEBNER, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Judgment

June 15, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to sustain defendant's motion as amended to suppress evidence, and to retry the case.

In the United States Court of Appeals for the Seventh Circuit

Before Hon. WALTER C. LINDLEY, *Circuit Judge;* Hon. H. NATHAN SWAIM, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge.*

No. 11111

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HAROLD E. SULLIVAN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Judgment

June 15, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to sustain defendant's motion as amended to suppress evidence, and to retry the case.

In the United States Court of Appeals for the Seventh Circuit

Nos. 11108-09-10-11

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THE SHOTWELL MFG. CO., BYRON A. CAIN, FRANK J. HUEBNER, HAROLD E. SULLIVAN, DEFENDANTS-APPELLANTS

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Order amending opinion

August 18, 1955

It is ordered by the Court that the Opinion of the Court in the above entitled appeals, filed June 15, 1955, be, amended by

the deletion of the following sentence appearing on page 11 thereof:

> In October, 1951, Cain talked to Oscar W. Olson, Mr. Wright's assistant, who told him that he would prefer that he see Mr. Wright, "but if I were you I'd have no worry about it at all."

In the United States Court of Appeals for the Seventh Circuit

[Title omitted.]

Order denying petition for rehearing, etc.

August 18, 1955

It is ordered by the Court that a Petition for Rehearing of these appeals before the Court en banc, be, and the same is hereby denied.

It is further ordered that a Petition for Rehearing of these appeals before the panel which heard the Appeals is hereby denied.

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

October Term, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, ET AL.

Order extending time to file petition for writ of certiorari

September 16, 1955

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 17, 1955.

Stanley Reed,
Associate Justice of the Supreme Court of the United States.

Dated this sixteenth day of September 1955.

Supreme Court of the United States

No. 470 and 471

October Term, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HEUBNER, ET AL.

AND

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HEUBNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

Order granting motion to defer consideration of the petitions for writs of certiorari

June 11, 1956

On consideration of the motion of the Solicitor General to defer consideration of the petitions for writs of certiorari in these cases,

It is ordered by this Court that the said motion be, and it is hereby, granted.

Supreme Court of the United States

No. 9

October Term, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, ET AL.

Order allowing certiorari

Filed February 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, limited to the issues raised in the amended motion to remand and supplement thereto and the respondents' answer to the amended motion to remand. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1957

SUPREME COURT, U.S.

No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
H. BRIAN HOLLAND,
Assistant Attorney General,
JOSEPH M. HOWARD,
Attorney,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

NO. —

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit, entered in the above case on June 15, 1955.

OPINIONS BELOW

The opinion of Judge Nordbye[1] denying respondent's motion to suppress evidence (Appendix, *infra*, pp. 27–34) has not been reported. The majority and dissenting opinions of the Court

[1] Judge Nordbye, District Judge for the District of Minnesota, was specially appointed by Chief Justice Vinson to try this case in the Northern District of Illinois. (R. 116–117.)

of Appeals (Appendix, *infra*, pp. 35–69) are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on June 15, 1955 (Appendix, *infra*, pp. 69–72), and a petition for rehearing, filed within the period allowed by the Court of Appeals, was denied on August 18, 1955. On September 16, 1955, by order of Mr. Justice Reed, the time for filing a petition for certiorari on behalf of the United States was extended to and including October 17, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

The district court, after hearing, found that respondents' alleged "voluntary disclosure" of their unpaid taxes was lacking in good faith, was not complete, and "had only one purpose and that was to mislead and misinform the Government agents of the true facts." The Court of Appeals reversed, holding that respondents had made a valid voluntary disclosure and that the use at the trial of evidence obtained through such disclosure constituted a violation of the Fifth Amendment.

The question is whether the Court of Appeals erred (a) in misapplying the so-called "voluntary disclosure" policy of the Treasury Department to the circumstances of this case, and (b) in misap-

plying the standards governing review of the trial court's findings of fact.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY

* * * * *

(b) *Fraud.* If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and

paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2). (26 U. S. C. 1952 ed., Sec. 293.)

STATEMENT

On March 14, 1952, a two-count indictment was filed in the United States District Court for the Northern District of Illinois charging that respondent Shotwell Manufacturing Company, a corporation, and the three individual respondents as officers thereof, wilfully attempted to evade a large part of the corporation's income taxes for 1945 and 1946, respectively, by filing fraudulent corporate income tax returns.[2] (R. 5–7.) The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1945)	$561,064.42	$370,638.95	$738,210.65	$534,288.89
Count II (1946)	1,202,917.18	457,012.98	1,526,490.47	579,970.83

[2] Shotwell Manufacturing Company manufactured candy and marshmallows. Sullivan, who had been attorney for the firm, and Cain, a millionaire real estate man, reorganized the business in 1941 and acquired a controlling stock interest. Cain became president, and Sullivan was general counsel with a salary of $30,000 a year. (R. 747–748, 971, 1764–1772, 1791–1793, 2541–2542, 2568–2569, 2629–2630, 2634–2637, 2647–2650, 2660–2661.) Huebner, a long-time employee of the corporation, became vice-president and general superintendent in charge of operations. He owned less than 1% of the stock. (R. 748, 1707, 1772, 1791, 2542, 2637.)

The Government furnished a bill of particulars which alleged that the unreported income resulted from the failure of the corporation to record on its books premiums received on certain sales of merchandise over and above the recorded invoice price, and from its complete failure to record certain other sales. (R. 8–9.) After a trial lasting five weeks, the jury returned its verdict of guilty as charged after short deliberation. (R. 3000.) The corporation was fined $20,000. (R. 3012–3013, 3221.) Cain was sentenced to imprisonment for three years and fined $10,000. (R. 3015–3016, 3224.) Sullivan was sentenced to imprisonment for three years and fined $5,000. (R. 3075, 3256–3257.) Huebner was sentenced to imprisonment for three years and fined $2,000. (R. 3019, 3222.)

The so-called voluntary disclosure policy of the Treasury Department was publicly announced in 1945 and was withdrawn in January 1952. (R. 3125–3126, 3142.) The policy provided generally that in cases in which taxpayers made voluntary disclosures of intentional evasions before an investigation had been begun, the Treasury Department would assess the tax deficiency plus civil penalties, including the 50% fraud penalty, but would not refer the case to the Department of Justice for criminal prosecution. (R. 3136–3137.) In two of the most definitive pronouncements of Treasury Department officials on the subject it was stated that taxpayers must cut "square

corners" with the Government (R. 3140), and that the voluntary disclosure policy assumed "that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability" (R. 3141). These two statements, one by J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, the other by Secretary of the Treasury Snyder, were issued in May 1947. (R. 3132, 3140.)

Early in 1948 respondents informed a Treasury official that the corporation had failed to report large black market currency receipts from sales of candy to one David Lubben, and in the summer of that year they submitted schedules purporting to show that the corporation had received approximately $380,000 in this manner during 1944, 1945 and 1946. None of these receipts had been recorded in the corporation's books or reported in its tax returns for those years. (R. 1844–1845, 1846.)

After the indictment had been returned respondents filed two motions to dismiss, alleging that they had made a voluntary disclosure and were entitled to immunity from prosecution. (R. 11–12, 31–32, 612–614.) Both motions were denied. (R. 90–99, 616–618.) Respondents also filed a motion to suppress all evidence obtained from them subsequent to the alleged disclosure on the ground that prosecutive use of evidence obtained through a promise of criminal im-

munity constitutes a violation of constitutional rights. (R. 120–127.) After a three day hearing at which both respondent Cain and Busby, the accountant who had advised the alleged disclosure and who had prepared the documents submitted in behalf of the corporation, testified at length, the motion was denied. (R. 150–448.) The evidence at the hearing was in sharp conflict on many points, and Judge Nordbye stated at the close that he felt it would be inappropriate to express his opinion as to the credibility of the witnesses and the good faith of respondents prior to trial, and he reserved the right to file findings of fact and conclusions of law upon completion of the trial. (R. 447–448.) After verdict Judge Nordbye filed a memorandum (Appendix, *infra*, pp. 27–34) in which he found as a fact that respondents' alleged disclosure was completely lacking in good faith and that they had been in no way misled by representatives of the Government.[3] Pointing out that the jury's verdict of guilty necessarily implied a finding that respondents, far from cooperating in a determination of the corporation's taxes, had intended to deceive the Government by the alleged disclosure, he said (Appendix, *infra*, p. 34):

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[3] In view of this, Judge Nordbye found it unnecessary to determine whether the alleged disclosure had been made before the Government had begun an investigation of the corporation's returns. (Appendix, *infra*, p. 34.)

> What a travesty it would be if, under such circumstances, immunity should be granted to the defendants because of the alleged disclosure which had only one purpose and that was to mislead and to misinform the Government agents of the true facts. False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine.

The evidence to support Judge Nordbye's findings may be summarized as follows:[4]

During the period when David Lubben was paying cash premiums over and above the invoice price for merchandise received from the corporation, Cain and Sullivan had impressed upon him that they were not paying taxes on this income and that no records should be kept of the cash payments. (R. 860–863, 920–922.) Sometime in the early part of 1948, however, Cain discovered, to his surprise, that Lubben had recorded all his over-the-ceiling cash pay-

[4] Some of the following facts are taken from the record of the hearing on the motion to suppress; others are taken from the trial evidence. In passing upon the propriety of a ruling such as this, the reviewing court will consider the whole record, not merely that portion prior to the ruling. *Carroll* v. *United States*, 267 U. S. 132, 162; *Rent* v. *United States*, 209 F. 2d 893, 896 (C. A. 5th).

ments.[4] (R. 866.) Early in February Cain sent Hufebner to pick up these records in order to "check their records" against Lubben's (R. 867), but the latter, on advice of his attorney, Davidson, refused to surrender the originals until he had photostats made (R. 864–870, 1316–1321). About the same time, Cain sent Busby, the accountant, and Graflund, the corporation's comptroller, to Lubben's plant to examine his books in connection with a $50,000 loan Lubben had requested. Graflund had further instructions, "to pick up whatever papers might be helpful to the company, personal memoranda, or anything else that might be helpful," without Lubben's knowledge.[5] (R. 1757–1758, 1773.)

During this visit Busby first learned of the cash premiums.[6] (R. 168–170.) He promptly spoke to Cain and Sullivan, who told him that all the receipts had been spent for raw materials; that they had not kept records of either the receipts or the expenditures because they did not wish to reveal violations of O. P. A. regulations; and that

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[4] Lubben's own tax returns had been under investigation by the Treasury Department as early as November 1945. (R. 335, cf. also 1059–1061.)

[5] Busby and Graflund placed this visit in January 1946. (R. 1757, 1825.) Lubben placed it in February. (R. 1207.)

[6] When Busby had prepared the corporation's returns for 1945 and 1946 he was given to understand that all receipts were recorded in the books and that there had been no violation of Office of Price Administration regulations. (R. 1822–1825.)

they had not reported the receipts as income because they considered the corresponding expenditures deductible and the whole series of transactions a wash-out tax-wise. Busby told them that the Commissioner of Internal Revenue would not allow deductions for the over-the-ceiling expeditures, and, knowing of Chief Counsel Wenchel's statement on the voluntary disclosure policy, he advised that the matter be disclosed. (R. 170–175, 204–207, 209–211, 213–214, 225–227, 248.)

In a series of conferences beginning about March 15, 1948, Chief Deputy Collector Sauber was advised of the above explanations, and he was told by Cain that it would be extremely difficult to prepare amended returns because no records had been kept of the over-the-ceiling receipts and payments and because the payments for raw materials had been made to "faceless" men who were unknown to respondents. (R. 224–249, 265, 282–285, 291, 299, 2580.) Cain stated that the corporation would immediately pay any tax the Government claimed, but that it would probably at a later date contest the Commissioner's refusal to allow deductions for its over-the-ceiling expenditures. (R. 232, 252, 1948.) Since the statement made to him clearly indicated lack of wilful intent to evade the corporation's taxes (see R. 295), Sauber told Cain that it was "strictly a civil case" and that there would be no publicity. At

no time did he assure Cain and Busby that they had made a valid voluntary disclosure. (R. 285–291.) He advised them that they should reconstruct both the receipts and the expeditures as accurately as they could and that an agent would then audit the corporation's books to determine the taxes due. (R. 282–285.)

Busby's subsequent exhaustive reconstruction, assisted by respondents and the staff of the corporation (R. 182–187, 232–233), resulted in a summary which revealed the receipt of approximately $380,000 in cash overages from Lubben for 1944, 1945 and 1946.[8] When it came to the countervailing expenditures, Cain testified that no one could recall the men (whom he characterized as "faceless") to whom these payments had been made (R. 208, 212, 223–224, 244, 249), so Cain quickly wrote down on a slip of paper a number of meaningless "plug" figures representing disbursements for raw materials,[9] and these were used by Busby to complete his summary (R. 216–217, 233–234, 258–268). The result was a credit balance of $6,000 which, according to respondents, had actually been reported in the corporation's return. (R. 131.) After Busby's work had been

[8] See Defendant's Exhibit 1 and Government Exhibit 4 at the suppression hearing (R. 3091, 3096), and Government's Exhibit 186 at the trial (Vol. VIII of the Record, p. 90).

[9] See Defendant's Exhibit 16 at the suppression hearing (R. 3174), and Government's Exhibit 185 at the trial (Vol. VIII of the Record, p. 89).

completed Cain notified Sauber that the figures were ready. (R. 285–286.) Cain testified that they represented "our best estimate at that time" (R. 261), and, when Revenue Agent Lima arrived at the corporation's office in the summer of 1948 to begin the audit, Busby gave him his work sheets and summary with the remark that they represented both the receipts and the disbursements "as near as they could figure" (R. 321). In February 1949 Cain was told by one of the investigating agents that criminal proceedings were possible. (R. 327–328, 331–332.) In the summer of 1949 Cain was told that the case would not be closed until respondents cooperated with the Government by revealing the persons to whom the corporation had made over-the-ceiling payments to obtain raw materials. (R. 240–241, 285–290.)

The corporation had kept an informal record of Lubben's over-the-ceiling cash payments. Some time after the revenue agents had come to the corporation's office in the summer of 1948, Cain twice directed Graflund to destroy this record, and his orders were eventually carried out.[10] (R. 785, 1743–1745.) In August 1948, and again in August 1951, Cain offered Lubben financial assistance and urged him to leave the country to

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[10] It should be noted that Judge Lindley's dissenting opinion mistakenly places this destruction of records before the beginning of the agents' audit. (Appendix, *infra*, pp. 64–66.)

avoid questioning by the agents. He admitted to Lubben that the corporation had received the overages, said that he was willing to pay the Government $450,000 personally just to get the matter cleared up, and indicated that he was attempting to settle the case through a political contact with Daniel Bolich, then Special Agent in Charge of the New York office of the Treasury Intelligence Unit. (R. 962–974, 1321–1328, 1335–1336, 1365, 2623.) The record reveals other efforts, both by Cain and by Sullivan, to have the case closed through political pressure. (R. 964, 972, 1322, 2680.)

At no time did respondents openly admit, either during the investigation or during the course of the proceedings in the courts below, that they had intentionally evaded corporate taxes. It is true that at the time of the alleged disclosure in 1948 they admitted that the corporation owed additional taxes, because at that time the Commissioner of Internal Revenue would not allow deductions for over-the-ceiling expenditures. (R. 171, 181, 207–208, 229–232.) However, that question was then pending before the courts. In December 1948 the Tax Court overruled the Commissioner and held such deductions allowable (*Sullenger* v. *Commissioner,* 11 T. C. 1076), and this was followed by a number of decisions to the same effect in the Courts of Appeals.[11] (R.

[11] The Commissioner acquiesced in these decisions shortly prior to the trial of this case. (R. 428.)

144–145, 427–428.) Accordingly, when respondents filed their pre-trial motions, they not only denied intent to evade the corporation's taxes, but they also denied that the corporation owed any additional taxes. (R. 17, 31–32.)

At the trial the Government proved by the direct evidence of Lubben and his associates and by Lubben's records that respondents had received approximately $450,000 in unrecorded and unreported cash premiums during 1945 and 1946 alone. (R. 1838–1840, 1844–1846, 2064–2066.) Although the summary submitted by respondents in connection with the alleged disclosure had showed receipt of about $380,000 in cash overages by the corporation from Lubben in 1944, 1945 and 1946 (*supra*, p. 11), and although at the disclosure hearing neither Cain nor Busby limited the receipts to any particular period (see R. 222–225), respondents Cain and Sullivan testified at the trial that the overage receipts from Lubben were confined to the period between September 1945 and August 1946, that they amounted to no more than $150,000, and that all of this had been paid out to unidentified individuals in premiums for raw materials. The defense was largely devoted to attempts to discredit Lubben and his records, and to efforts to prove that the corporation *must* have paid out large sums in overages during 1945 and 1946 in order to obtain the raw materials necessary to continue in operation.

Three employees of the corporation testified vaguely that they had made such payments (R. 1732, 1736, 1738, 1782, 1784, 1785, 2009–2014, 2017), but none of them could testify as to the amounts they had paid. None of the other numerous witnesses for the defense had knowledge of any specific amount paid out in the corporation's behalf. (R. 2038–2039, 2329, 2376, 2384, 2404, 2433, 2467, 2488, 2575, 2652, 2685.) And no witness was called to testify that he had received cash payments from the corporation.[12]

Without referring to a large part of the evidence summarized above, the Court of Appeals, with Judge Lindley dissenting, held, contrary to the district court's express findings, that respondents had "cooperated to the extent that they were able, and in complete compliance with the policy of the department." (Appendix, *infra*, p. 54.) The majority held that respondents had made a voluntary disclosure, and that the use at the trial of evidence obtained through the disclosure constituted a violation of the privilege against self-incrimination as guaranteed by the Fifth Amendment. The convictions were reversed with in-

[12] Respondent Huebner, to whom almost all of Lubben's cash payments were delivered personally and who was in charge of operation of the Shotwell plant, did not take the stand. When the sentences were about to be imposed Cain voluntarily asked the court to give consideration to the fact that all of Huebner's actions had been approved by himself and Sullivan. (R. 3013, 3016–3017.)

structions to grant the motion to suppress evidence. The majority found it unnecessary to consider numerous other alleged errors. (Appendix, *infra*, p. 59.)

REASONS FOR GRANTING THE WRIT

The opinion of the majority below assumes that a taxpayer who has made a voluntary disclosure must in good faith cooperate with the revenue agents in a determination of his correct tax liability, in order to obtain the exclusion of evidence obtained from him if criminal proceedings are instituted. (Appendix, *infra*, pp. 54–55.) The majority holds that these respondents did cooperate. Judge Lindley points out in his dissent that it is uncertain whether the majority opinion means that, as a matter of law, a partial disclosure is sufficient to bring a taxpayer within the terms of the policy; or whether it means that, as a matter of fact, there was no substantial evidence in this record to support Judge Nordbye's finding, in effect endorsed by the jury, that respondents' disclosure was completely lacking in good faith. (Appendix, *infra*, pp. 60–63.) Whichever be taken as the basis of the decision of the court below, we submit that the decision is so manifestly erroneous as to call for review by this Court.

1. As Judge Lindley says in his dissent, the majority opinion seems to hold "that any action by a taxpayer which advises a Treasury official

that a tax return previously filed by him is incorrect or incomplete * * * is a sufficient disclosure, irrespective of what facts are revealed to or concealed thereby from the government and irrespective of what roadblocks the taxpayer may thereafter erect in the way of a determination of the true facts surrounding the fraudulent return." (Appendix, *infra*, pp. 60–61.)

We agree that if a taxpayer should have voluntarily disclosed an unpaid tax liability before investigation has begun, and should thereafter cooperate in good faith in a determination of the taxes due, he would be entitled to an exclusion of the evidence thus obtained should criminal proceedings be instituted.[13] But in this case all respondents did was to present evidence of additional receipts from which it might possibly be concluded that the corporation owed additional

[13] It is highly doubtful that the exclusion of such evidence rests, as the majority below held (Appendix, *infra*, p. 59), upon the constitutional privilege against self-incrimination, since a voluntary disclosure does not involve extortion of a confession by either physical or moral compulsion. *Holt* v. *United States*, 218 U. S. 245, 252–253; *Centracchio* v. *Garrity*, 198 F. 2d 382, 388 (C. A. 1st), certiorari denied, 344 U. S. 866; cf. *United States* v. *Carignan*, 342 U. S. 36, 41. If this were the basis for the rule, there would be serious doubt of its applicability here, since the disclosure was made on behalf of a corporation which cannot claim the privilege. *United States* v. *White*, 322 U. S. 694, 699. We think confessions of this nature should be excluded under a rule of evidence. See *Centracchio* v. *Garrity*, *supra*; and cf. *United States* v. *Carignan*, *supra*, and *McNabb* v. *United States*, 318 U. S. 332.

taxes. They never admitted tax evasion, and they ultimately even denied that any taxes were owing. They filed no new, corrected tax returns. They destroyed crucial evidence. They presented fictitious evidence of corporate expenditures. They endeavored to persuade the Government's key witness to go to South America. They attempted to settle the case through political pressure. And they did not even disclose all the corporation's unreported cash receipts, for Busby's summary showed receipts of only about $380,000 in cash overages from Lubben for 1944, 1945 and 1946, whereas the Government proved approximately $450,000 for 1945 and 1946 alone. (*Supra,* p. 14.)

Furthermore, there were two reasons why it was necessary for the agents to determine what respondents had done with these receipts. If they had not, as they claimed, paid them out for raw materials, then they would obviously have been intentionally evading corporate taxes, and the 50% fraud penalty (*supra,* pp. 3–4), a civil incident of the assessment and collection of the proper tax (*Helvering* v. *Mitchell,* 303 U. S. 391, 405) and a very considerable amount in this case, would automatically have become due to the Government. Secondly, although during most of 1948 the Commissioner was disallowing black-market expenditures as deductions, the question had not yet been decided by the courts, and the

agents would have been remiss in their duties if they had failed to check the accuracy of the expenditures figures in Busby's summary. When the decision in *Sullenger* v. *Commissioner*, 11 T. C. 1076, overruled the Commissioner not long after the audit had begun (*supra*, p. 13), it became all the more necessary that the claim of deductible expenditures be thoroughly investigated in order to determine the proper amount of taxes owed by the corporation. Yet respondents consistently refused to produce any tangible evidence to support the claimed expenditures, and they have never specifically proved the payment of any money to the men they described as "faceless". Surely, to hold that in these circumstances, as a matter of law, respondents "cooperated to the extent that they were able, and in complete compliance with the policy of the department" (Appendix, *infra*, p. 54), transforms the "voluntary disclosure" policy into a device for enabling tax evaders to escape punishment, through the simple expedient of making "false statements and fraudulent representations" designed only "to mislead and to misinform the Government agents of the true facts" (Appendix, *infra*, p. 34).

This Court has held in the *Whiskey Cases*, 99 U. S. 594, that, where there is no statutory basis for a promise of immunity in return for a confession, the accused cannot hold the prosecutor to his promise; but that, if the accused *fully*

and fairly complies with his part of the bargain, he obtains equitable rights which may be enforced. We submit that that principle should be controlling here, and that nothing less than full and fair cooperation with the agents in determination of the tax due constitutes sufficient compliance with the voluntary disclosure policy to justify exclusion of the Government's evidence. The decision of the majority, if it means that a partial disclosure is sufficient, is in conflict with the holdings in *Contracchio* v. *Garrity*, 198 F. 2d 382, 389 (C. A. 1st), certiorari denied, 344 U. S. 866, and *Bateman* v. *United States*, 212 F. 2d 61, 65–66 (C. A. 9th). And it conflicts in principle with the holding in *Monroe* v. *United States*, 215 F. 2d 81, 84 (C. A. 5th), certiorari denied, 348 U. S. 914, to the effect that an alleged disclosure cannot be twisted into a trap for the Government. Cf. *Application of Henry Lustig Co.*, 67 F. Supp. 306, 310 (S. D. N. Y.), affirmed, 163 F. 2d 85 (C. A. 2d), certiorari denied, 332 U. S. 775.

The question of law involved is one of considerable importance to the revenue, for, although the policy has been abandoned, there are many pending cases in which this issue either has been, or can be raised.[14] Furthermore, the statute of limi-

[14] We are informed by the Internal Revenue Service that there are now between 60 and 70 pending cases in which the question of a voluntary disclosure made under the former policy either has been, or may be, raised as a defense.

tations will not run on the last year affected by the policy until March 15, 1957, and it is likely that some cases involving the issue will reach the Courts of Appeals as late as 1960.

2. If, on the other hand, the majority means to hold that Judge Nordbye's finding of lack of good faith was without support in the record, the decision conflicts with numerous decisions of this Court and the courts of appeals, and constitutes such an extraordinary departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. In view of the facts which we have set forth in the Statement (*supra*, pp. 8–15) there cannot be the shadow of a doubt that there was abundant evidence in the record to support Judge Nordbye's finding of "entire absence of good faith in * * * [the] alleged disclosure" (Appendix, *infra*, p. 31). True, the evidence was in conflict, but where the trial judge is required to make a finding of fact upon conflicting testimony the standard of review is the existence of substantial supporting evidence in the record. In *United States* v. *Johnson*, 327 U. S. 106, this Court reversed another split decision of the court below[15] on a similar issue, pointing out that the majority had substituted its own finding of fact for that of the trial court. This Court said (327 U. S., pp. 111–112, 113): "While the appellate

[15] *United States* v. *Johnson*, 149 F. 2d 31 (C. A. 7th).

court might intervene when the findings of fact are wholly unsupported by evidence, * * * it should never do so where it does not clearly appear that the findings are not supported by any evidence." See also *United States* v. *Johnson*, 319 U. S. 503, 518; *Delaney* v. *United States*, 263 U. S. 586, 589–590; *Helvering* v. *Kehoe*, 309 U. S. 277; *White* v. *United States*, 194 F. 2d 215, 217 (C. A. 5th), certiorari denied, 343 U. S. 930; *Alger* v. *United States*, 171 F. 2d 667, 668–669 (C. A. 7th); *Cannon* v. *United States*, 166 F. 2d 85, 86 (C. A. 5th); *Lowrey* v. *United States*, 161 F. 2d 30, 34 (C. A. 8th), certiorari denied, 331 U. S. 849; *Blodgett* v. *United States*, 161 F. 2d 47, 54–55 (C. A. 8th); *United States* v. *Nardone*, 127 F. 2d 521 (C. A. 2d); *Coupe* v. *United States*, 113 F. 2d 145, 148 (C. A. D. C.), certiorari denied, 310 U. S. 651.

The majority's substitution of its own finding of good faith in the disclosure is all the more inexplicable in view of the fact that the jury's verdict necessarily indicated that it had reached the same conclusion as had Judge Nordbye. For, while the Government proved that the corporation had received approximately $450,000 unreported income from Lubben, respondents testified that the amount was only $150,000 and that substantially all of this was passed along to the "faceless" men. If the jury had believed respondents, they would have been acquitted. Despite

the verdict of guilt, however, the majority finds that the respondents "cooperated to the extent that they were able." (Appendix, *infra*, p. 54).

Judge Nordbye found that respondents had been in no way misled by representatives of the Government. (Appendix, *infra*, p. 33.) The majority substituted its own finding on this issue also. (Appendix, *infra*, pp. 55–57.) Sauber testified that he had never assured Cain and Busby that they had made a valid disclosure. (R. 291.) Early in 1949 an agent told Cain that prosecution was possible. (R. 327–328, 331–332.) In the summer of 1949 Cain was told by Sauber that the case would not be closed until respondents cooperated. (R. 289–290.) In October 1951 Agent Wright told him substantially the same thing. (R. 240–241.) Agent Olson flatly denied that he had assured Cain in October 1951 that he had nothing to worry about. (R. 357.) Judge Nordbye's finding is clearly supported by the record.

In conclusion, it should be noted that Judge Nordbye specifically refrained from making a finding as to the timeliness of the disclosure (Appendix, *infra*, p. 34), a question as to which the evidence was in conflict. The majority below made its own finding that the disclosure was timely. (Appendix, *infra*, p. 58.) The case should at least have been remanded to permit the court of first instance to pass upon this

disputed issue of fact, if it were deemed significant.

CONCLUSION

For the reasons stated, it is respectfully submited that this case warrants further review. The petition for certiorari should be granted.

Respectfully submitted.

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OCTOBER 1955.

In the United States District Court for the Northern District of Illinois, Eastern Division

No. 52 Cr 143

UNITED STATES OF AMERICA, PLAINTIFF

vs.

SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, HAROLD E. SULLIVAN, FRANK J. HUEBNER, DEFENDANTS

MEMORANDUM DECISION

The above-named defendants filed a motion to suppress all evidence obtained from them by the agents of the Government subsequent to their alleged disclosure in January 1948, and the motion involves not only the suppression of any statements or admissions made by any of the defendants, but also all information and data obtained from the books, records, and documents belonging to the corporate defendant. The Court heard the evidence submitted by the defendants in support of their motion, and that offered by the Government in opposition thereto. At the close of the hearing on November 21, 1952, the Court announced that the motion would be denied and an order of denial was thereupon entered upon the minutes of the court. The Court reserved the right, however, to file a memorandum or formal findings of fact and conclusions of law in the event it later seemed necessary or advisable. The trial of the matter now having been concluded and the jury having found all of the defendants guilty on both counts of the indict-

ment, the Court desires to set forth in a memorandum his views with reference to the motion to suppress.

It is the defendant's position that the use of any information divulged to the agents of the Government by the defendants or obtained by the agents of the Government from the books, records and documents belonging to the corporate defendant after their alleged voluntary disclosure, would be a violation of their rights under the Fourth and Fifth Amendments to the Constitution of the United States.

Defendants rely upon the former voluntary disclosure doctrine as enunciated in various public announcements of the officials of the Treasury Department and the Bureau of Internal Revenue. The so-called doctrine must be culled from the many statements, press releases and pronouncements of the officials in that no formal regulations or procedures in this regard were adopted by the Treasury Department or the Bureau of Internal Revenue. Reference to isolated statements made by various government officials as to what had to be done by a tax evader to obtain immunity in a tax prosecution may be entirely misleading. Considerable difficulty has been encountered in applying the so-called doctrine because of the many versions and interpretations which may be gleaned from press reports and public pronouncements attributed to various government officials charged with the enforcement of the income tax laws. And without attempting to formulate the doctrine in concise language from a reading of the various

pronouncements referred to by the defendants and upon which they contend they relied in making their disclosure, it seems evident therefrom that at least the doctrine contemplated a situation where a taxpayer confesses his wilfull tax evasion to one or more of the designated government agents before any investigation is commenced by the Government and evidences his good faith by aiding and assisting the Government in obtaining the payment of the taxes due.

When Mr. Cain and Mr. Busby, the latter being the Shotwell Company's accountant, conferred with Mr. Sauber, the then Chief Deputy Collector for the First Internal Revenue District of Illinois, they merely indicated to him that there were unreported receipts obtained by the Shotwell Company in black market operations which were completely offset by unreported deductions for raw materials. And to the end that an amended tax return might be filed disclosing that situation, they sought the aid and advice of Mr. Sauber. Both Mr. Cain and Mr. Busby maintained to Mr. Sauber that the premium receipts were washed out, so to speak, by the premium payments made in connection with the goods that were sold and to the extent that there was any difference as between premium receipts and premium payments, such balance was reported in the 1946 corporation income tax return. There was no disclosure of an intentional tax violation or any disclosure of an intent to defraud the Government. Cain contended that he assumed in good faith that the premium receipts were offset by the premium payments made, and hence no taxes were due. Moreover, he con-

tended that he did not know of any contrary ruling by the Treasury Department until Mr. Busby told him of such ruling. At most, therefore, the disclosure assumed to indicate nothing more than that there was a necessity of filing amended tax returns so that the corrected receipts and corrected payments for goods manufactured might be set forth therein and thus reconcile the items of net profits which had already been reflected in the net income for 1946. At no time during any of the alleged disclosure did the defendants disclose any unreported net income.

Defendants heretofore made a motion to dismiss the indictment on substantially the same grounds urged herein. This motion was heard by Judge Barnes and denied. In the affidavit in support of said motion submitted by Mr. Cain, it appears that he stated that he and his associates always maintained that the defendant corporation owed no tax over and above the amount reported in the 1945 and 1946 income tax statements. The claimed willingness of the defendants to pay any tax due the Government upon the assumption that the Commissioner's ruling regarding the nondeductibility of black market payments for raw materials required such tax payment, did not constitute an admission of a wilfull tax evasion. At most, according to the position of the defendants, the situation which was presented to Mr. Sauber was due to misunderstanding on their part resulting from their alleged good-faith belief that such payments were deductible and hence there were no additional taxes due the Government. Mr. Cain's gesture of accepting Mr. Lub-

ben's figures of the total amount of overages paid to Shotwell and then fabricating fictitious payments for raw material to offset such receipts, indicates the entire absence of good faith in defendants' alleged disclosure. If they feared some civil assessment for a tax deficiency because the Treasury Department at that time had refused to recognize deductions for black market payments for the purchase of goods, nevertheless they indicated their reservation of the right to challenge such ruling. Consequently, it seems clear that here we have no disclosure of anything on which these defendants could be prosecuted. There was no admission of any tax fraud or any intent to violate the tax laws of the Government.

If the Government is to promise immunity, it must be in a situation where there is disclosed a wrongdoing on the part of the taxpayer, not merely a disclosure of good-faith errors in his return. Obviously, if the situation is one where there is no wrongdoing and no tax due the Government, there can be no dependency upon immunit under the so-called voluntary disclosure doctrine. If the defendants' alleged disclosure of the factual situation were true, there could be no criminal prosecution.

The very purpose of the voluntary disclosure doctrine was to obtain the payment of taxes of which the Government had been defrauded. The doctrine necessarily contemplates a contrite taxpayer who confesses his fraud and evidences good faith in aiding and assisting the Government in obtaining the payment of the taxes due. This basic element of a voluntary disclosure within the enunciated government policy is entirely lack-

ing here. As indicative of the lack of good faith on the part of the defendants, the evidence discloses that some of the records which would be illuminating and helpful in determining the true situation with reference to defendants' black market operations were destroyed at the instance of Mr. Cain, and no bona fide attempt was made by any of the defendants to reconstruct destroyed or incomplete records in order to determine the amount and the persons to whom any premium payments were made for raw materials. The figures which were submitted to the Government agent in this regard were admittedly fictitious and submitted solely for the purpose of indicating that premium receipts were completely wiped out by the premium payments. In fact, the evidence indicates that Mr. Cain, during the various conferences with the Government agents, took the position that he would not under any circumstances disclose to whom any premium payments were made by Shotwell for raw materials, and thus he attempted to foreclose any investigation by the Government as to the verity of the claim of such payments.

The defendants urge that, under the so-called voluntary disclosure doctrine, the question of immunity does not rest in the discretion of the Government officials, but that there is an open promise of immunity by the Government in the event the taxpayer by his voluntary disclosure comes within the purview of the announced doctrine. But if that view is sound, defendants have, under the evidence submitted, fallen far short of presenting a factual basis for the application of the doctrine by the Court.

In addition, defendants urge that any disclosure made, written or otherwise, and the evidence obtained therefrom, must be suppressed because such disclosure was induced by a promise of immunity, express or implied, by the Government agents. I am convinced from the evidence produced on the motion that no promise of immunity was held out to these defendants, or any of them, by any representative of the Government when these alleged disclosures were made, or at any other time. Moreover, I am satisfied that there were no representations by any Government representative which would lead these defendants to believe that the alleged disclosure would be considered a voluntary disclosure within the purview of the voluntary disclosure doctrine. And the evidence will not sustain a finding that any Government representative held out to the defendants, or any of them, that there would be no criminal prosecution by reason of the so-called voluntary disclosure.

And, in passing, reference may be made to the results of the trial on the merits which took place in September and October, 1953, when the jury found, and the evidence convincingly established, that large sums of black market receipts received by the Shotwell Company were never paid out for raw materials on the black market or elsewhere during 1945 and 1946. The jury's verdict of guilty necessarily requires a finding that a substantial tax over and above that which was paid by the Shotwell Company for 1945 and 1946 was due the Government by reason of the unreported premium receipts received by Shotwell during

1945 and 1946. What a travesty it would be if, under such circumstances, immunity should be granted to the defendants because of the alleged disclosure which had only one purpose and that was to mislead and to misinform the Government agents of the true facts. False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine.

I find, therefore, that the defendants have failed to sustain the burden of proof in establishing that a voluntary disclosure was made by them within the purview of the so-called voluntary disclosure doctrine. In view of this finding, I do not find it necessary to make any finding as to the exact date when the Government first commenced its investigation of the Shotwell Company's income taxes for the years in question.

The above may be considered as the Court's findings of fact on defendants' motion to suppress, and the same may be and is hereby made a part of the order of this Court of November 21, 1952, denying defendants' motion to suppress.

An exception is reserved to the defendants.

Dated this 28th day of November, 1953.

Enter:

GUNNAR H. NORDBYE,
United States District Judge.

In the United States Court of Appeals for the Seventh Circuit

October Term, 1954
April Session, 1955

No. 11108

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

THE SHOTWELL MANUFACTURING COMPANY, DEFENDANT-APPELLANT

No. 11109

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

BYRON A. CAIN, DEFENDANT-APPELLANT

No. 11110

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

FRANK J. HUEBNER, DEFENDANT-APPELLANT

No. 11111

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

HAROLD E. SULLIVAN, DEFENDANT-APPELLANT

June 15, 1955

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.*

Shotwell Manufacturing Company, a corporation (sometimes herein referred to as Shotwell) and Byron A. Cain, Frank J. Huebner and Harold E. Sullivan, its officers, were indicted on two counts on March 14, 1952, for allegedly wilfully and knowingly attempting to defeat and evade a large part of the income taxes due and owing by Shotwell to the United States of America for the calendar years 1945 and 1946, in violation of section 145 (b) of the Internal Revenue Code,[1] in that defendants filed and caused to be filed false and fraudulent tax returns for said corporation.

After trial on pleas of not guilty, the jury found all of the defendants guilty on both counts. Judgments of conviction were entered on the verdict, Shotwell was fined $10,000 on each count, the individual defendants were sentenced to three years' imprisonment on each count (to run concurrently), Cain was fined $5,000 on each count, Huebner was fined $5,000 on each count, and Sullivan was fined $2,500 on each count. The defendants have severally appealed.

The errors relied on arise out of the alleged insufficiency of the evidence to support the verdict; the failure of the court to sustain defend-

[1] 26 U.S.C.A. § 145 (b).

ants' motions to dismiss; the failure of the court to sustain motions to suppress documents and information prepared or furnished by defendants for the government during an alleged disclosure; certain rulings on evidence and instructions; and denial of motions for new trial.

1. The trial court was correct in denying defendants' two motions to dismiss the indictment, in the nature of special pleas in bar. These motions were based on the theory that defendants had acquired immunity from criminal prosecution by making a "voluntary disclosure", in reliance upon an announced policy of the Treasury Department not to prosecute in cases where such a disclosure had been made.

There was no statutory basis for the alleged promises of immunity announced by the various Treasury Department officials.[2] Thus the making of a voluntary disclosure by the defendants was no legal bar to a criminal prosecution. Only an act of Congress could create such immunity. In the absence of statute, a defendant cannot enforce such a promise and "cannot by law plead such facts in bar of any indictment against him, nor avail himself of it upon his trial, * * *" *Whiskey Cases*, 99 U. S. 594, 595, 25 L. Ed. 399, 400.

Defendants contend, however, that there is a statutory basis for the voluntary disclosure policy in the power of the Secretary of the Treasury to

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[2] "At the outset, it is most important to point out that this policy of the Bureau of Internal Revenue not to recommend criminal prosecution where the taxpayer had made a voluntary disclosure before the investigation started, had no basis either in statute, rule or regulation." Balter, *Fraud Under Federal Tax Law*, Second Ed. 1953, p. 102.

compromise any civil or criminal case under § 3761 of the Internal Revenue Code of 1939[3] This same argument was squarely met and disposed of in *U. S.* v. *Lustig*, 163 F. 2d 85, 89[3a] where the court said:

> The compromise statute[4] affords no shield to one who has violated the tax laws unless there has actually been a compromise. See *Botany Worsted Mills* v. *United States*, 278 U. S. 282, 49 S. Ct. 129, 73 L. Ed. 379. It is not even claimed here that there was more than an offer to make a compromise. None of the formalities prescribed by the statute and treated by the Supreme Court as necessary to effect a compromise were observed. *Botany Worsted Mills* v. *United States, supra*, 278 U. S. at pages 288–289, 49 S. Ct. 129, 73 L. Ed. 379. There was no issue of fact for court or jury as to whether a contract of compromise had been made. Accordingly there is no merit in the defense of immunity.

The language of the *Lustig* opinion is fully applicable to the case at bar. The Treasury Department officials did not have the power to confer immunity on persons making voluntary disclosures, defendants' voluntary disclosure was not a statutory compromise of a criminal case and did not entitle them to immunity, and the motions to dismiss the indictment were properly denied.

2. A timely motion by defendants, supported by affidavits, and later amended, was made before

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[3] 26 U. S. C. A. § 3761.

[3a] Cert. den. 332 U. S. 775.

[4] 26 U. S. C. A. § 3761.

trial to suppress certain evidence in the possession of the government. The motion averred that the evidence had been produced by defendants in reliance on a promise of immunity. More specifically, it averred that the Bureau of Internal Revenue, through the Secretary of the Treasury, the Commissioner of Internal Revenue, and other responsible treasury officials thereunto duly authorized, publicly offered and held out to all of those whose income tax returns contained omissions or misstatements, that there would be immunity from criminal prosecution in any case where the taxpayer who filed such return would come forward before investigation had been initiated and acknowledge the existence in such return of omissions for misstatements, and the Treasury Department in such case would merely assess such unpaid tax, interest, civil penalties, if any, as might thereafter be determined to be due, and that said offer was and had been in full force and effect. The motion likewise set forth that such timely acknowledgment was made to a responsible officer or agent of the Treasury Department in January 1948 of the returns of Shotwell for the years mentioned in the indictment; that the defendants informed said agents of the Treasury Department, among other things, that said returns contained omissions and misstatements in that they intentionally failed to include, under the heading of gross sales, all or part of the sums received by Shotwell through sales of goods, and they failed also to include under the heading of "costs of goods sold", various payments made by defendants for said goods,

which receipts and payments were in excess of the ceiling prices [5] as set by the laws and regulations of the United States at the time such goods were purchased. It was also stated in the motion that the defendants at said times stated that Shotwell, through its officers, was ready, able and willing to pay such unpaid tax, interest and civil penalties, if any, as might be determined to be due after inspection and investigation by the agents of the Bureau of Internal Revenue. The motion also set forth that, at the time of the disclosure, Shotwell's over-the-ceiling payments for raw material were not deductible as a part of the cost of goods sold, under the rulings of the Commissioner.

The motion also averred that the officers and agents of the Treasury Department acknowledged the sufficiency and timeliness of the disclosure, and that the defendants, at the request of said officers, caused to be made available to them the books and records of Shotwell, and the individual defendants communicated to them information in their possession materially related to said omissions and misstatements and not available to such officers and agents through said corporate books and records, which information could not have been obtained from the individual defendants in any manner in view of their constitutional privilege and rights, and also that the defendants caused certain accountants to be employed to assist the said agents in obtaining the facts. Shotwell thus incurred and paid auditing charges in excess of $20,000.

[5] Fixed pursuant to 50 U. S. C. A. App. § 902 (1944 ed.).

The motion also set forth in substance that in pursuance of the foregoing, the Treasury officials examined the corporate books, records and data, and made copies thereof continuously over a period of more than four years preceding the return of the indictment, and did not advise the defendants that said disclosure was untimely or insufficient, or that criminal prosecution was or had been contemplated, or that it might be recommended; that, not withstanding the foregoing, said officials shortly before the proceedings before the grand jury which resulted in the indictment herein, repudiated the said offer so relied and acted upon by the defendants, without granting to them any hearing or conference, and without communicating to them the amount which, upon such inspection, the Bureau of Internal Revenue had determined to be due, and without affording Shotwell or said officers on its behalf, an opportunity to pay such amount. The motion charged that the said actions of the Bureau of Internal Revenue constituted an improper inducement of a confession or admission of facts upon which a criminal prosecution might be based and an illegal search and seizure of the books, papers and records of the defendants, and that, in consequence, the admission in evidence of all books, records, papers and statements so obtained and any copies thereof or data procured therefrom as a result of information obtained therefrom, would violate the rights of the defendants under the fourth and fifth amendments to the Constitution of the United States.

A hearing was held on the motion to suppress. The following is a statement of the facts proved,

including only those facts shown by the government's evidence wherever there was a conflict.

Leon J. Busby, a certified public accountant under the laws of Illinois, was a member of the firm of Busby and Oury, located in Chicago. Beginning in 1942 that firm did the general auditing work of Shotwell for the purpose of certifying financial statements used in credit channels. The firm prepared Shotwell's income tax returns, installed efficiency systems, and did other matters of a general accounting nature.

In January 1948, at the request of defendant Cain, Busby made a trip with Stanley Graflund, vice-president and comptroller of Shotwell, to the plant of General Confections Company in New York, to determine whether a loan of $50,000 to General Confections, requested by David G. Lubben, would be nancially secure. Having made a cursory survey, he reported to the Shotwell officers, including Graflund and defendants Cain and Huebner, that the survey did not justify such a loan.

Although Busby was active in the supervision of the auditing work for Shotwell, he did not know that Shotwell had received over-ceiling or premium payments. During this trip Graflund told him of that condition. In reporting on January 11, 1948 to Cain and Sullivan, Busby recommended against making the loan, and told of Graflund's revelation about the collection of over-ceiling prices for candy sold by Shotwell to General Confections, that Graflund had said that he did not know how much the over-ceiling payments were, and that he (Graflund) also thought "the money had been paid out by Shotwell."

Busby said that he told Cain and Sullivan that, while it might not be that Shotwell was in a serious position, they should file an amended return to get the matter on record, and they discussed it for a while. Cain and Sullivan readily admitted the over-ceiling payments. They asked Busby "whether or not it would be in order to discuss the matter with the department." Busby told them that he thought it would and that, even if they made the disclosure, which was, in his opinion, the customary thing to do, "there probably would be nothing to it except that it would clear Shotwell of omissions from the tax returns." Busby directed their attention to the fact that it was a common thing to make disclosures to the department, and in so doing he did not see that there were any serious consequences, and that "there wouldn't be any critical attitude of the department towards them."

This discussion about making a disclosure occurred off and on between these men for a couple of weeks. They assigned Busby to communicate with the department, after having discussed the possibility of sending a lawyer.

About March 15, 1948, Busby went to the office of the Chief Deputy Collector in Chicago, Ernest Sauber, and told Sauber that he had a client which had been engaged in over-ceiling sales and over-ceiling purchases, which were not reflected in its books, that the client "wants to clean up some omissions from his tax return", that he [Busby] had been asked to prepare amended returns; that he had been unable to ascertain the exact figures and he did not know how he could

prepare amended returns without having the figures, and he asked Sauber's advice on how to proceed. In response to Sauber's inquiry, Busby said that these transactions were handled all in cash, the part representing the over-ceiling payments was kept in a cash box, which cash was used to make over-ceiling purchases; that said transactions to a large extent "washed each other"; that when it was no longer necessary to make over-ceiling sales and purchases, the balance in the cash box was taken into the corporate records and declared as income for the year that the OPA ceiling ceased to exist. Busby told Sauber that "we wanted to go into the matter and have the agent come out and examine the situation and see what the real condition was and if there was any net amount due to the Government, we wanted to pay it."

Sauber told Busby that he could not prepare amended returns on the basis of his then knowledge, and suggested that Busby get statements from every individual at Shotwell who had anything to do with these transactions, and therefrom reconstruct the figures necessary for an accurate return, and after the figures had been reconstructed to ask the internal revenue agent's office to audit the Shotwell return. On this occasion Sauber advised Busby that if the disclosure was timely and the facts that he had related to Sauber were correct, the latter saw no reason why the immunity from criminal prosecution policy of the Bureau should not be applied.

The next day Busby met Cain, Huebner and Sullivan and told them that Sauber recommended

that one of the officers come forward and disclose the identity of the taxpayer and "that if this were done, they should proceed to determine as nearly as possible how much was involved, and he saw no reason why there should be any trouble with respect to criminal prosecution in case of timely disclosure." Sauber had said that either an officer of the company or its representative could make the disclosure. Busby also told the individual defendants that Sauber said that there was no need for amended returns. Cain, president of Shotwell, told Busby to go to the collector's office and "disclose the whole affair, the whole details."

On one of various visits of Busby to Sauber's office, Sauber asked if Busby knew how much was involved, and when given a negative answer and told that Shotwell had no specific records from which that could be determined, Sauber suggested that Busby gather "such information as we could from any memorandum or memory and summarize it on a form, and in the meanwhile he would contact the office of the agent in charge and have an auditor come out and work with us for the purpose of substantiating or getting together the true facts as nearly as could be accomplished." Sauber said that he would have the Agent in Charge, Mr. Wright, send out an agent to verify the summarization, or to help compile it. He said that the Agent "was to cover an examination of the books which would include just about a routine audit, verification of the tax returns; that he would examine the books and any other data that we had to submit to him."

Within a week Busby brought Cain into Sauber's office and said that Shotwell was the client that he had referred to in the previous meeting. Cain then told Sauber the same story that Busby had told him, and that "they did not know how to proceed in order to correct their tax returns." Sauber gave Cain the same advice he had given Busby, and told him "to ask for an audit of their returns."

Cain told Sauber that he had two boys in school and he was worried about publicity, and Sauber said that there would be no publicity on the case, that the only time an income tax case received publicity was when there was an indictment. Sauber told Cain that in his opinion this was strictly a civil case and that it was not a criminal case, and that he had nothing to worry about so far as publicity was concerned.

About thirty days thereafter (latter part of April, 1948), Cain telephoned to Sauber and said that his advice had been followed, a meeting of all Shotwell people connected with the black market transactions had been held, and that figures had been prepared which he would like to come in and turn over to Sauber. The latter said that he had no jurisdiction in the case, that corporation returns were handled by the Revenue Agent's office, which he should call and request an audit of the Shotwell returns. At Cain's request, Sauber called the Revenue Agent's office. Ralph Johnson, the group chief in that office, agreed to do it. Johnson said he would schedule the returns for audit. Sauber said the cases had not been assigned for audit to any particular agent.

Thirty days later and several times thereafter, Cain called Sauber and stated that no one had come from the department. He was very insistent that the audit be started. Sauber learned by inquiry at the Revenue Agent's office that there had been delays there due to misunderstanding in regard to the name of Shotwell. Sauber reported this fact to Cain.

From 1945 through 1948 the procedure in the office of the Collector of Internal Revenue in regard to corporate returns was that after returns were filed with the collector they were sent to the Bureau at Washington for statistical purposes and for clarification purposes. The Bureau would make a survey of the returns and select those which it believed were worthy of examination in the field. They were then sent to the office of the Internal Revenue Agent in Charge and there was a further classification made of those returns in the local office. Those returns which a local office believed required investigation were retained, sent to the record section where an office card record was made and then they would be sent to the various groups for investigation by their agents.

As to the Shotwell return for 1945, the card record fails to show on what date it was determined that the return should be audited or investigated. What the card does show, as interpreted by Holz, a government witness, is as follows: On January 15, 1947, the 1945 income tax return and the 1945 excess profits tax return of Shotwell, were assigned to Group Chief Magnus for audit in the field, and Magnus assigned them to Agent

Korman on January 20, 1947. Korman filed a report on August 5, 1947, and either then or later an agreement was signed consenting to the assessments of deficiencies, such agreement specifying that the taxpayer waived his right to petition the tax court, and consenting to an immediate assessment of the deficiencies. This may have occurred at any time from August 8, 1947 to September 26, 1947, when the card record indicates that the case was disposed of.

As to the 1946 Shotwell return, the card record indicates that on December 11, 1947, the card was made out, and that on December 16, 1947, the return was assigned to Group Chief Granahan for investigation in the field by one of his agents, which means for an audit. On July 22, 1948, the card indicates the return was sent to Group Chief Johnson, and then on February 4, 1949, to Group Chief Williams, now deceased. The record is silent as to when any investigation or audit commenced as to the 1946 Shotwell return.

In 1949 Cain called Sauber and reported that three men had been auditing the Shotwell returns, and asked what could be done to expedite the closing of the case. Sauber referred him to Wright, Internal Revenue Agent in Charge. A week later Cain told Sauber that he had seen Wright and had "gotten nowhere" with him, and requested Sauber to find out what the difficulty was. After talking to Wright, Sauber advised Cain that the difficulty was Shotwell "would not tell the Government to whom the over-the-ceiling purchase payments had been paid, and until such time as the Shotwell Manufacturing Company would tell the Government or identify the persons

receiving the over-the-ceiling purchase payments, the case would not be closed, that they would be required to cooperate with the Government before they would consider closing the case."

Cain then told Sauber "he could not identify the persons receiving these payments; the only persons that he knew of was a Dr. Doe in the Board of Trade Building, that someone had sent some money to, and that he himself thought it was a fictitious name and he would not appear ridiculous naming a Dr. Doe, and that was the only person he knew that had received any of these payments, and he would not reveal that name because he himself thought it was fictitious."

All corporate records were made available to revenue agents Krane and Mammel.

Revenue agent Krane came to work at the Shotwell plant in June or July, 1948, and he came in from time to time over a long period of time. In July, 1948, Busby, having prepared a tentative schedule, gave it to the revenue agent when he appeared at the plant to examine the books.[6]

On February 7, 1949, revenue agent Mammel was given the *Shotwell* case. He had nothing to do with a decision as to whether there should be a recommendation of prosecution. The discretion in that regard was vested in the Intelligence Office, and he was not in that office. Although he could recommend a prosecution, those vested with authority could refuse to prosecute. In March of 1949, he talked to defendant Cain and told Cain that there might possibly be prosecution

[6] This compilation was introduced in evidence by the government at the trial.

and therefore he (Mammel) had to do a perfect job in his investigation [of the accounts of Shotwell] so that he would not have to do the work over again. He did not tell Cain that he considered what they had done constituted a voluntary disclosure.

Early in 1951, Cain and Sullivan visited Wright and discussed the case in detail, at which time Cain stated that he wanted a bill. Wright again assured them "that he would check into it and see if a bill could be brought forth." Cain asked Wright if they "couldn't get the tax matter settled."

Prior to the indictment on March 14, 1952, the defendants were never notified what amount of tax the Bureau of Internal Revenue had determined was due.

On May 28, 1945, former Secretary of the Treasury Morgenthau stated at a press conference that "some taxpayers who have failed to declare their full income and pay the tax due may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started."

On August 21, 1945, former Secretary of the Treasury Vinson stated through the press: "No one is going to jail for an honest mistake in filling out his tax return. Treasury policy even permits the wilful evader to escape prosecution if he repents in time. The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other

misstatement in his tax return * * *. Monetary penalties may be imposed for delinquency, for negligence and for fraud, but the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out.' "

On October 15, 1945, the then Commissioner of Internal Revenue "stressed the *bureau policy* of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalities before the Bureau has begun investigating their cases."

On May 14, 1947 the chief counsel of the Bureau of Internal Revenue said in the course of an address: "The law requires the prosecution of the tax evader and that is what the Department recommends to the Attorney General. There is one important exception to that. * * * The Department has always encouraged voluntary disclosures. * * * The making of a voluntary disclosure is a simple thing. The taxpayer or his legal agent can go before any official of the Bureau of Internal Revenue or any of its field offices—whether it is the collector, a deputy collector, a revenue agent, a special agent, or any other responsible Treasury officer. There is no special form for making the disclosure. The simple statement that 'I have filed false tax returns and I want to make the govern-

ment whole,' would constitute a complete disclosure. * * *"

The government's brief sets forth the following as the reasons the district court denied the motion to suppress:

The Treasury's voluntary disclosure policy required (1) the disclosure of a tax deficiency, (2) an admission that the taxes due had been wilfully evaded, and (3) good faith cooperation with the government thereafter in determining the amount of taxes due. The court made the following findings of fact: that appellants had never disclosed unreported income; that they had consistenly denied any intent to evade taxes; that, far from showing good faith, they had attempted to deceive the revenue agents during the investigation; and that no government official had represented to appellants that their alleged disclosure would result in immunity from criminal prosecution.

In seeking to sustain the action of the district court in denying defendants' motion to suppress certain evidence, the government in its brief relies upon the reasons given by the district court, and adds that, "although the taxpayer who made a voluntary disclosure was not entitled to immunity from prosecution, an entirely different question would, of course, arise if the disclosure was made fully and fairly and in reliance on the policy, and if the action of the investigating agents gave the taxpayer good reason to believe that the Treasury would not recommend prosecution." The government contends that "that question has been determined adversely to appellants by the trial court's findings of fact, amply supported by the

evidence summarized above, to the effect that the testimony at the suppression hearing indicated an entire absence of good faith on the part of appellants and no misleading actions or improper inducement on the part of the Government representatives."

It is obvious that both the district court and government counsel concede the existence of the Treasury Department's voluntary disclosure policy, and that the policy itself had valid legal standing. The differences of opinion here pertain to the application of the policy to this case.

(a) The evidence shows that defendants did disclose unreported taxable income. Their admission that they had omitted from Shotwell's return, over-the-ceiling receipts for candy sold, revealed income which should have been considered in fixing its tax, according to the Treasury Department's ruling that illegal payments for goods purchased were not deductible for tax purposes.

(b) While they coupled a disclosure of unreported income with a *legal* suggestion that that income was not taxable because it was offset by disbursements substantially equivalent thereto for over-the-ceiling purchases of raw material, contrary to the then legal contentions of the Treasury Department, they did disclose the *facts*. The voluntary disclosure policy referred to the disclosure of facts, and not to the disclosure of the legal contentions of a taxpayer's lawyer. Actually the legal contention made by the defendants at that time was not fantastic or unreasonable. This is established by the department's later reversal of its stand on such offsetting illegal

disbursements, and its adoption of the same view that defendants suggested as to the law.[7] Therefore defendants' contention did not cast any doubt upon their good faith in making their disclosure of facts.

Nor was bad faith on their part evidenced by their conduct after making their offer of disclosure. They cooperated to the extent that they were able, and in complete compliance with the policy of the department. They insistence of the revenue agents that defendants go beyond their duty of disclosing facts material to the determination of their unreported tax liability, by informing the government of the names of the persons to whom they paid over-the-ceiling prices for raw materials, was met with a refusal by defendants. This refusal was not inconsistent with a full disclosure of relevant facts on their tax liability. First, in the various statements of the voluntary disclosure policy, there is no suggestion or requirement that a taxpayer must furnish information for the prosecution of others, except insofar as that information may be incidental to a determination of his own tax liability, and, secondly, in view of the government's position that payments by defendants of over-the-ceiling prices were not germane to the computation of defendants' tax liability, the identification of the persons receiving those payments was irrelevant. It can hardly be contended that a taxpayer, who comes in and admits that he incorrectly reported his income for tax purposes,

[7] The Commissioner later acquiesced in court decisions which held such deductions allowable.

can be required to become an informer against persons who may be criminally liable in transactions which are not pertinent to his tax liability.

We therefore hold that defendants' inability or refusal to name the recipients of Shotwell's illegal disbursements, did not show that their offer of disclosure was in bad faith.

(c) When confronted with defendants' admission that Shotwell had intentionally omitted taxable income from its 1945 and 1946 income tax returns, and an expressed willingness to pay what was due, and to cooperate with the Bureau of Internal Revenue in taking whatever steps were necessary to establish the amount thereof, the responsible heads of the Bureau in Chicago not only said nothing to indicate that the offer was rejected, but, in complete harmony with the policy of the Treasury Department in regard to voluntary disclosures, accepted the cooperation of the defendants and thereby obtained access to Shotwell's books and records, and conducted investigations which continued until an indictment was filed in the district court.

From March, 1948, when defendants made their disclosure to Chief Deputy Collector Sauber, until March 14, 1952, when the indictment was filed, defendants were led to believe by the government representatives that the course which they were pursuing would avert their criminal prosecution. At the March 15, 1948, conference between Busby and Sauber, when the nature of the income omissions was frankly outlined by Busby, Sauber said that, if the disclosure was timely and the related facts were correct, he saw no reason why the immunity from criminal prosecution policy of the

Bureau should not be applied. Later Sauber told Cain, who was worried about publicity, that there would be no publicity in this case, that the only time an income tax case received publicity was when there was an indictment. He expressed the opinion that this was strictly a civil case, and not a criminal case; and that Cain had nothing to worry about so far as publicity was concerned. This statement is corroborative of defendants' contention that immunity from such prosecution had been offered in return for a voluntary disclosure under the department's policy.

Early in 1951, Agent in Charge Wright told the defendants, who repeated prior requests that they be given a bill for their taxes so they could pay it, that he would check into the matter and see if a bill could be brought forth. As late as October, 1951, Wright's assistant, Oscar Olson, told Cain that he had nothing to worry about at all.

These expressions from the representatives of the government, paralleling the Treasury Department's policy not to "recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return," conclusively show that responsible government officials, from cabinet level to local level, had represented to defendants that their disclosure would result in immunity from criminal prosecution.

The government does not effectively support its contentions when it says that "As early as February, 1949, Cain was told by the examining agents that prosecution was possible." This is because first, Mammel, who is the agent who made such a

statement, had no authority to decide who should be prosecuted and, secondly, if this were to be an announcement of intention by the government to prosecute the defendants, it came almost a year after the disclosure had been made by the defendants and accepted by the revenue officials, and long after the government, by means of the disclosure, had obtained information and records which it used in the prosecution of this case.

(d) The government seems to contend in this court that when the defendants made their disclosure they should have used words indicating that they had perpetrated a fraud upon the government or, as otherwise expressed, that they had wilful intent to evade taxes. Their disclosure showed that they knew that they had over-ceiling income, and that they had intentionally not reported it. That was all that was necessary. Nothing in the pronouncement of the policy required them, in making a disclosure, to use the language of a lawyer in characterizing their failure to report taxable income.

The application of the disclosure policy is not conditioned upon the officers of the corporate taxpayer exhibiting to the representatives of the Commissioner of Internal Revenue a contrite spirit. It is not required by the policy that they appear in sackcloth and ashes and seek absolution from the internal revenue agent, or that he occupy the office of father confessor. When the taxpayer's representatives avail themselves of this policy they are not seeking moral forgiveness. The transaction is entirely amoral, one side seeking to avoid the criminal penalties which they have risked by their incomplete or erroneous

return of income, and the government agents being engaged in the mundane purpose of collecting federal taxes.

We hold that as against this attack of the government, the disclosure by defendants was not defective.

(e) In a footnote in its brief in this court, the government makes an oblique attack upon the timeliness of defendants' disclosure. We think the facts in evidence show that when the disclosure was made, no investigation involving the over-ceiling income of Shotwell during the taxable years had been started or even suggested or contemplated by the government. The disclosure was timely.

When the revenue agents get the scent and are in pursuit of the miscreant, it is too late for him to seek the protection of the Treasury Department's voluntary disclosure policy. Until then its door is open and the welcome mat is out.

(f) There is no inconsistency between the voluntary disclosure and the statement by Cain that the defendants would contest an assessment when made. That is the right of any taxpayer who would question the method of determining his tax assessment. By making a disclosure of facts upon which an assessment can be made, a taxpayer is not deprived of his right to be heard as to the method used in making the assessment.

We hold that defendants made a valid voluntary disclosure in reliance upon promises of immunity. The evidence thereby obtained by the government stands on the same footing as an oral or a written confession induced by such a

promise. The use of such evidence at the trial was a violation of each defendant's privilege against being compelled in any criminal case to be a witness against himself, as guaranteed by the fifth amendment to the Constitution of the United States.

It therefore follows that the court erred in denying the motion, as amended, to suppress such evidence. The use of that evidence at the trial makes it necessary to reverse the conviction of the defendants.

In view of the fact that a retrial will be required in this case, we find it unnecessary to rule on defendant Sullivan's contention that the district court erred in overruling his motion for a separate trial made at the close of the government's case-in-chief. Upon his retrial he is free to make a timely motion for severance. We express no opinion as to what the ruling thereon should be.

Inasmuch as important and substantial evidence should have been suppressed, the case must be retried. It is unnecessary to express an opinion as to whether the remaining evidence upon the trial below did or did not establish defendants' guilt, or to pass upon the other errors relied upon.

For the reasons hereinbefore set forth, the judgments of the district court are reversed, with instructions to sustain defendants' motion as amended to suppress evidence, and to retry the case.

REVERSED AND REMANDED WITH INSTRUCTIONS.

LINDLEY, *Circuit Judge*, Dissenting.

I regret that I cannot agree with the result reached in the majority opinion.

Disregarding the merits of the suppression question for the moment, it seems to me the majority fails to define clearly its interpretation of the Bureau's voluntary disclosure policy. The legal issue involved on this phase of the case seems to me to require an explicit determination of just what that policy is, whereas the language of the majority, I think, leaves the resolution of that question in doubt.

As to the merits of the order denying suppression, in the first place, I believe that the majority has overlooked the nature of the issues raised by the motion to suppress. These include the legal question of interpretation of the Government's voluntary disclosure pronouncements and, in addition, the question of fact as to whether defendants made a voluntary disclosure within the purview of the announced policy. And if these two issues should be resolved in defendants' favor, a further question then arises, in the light of the reported cases, of whether evidence given to the Treasury officials in reliance on the disclosure policy will be suppressed. That question is by no means settled. Compare *Contracchio* v. *Garrity*, 198 F. 2d 382, 388, cert. denied 344 U. S. 866 (CA–1), with *In re Liebster*, 91 F. Supp. 814.

Reverting to the legal question of interpretation of the policy statements, it seems to me the majority opinion turns on an assumption that any action by a taxpayer which advises a Treasury official that a tax return previously filed by him is incorrect or incomplete is a sufficient dis-

closure. Paraphrasing the language in part, the majority opinion seems to hold that any word which is sufficient to put the Treasury bloodhounds on the scent of a fraudulent return is a sufficient disclosure, irrespective of what facts are revealed to or concealed thereby from the government and irrespective of what roadblocks the taxpayer may thereafter erect in the way of a determination of the true facts surrounding the fraudulent return. Then, as I construe the majority's expressions, any evidence that the taxpayer may thereafter surrender to Treasury agents must be suppressed, if criminal prosecution is recommended when the fraudulent omission is discovered.

Such a broad statement of the doctrine, I think, is an unwarranted interpretation of the Treasury policy. The Wenchel statement, upon which defendants place principal reliance, when considered in its entirety, carries with it the clear implication that the disclosure contemplated must be a full disclosure of all facts bearing on the false return. Secretary Snyder's statement, issued about 10 days after the Wenchel statement, after referring to the long existent policy, concluded that the application of the policy to a particular taxpayer "presumes, of course, that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability."

Furthermore, I think the broad interpretation on which the majority opinion rests ignores persuasive judicial pronouncements bearing on this question. The Court of Appeals for the First

Circuit in the *Centracchio* case, *supra*, said at 198 F. 2d at page 389: "If it be assumed * * * that evidence disclosed to the Treasury officials on the faith of the announced voluntary disclosure policy, and in compliance with its conditions, should be excluded from evidence in a subsequent criminal trial, it would seem that the taxpayer would have to satisfy the court that he made a voluntary, good faith disclosure of all data necessary to a correct computation of his income tax deficiencies, and that he made such disclosures, before an investigation was under way." And in *In re Monroe*, 110 F. Supp. 507, aff'd 215 F. 2d 81, cert. denied 348 U. S. 914 (CA–5), the court defined the disclosure policy as containing the specification that the disclosure must be "a complete, fair and honest disclosure, and not a portion." While these authorities are not binding on us, the reasonable interpretation adopted by the jurists who penned those opinions is entitled to our respect and deserving of our serious consideration. See also *Chieftain Pontiac Corp.* v. *Julian*, 209 F. 2d 657 (CA–1).

The question, basically, is what would the average taxpayer understand, after reading the Treasury statements, as to what would constitute a sufficient disclosure thereunder. The trial court, consistently with the pronouncements made in *Centracchio* and *Monroe*, applied the rule of reason that a "disclosure" requires a good faith disclosure of all facts pertinent to the fraudulent return. This, I believe, is a correct analysis of the policy as announced and, insofar as the majority opinion is based on a less restrictive rule, I respectfully dissent.

The second point on which I believe the majority falls into error is in its treatment of the suppression question as one wholly of law. It seems to me that the majority attempts to try the factual issues *de novo* and fails to give the requisite weight to the trial court's findings of fact which are essential elements of the question under review.

The weight to be accorded by a court of appeals to such findings has been variously defined. In *Roberson* v. *United States*, 165 F. 2d 752, at 754 (CA–6), the court pointed out that "the finding of the trial court on a preliminary question of fact should not be reversed on appeal if it be fairly supported by the evidence." In *Nichols* v. *United States*, 176 F. 2d 431 (CA–8), the court said at page 432: "The facts as determined by the trial court are supported by evidence * * * and are binding on this Court." And in *Cannon* v. *United States*, 166 F. 2d 85 (CA–5), the court's language was, at pages 86–87: "It cannot be said that the judge's findings on this question were without substantial support. Therefore we will not disturb those findings."

In each of these cases, the findings to which reference was had were made by the trial court in ruling on a motion to suppress evidence allegedly obtained by an illegal search and seizure. While these decisions, as well as the subsequently adopted rule which embodies the then existing case law,[1] pertain only to the classic search and

[1] Federal Rules of Criminal Procedure 41 (e), effective October 20, 1949, 18 U. S. C. A. See note to subdivision (e), Notes of Advisory Committee on Rules, 18 U. S. C. A. p. 463.

seizure question rather than to the Treasury's voluntary disclosure doctrine, the proceeding to suppress the evidence is the same and the same procedural rules should be applied. If adequate evidence supports the findings upon which the trial court's ruling is based, we cannot disturb those findings. See *White* v. *United States,* 194 F. 2d 215, 217, cert. denied 343 U. S. 930.

In its memorandum decision denying defendants' motion, the district court found that defendants had not sustained the burden of proving that a sufficient voluntary disclosure within the purview of the announced policy had been made by them. It found that there had been "no disclosure of an intentional violation or * * * of an intent to defraud the Government" in view of defendants' position, which they maintained at all times, that no tax liability could arise from Shotwell's failure to report black-market receipts, since such receipts and corresponding black-market disbursements by the company "washed-out" each other, and that the disclosure to Sauber was merely an admission of omissions in Shotwell's 1945 and 1946 returns which were based on defendants' alleged good-faith belief that no added tax liability arose from the company's black-market operations.

As bearing on defendants' proof as to their good faith in the so-called disclosure, the court found that such records of the cash transactions in the black-market operations as the corporation had, had been destroyed on instructions of Cain prior to the initial conferences between Shotwell's agents and Sauber; that no bona fide efforts were made by defendants to reconstruct such destroyed

records so as to enable the government to determine the amount of tax due, and that figures contained in work sheets turned over to Treasury agents as a part of the alleged disclosure were admittedly fictitious. The court found further that no promise of immunity had been held out to defendants by any representative of the government at any time, and that nothing was done by any agent of the Bureau to lead defendants to believe that the alleged disclosure was accepted as adequate or that there would be no criminal prosecution on account thereof.

Unless we can say that these findings are so lacking in evidentiary support as to require that they be set aside, we have no choice but to affirm the order denying the motion to suppress evidence. A brief recital of the facts underlying this litigation and a brief summary of the evidence before the court at the proceeding on the suppression motion sufficiently demonstrate, in my opinion, that the findings of the court, were amply supported.

When Busby, and later Cain, first approached Sauber, each reported that, during the taxable years 1945 and 1946, Shotwell had sold large quantities of candy to Lubben, or to Lubben's companies, at a premium price above the established OPA ceiling for the commodity. These shipments were invoiced to the buyer at the established ceiling price, and payments therefor at those prices were recorded on Shotwell's books and duly reported on its tax returns. The buyer was billed separately for the above-ceiling portions of the purchase prices. These payments

were received by defendants in cash and were neither recorded on the company's books nor reported for income tax purposes. At the same time, it was reported that the cash thus received was paid out by Shotwell as above-ceiling premium prices for the raw materials which it needed, such as corn syrup and chocolate. On the basis of the representations thus made, Sauber, at that time, expressed his opinion that the facts disclosed strictly a civil matter. The indictments were returned after several years of investigation, during which time Shotwell employed Busby, an accountant, to work with the federal agents.

But the above facts tell only a part of the story on which the trial court's findings are based. The evidence adduced at the suppression hearing indicates that Shotwell's black-market operations were more extensive than those first disclosed to Sauber. For example, Sauber was not advised that Shotwell, during the taxable period, made other black-market sales of goods on which no part of the transaction was reflected on the company's books. Allusion has previously been made to other evidentiary facts bearing on the sufficiency of the alleged disclosure, namely, the fact that all records which reflected black-market operations were destroyed by defendants before they approached the Treasury officials and the fact that work papers and supposed summaries of the unreported income turned over to the agents were admittedly fictitious. Furthermore, defendants have maintained at all times that alleged black-market disbursements totalling hun-

dreds of thousands of dollars were paid out by them, without the benefit of any receipts, to faceless men who were unknown to defendants. At all times during the investigation they refused to advise Treasury agents as to who had received these disbursements. They took the position that to whom such payments were made was none of the Bureau's business, while at the same time fictitious figures were inserted in accounting data given to the agents which purportedly reconstructed the financial history of Shotwell's black-market dealings.

The point to be stressed is that on the record before us we cannot say that the evidence does not support the finding of the trial court that no sufficient disclosure was made. We cannot say that the court's conclusion that "False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine" is an erroneous legal statement or that the hypothecated facts included in this statement are not descriptive of the proofs made in this case. Two factual questions were presented to the court below, namely, what was disclosed, and, was the disclosure prompted by the taxpayer's reliance on the announced policy or by some other motive best known to him? The trial tribunal has found that, at most, only a partial disclosure was made; that good-faith cooperation with Treasury agents was lacking, and that such lack of good faith disclosed a purpose to mislead

the agents. These findings are adequately supported by the evidence. It is not within our province to second-guess the trial court on factual questions.

In my opinion we cannot overturn the court's further finding that no promise of immunity was held out to defendants, or that no other representations were made, which reasonably led them to believe that no criminal prosecution was contemplated. Sauber's opinion, which he expressed during his initial meeting with Cain, that this was strictly a civil matter, was based on the latter's original statement that black-market income not reported for the taxable years was "washed-out" by black-market expenditures which was, as the court below found, a partial disclosure only of the true facts of the case. The oral testimony as to statements made at various times by Treasury agents that no prosecution was intended—that defendants had nothing to worry about—are disputed by the agents' testimony. Thus this finding is based, in large measure, on the trial court's ruling on the credibility of witnesses.

On the record as a whole, I cannot escape the conviction that the court's interpretation of the voluntary disclosure statements as requiring such a complete disclosure and good-faith effort as to enable the internal revenue agents to assess the additional tax due is a correct interpretation of the offer held out to taxpayers in the Treasury policy statements. Believing that the court's findings of fact are unassailable, I would affirm the decision denying defendants' motion to suppress

the evidence and proceed to consider the merits of the appeal.

A true Copy:

Teste:

_____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals for the Seventh Circuit, Chicago 10, Illinois

Wednesday, June 15, 1955

No. 11108

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

THE SHOTWELL MANUFACTURING COMPANY, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Before Hon. WALTER C. LINDLEY, Hon. H. NATHAN SWAIM, and Hon. ELMER J. SCHNACKENBERG, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and

the same is hereby, REVERSED, and that this cause be, and it is hereby, REMANDED to the said District Court with instructions to sustain defendant's motion as amended to suppress evidence, and to retry the case.

United States Court of Appeals for the Seventh Circuit, Chicago 10, Illinois

Wednesday, June 15, 1955

No. 11109

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

BYRON A. CAIN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOI EASTERN DIVISION

Before Hon. WALTER C. LINDLEY, Hon. H. NATHAN SWAIM, AND Hon. ELMER J. SCHNACKENBERG, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and that this cause be, and it is hereby, REMANDED to the said District Court with instructions to sustain defendant's motion as amended to suppress evidence, and to retry the case.

United States Court of Appeals for the Seventh Circuit, Chicago 10, Illinois

Wednesday, June 15, 1955

No. 11110

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

FRANK J. HUEBNER, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Before Hon. WALTER C. LINDLEY, Hon. H. NATHAN SWAIM, AND Hon. ELMER J. SCHNACKENBERG, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and that this cause be, and it is hereby, REMANDED to the said District Court with instructions to sustain defendant's motion as amended to suppress evidence, and to retry the case.

United States Court of Appeals for the Seventh Circuit, Chicago 10, Illinois

Wednesday, June 15, 1955

No. 11111

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

HAROLD E. SULLIVAN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Before Hon. WALTER C. LINDLEY, Hon. H. NATHAN SWAIM, and Hon. ELMER J. SCHNACKENBERG, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and that this cause be, and it is hereby, REMANDED to the said District Court with instructions to sustain defendant's motion as amended to suppress evidence, and to retry the case.

United States Court of Appeals for the Seventh Circuit, Chicago 10, Illinois

Thursday, August 18, 1955

Nos. 11108-09-10-11

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

THE SHOTWELL MFG. CO., BYRON A. CAIN, FRANK J. HUEBNER, HAROLD E. SULLIVAN, DEFENDANTS-APPELLANTS

Before Hon. WALTER C. LINDLEY, Hon. H. NATHAN SWAIM, and Hon. ELMER J. SCHNACKENBERG, Circuit Judges

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

It is ordered by the Court that the Opinion of the Court in the above entitled appeals, filed June 15, 1955, be, amended by the deletion of the following sentences appearing on page 11 thereof:

> In October, 1951, Cain talked to Oscar W. Olson, Mr. Wright's assistant, who told him that he would prefer that he see Mr. Wright, "but if I were you I'd have no worry about it at all."

United States Court of Appeals for the Seventh Circuit, Chicago 10, Illinois

Thursday, August 18, 1955

Nos. 11108–09–10–11

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

THE SHOTWELL MFG. CO., BYRON A. CAIN, FRANK J. HUEBNER, HAROLD E. SULLIVAN, DEFENDANTS-APPELLANTS

Before Hon. WALTER C. LINDLEY, Hon. H. NATHAN SWAIM, and Hon. ELMER J. SCHNACKENBERG, Circuit Judges

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

It is ordered by the Court that a Petition for Rehearing of these appeals before the Court en banc, be, and the same is hereby DENIED.

It is further ordered that a Petition for Rehearing of these appeals before the panel which heard the Appeals is hereby DENIED.

Supreme Court of the United States

No. ——, October Term, 1955

UNITED STATES OF AMERICA, PETITIONER

vs.

THE SHOTWELL MANUFACTURING COMPANY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 17th, 1955.

(Sgd) STANLEY REED,
Associate Justice of the
Supreme Court of the United States.

Dated this 16th day of September 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

NOV 1 4 1955
HAROLD B. WILLEY, Clerk

No. 421

In the Supreme Court of the United States

OCTOBER TERM, 1955

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER AND HAROLD E. SULLIVAN, CROSS-PETITIONERS

v.

THE UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 471

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER AND HAROLD E. SULLIVAN, CROSS-PETITIONERS

v.

THE UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES

The primary contention in our petition for certiorari (*United States* v. *Shotwell Manufacturing Co.*, No. 470, this Term) is that the decision of the Court of Appeals transforms the "voluntary disclosure" policy into a trap for the Government by holding, in effect, that a taxpayer who has made only a partial disclosure and has not cooperated in good faith in a determination of his true taxes, may nonetheless obtain suppression of evidence. The conditional cross-petition would go further; it asserts that the court below erred in failing to

direct dismissal of the indictment (see Conditional Cross-Petition, pp. 18-19). While we believe that this contention is without merit for the reasons stated by the Court of Appeals, in view of its relation to the questions presented in the Government's petition for certiorari we think that the Court should review all the questions decided by the court below.

We note, however, that there may be a question as to the timeliness of the cross-petition. The Court of Appeals had under review several orders of the District Court: the denial of the motion to dismiss the indictments, the denial of the motion to suppress evidence, and the judgment of conviction. It affirmed the first, reversed the second, and did not reach the third. The defendants were aggrieved by the first part of the decision, since their claim of immunity was rejected and the indictment sustained. The defendants did not, however, file a petition for rehearing. The cross-petition for certiorari is timely only if the period within which they could seek review was extended by the Government's petition for rehearing, which challenged only that portion of the decision below holding that the motion to suppress should have been granted. Cf. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206; and see Stern & Gressman, *Supreme Court Practice*, 2d ed. (1954), p. 166; compare Brief for the Federal Trade Commission in Opposition, filed in *American Crayon*

Office - Supreme Court, U.S.
FILED
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JOHN T. FEY, Clerk

NOS. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN, CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

MOTION TO REMAND

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 9 and 10

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN, CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

MOTION TO REMAND

The Solicitor General, on behalf of the United States, respectfully moves that this case, now pending in this Court on the Government's petition for a writ of certiorari and on respondents' cross-petition, be remanded to the District Court. The reasons for granting this motion are set forth below:

A detailed summary of most of the pertinent facts of record will be found in the Government's petition and defendants' cross-petition. Briefly, de-

fendants were indicted for wilful evasion of income taxes. They moved that certain evidence be suppressed on the ground that it had been voluntarily disclosed to the Government in reliance upon Treasury Department policy. After a three-day pre-trial hearing, the District Court held that the disclosure was neither complete nor made in good faith, and defendants were ultimately found guilty by a jury. The Court of Appeals reversed, holding that the disclosure was in good faith, that it was in complete compliance with the policy, *and* that it was timely. The District Court had not, however, ruled upon the issue of timeliness. Cf. *United States* v. *Lustig*, 163 F. 2d 85, 88, (C. A. 2d), certiorari denied, 332 U. S. 775; *Lapides* v. *United States*, 215 F. 2d 253, 255–256 (C. A. 2d).

In all the proceedings in the courts below, and in its petition for certiorari (pp. 10–12), the Government accepted as a fact testimony that defendant Cain and the corporation's accountant, Busby, met with Ernest J. Sauber, then Chief Deputy Collector, some time *early in 1948*, at which time they revealed to him the fact that the corporation had not reported receipts from black market transactions. The Government also had no reason to doubt Busby's testimony that he prepared the disclosure figures after an intensive investigation lasting several months. None of the several Department of Justice attorneys who handled the prosecution suspected, so far as we can determine, that this was not so.[1]

[1] See Exhibit C, *infra*.

Now, as the result of an investigation begun by the National Office of the Internal Revenue Service in the early part of 1955, over a year after the conclusion of the trial,[2] additional evidence has come to light.[3] This evidence gives substance and meaning to other evidence in the record and to other facts known to the Department of Justice and the Internal Revenue Service, the full significance of which had not previously been appreciated. Should the District Court be given an opportunity to receive this new evidence, it would support a finding that defendants did not attempt to make a voluntary disclosure until *July 1948*, after a revenue agent, acting on instructions from his superiors, had already obtained evidence of the corporation's unreported receipts. It would also support a finding that Busby's figures were all prepared during the space of one day in the month of July.[4]

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[2] See Exhibit A, *infra*.

[3] See Exhibit B, *infra*, paragraphs 4–5; and Exhibit D, *infra*. The late Assistant United States Attorney Edward Ryan, who represented the Government at the hearing on the motion to suppress, was aware of some of these facts, but he was prevented from perceiving their significance by the manner in which they were presented to him. (See Exhibit C, *infra*.)

[4] As a result of this new evidence, Sauber, who had been promoted in the interim to District Director, has been removed from office by the Commissioner of Internal Revenue, and the Department of Justice has begun a grand jury investigation to determine whether various indictable offenses may have been committed, including perjury, obstruction of justice, and conspiracy to evade income taxes for years other than those involved in the present case. An injunction filed by the defendants to prevent the Government from presenting evidence to the grand jury was denied by the district court on April 17, 1956. The Court of Appeals affirmed this order on May 11, 1956.

As appears from the attached affidavits (set out in the Appendix, *infra*) of the officials of the Internal Revenue Service and the Department of Justice who had immediate responsibility for the case, it was not until November 1955, after the Government's petition for certiorari was filed, and only as a result of the full-scale investigation begun in April 1955 into possible misconduct and wrongdoing on the part of Internal Revenue Service personnel in the Chicago office, that this new evidence was discovered. And it is equally apparent, we believe, that the failure of the Government to discover and present such evidence to the court at an earlier date was not attributable to any lack of due diligence.[5]

It may be that this Court would consider, as did Judge Nordbye, that it is unnecessary to go into the question of the timeliness of the alleged voluntary disclosure, because it was inadequate on other grounds. But if that issue be reached, and if this Court were to review the case in its present posture, the record would be inadequate and incomplete. Furthermore, had the evidence now available been presented to the lower courts the rulings under review might conceivably have been altered, for the majority of the Court of

[5] The Government's petition for certiorari (No. 470, 1955 Term) and the defendants' conditional cross-petition (No. 471) were filed on October 17, 1955. On December 6, 1955, the Solicitor General, in a letter to the Clerk, requested the Court to withhold action on the petitions until the Internal Revenue Service could complete its pending investigation. On June 1, 1956, the Solicitor General informed the Court of the developments in the case to that date, and requested that consideration of the petitions be further deferred. On June 11, 1956, the Court entered an order granting the Solicitor General's motion (351 U. S. 980).

Appeals recognized that a "voluntary disclosure" must be timely:[*]

> When the revenue agents get the scent and are in pursuit of the miscreant, it is too late for him to seek the protection of the Treasury Department's voluntary disclosure policy. Until then its door is open and the welcome mat is out.

In these circumstances, we submit that the interests of justice would be served by remanding this case to the District Court for a further hearing[†] to amplify the record by enabling the parties to present new, additional evidence on the timeliness of the alleged voluntary disclosure. After such hearing the District Court would make such further findings and orders, if any, as the facts and the law may require. Such remand should be without prejudice to the right of the parties to preserve and renew the points presented in the pending petition and cross-petition.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

OCTOBER 1956.

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[*] See Petition for Certiorari, No. 9, p. 56.

[†] The issues of fact and law raised by the alleged voluntary disclosure were decided solely by the trial judge after a pre-trial hearing on defendants' motions to dismiss the indictment and to suppress the evidence obtained from them subsequent to the alleged disclosure. (See Petition for Certiorari, No. 9, pp. 6–7). These issues, and the evidence bearing on them, were not submitted to the jury. Cf. *Mesarosh et al.* v. *United States*, No. 20, this Term, decided Oct. 10, 1956.

APPENDIX

Exhibit A

AFFIDAVIT

I am a Special Assistant (Enforcement) to the Chief Counsel for the Internal Revenue Service, in Washington, D. C. My duties include the handling of cases and problems assigned to me by the Chief Counsel or the Assistant Chief Counsel (Enforcement) relating to criminal matters.

The criminal aspects of the Shotwell Manufacturing Company case were considered and processed by the Chief Counsel's field office in Chicago. In early March, 1955, at a time when the appeals of Cain, Sullivan, and Huebner, with respect to their conviction for willfully attempting to evade the income taxes of the Shotwell Manufacturing Company for 1945 and 1946, were pending with the Court of Appeals for the Seventh Circuit, there was routed to me for review a matter involving the tax liability of the corporation for the subsequent years 1947, 1948, and 1949. One of the problems was whether negotiations looking toward settlement of the civil tax liabilities of the corporation and Cain for the years 1947, 1948, and 1949 should be undertaken during the pendency of the criminal appeals. Other problems related to the refusal of the corporation to turn over books and records for the years 1944 to 1946, inclusive. My examination of the headquarters file of the Chief Counsel's office with respect to the Shotwell criminal case disclosed that it included excerpts from a report of a revenue agent dated December 13, 1954, covering Cain's liability for the years 1947 to 1949, inclusive, wherein the agent asserted

that Cain was attempting to secure a favorable settlement of his civil liabilities for the later years in order to better his position on appeal in the criminal case. The revenue agent also strenuously objected to the manner in which the Chicago office of the Internal Revenue Service was handling Cain's civil liabilities.

In view of the nature of the aforementioned excerpts, it was clear that the full report required examination. I called this matter to the attention of the Assistant Chief Counsel (Enforcement) and a request was made of the Chicago office that it forward a full copy of the agent's report. That report was received in the National Office in Washington on about March 28, 1955. In his transmittal memorandum, the Regional Counsel at Chicago advised the National Office for the first time that the Inspection Office of the Internal Revenue Service, which has the function of investigating allegations of misconduct and wrongdoing on the part of Internal Revenue Service personnel, had begun an inquiry in the case. The full report disclosed, in addition, that the investigation of the individual income tax returns of Cain and Sullivan for the years 1944 to 1946, inclusive, was still incomplete and that there had been no determination whether these individuals had the use and benefit of the unreported and concealed black market receipts involved in the corporation case for the same years. Such evidence would have been strong corroboration of the charge of wilful attempted tax evasion in the Shotwell case. Furthermore, the revenue agent charged that he had been subjected to intense pressure to submit his report although he considered that his investigation was incomplete and that a full development of all the facts was required.

I discussed the revenue agent's report with the Assistant Chief Counsel (Enforcement) and he thereafter took the matter up with the Assistant Commis-

sioner, Inspection, among others. Subsequently, in late April 1955, inspectors were assigned to make a full-scale investigation of the administrative handling of the tax cases of Cain and the Shotwell Manufacturing Company.

At the time I first became actively concerned with the Shotwell case in March of 1955, to my knowledge no question had been raised in the Internal Revenue Service as to the truthfulness of the testimony of former District Director Ernest J. Sauber that in March, 1948, he had been advised of unreported corporate receipts by Cain and his accountant. However, a detailed study of the available material and extensive discussions with the Assistant Chief Counsel (Enforcement) and the Inspectors conducting the investigation gave rise to the strong suspicion that the alleged disclosure might not have taken place in March, 1948. Certainly, by the middle of 1955 this suspicion became firmly fixed. In November, 1955, an inspector assigned to the case brought to the attention of the Chief Counsel's office newly discovered affirmative evidence which was in conflict with the sworn testimony at the suppression hearing before Judge Nordbye that a disclosure had been made in March, 1948. This information, together with other information ascertained by that time, was referred by the Chief Counsel to the Department of Justice on December 1, 1955.

Lester Stein.
LESTER STEIN.

Sworn to and subscribed before me this 2d day of October, 1956, at Washington, D. C.

[SEAL] BERNARD L. BAUSERMAN,
Notary Public, District of Columbia.

My commission expires October 14, 1958.

EXHIBIT B

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, JAMES YADEN, first being duly sworn according to law, depose and state:

1. That I am currently employed as an Inspector with the Internal Revenue Service. That on April 29, 1955, in my capacity of Internal Revenue Inspector, I was assigned by my superiors to conduct an investigation of the administrative handling of the Shotwell Manufacturing Company, Incorporated, and related income tax cases for the years 1944 to 1949, inclusive, and that since that date I have had this matter under active investigation. On July 13, 1955, Inspector Harvey M. Lyon was assigned to assist in the investigation in question and has been actively engaged in the conduct of the investigation since that date.

2. That during the investigation of this matter my attention was directed to the discrepancies in the date that The Shotwell Manufacturing Company, Incorporated, initially brought to the attention of the Internal Revenue Service the fact that it had not reported all of its receipts for the years 1944, 1945, and 1946. That according to the record of the testimony given at the hearing on the motion to suppress evidence in the United States District Court for the Northern District of Illinois, Eastern Division, on about November 12, 1952, Messrs. Byron A. Cain and Leon J. Busby placed the date of the initial

contact with Chief Field Deputy Collector Ernest J. Sauber as in January 1948, whereas, Ernest J. Sauber's testimony at the same proceeding placed the date of the initial contact by representatives of The Shotwell Manufacturing Company, Incorporated, as on or about March 15, 1948.

3. That witnesses under interrogation by me in October and November 1955, have given statements, based on their personal knowledge that when Special Agent Sam Krane called at the office of The Shotwell Manufacturing Company, Incorporated, on June 21, 1948, and requested, among other things, certain unrecorded invoices of The Shotwell Manufacturing Company, Incorporated, a telephone call was made by Mr. H. Stanley Graflund, in Mr. Krane's presence, to Byron A. Cain, then president of The Shotwell Manufacturing Company, Incorporated, at the Waldorf Astoria Hotel in New York; that Mr. Cain was advised that the special agent had requested certain specific documents and invoices relative to transactions with one David Lubben and General Confections Company, Incorporated; that upon learning of such request, Mr. Cain was surprised, shocked and disturbed; and that, upon terminating the telephone conversation, Mr. Cain turned to his associates, Frank J. Huebner and Harold E. Sullivan, and condemned Mr. Graflund for having given the documents to Mr. Krane.

4. That Mr. Ernest Sauber and Group Supervisor Ralph Johnson stated to me under oath in July, 1955, that they attended a luncheon meeting with Byron A. Cain and Leon J. Busby (at the expense of Mr. Cain or Mr. Busby) at the

Chicago Athletic Club, Chicago, Illinois. That Mr. Johnson testified under oath in July, 1955, in my presence, that this luncheon was held sometime between July 21, 1948, when he had the original and amended 1946 income tax returns of The Shotwell Manufacturing Company, Incorporated, transferred to his group, and July 30, 1948, when the case of The Shotwell Manufacturing Company, Incorporated, was assigned to Internal Revenue Agent Joseph M. Lima for investigation. Group Supervisor Johnson has further testified before me that at this luncheon Mr. Busby displayed figures of the unreported over-ceiling sales received by The Shotwell Manufacturing Company, Incorporated, and offered to turn them over to him.

5. That a witness with personal knowledge stated while under interrogation by me in November, 1955, that in July of 1948 a meeting was held in the Belden-Stratford Hotel in Chicago, Illinois, for the express purpose of preparing the underlying documents from which there could be developed a purported voluntary disclosure of unreported over-ceiling receipts of The Shotwell Manufacturing Company, Incorporated, during the years 1944, 1945, and 1946; that these were the figures subsequently turned over to Revenue Agent Lima when he first appeared at the office of The Shotwell Manufacturing Company, Incorporated, in August of 1948; and that this witness has also identified the persons present at this meeting, and has stated that these included Mr. Byron A. Cain, Mr. Frank J. Huebner, Mr. Leon J. Busby, and at least three employees of The Shotwell Manufacturing Company, Incorporated.

6. That Mr. Sauber on July 20, 1955, testified

under oath before me that he made no record, notation, or contemporaneous memorandum reflecting or pertaining to any contacts he had with Mr. Cain or Mr. Busby in 1948, specifically during the period when purported attempts were being made in behalf of The Shotwell Manufacturing Company, Incorporated, to disclose to the Internal Revenue Service, unreported over-ceiling sales.

7. That Mr. Johnson, on July 20, 1955, testified under oath before me that he made no record, notation, or contemporaneous memorandum reflecting or pertaining to any discussion had with, or information received from, Mr. Sauber in 1948 respecting the income tax case of The Shotwell Manufacturing Company, Incorporated, or any matter relating thereto.

I have carefully read this statement, consisting of five (5) pages, and it is true, accurate and complete to the best of my knowledge and belief. It has been made freely and voluntarily, without any threats, rewards, promises or duress having been made to or upon me.

JAMES E. YADEN,
Inspector, Internal Revenue Service.

Subscribed and sworn to before me this 1st day of December, 1955, at Washington, D. C.

DONALD C. ADAMS,
Inspector, Internal Revenue Service.

EXHIBIT C

AFFIDAVIT

UNITED STATES OF AMERICA,
CITY OF WASHINGTON,
District of Columbia, ss:

JOSEPH M. HOWARD, being duly sworn, deposes and says:

I am now, and have been at all times material herein, an attorney in the Tax Division of the Department of Justice.

The case of United States v. The Shotwell Manufacturing Company, Byron A. Cain, Frank J. Huebner and Harold E. Sullivan, was assigned to me shortly after the notices of appeal from the convictions had been filed. I wrote the brief and argued the case for the Government in the Court of Appeals, and I prepared the draft of the Government's petition for a writ of certiorari.

I accepted as a fact the testimony of Ernest J. Sauber that he had conversations with respondent Cain and his accountant, Busby, early in 1948 concerning certain unreported receipts of the corporation. I also accepted as a fact the testimony of Busby that the summaries and compilations which he submitted in support of the alleged voluntary disclosure of unreported receipts were prepared during an intensive investigation lasting several months. I had no suspicion that this testimony might be untrue until I was informed in November 1955 that there was good cause to believe that there had been no conversation between Sauber, Cain and Busby concerning the unreported receipts until some-

time after Special Agent Krane had asked in June 1948 for records of the corporation's dealings with David Lubben.

The files of the Department of Justice contain statements, similar to the above paragraph, from all the attorneys who took an active part in the case on behalf of the Government, with the exception of the late Assistant United States Attorney Edward Ryan. The files of the Department also contain statements of the attorneys and revenue agents who worked with Mr. Ryan in his conduct of the case, to the effect that Mr. Ryan at no time expressed any suspicion that the above testimony of Sauber and Busby might not be true.

JOSEPH M. HOWARD,
Attorney, Tax Division.

Signed and sworn to before me this 25th day of April, 1956.

W. E. HOUSE,
Notary Public.

My Commission expires January 31, 1960.

EXHIBIT D

CITY OF CHICAGO,
COUNTY OF COOK,
State of Illinois, ss:

AFFIDAVIT

VINCENT P. RUSSO, being first duly sworn according to law, deposes and says:

I am now, and at all times material hereto have been a trial attorney in the Tax Division of the Department of Justice.

By letter dated April 9, 1956, I was commissioned as a special attorney by the Attorney General of the United States of America under the authority conferred on him by Title 5, United States Code, Section 315. On the same date, Charles A. McNelis, who is an attorney in the Tax Division of the Department of Justice, was likewise commissioned. Both Mr. McNelis and I took the prescribed oath on or about April 10, 1956.

Under my commission I am authorized, among other things, to conduct in the Northern District of Illinois, and in any other judicial district where the jurisdiction thereof lies, any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates which district attorneys are authorized by law to conduct.

On April 10, 1956, pursuant to the authority vested in me by my commission, I undertook a grand jury investigation to determine whether various indictable offenses, including but not limited to perjury, obstruction of justice, and conspiracy to evade and de-

feat income taxes, may have been committed by anyone, including the Shotwell defendants, either at the hearing on the motion to suppress evidence or at the trial. My first official act under my commission was to procure the issuance of a *subpoena duces tecum* directed to Leon J. Busby, accountant for the Shotwell Mfg. Co., commanding him to bring with him and to produce before the duly sworn and impaneled April 1956 Term Grand Jury, on April 16, 1956, certain documents.

On April 11, 1956, Homan Mfg. Co., Inc., a corporation formerly named Shotwell Mfg. Co., Byron A. Cain, Harold E. Sullivan and Frank J. Huebner filed a Complaint and Petition in the United States District Court for the Northern District of Illinois, Eastern Division, naming me, Mr. McNelis and one Charles J. Mammel, an Internal Revenue Agent, as defendants. The plaintiffs sought to enjoin us from presenting evidence to the grand jury and to quash the *subpoena duces tecum* that had been served on Busby.

On April 12, 1956, Mr. McNelis and I, *pro sese* and as attorneys for defendant Mammel, filed a Motion to Dismiss the Complaint and Petition on the ground that it failed to state a cause of action upon which relief could be granted. The Complaint and Petition was dismissed by the District Court on April 17, 1956. On the same day the plaintiffs filed a Notice of Appeal and on April 18, 1956, the Court of Appeals entered an order staying the force and effect of the *subpoena duces tecum* that had been served on Busby. The appeal was argued on May 2, 1956 and on May 11, 1956, the Court of Appeals affirmed the order of the District Court. *Homan Mfg. Co., et al.* v. *Vincent P. Russo, et al.*, 233 F. 2d 547.

From April 11, 1956, when the injunction suit was filed, to July 12, 1956, the grand jury was in recess with respect to any and all matters relating to the defendants in the Shotwell case. However, during the period in which the grand jury was in recess I personally interviewed and interrogated many witnesses.

From the record of the testimony given on November 12, 1952, at the hearing on the Motion to Suppress Evidence in the United States District Court for the Northern District of Illinois, Eastern Division, it appears that Byron A. Cain and Leon J. Busby fixed the date of the initial contact with Ernest J. Sauber, then Chief Field Deputy Collector, for the purpose of making a voluntary disclosure, as January 1948. From Sauber's testimony given at the same hearing on November 13, 1952 it appears that he fixed such date as on or about March 15, 1948.

From statements of fact within the personal knowledge of witnesses interviewed and interrogated by me, and from facts and circumstances already in the record, it appears that prior to June 21, 1948 when Special Agent Sam Krane called at the office of the Shotwell Mfg. Co. and requested, among other things, certain records evidencing shipments of merchandise for which no invoices were rendered and for which payment had been received but concealed from the corporate books and records, no disclosure, voluntary or otherwise, had been made by Busby and Cain to Sauber or to any other official or employee of the Internal Revenue Service.

Special Agent Krane's request for records precipitated a telephone call from H. Stanley Graflund, the Comptroller of the Shotwell Mfg. Co., to Byron A. Cain, president of Shotwell, who was then at the Waldorf Astoria Hotel in New York City. Graflund

informed Cain of Special Agent Krane's visit and request for documents and of the fact that he had furnished Krane with the documents requested. Cain was upset, swore and used some profanity, and asked Gratlund why he had given the records to Krane.

One Edward T. Urban, an officer of Close & Co., candy manufacturers, also the recipient of black market money from David Lubben, the government's principal witness against the Shotwell Mfg. Co., Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, has informed me that sometime within the first three weeks of July 1948, at the invitation of Frank J. Huebner, he met and had lunch with Huebner and Harold E. Sullivan at the Chicago Athletic Club; that during the luncheon there was discussed a contemplated purchase by the Shotwell Mfg. Co., Close & Co., and others, who had received overceiling currency payments from Lubben, of Lubben's companies for the purpose of acquiring and destroying the books and records of such companies; and that the acquisition and destruction of such books and records would remove evidence against the proposed purchasers with respect to monies that they had received from Lubben.

Mr. Urban asserted that the discussion at the luncheon positively did not relate to the acquisition of Lubben's books and records for use in accumulating data and figures to be used in the making of any disclosure to the government by the Shotwell Mfg. Co.

From the record it also appears that Sauber testified that immediately after Busby's initial contact with him on or about March 15, 1948, he immediately telephoned one Ralph Johnson, group supervisor, Office of Internal Revenue Agent in Charge, and related the conversation he had had with Busby. John-

son has stated to me that he received no telephone call from Sauber in connection with any purported disclosure to Sauber by Busby or by Busby and Cain in either March or April 1948; that he did receive a telephone call from Sauber sometime prior to July 21, 1948, perhaps sometime in May or June of that year.

Johnson also stated that in a conversation with Sauber prior to the hearing on the Motion to Suppress Evidence, Sauber asked Johnson whether he could state that Sauber had consulted him around March 1948 about the advisability of filing amended returns or the making of a voluntary disclosure in connection with Shotwell's failure to report income resulting from overceiling sales of merchandise. Johnson asserts that he informed Sauber that he "could not go back that far." In this connection, it is pertinent to note that Johnson was not called as a witness at either the suppression hearing or at the trial.

From Busby's testimony in the record it appears that he and members of his staff compiled the data in Government Exhibits 186 and 189 A, B, C, D, and E (the alleged disclosure documents) from the first of February 1948 through the first part of June 1948, or thereabouts.

From statements of fact made to me by witnesses with personal knowledge, it appears that Government Exhibits 186 and 189 A, B, C, D, and E were compiled during the space of a day or two at a meeting at the Belden-Stratford Hotel in Chicago, Illinois, in late July 1948; that no member of Busby's staff aided, assisted or participated in the preparation and compilation of such exhibits; and that such exhibits were prepared and compiled by Leon J. Busby and the following officers or employees of the Shotwell Mfg.

Co.: Byron A. Cain, Frank J. Huebner, H. Stanley Graflund, Howard Roeser and Martin Ericsón.

VINCENT P. RUSSO,
Trial Attorney, Tax Division.

Signed and sworn to before me this 19th day of September, 1956.

[SEAL] RUTH I. QUINLAN, *Notary Public.*

My Commission expires June 19, 1958.

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JOHN T. FEY, Clerk

Nos. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN, CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

MOTION TO REMAND (AMENDED)

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 9 and 10

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN, CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

MOTION TO REMAND (AMENDED)*

The Solicitor General, on behalf of the United States, respectfully moves that this case, now pending in this Court on the Government's petition for a writ of certiorari and on respondents' cross-peti-

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*The motion was originally filed on October 15, 1956. In order to supplement the Appendix by including an additional affidavit, dated November 6, 1956 (Exhibit E, *infra*, pp. 22-23), and to correct certain minor errors in the original motion, this amended motion is being filed.

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tion, be remanded to the District Court. The reasons for granting this motion are set forth below:

A detailed summary of most of the pertinent facts of record will be found in the Government's petition and defendants' cross-petition. Briefly, defendants were indicted for wilful evasion of income taxes. They moved that certain evidence be suppressed on the ground that it had been voluntarily disclosed to the Government in reliance upon Treasury Department policy. After a three-day pre-trial hearing, the District Court held that the disclosure was neither complete nor made in good faith, and defendants were ultimately found guilty by a jury. The Court of Appeals reversed, holding that the disclosure was in good faith, that it was in complete compliance with the policy, *and* that it was timely. The District Court had not, however, ruled upon the issue of timeliness. Cf. *United States* v. *Lustig*, 163 F. 2d 85, 88 (C. A. 2d), certiorari denied, 332 U. S. 775; *Lapides* v. *United States*, 215 F. 2d 253, 255–256 (C. A. 2d).

In all the proceedings in the courts below, and in its petition for certiorari (pp. 10–12), the Government accepted as a fact testimony that defendant Cain and the corporation's accountant, Busby, met with Ernest J. Sauber, then Chief Deputy Collector, some time *early in 1948*, at which time they revealed to him the fact that the corporation had not reported receipts from black market transactions. The Government also had no reason to doubt Busby's testimony that he prepared the disclosure figures during an intensive investigation lasting several months. None

of the several Department of Justice attorneys who handled the prosecution suspected, so far as we can determine, that this was not so.[1]

Now, as the result of an investigation begun by the National Office of the Internal Revenue Service in the early part of 1955, over a year after the conclusion of the trial,[2] additional evidence has come to light.[3] This evidence gives substance and meaning to other evidence[4] in the record and to other facts known to the Department of Justice and the Internal Revenue Service, the full significance of which had not previously been appreciated. Should the District Court be given an opportunity to receive this new evidence, it would support a finding that defendants did not attempt to make a voluntary disclosure until *July 1948*, after a revenue agent, acting on instructions from his superiors, had already obtained evidence of the corporation's unreported receipts. It would also support a finding that Busby's figures were all prepared during the space of a few days in the month of July.[4]

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[1] See Exhibit C, *infra*.

[2] See Exhibit A, *infra*.

[3] See Exhibit B, *infra*, paragraphs 4-5; and Exhibits D and E, *infra*. The late Assistant United States Attorney Edward Ryan, who represented the Government at the hearing on the motion to suppress, was aware of some of these facts, but he was prevented from perceiving their significance by the manner in which they were presented to him. (See Exhibit C, *infra*.)

[4] As a result of this new evidence, the Department of Justice has begun a grand jury investigation to determine whether various indictable offenses may have been committed, including perjury, obstruction of justice, and conspiracy to evade income taxes for years other than those involved in the present case. An injunction filed by the defendants to prevent the Government from presen-

As appears from the attached affidavits (set out in the Appendix, *infra*) of the officials of the Internal Revenue Service and the Department of Justice who had immediate responsibility for the case, it was not until November 1955, after the Government's petition for certiorari was filed, and only as a result of the full-scale investigation begun in April 1955 into possible misconduct and wrongdoing on the part of Internal Revenue Service personnel in the Chicago office, that this new evidence was discovered. And it is equally apparent, we believe, that the failure of the Government to discover and present such evidence to the court at an earlier date was not attributable to any lack of due diligence.[5]

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ing evidence to the grand jury was denied by the district court on April 17, 1956. The Court of Appeals affirmed this order on May 11, 1956.

As a further result of the Internal Revenue Service investigation, a number of charges were preferred against Sauber, one arising, in part, out of his conduct relative to the alleged disclosure in this case, and others based on his handling of other unrelated cases. He was placed on administrative annual leave on December 2, 1955, suspended on March 2, 1956, and removed from office on August 6, 1956. The removal was based on two of the unrelated charges, and no findings were made by the Commissioner as to the charges based on the evidence in this case. The Treasury Department has granted Sauber an extension of time to November 14, 1956, within which to file an appeal to the Secretary.

[5] The Government's petition for certiorari (No. 470, 1955 Term) and the defendants' conditional cross-petition (No. 471) were filed on October 17, 1955. On December 6, 1955, the Solicitor General, in a letter to the Clerk, requested the Court to withhold action on the petitions until the Internal Revenue Service could complete its pending investigation. On June 1, 1956, the Solicitor General informed the Court of the developments in the case to

It may be that this Court would consider, as did Judge Nordbye, that it is unnecessary to go into the question of the timeliness of the alleged voluntary disclosure, because it was inadequate on other grounds. But if that issue be reached, and if this Court were to review the case in its present posture, the record would be inadequate and incomplete. Furthermore, had the evidence now available been presented to the lower courts the rulings under review might conceivably have been altered, for the majority of the Court of Appeals recognized that a "voluntary disclosure" must be timely:[6]

> When the revenue agents get the scent and are in pursuit of the miscreant, it is too late for him to seek the protection of the Treasury Department's voluntary disclosure policy. Until then its door is open and the welcome mat is out.

In these circumstances, we submit that the interests of justice would be served by remanding this case to the District Court for a further hearing to amplify

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that date, and requested that consideration of the petitions be further deferred. On June 11, 1956, the Court entered an order granting the Solicitor General's motion (351 U. S. 980).

[6] See Petition for Certiorari, No. 9, p. 56.

[7] The issues of fact and law raised by the alleged voluntary disclosure, in so far as they related to the defendants' motions to dismiss the indictment and suppress the evidence obtained from such alleged disclosure, were decided solely by the trial judge after a pre-trial hearing. (See Petition for Certiorari, No. 9, pp. 6-7.) These issues, and the evidence bearing on them, were not submitted to the jury, except that the jury was allowed to consider the evidence as to the alleged disclosure in so far as it threw light upon the issue of wilfulness as an element of the sub-

the record by enabling the parties to present new, additional evidence on the timeliness of the alleged voluntary disclosure. After such hearing the District Court would make such further findings and orders, if any, as the facts and the law may require. Such remand should be without prejudice to the right of the parties to preserve and renew the points presented in the pending petition and cross-petition.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

NOVEMBER 1956.

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stantive offense, i. e., the defendants' "intent" and "good faith" (R. 2968-2970). Cf. *Mesarosh, et ux. v. United States*, No. 20, this Term, decided October 10, 1956, opinion of the Court delivered November 5, 1956.

APPENDIX

EXHIBIT A

AFFIDAVIT

I am a Special Assistant (Enforcement) to the Chief Counsel for the Internal Revenue Service, in Washington, D. C. My duties include the handling of cases and problems assigned to me by the Chief Counsel or the Assistant Chief Counsel (Enforcement) relating to criminal matters.

The criminal aspects of the Shotwell Manufacturing Company case were considered and processed by the Chief Counsel's field office in Chicago. In early March, 1955, at a time when the appeals of Cain, Sullivan, and Huebner, with respect to their conviction for willfully attempting to evade the income taxes of the Shotwell Manufacturing Company for 1945 and 1946, were pending with the Court of Appeals for the Seventh Circuit, there was routed to me for review a matter involving the tax liability of the corporation for the subsequent years 1947, 1948, and 1949. One of the problems was whether negotiations looking toward settlement of the civil tax liabilities of the corporation and Cain for the years 1947, 1948, and 1949 should be undertaken during the pendency of the criminal appeals. Other problems related to the refusal of the corporation to turn over books and records for the years 1944 to 1946, inclusive. My examination of the headquarters file of the Chief Counsel's office with respect to the Shotwell criminal case disclosed that it included excerpts from a report of a revenue agent dated December 13, 1954, covering

Cain's liability for the years 1947 to 1949, inclusive, wherein the agent asserted that Cain was attempting to secure a favorable settlement of his civil liabilities for the later years in order to better his position on appeal in the criminal case. The revenue agent also strenuously objected to the manner in which the Chicago office of the Internal Revenue Service was handling Cain's civil liabilities.

In view of the nature of the aforementioned excerpts, it was clear that the full report required examination. I called this matter to the attention of the Assistant Chief Counsel (Enforcement) and a request was made of the Chicago office that it forward a full copy of the agent's report. That report was received in the National Office in Washington on about March 28, 1955. In his transmittal memorandum, the Regional Counsel at Chicago advised the National Office for the first time that the Inspection Office of the Internal Revenue Service, which has the function of investigating allegations of misconduct and wrongdoing on the part of Internal Revenue Service personnel, had begun an inquiry in the case. The full report disclosed, in addition, that the investigation of the individual income tax returns of Cain and Sullivan for the years 1944 to 1946, inclusive, was still incomplete and that there had been no determination whether these individuals had the use and benefit of the unreported and concealed black market receipts involved in the corporation case for the same years. Such evidence would have been strong corroboration of the charge of wilful attempted tax evasion in the Shotwell case. Furthermore, the revenue agent charged that he had been subjected to intense pressure to submit his report although he considered that his investigation was incomplete and that a full development of all the facts was required.

I discussed the revenue agent's report with the

Assistant Chief Counsel (Enforcement) and he thereafter took the matter up with the Assistant Commissioner, Inspection, among others. Subsequently, in late April 1955, inspectors were assigned to make a full-scale investigation of the administrative handling of the tax cases of Cain and the Shotwell Manufacturing Company.

At the time I first became actively concerned with the Shotwell case in March of 1955, to my knowledge no questions had been raised in the Internal Revenue Service as to the truthfulness of the testimony of former District Director Ernest J. Sauber that in March, 1948, he had been advised of unreported corporate receipts by Cain and his accountant. However, a detailed study of the available material and extensive discussions with the Assistant Chief Counsel (Enforcement) and the Inspectors conducting the investigation gave rise to the strong suspicion that the alleged disclosure might not have taken place in March, 1948. Certainly, by the middle of 1955 this suspicion became firmly fixed. In November, 1955, an inspector assigned to the case brought to the attention of the Chief Counsel's office newly discovered affirmative evidence which was in conflict with the sworn testimony at the suppression hearing before Judge Nordbye that a disclosure had been made in March, 1948. This information, together with other information ascertained by that time, was referred by the Chief Counsel to the Department of Justice on December 1, 1955.

LESTER STEIN.

Sworn to and subscribed before me this 2d day of October, 1956, at Washington, D. C.

[SEAL] BERNARD L. BAUSERMAN,
Notary Public, District of Columbia.

My commission expires October 14, 1958.

Exhibit B

United States of America,

District of Columbia, ss:

I, James Yaden, first being duly sworn according to law, depose and state:

1. That I am currently employed as an Inspector with the Internal Revenue Service. That on April 29, 1955, in my capacity of Internal Revenue Inspector, I was assigned by my superiors to conduct an investigation of the administrative handling of the Shotwell Manufacturing Company, Incorporated, and related income tax cases for the years 1944 to 1949, inclusive, and that since that date I have had this matter under active investigation. On July 13, 1955, Inspector Harvey M. Lyon was assigned to assist in the investigation in question and has been actively engaged in the conduct of the investigation since that date.

2. That during the investigation of this matter my attention was directed to the discrepancies in the date that The Shotwell Manufacturing Company, Incorporated, initially brought to the attention of the Internal Revenue Service the fact that it had not reported all of its receipts for the years 1944, 1945, and 1946. That according to the record of the testimony given at the hearing on the motion to suppress evidence in the United States District Court for the Northern District of Illinois, Eastern Division, on about November 12, 1952, Messrs. Byron A. Cain

and Leon J. Busby placed the date of the initial contact with Chief Field Deputy Collector Ernest J. Sauber as in January 1948, whereas, Ernest J. Sauber's testimony at the same proceeding placed the date of the initial contact by representatives of The Shotwell Manufacturing Company, Incorporated, as on or about March 15, 1948.

3. That witnesses under interrogation by me in October and November 1955, have given statements, based on their personal knowledge that when Special Agent Sam Krane called at the office of The Shotwell Manufacturing Company, Incorporated, on June 21, 1948, and requested, among other things, certain unrecorded invoices of The Shotwell Manufacturing Company, Incorporated, a telephone call was made by Mr. H. Stanley Grafund, in Mr. Krane's presence, to Byron A. Cain, then president of The Shotwell Manufacturing Company, Incorporated, at the Waldorf Astoria Hotel in New York; that Mr. Cain was advised that the special agent had requested certain specific documents and invoices relative to transactions with one David Lubben and General Confections Company, Incorporated; that upon learning of such request, Mr. Cain was surprised, shocked and disturbed; and that, upon terminating the telephone conversation, Mr. Cain turned to his associates, Frank J. Huebner and Harold E. Sullivan, and condemned Mr. Grafund for having given the documents to Mr. Krane.

4. That Mr. Ernest Sauber and Group Supervisor Ralph Johnson stated to me under oath in July, 1955, that they attended a luncheon meeting with Byron A. Cain and Leon J. Busby (at

the expense of Mr. Cain or Mr. Busby) at the Chicago Athletic Club, Chicago, Illinois. That Mr. Johnson testified under oath in July, 1955, in my presence, that this luncheon was held sometime between July 21, 1948, when he had the original and amended 1946 income tax returns of The Shotwell Manufacturing Company, Incorporated, transferred to his group, and July 30, 1948, when the case of The Shotwell Manufacturing Company, Incorporated, was assigned to Internal Revenue Agent Joseph M. Lima for investigation. Group Supervisor Johnson has further testified before me that at this luncheon Mr. Busby displayed figures of the unreported over-ceiling sales received by The Shotwell Manufacturing Company, Incorporated, and offered to turn them over to him.

5. That a witness with personal knowledge stated while under interrogation by me in November, 1955, that in July of 1948 a meeting was held in the Belden-Stratford Hotel in Chicago, Illinois, for the express purpose of preparing the underlying documents from which there could be developed a purported voluntary disclosure of unreported over-ceiling receipts of The Shotwell Manufacturing Company, Incorporated, during the years 1944, 1945, and 1946; that these were the figures subsequently turned over to Revenue Agent Lima when he first appeared at the office of The Shotwell Manufacturing Company, Incorporated, in August of 1948; and that this witness has also identified the persons present at this meeting, and has stated that these included Mr. Byron A. Cain, Mr. Frank J. Huebner, Mr. Leon J. Busby, and at least three employees of The Shotwell Manufacturing Company, Incorporated.

6. That Mr. Sauber on July 20, 1955, testified under oath before me that he made no record, notation, or contemporaneous memorandum reflecting or pertaining to any contacts he had with Mr. Cain or Mr. Busby in 1948, specifically during the period when purported attempts were being made in behalf of The Shotwell Manufacturing Company, Incorporated, to disclose to the Internal Revenue Service, unreported over-ceiling sales.

7. That Mr. Johnson, on July 20, 1955, testified under oath before me that he made no record, notation, or contemporaneous memorandum reflecting or pertaining to any discussion had with, or information received from, Mr. Sauber in 1948 respecting the income tax case of The Shotwell Manufacturing Company, Incorporated, or any matter relating thereto.

I have carefully read this statement, consisting of five (5) pages, and it is true, accurate and complete to the best of my knowledge and belief. It has been made freely and voluntarily, without any threats, rewards, promises or duress having been made to or upon me.

JAMES E. YADEN,
Inspector, Internal Revenue Service.

Subscribed and sworn to before me this 1st day of December 1955, at Washington, D. C.

DONALD C. ADAMS,
Inspector, Internal Revenue Service.

Exhibit C

AFFIDAVIT

United States of America,
City of Washington,
District of Columbia, ss:

Joseph M. Howard, being duly sworn, deposes and says:

I am now, and have been at all times material herein, an attorney in the Tax Division of the Department of Justice.

The case of United States v. The Shotwell Manufacturing Company, Byron A. Cain, Frank J. Huebner and Harold E. Sullivan, was assigned to me shortly after the notices of appeal from the convictions had been filed. I wrote the brief and argued the case for the Government in the Court of Appeals, and I prepared the draft of the Government's petition for a writ of certiorari.

I accepted as a fact the testimony of Ernest J. Sauber that he had conversations with respondent Cain and his accountant, Busby, early in 1948 concerning certain unreported receipts of the corporation. I also accepted as a fact the testimony of Busby that the summaries and compilations which he submitted in support of the alleged voluntary disclosure of unreported receipts were prepared during an intensive investigation lasting several months. I had no suspicion that this testimony might be untrue until I was informed in November 1955 that there was good cause to believe that there had been no conversation between Sauber, Cain and Busby

concerning the unreported receipts until sometime after Special Agent Keane had asked in June 1948 for records of the corporation's dealings with David Lubben.

The files of the Department of Justice contain statements, similar to the above paragraph, from all the attorneys who took an active part in the case on behalf of the Government, with the exception of the late Assistant United States Attorney Edward Ryan. The files of the Department also contain statements of the attorneys and revenue agents who worked with Mr. Ryan in his conduct of the case, to the effect that Mr. Ryan at no time expressed any suspicion that the above testimony of Sauber and Busby might not be true.

JOSEPH M. HOWARD,
Attorney, Tax Division.

Signed and sworn to before me this 25th day of April, 1956.

W. E. HOUSE,
Notary Public.

My Commission expires January 31, 1960.

Exhibit D

City of Chicago,
County of Cook,
State of Illinois, ss:

AFFIDAVIT

Vincent P. Russo, being first duly sworn according to law, deposes and says:

I am now, and at all times material hereto have been a trial attorney in the Tax Division of the Department of Justice.

By letter dated April 9, 1956, I was commissioned as a special attorney by the Attorney General of the United States of America under the authority conferred on him by Title 5, United States Code, Section 315. On the same date, Charles A. McNelis, who is an attorney in the Tax Division of the Department of Justice, was likewise commissioned. Both Mr. McNelis and I took the prescribed oath on or about April 10, 1956.

Under my commission I am authorized, among other things, to conduct in the Northern District of Illinois, and any other judicial district where the jurisdiction thereof lies, any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates which district attorneys are authorized by law to conduct.

On April 10, 1956, pursuant to the authority vested in me by my commission, I undertook a grand jury investigation to determine whether various indictable offenses, including but not limited to perjury, ob-

struction of justice, and conspiracy to evade and defeat income taxes, may have been committed by anyone, including the Shotwell defendants, either at the hearing on the motion to suppress evidence or at the trial. My first official act under my commission was to procure the issuance of a *subpoena duces tecum* directed to Leon J. Busby, accountant for the Shotwell Mfg. Co., commanding him to bring with him and to produce before the duly sworn and impaneled April 1956 Term Grand Jury, on April 16, 1956, certain documents.

On April 11, 1956, Homan Mfg. Co., Inc., a corporation formerly named Shotwell Mfg. Co., Byron A. Cain, Harold E. Sullivan and Frank J. Huebner filed a Complaint and Petition in the United States District Court for the Northern District of Illinois, Eastern Division, naming me, Mr. McNelis and one Charles J. Mammel, an Internal Revenue Agent, as defendants. The plaintiffs sought to enjoin us from presenting evidence to the grand jury and to quash the *subpoena duces tecum* that had been served on Busby.

On April 12, 1956, Mr. McNelis and I, *pro sese* and as attorneys for defendant Mammel, filed a Motion to Dismiss the Complaint and Petition on the ground that it failed to state a cause of action upon which relief could be granted. The Complaint and Petition was dismissed by the District Court on April 17, 1956. On the same day the plaintiffs filed a Notice of Appeal and on April 18, 1956, the Court of Appeals entered an order staying the force and effect of the *subpoena duces tecum* that had been served on Busby. The appeal was argued on May 2, 1956 and on May 11, 1956, the Court of Appeals affirmed the order of the District Court. *Homan*

Mfg. Co., et al. v. Vincent P. Russo, et al., 233 F. 2d 547.

From April 11, 1956, when the injunction suit was filed, to July 12, 1956, the grand jury was in recess with respect to any and all matters relating to the defendants in the Shotwell case. However, during the period in which the grand jury was in recess I personally interviewed and interrogated many witnesses.

From the record of the testimony given on November 12, 1952, at the hearing on the Motion to Suppress Evidence in the United States District Court for the Northern District of Illinois, Eastern Division, it appears that Byron A. Cain and Leon J. Busby fixed the date of the initial contact with Ernest J. Sauber, then Chief Field Deputy Collector, for the purpose of making a voluntary disclosure, as January 1948. From Sauber's testimony given at the same hearing on November 13, 1952 it appears that he fixed such date as on or about March 15, 1948.

From statements of fact within the personal knowledge of witnesses interviewed and interrogated by me, and from facts and circumstances already in the record, it appears that prior to June 21, 1948 when Special Agent Sam Krane called at the office of the Shotwell Mfg. Co. and requested, among other things, certain records evidencing shipments of merchandise for which no invoices were rendered and for which payment had been received but concealed from the corporate books and records, no disclosure, voluntary or otherwise, had been made by Busby and Cain to Sauber or to any other official or employee of the Internal Revenue Service.

Special Agent Krane's request for records precipitated a telephone call from H. Stanley Gratlund, the Comptroller of the Shotwell Mfg. Co., to Byron A.

Cain, president of Shotwell, who was then at the Waldorf Astoria Hotel in New York City. Gratlund informed Cain of Special Agent Krane's visit and request for documents and of the fact that he had furnished Krane with the documents requested. Cain was upset, swore and used some profanity, and asked Gratlund why he had given the records to Krane.

One Edward T. Urban, an officer of Close & Co., candy manufacturers, also the recipient of black market money from David Lubben, the government's principal witness against the Shotwell Mfg. Co., Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, has informed me that sometime within the first three weeks of July 1948, at the invitation of Frank J. Huebner, he met and had lunch with Huebner and Harold E. Sullivan at the Chicago Athletic Club; that during the luncheon there was discussed a contemplated purchase by the Shotwell Mfg. Co., Close & Co., and others, who had received overceiling currency payments from Lubben, of Lubben's companies for the purpose of acquiring and destroying the books and records of such companies; and that the acquisition and destruction of such books and records would remove evidence against the proposed purchasers with respect to monies that they had received from Lubben.

Mr. Urban asserted that the discussion at the luncheon positively did not relate to the acquisition of Lubben's books and records for use in accumulating data and figures to be used in the making of any disclosure to the government by the Shotwell Mfg. Co.

From the record it also appears that Sauber testified that immediately after Busby's initial contact with him on or about March 15, 1948, he immediately telephoned one Ralph Johnson, group supervisor, Office of Internal Revenue Agent in Charge, and re-

lated the conversation he had had with Busby. Johnson has stated to me that he received no telephone call from Sauber in connection with any purported disclosure to Sauber by Busby or by Busby and Cain in either March or April 1948; that he did receive a telephone call from Sauber sometime prior to July 21, 1948, perhaps sometime in May or June of that year.

Johnson also stated that in a conversation with Sauber prior to the hearing on the Motion to Suppress Evidence, Sauber asked Johnson whether he could state that Sauber had consulted him around March 1948 about the advisability of filing amended returns or the making of a voluntary disclosure in connection with Shotwell's failure to report income resulting from overceiling sales of merchandise. Johnson asserts that he informed Sauber that he "could not go back that far." In this connection, it is pertinent to note that Johnson was not called as a witness at either the suppression hearing or at the trial.

From Busby's testimony in the record it appears that he and members of his staff compiled the data in Government Exhibits 186 and 189, A, B, C, D, and E (the alleged disclosure documents) from the first of February 1948 through the first part of June 1948, or thereabouts.

From statements of fact made to me by witnesses with personal knowledge, it appears that Government Exhibits 186 and 189 A, B, C, D, and E were compiled during the space of a day or two at a meeting at the Belden-Stratford Hotel in Chicago, Illinois, in late July 1948; that no member of Busby's staff aided, assisted or participated in the preparation and compilation of such exhibits; and that such exhibits were prepared and compiled by Leon J. Busby and the

following officers or employees of the Shotwell Mfg. Co.: Byron A. Cain, Frank J. Huebner, H. Stanley Graflund, Howard Roeser and Martin Ericson.

VINCENT P. RUSSO,
Trial Attorney, Tax Division.

Signed and sworn to before me this 19th day of September, 1956.

[SEAL] RUTH I. QUINLAN, *Notary Public.*

My Commission expires June 19, 1958.

EXHIBIT E

AFFIDAVIT

UNITED STATES OF AMERICA,
CITY OF WASHINGTON,
District of Columbia, ss:

CHARLES A. MCNELIS, being duly sworn, deposes and says:

I am now, and have been at all times material herein, an attorney in the Tax Division of the Department of Justice.

By letter dated April 9, 1956, I was commissioned as a special attorney by the Attorney General of the United States of America and since that time I have assisted Vincent P. Russo in a grand jury investigation in the Northern District of Illinois to determine whether various offenses in violation of Federal laws may have been committed in said District.

In assisting Mr. Russo I personally have interviewed and interrogated many witnesses outside the presence of the grand jury and have been present while other Federal Government employees, including Mr. Russo, have interviewed and interrogated witnesses.

I have read the affidavit of Vincent P. Russo, Exhibit D, and know all facts alleged therein to be true.

More particularly I wish to state that:

Edward T. Urban has informed me that he attended a meeting, sometime within the first three weeks of July 1948, with Harold E. Sullivan and Frank J. Huebner and discussed with them a plan whereby they and others would acquire Lalbben's books and

records for the purpose of destroying them so that evidence of unreported receipts would not be available to the Government.

Ralph Johnson, Internal Revenue Service, Chicago, Illinois, has stated to me that in a conversation with Ernest J. Sauber, prior to the hearing on the Motion to Suppress Evidence, he told Sauber he could not go back as far as March 1948 in fixing the time when Sauber first contacted him about the Shotwell case; that he did receive the first call from Sauber on the Shotwell case prior to July 21, 1948, but not before May 1948; that he is definitely sure that Sauber did not contact him in March or April 1948.

From statements made to me by witnesses with personal knowledge of the facts Shotwell's alleged disclosure documents, Government Exhibits 186 and 189, A–E, inclusive, must have been prepared, in the course of a few days in late July 1948, by Shotwell personnel and Busby without the assistance of any member of Busby's staff.

CHARLES A. McNEILS,
Attorney, Tax Division.

Signed and sworn to before me this 6th day of November, 1956.

[SEAL] W. E. HOUSE, *Notary Public.*

My Commission expires January 31, 1960.

U.S. GOVERNMENT PRINTING OFFICE 1958

Nos. ~~9 and 10~~

In the Supreme Court of the United States

OCTOBER TERM, 1956.

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN, CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENT TO MOTION TO REMAND

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 9

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

No. 10

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN; FRANK J. HUEBNER, AND HAROLD E. SULLIVAN, CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENT TO MOTION TO REMAND

The rapidly unfolding developments in this case require the filing of this supplement to the Government's motion to remand this case to the district court.

The principal purpose of this supplemental memorandum is to bring to the Court's attention the attached affidavit (Appendix, *infra*) of Frank J. Huebner, one of the three individual defendants in this case. The significance of Huebner's affidavit may

be understood from the following brief description of the background of the motion to remand: In 1952, the Shotwell Manufacturing Company and three of its responsible officers, Byron A. Cain, Frank J. Huebner, and Harold E. Sullivan, were indicted for wilful evasion of income taxes. Prior to the trial they moved that certain evidence be suppressed on the ground that it had been voluntarily disclosed to the Government in reliance upon Treasury Department policy. After a three-day pretrial hearing, the district court (Judge Nordbye) found that the disclosure was neither complete nor made in good faith, and denied the motion to suppress. The defendants were tried and convicted. On appeal, the Court of Appeals (Judge Lindley dissenting) reversed, holding that the disclosure was in good faith, that it was in complete compliance with the so-called voluntary disclosure policy, and that it was timely. Accordingly, the convictions were reversed with instructions to grant the motion to suppress.

In its petition for certiorari, filed October 1955, the Government contended that the court below erred in setting aside Judge Nordbye's finding that the defendants' alleged disclosure was incomplete and lacking in good faith. The petition for certiorari noted (p. 23) that Judge Nordbye specifically refrained from making a finding as to the timeliness of the disclosure, a question as to which the evidence before him was conflicting. The Government argued in its petition for certiorari that the case should at least have been remanded by the Court of Appeals to permit the trial court to pass upon this disputed issue of fact, if it were deemed significant.

Subsequent to the filing of the petition for certiorari, and as the result of an investigation initfated by the national office of the Internal Revenue Service early in 1955, additional evidence began to come to light. Such evidence, some of which has already been outlined in the motion to remand filed by the Government on November 15, 1956, indicates that the record now before this Court contains perjured testimony, both by defense witnesses and by Government witnesses, as to the circumstances of the alleged disclosure. In one aspect, the new evidence indicates that the officers of the Shotwell Manufacturing Company made no move to disclose the unreported corporate receipts until they discovered that the Treasury Department was already aware of them. Such evidence would unquestionably have a high degree of relevance on the issue of the timeliness of the disclosure, a matter left undecided by Judge Nordbye. In addition, it would strongly support Judge Nordbye's finding of fact that the disclosure was totally lacking in good faith.

Sullivan and Cain took the stand and testified, the former at the trial, the latter both at the suppression hearing and at the trial. Huebner never testified. He states in the attached affidavit (Appendix, *infra*, p. 10) that "I was not asked to testify at either the trial or suppression hearing because I had stated I would not lie on the stand."

Huebner's affidavit states that he has now voluntarily appeared before the grand jury which is investigating various facets of this case, and has testified before the grand jury "to these and other facts concerning the voluntary disclosure alleged to have been

made for and on behalf of The Shotwell Manufacturing Company". (Appendix, *infra*, p. 10) Huebner has also filed a motion in this Court to withdraw from opposition to the Government's petition for certiorari, and to consent to the Government's motion that the case be remanded to the district court.

On such remand, Huebner's testimony, as reflected in the attached affidavit, will contradict the testimony given by Sullivan and Cain on several crucial points: (1) Huebner states that the corporation received over-ceiling premium currency payments from Libbey during the period from November 1944 to December 1946. Sullivan and Cain testified (R. 2546-2550, 2650) that such payments were received only from September 1945 until the summer of 1946.[1] (2) Huebner states that he was never informed that a voluntary disclosure either had been made, or would be made, until the meeting at the Belden-Stratford Hotel in July 1948, and that he was then given to understand that it had been agreed that the date of the disclosure would be set at June 15, 1948. Cain and his accountant Busby testified (R. 176, 228-229) that a disclosure had been made to then Chief Deputy Collector Sauber as early as January 1948, and that Huebner had participated in the decision to make the disclosure.[2] (3)

---

[1] This was the critical factual issue before the jury. Compare Petition for Certiorari (No. 9), page 14, with Brief of Respondents in Opposition, pages 5-6.

[2] Sauber, who had already committed himself in a written statement over a year before the suppression hearing (R. 3154), testified that the disclosure took place about March 15, 1948. Sauber has not been exonerated from perjury in this respect, as Sullivan and Cain assert in their Answer to the Motion to Remand (pp. 11, 26).

Huebner states that, after the Belden-Stratford meeting, he was informed by Cain and Busby that the corporation's case had been "fixed" and that it would be settled for a tax deficiency of only $20,000, but that someone in the revenue office destroyed the settlement papers.

The Government reiterates its belief that Judge Nordbye's finding that the alleged disclosure was totally lacking in good faith is abundantly supported by the facts already in the record, as summarized in the Government's petition for certiorari. We think that, on the record already made, the defendants' conviction was amply justified by the evidence and should have been affirmed on appeal. The new evidence which has come to light confirms and amplifies the inadequacies of the "voluntary disclosure" defense. In no sense is the Government moving, as the defendants assert, for "a partial new trial in order to validate a conviction already obtained." Rather, the Government requests a remand to the district court solely in order that the case should not be reviewed by this Court on the basis of a record which now clearly appears to contain perjured testimony and to be incomplete and inaccurate, on the timeliness, extent, and good faith of the alleged disclosure relied on by the defendants. We suggest that this Court may not desire to rule on the issues relating to the alleged disclosure on the basis of such a record, and that it would be in the interests of justice to remand this case to the district court for a full investigation and determination of the matters involved. Neither this Court nor the Court of Appeals is properly

equipped for the task of receiving and appraising testimony and evidence bearing on the controverted questions of fact. Ascertainment of where the whole truth lies with respect to the alleged disclosure is a function, we believe, for the trial court in the first instance.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JANUARY 1957.

APPENDIX

CITY OF CHICAGO,
County of Cook,
State of Illinois, ss:

AFFIDAVIT

Frank J. Huebner, being first duly sworn according to law, deposes and says:

I am one of the defendants in the case of *United States of America* v. *The Shotwell Manufacturing Company, Byron A. Cain, Frank J. Huebner, and Harold E. Sullivan,* which case is now pending before the Supreme Court of the United States on the petition of the United States for a writ of certiorari to the Court of Appeals for the Seventh Circuit. I did not testify as a witness at the trial of that case or at the hearing held on the motion of the defendants to suppress evidence.

During the years 1944 to May, 1952, I was Vice President and Plant Manager, in 1947 General Manager, of the Shotwell Manufacturing Company, Chicago, Illinois. I also was, and so far as I know still am, a director and officer of the Shotwell Manufacturing Company (now known as the Homan Mfg. Co., Inc.).

I know, from my own knowledge, that over-ceiling premium payments in currency were received by Shotwell from David G. Lubben during the period from November, 1944, to sometime in December, 1946, that none of these payments were recorded on Shotwell's books and that Cain and Sullivan were aware of these facts as they occurred. Cain and Sullivan

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FILED
JUN 7 1957
JOHN T. FEY, Clerk

No. ~~1665~~ 10

In the Supreme Court of the United States

OCTOBER TERM, 1956

SAMUEL C. BRODY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington, D. C.

testified that these payments were received only during the period beginning in the late summer of 1945 and ending in July, 1946. I know of my own knowledge that this testimony was untrue.

During a period from about March, 1946 to about July, 1946, uninvoiced shipments of candy were made to Lubben by Shotwell. Payment for these shipments was made by or on behalf of Lubben in currency. So far as I know, none of the payments were recorded on the regular books and records of Shotwell or reported on the corporate income tax return for 1946. I was directed by Harold E. Sullivan, to make the uninvoiced shipments and to receive currency in payment for them. Byron A. Cain at about the same time also authorized me by telephone to pursue this procedure. Some of the uninvoiced shipments were made in the name of the ABC Candy Company, which was a fictitious and non-existent concern.

During the first six months of 1948, I had several conversations with Cain and Sullivan about the tax difficulties Lubben could get us into. At no time during that period did Cain, Sullivan or Leon J. Busby, the Shotwell accountant, mention to me that Shotwell had made a voluntary disclosure to the Internal Revenue Service, that it was contemplated a voluntary disclosure would be made, or that it would be claimed that a voluntary disclosure had been made.

Early in July, 1948, on Sullivan's instructions, I arranged a meeting at the Chicago Athletic Club with one Edward Urban of Close and Company, which also had black market transactions with Lubben. At the meeting, Sullivan discussed with Urban the possibility of forming a group to purchase Lubben's business interests in order that Lubben's books and records could be obtained. No mention of voluntary disclosure was made at the meeting.

In about the middle of July, 1948, I met with Cain, Busby and certain other Shotwell officials at the Belden-Stratford Hotel in Chicago, Illinois. We reconstructed all of the black market payments received from Lubben from 1944 through 1946 in the amount of about $389,000. Cain stated that the purpose of the meeting was to prepare figures so that a disclosure could be made to the Internal Revenue Service. The over-ceiling disbursement figures prepared by Cain to offset the black market receipts had no basis in fact but were taken out of thin air.

Prior to this meeting at the Belden-Stratford, so far as I know, no work was done by anyone relative to compiling data for the purpose of making a voluntary disclosure to the Government. I was given to understand that it had been agreed that the date of the disclosure would be set at June 15, 1948.

Sometime in late July, 1948, at Cain's request, I gave him $5,000.00 in currency and again in August, 1948, another $5,000.00 in currency. When he asked me for this money Cain told me he needed it to take care of and fix the tax difficulty we were in. He also stated that he and Sullivan did not have the cash and that they did not want to cash any checks because checks could be easily traced. Later, Cain told me he had turned the money over to someone to take care of a tax fix.

Cain also told me, sometime in about late July, 1948, that he was about to settle the tax case. Shortly thereafter, Cain told me he had settled the tax case for a tax deficiency of $20,000.00.

In October, 1948, Busby told me that there had been a meeting in the fraud division at the Internal Revenue office and that hell had broken loose; that some Internal Revenue people had a heck of a time destroying papers that had been made up for the purpose of billing Shotwell for taxes.

On November 13, 1952, Sauber testified at the hearing on the defendant's motion to suppress evidence that Busby and Cain had contacted him in March, 1948. After hearing Sauber testify, I told Cain I thought the voluntary disclosure date was supposed to be June 15, 1948. Cain said to me, "Ssshhh! There is nobody that knows anything about this. Keep quiet."

I was not asked to testify at either the trial or suppression hearing because I had stated I would not lie on the stand. I have testified voluntarily before the April 1956 Term Grand Jury, Northern District of Illinois, to these and other facts concerning the voluntary disclosure alleged to have been made for and on behalf of The Shotwell Manufacturing Company.

/s/ Frank J. Huebner.
FRANK J. HUEBNER.

Signed and sworn to before me this 19th day of December, 1956.

/s/ IRENE L. GOLDTHWAITE,
Notary Public.

My Commission expires 11-17-59.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1039

SAMUEL C. BRODY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The basic question in this case is whether the taxpayer's refusal to answer the questions contained in the District Court's order of January 10, 1956, was justified in the particular circumstances of the case. The critical facts, as found by the District Court after a full hearing and as reviewed in detail by the Court of Appeals, are as follows: The order of January 10 was entered by the court at a proceeding at which petitioner's counsel entered a general appearance; the order was approved by petitioner's counsel (Pet. 25). Petitioner discussed with counsel the possibility of asserting his privilege under the Fifth

Amendment and affirmatively decided not to assert it (Pet. 38). Petitioner did not claim the privilege when the order of January 10 was entered, nor when he refused to comply with it, nor when he was ordered to show cause why he should not be held in contempt (Pet. 35–37). On the contrary, at the latter time petitioner explained to the court that his deliberate refusal to provide the requested information was so that he would be in a better bargaining position to negotiate a compromise of his tax liabilities (R. 10). The court found as a fact that his failure to comply with the order of January 10 had nothing whatever to do with an apprehension that answers to the questions might involve him in self-incrimination (R. 28). These findings have been considered by the two courts, and are fully supported by the record.

In the light of these facts, petitioner is thus asserting that his refusal, for reasons of possible personal advantage, to comply with a valid court order to which his counsel consented was nevertheless justified because of the existence of his Fifth Amendment privilege. The short answer is, however, that he did not assert the privilege at any relevant time and it had nothing whatever to do with his refusal. On the facts here, the so-called questions of law raised by petitioner are not presented.

There is no merit in petitioner's contention that he was afforded no opportunity to invoke his privilege. His counsel was present in court when the order of January 10 was entered, and agreed to it. During

the entire five months' period in which the order was outstanding, petitioner at no time nor in any way suggested that he wished to invoke the Fifth Amendment. When ordered to show cause why he should not be held in contempt he answered, but again made no allusion to the Fifth Amendment. Finally, the contempt proceeding was reopened so that petitioner could assert his claimed privilege. At this stage, the least petitioner would be required to show was that his refusal to comply was because of the Fifth Amendment privilege. This he was unable to do, the facts being to the contrary.

There is no conflict, nor is any asserted. The decision below is correct, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JUNE 1957.

Office - Supreme Court, U.S.
FILED
AUG 26 1957
JOHN T. FEY, Clerk

No. 1

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, AND HAROLD E. SULLIVAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
LEONARD B. SAND,
Assistant to the Solicitor General,
JOSEPH M. HOWARD,
JOHN J. McGARVEY,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, AND HAROLD E. SULLIVAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of Judge Nordbye[1] denying respondents' motion to suppress evidence (R. 3242–47) has not been reported. The majority and dissenting opinions of the Court of Appeals (R. 3339–60) are reported at 225 F. 2d 394.

JURISDICTION

The judgments of the Court of Appeals were entered on June 15, 1955 (R. 3361–64), and a petition for rehearing, timely filed, was denied on August 18,

[1] Judge Nordbye, District Judge for the District of Minnesota, was specially appointed by Chief Justice Vinson to try this case in the Northern District of Illinois. (R. 116–117.)

1955 (R. 3365). On September 16, 1955, by order of Mr. Justice Reed, the time for filing a petition for certiorari on behalf of the United States was extended to and including October 17, 1955. (R. 3365.) The Government's petition for certiorari was filed on October 17, 1955. Respondents filed a conditional cross-petition for certiorari. On June 11, 1956, this Court entered an order (R. 3366) granting the motion of the Solicitor General to defer consideration of the petitions for writs of certiorari. Thereafter, the Government filed a motion to remand, later amended and supplemented, to which respondents filed answers. Following this, respondent Huebner moved to withdraw from the conditional cross-petition for certiorari and from opposition to the Government's petition for certiorari, consenting in addition to the motion to remand. This Court denied the respondents' cross-petition, granted respondent Huebner's motions, and granted the Government's petition for certiorari, "limited to the issues raised in the amended motion to remand and supplement thereto and the respondents' answer to the amended motion to remand." (352 U. S. 997–998.) The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether, in the present posture of the case and in view of the unusual circumstances involved, the interests of justice would be served by vacating the judgments of the Court of Appeals and remanding the case to the district court with directions to take further evidence and make supplementary findings on the issues raised by respondents' pre-trial motion to suppress evidence.

STATUTE INVOLVED

28 U. S. C., SEC. 2106. *Determination*

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT

On March 14, 1952, an indictment in two counts was returned in the United States District Court for the Northern District of Illinois charging respondent Shotwell Manufacturing Company, a corporation, and respondents Cain, Sullivan and Huebner as officers thereof, with wilful attempted evasion of a large part of the corporation's income tax for each of the years 1945 and 1946, by filing false and fraudulent corporate income tax returns, in violation of Section 145 (b) of the Internal Revenue Code of 1939. (R. 4–7.) The amounts of the corporation's reported and correct net income and tax liability as alleged in the indictment were as follows:

Year	Reported		Correct	
	Income	Tax	Income	Tax
1945	$561,064	$370,638	$738,210	$534,288
1946	1,202,917	457,012	1,526,400	579,970

As set forth in the bill of particulars (R. 8–9), the unreported income consisted of premium payments received by the corporation in excess of the recorded invoice and O. P. A. ceiling prices and payments received for wholly unrecorded sales. After a jury trial which lasted five weeks, respondents were found guilty as charged. (R. 2990.) The corporation was fined $10,000 on each count. The individual respondents were sentenced to imprisonment for three years on each count, the sentences to run concurrently, and were fined varying amounts. (R. 3012, 3015–16, 3018–19, 3075, 3221–24, 3256–57.)

The Court of Appeals, with Judge Lindley dissenting, reversed on the ground that the trial court erred in denying respondents' pre-trial motion to suppress evidence, and it remanded the case for a new trial with instructions to sustain the motion.[2] (R. 3361–64.) A petition for rehearing was denied (R. 3365), and the Government petitioned this Court for a writ of certiorari.[3]

After the petition for certiorari had been filed, the Department of Justice received information from the Internal Revenue Service to the effect that an investigation then in progress indicated that perjured testimony relevant to the issues raised by the motion to suppress had been given at the hearing on the motion and at the trial. (See Appendix, *infra*, pp. 40–46, for a chronological statement of the history of this

[2] In view of this determination, the majority found it unnecessary to consider other errors alleged by respondents.

[3] Respondents filed a conditional cross-petition for writ of certiorari on Oct. 17, 1955.

litigation.) The Solicitor General immediately advised this Court of the receipt of such information[4] and thereafter filed in this Court a motion, later amended and supplemented, to remand the case to the district court for the taking of further evidence. Respondents filed an answer opposing the motion. Thereafter, respondent Huebner filed and this Court granted (352 U. S. 997) a motion to withdraw from opposition to the Government's petition for writ of certiorari, and at the same time, Huebner consented to the motion to remand. This Court granted the Government's petition for writ of certiorari "limited to the issues raised in the amended motion to remand and supplement thereto and the respondents' answer to the amended motion to remand." (R. 3367.)

I

THE MOTION TO SUPPRESS EVIDENCE

A. THE VOLUNTARY DISCLOSURE POLICY

Respondents' pre-trial motion to suppress was predicated on the contention that there had been a voluntary disclosure to the Treasury Department at a time when the policy of that Department was to grant immunity from criminal prosecution to taxpayers making such disclosures. (R. 120–127, 144–145.) This so-called "voluntary disclosure policy" was publicly announced in 1945 and was withdrawn in January 1952. (R. 3125–26, 3142.) The policy provided generally that, in cases in which taxpayers made voluntary disclosures of intentional evasions before an in-

[4] Letter to Harold B. Willey, Esq., dated Dec. 6, 1955.

vestigation had been begun, the Treasury Department would assess the tax deficiency plus civil penalties, including the 50% fraud penalty, but would not refer the case to the Department of Justice for criminal prosecution. (R. 3136–37.) In the two most definitive pronouncements of Treasury Department officials on the subject, it was stated that taxpayers must cut "square corners" with the Government (R. 3140), and that the voluntary disclosure policy assumed "that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability." (R. 3141.) These two statements, one by J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, the other by Secretary of the Treasury Snyder, were issued in May 1947.[5] (R. 3132–40.)

B. THE ALLEGATIONS OF THE MOTION

Respondents' motion (R. 120–127), as amended (R. 144–145), alleged in substance that, in reliance on the voluntary disclosure policy and before any investigation had been initiated, respondents came forward and made such a disclosure with respect to the tax returns of the corporation for the years covered by the indictment. Respondents alleged that they had informed a Treasury official that receipts from black market transactions had not been recorded on the corporation's books or reported in its tax returns and that these receipts in turn had been expended by the corporation for over-ceiling price purchases of raw materials which purchases were likewise not recorded

[5] The statements of Treasury officials on the voluntary disclosure policy appear in the record at pp. 3103–53.

on the books or reflected in the tax returns, with the result that no actual gain was realized from the black market transactions. Further, respondents asserted that the matter was brought to the attention of the Treasury Department since its then legal position was that expenditures for materials in excess of O. P. A. ceiling prices could not be included in cost of goods sold for the purpose of determining taxable income,[6] so that, under the Treasury Department's interpretation of the law, the corporation owed additional taxes for those years; and that after Treasury officials had acknowledged the sufficiency and timeliness of this disclosure, respondents made available to Treasury agents the books and records of the corporation and communicated information not reflected in those records material to the "omissions and misstatements" in the corporate returns and otherwise cooperated with the examining agents to the utmost of their ability. The motion prayed for the suppression of all evidence obtained from respondents subsequent to this disclosure on the grounds (R. 123)—

> that the actions aforesaid of the Bureau of Internal Revenue constituted an improper inducement of a confession or admission of facts upon which a criminal prosecution might be based and an illegal search and seizure of the books, papers and records of the [respondents], and

[6] This question was then pending before the courts. In December 1948 The Tax Court overruled the Commissioner and held such deductions allowable (*Sullenger* v. *Commissioner*, 11 T. C. 1076), and this was followed by a number of decisions to the same effect in the courts of appeals. (R. 144–145, 427–428.) The Commissioner acquiesced in these decisions shortly prior to the trial of this case. (R. 428.)

> that, in consequence, the admission in evidence of all books, records, papers and statements so obtained, and any copies thereof or data procured therefrom as a result of information obtained therefrom would violate the rights of the [respondents] * * * under the Fourth and Fifth Amendments to the Constitution * * *

and on the further ground (R. 145)—

> that even if the said disclosure was insufficient or entirely, [*sic*, should be untimely] or both, [petitioner], by reason of the premises, is estopped from so asserting, and * * * [respondents] are, nevertheless, entitled to the relief by this motion requested.

Affidavits were submitted in support of the motion by respondent Cain (R. 127–132) and by Leon J. Busby, an accountant engaged by respondents (R. 18–24).

After a three-day hearing, at which eleven witnesses testified including respondent Cain (R. 150–448), the motion was denied. The evidence at the hearing was in sharp conflict on many points, and Judge Nordbye stated at the close that he felt it would be inappropriate to express his opinion as to the credibility of the witnesses and the good faith of respondents prior to trial, and he reserved the right to file a memorandum of findings of fact and conclusions of law upon completion of the trial. (R. 447-448.) This memorandum was later filed. (R. 3242–47.)

C. THE EVIDENCE

The evidence relating to the issues raised by the motion to suppress may be summarized as follows:[7]

At all times material hereto, respondent Shotwell Manufacturing Company was engaged in the manufacture and sale of candy and marshmallows. Its office and plant were located in Chicago, Illinois. The principal stockholders of the corporation were respondents Cain and Sullivan and their families.[8] Cain became president of the corporation prior to 1945. Sullivan, an attorney whose association with the corporation dates back to 1929, was general counsel, a director and, beginning in 1946, executive vice-president. Huebner, a long time employee of the corporation, was a vice-president and general manager in charge of plant operations; he owned less than one percent of the stock. (R. 747, 748, 1707, 1772, 1791, 2542, 2635, 2637, 2648.) Since 1942, the accounting firm of Busby and Oury performed accounting services for the corporation. (R. 168, 1820–1821.)

In the latter part of 1943, David G. Lubben, a candy dealer, offered to sell the corporation a large

[7] The summary includes the evidence presented both at the hearing on the motion to suppress and at the trial. In passing upon a ruling such as this, the reviewing court may properly consider the whole record, not merely the evidence adduced prior to the ruling. *Carroll* v. *United States*, 267 U. S. 132, 162; *Reid* v. *United States*, 209 F. 2d 893, 896 (C. A. 5th).

[8] In 1945, Cain and Sullivan and their families owned approximately 48 per cent of the corporation's stock which holdings were increased in 1946 to about 75 per cent. (R. 1793.)

quantity of scarce chocolate if he were appointed broker for the corporation's candies in the New York area, and an agreement to this effect was made. In August or September 1944, Huebner asked Lubben, who had been seeking increased shipments, if he would be willing to pay ten cents a pound in cash above the invoice price for bulk candy, the shipments to be invoiced at the prevailing O. P. A. ceiling price. Lubben readily agreed to this and, after Huebner conferred with Cain, the corporation began to ship Lubben large quantities of candy. (R. 792–797, 2055–2061, 2543–2544.) During 1945 and 1946, Lubben, in accordance with the agreement, personally made cash payments to Huebner, in excess of the invoice and O. P. A. ceiling prices, totaling more than $290,000. (R. 811–855, 864–876, 888–905, 910–933, 1417–1516, 1524–1534, 1538–1568, 1573–1577.) Other similar cash payments were made to Huebner by Lubben's employees, Heitman and Hankermyer (R. 876–892, 1369–1377, 1554), and by his brother-in-law, Moran (R. 1297–1303, 1309–1311). In one instance, Cain directed Lubben to pay $1,450 of the overages due the corporation to a Mrs. Krasne, in connection with the purchase of jewelry by Cain's wife. (R. 888–891, 1286–1288, 2628–2629.) The Government's expert witness at the trial testified that, upon the basis of the evidence before the jury, the over-ceiling cash receipts for the years 1945 and 1946 totaled $177,146, and $211,193 respectively. (R. 1838–1840, 1845–1846, 2064–2066.)

In addition to the above transactions, in which the invoice price was paid by check and only the overage

in cash, the corporation made a number of shipments to Lubben during 1946, referred to herein as "unbilled shipments," for which no invoice was made out and for which Lubben paid both the ceiling price and the overage to Huebner in cash. (R. 802–805, 953–962.) The unbilled shipments began in March 1946 after Huebner told Lubben that he could have a lot of merchandise on condition that he pay both the ceiling price and the overage in cash and accept shipment without an invoice. (R. 933–935.) The Government's expert witness testified at the trial that, on the basis of the evidence before the jury, the unbilled shipments in 1946 totaled $65,532. (R. 1845–1946.)

When Lubben made the aforementioned cash payments to Huebner, the latter invariably divided the money into three piles with the comment that one was for Cain, one for Sullivan and one for himself. (R. 827, 831, 837, 840, 903–904, 992–995.)

No part of the cash payments made by Lubben was recorded on the corporation's books or reported in its tax returns. (R. 1844–1846.) Certain informal records were kept by the corporation of the cash receipts and their disbursement during a part of the period in question. (R. 785, 1706, 1741–1742.) But when Busby prepared the corporation's tax returns for 1945 and 1946, he was given to understand that there had been no violation of O. P. A. regulations by the corporation and that all receipts and disbursements had been recorded in the corporation's books. (R. 1822–1825.)

During the period in which the cash payments were made by Lubben for merchandise received from the

corporation, both Cain and Sullivan had repeatedly impressed upon Lubben that the corporation was not reporting the cash receipts as income and that no record should be kept by Lubben of his cash payments. (R. 860–863, 920–922.) Although Lubben told Cain and Sullivan that he was not keeping any records of his cash payments, he did in fact make and retain a record of the payments (R. 866), and sometime around the end of January 1948, Lubben told Cain that he had a record of the over-ceiling and other cash payments.[9]

In January or February 1948,[10] Cain sent Busby and H. Stanley Grafflund, the corporation's comptroller, to Lubben's plant in Hillsdale, New Jersey, to examine Lubben's books in connection with a $50,000 loan which Lubben had requested from respondents. (R. 1757–1758.) Busby testified as a defense witness at the hearing on the motion and as a Government witness at the trial[11] that during this trip he learned for the first time, in the course of a conversation with Grafflund, that Lubben had made over-ceiling cash payments for merchandise received from the corporation. (R. 169–171, 1826–1829.) He testified further that immediately upon his return to Chicago, he discussed the matter with Cain and Sullivan who told him that all the black market receipts had been used

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[9] Lubben's own tax returns had been under investigation by the Treasury Department as early as November 1945. (R. 335; see also R. 1059–1061.)

[10] Busby and Grafflund placed this trip in January 1948 (R. 1757, 1825); Lubben placed it in February (R. 1207).

[11] Later in the trial he testified as a defense witness. (R. 2741.)

by the corporation for the purchase of raw materials; that no records had been kept of either the receipts or the expenditures because they did not wish to reveal violations of O. P. A. regulations; and that they had not reported the receipts as income because they considered the expenditures for black market purchases deductible and the whole series of transactions a "wash-out" taxwise. Upon hearing this, Busby allegedly told Cain and Sullivan that the Commissioner of Internal Revenue would not allow taxpayers to include in cost of goods sold payments above ceiling prices for the purchase of materials; that they had a tax problem; and that (R. 172) "if they made the disclosure which was in my opinion the thing to do and customary, there probably would be nothing to it except they would clear The Shotwell [*sic*] of omissions from the tax returns." (R. 170–172, 204–207, 209–211, 213–214, 1826–1832.). It was Busby's testimony that acting under instructions from Cain and Sullivan he went to the office of then Chief Deputy Collector of Internal Revenue Sauber about the middle of January 1948 and without revealing his clients' names discussed with Sauber the factual situation related to him by Cain and Sullivan; that Sauber advised him that (R. 175) "if the disclosure is timely and the facts that I had related to him were correct, he saw no reason why the immunity policy of the Bureau should not be applied in this particular matter"; and that on the following day at a meeting at which Cain, Sullivan and Huebner were present, he gave a report of his conversation with Sauber (R. 176). Further, that he was then instructed by Cain to (R. 177) "go in and

talk to the Collector's Office and disclose the whole affairs [*sic*], whole details as I have outlined it [*sic*] to you and get their instructions * * * as to how we should proceed"; and that within a few days he returned to Sauber's office, discussed the whole matter with Sauber and revealed the identity of the respondents. Sauber allegedly then told Busby that the disclosure was sufficient and timely but that the Internal Revenue Service would not allow deductions for over-ceiling purchases of raw materials and suggested that Busby prepare a summary of the corporation's over-the-ceiling receipts, adding that he would send an agent out to verify the results. (R. 175–181, 214–216, 251–252.) Cain allegedly accompanied Busby on a subsequent visit to Sauber in which the whole subject was discussed, and Cain told Sauber that, while the corporation was ready to pay any tax the Government claimed, it would at a later date probably contest the Commissioner's refusal to allow deductions for its over-the-ceiling expenditures. (R. 230–232, 251–253, 1948)

It was the testimony of both Cain and Busby that, after the initial meetings with Sauber, Cain directed Busby to make an investigation of the black market receipts; that thereafter Busby conducted an exhaustive investigation over a period of several months with the assistance of Cain, Sullivan, Huebner and members of his own staff; and that the results of the investigation were summarized in the schedule which he submitted to Revenue Agent Lima when the latter appeared at the corporation's office sometime around the first of August 1948. According to Busby's sum-

mary,* the corporation's unreported receipts from Lubben for the years 1944, 1945 and 1946 totaled about $378,000. The summary also purported to show that with the exception of some $6,000 (which had been reported as income), all the unreported receipts had been expended for the purchase of raw materials. (R. 1942–1944, 2553–2558, 2563–2564, 2801–2805, 2808, 2816, 2838–2839.)

Sauber, testifying as a Government witness, placed his first conversation with Busby on or about March 15, 1948. Sauber's account was as follows: About a week after Busby's initial visit, the latter returned with Cain at which time he was told by Busby and Cain that the corporation's black market receipts were not reported; that the over-ceiling receipts had been paid out for over-the-ceiling purchases, and the balance declared as income, but that there were no records and it would be extremely difficult to reconstruct the figures and prepare accurate amended returns. He advised Cain and Busby to call everyone together who had anything to do with the transactions, reconstruct the receipts and expenditures as accurately as they could, and then request an audit of the returns. He told Cain and Busby he thought it was strictly a "civil case," in view of the facts related to him, but at no time did he tell them that their revelations constituted a timely and sufficient voluntary disclosure. (R. 282–285, 291.) Sauber testified that in the latter

* This schedule was introduced in evidence at the hearing on the motion (R. 189) as Def. Ex. 1 (reproduced in the record at pp. 3091–96) and at the trial (R. 2811) as Government Exs. 186 and 189.

part of April, Cain informed him that the Shotwell officers had followed his advice, that they had a meeting of all the Shotwell personnel who were connected with the black market transactions, that they had prepared the figures, and that Cain wanted to submit the figures and have the returns audited. (R. 286.) Cain allegedly called him several times thereafter to ask when an audit of the company records would be commenced. (R. 287.)

On June 21, 1948, Special Agent Krane visited the corporation's office and requested certain records and information from Gratlund relating to transactions with Lubben. His visit to the corporation office was occasioned by a telephone call from the Treasury Intelligence Unit in New York, which by March 4, 1948, was in possession of information concerning over-ceiling payments and unbilled shipments involving Shotwell and the Lubben companies. (Def. Exs. 5 & 6, R. 3159-3163; R. 334-356.)

Some time after the revenue agents appeared at the corporation's office in the summer of 1948, Cain twice directed Gratlund to destroy the corporation's informal record of Lubben's over-the-ceiling cash payments for a part of the period in question, and his orders were eventually carried out. (R. 785, 1743-1745.) In August 1948, Cain had a conversation with Lubben and the latter's attorney, Davidson, during which he told them that internal revenue agents had visited the Shotwell plant; that Gratlund "like a damn fool" had given them records; and that the agents were working on tax cases involving Lubben, Lub-

ben's former partner William Giglio, and the Shotwell personnel. In August 1948, Cain offered Lubben financial assistance and urged him to leave the country to avoid questioning by the agents. He indicated to Lubben at the time that he was attempting to settle the case through political pressure. (R. 962–974.)

Respondents' defense on the merits was that the total of the over-ceiling payments received from Lubben was much smaller than the amount shown by the prosecution's evidence; that the corporation received the over-ceiling payments from Lubben only from September 1945 to the middle of 1946; and that all the black market receipts had been paid out to obtain raw materials. (R. 2540–2631, 2631–2686.) Cain testified that the purchases by the corporation of raw materials with black market receipts were handled by employees. (R. 262–266, 2577, 2579, 2580, 2583.) He admitted that the figures appearing in Busby's summary purporting to reflect purchases of raw materials with the black market receipts were meaningless "plug" figures. (R. 216–217, 233–234, 258–268.) He also admitted that he never made any effort to find out to whom the money was paid, and that he repeatedly told the revenue agents that he did not want to know to whom the money had been paid. (R. 266, 268.) For his part, Sullivan testified that he never saw any of the black market receipts; that he never received any of the money himself; and that he had no "actual" knowledge of the alleged purchases and knew only what he had been told by others. (R. 2638, 2645, 2650, 2654, 2671.)

II

FINDINGS AND CONCLUSIONS OF THE TRIAL COURT

As previously noted, *supra*, p. 8, the trial court (Judge Nordbye) denied the motion to suppress evidence at the close of the hearing with the observation that it would be inappropriate for the court to express its views prior to trial on the credibility of the witnesses and the good faith of respondents. After the verdict, the court filed a Memorandum Decision (R. 3242-3247) setting forth its findings of fact and conclusions of law in which it held that (R. 3247) "the [respondents] have failed to sustain the burden of proof in establishing that a voluntary disclosure was made by them within the purview of the so-called voluntary disclosure doctrine." Having concluded that no good faith disclosure was made by respondents, the trial court did not find it necessary to make a finding as to the timeliness of the alleged disclosure.

The trial court found as a fact that the so-called disclosure made by respondents was not only devoid of good faith but that respondents, by their "[f]alse statements and fraudulent representations" to Government agents in the guise of a voluntary disclosure, had actually attempted to deceive the Government and to conceal the true facts. (R. 3247.) In so finding, the court pointed to Cain's conduct in "accepting Mr. Lubben's figures of the total amount of overages paid to Shotwell and then fabricating fictitious payments for raw material to offset such receipts" (R. 3245); to the evidence that records "which would be illuminating and helpful in determining the true situation"

with respect to the black market transactions had been destroyed at Cain's direction after the agents began their investigation (R. 3245); to the fact that the figures submitted to the investigating agents which purported to represent expenditures by the corporation for black market purchases "were admittedly fictitious and submitted solely for the purpose of indicating that premium receipts were completely wiped out by the premium payments" (R. 3246); and to the absence of any bona fide attempt by respondents "to determine the amount and the persons to whom any premium payments were made for raw materials" (R. 3245–3246). With respect to this last consideration, the court noted (R. 3246) that throughout the course of the investigation Cain took the position that he would not under any circumstances disclose to whom the payments were made for the alleged black market purchases of raw materials by the corporation and thus "attempted to foreclose any investigation by the Government as to the verity of the claim of such payments."[11]

[11] The trial court also found that the factual situation disclosed to Sauber by Busby and Cain was that (R. 3244) "there were unreported receipts obtained by the Shotwell Company in black market operations which were completely offset by unreported deductions [expenditures] for raw materials". This finding, coupled with Cain's assertions that he had assumed in good faith that expenditures for black market purchases were deductible (and the transactions a wash-out taxwise) and that he was unaware of the Treasury Department's ruling to the contrary until so advised by Busby, led the court to conclude (R. 3244) that here "[t]here was no disclosure of an intentional tax violation or * * * of an intent to defraud the Government". In other words if the representations made by Cain and Busby were true there was (R. 3245) "no disclosure of anything on which these [respondents] could be prosecuted."

Finally, the trial court found as facts that (R. 3246) "no promise of immunity was held out to these [respondents], or any of them, by any representative of the Government when these alleged disclosures were made, or at any other time"; and that "there were no representations by any Government representative which would lead these defendants to believe that the alleged disclosure would be considered a voluntary disclosure within the purview of the voluntary disclosure doctrine."

In interpreting the various public pronouncements of Treasury Department officials on the voluntary disclosure policy, the trial court ruled as a matter of law that (R. 3245)—

> The doctrine necessarily contemplates a contrite taxpayer who confesses his fraud and evidences good faith in aiding and assisting the Government in obtaining the payment of the taxes due.

In the trial court's view (R. 3245), the "basic element of a voluntary disclosure within the enunciated Government policy" is good faith on the part of the taxpayer. That element it found was entirely lacking here. The court noted that (R. 3246) "the evidence convincingly established," as the jury found, that a large part of the black market receipts was never paid out for the purchase of raw materials, as respondents had represented. The court further observed (R. 3247):

> What a travesty it would be if, under such circumstances, immunity should be granted to the defendants because of the alleged disclosure

which had only one purpose and that was to mislead and to misinform the Government agents of the true facts. False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine.

III

THE DECISION BELOW

The court below, with Judge Lindley dissenting, reversed the judgments of conviction on the ground that the trial court erred in denying respondents' motion to suppress evidence, and it remanded the case for a new trial with instructions to sustain repondents' motion. (R. 3361–3364.) The majority held (R. 3354) that respondents made a "valid voluntary disclosure"; that they did so "in reliance upon promises of immunity"; that the evidence thus obtained by the Government stands on the same footing as an oral or written confession induced by such a promise; and that the use of such evidence at the trial was a violation of respondents' privilege against self-incrimination as guaranteed by the Fifth Amendment to the Constitution. Thus, the court below found that respondents "did disclose the *facts*" (R. 3351); that they "frankly outlined" the nature of the omissions from the returns (R. 3352); and that they "cooperated [with Treasury agents] to the extent that they were able, and in complete compliance with the [voluntary disclosure] policy of the department" (R.

3351). Further, the court held that the disclosure was "accepted by the revenue officials" as a voluntary disclosure within the announced policy of the Treasury Department (R. 3352–3353); that at all material times respondents "were led to believe by the Government representatives that the course which they were pursuing would avert their criminal prosecution" (R. 3352); and that "responsible government officials, from cabinet level to local level, had represented to [respondents] that their disclosure would result in immunity from criminal prosecution" (R. 3352–3353). On the basis of these findings, the majority concluded that (R. 3354) "[respondents] made a valid voluntary disclosure in reliance upon promises of immunity".

The dissent by Judge Lindley (R. 3356–3358) was based mainly on the ground that the majority, in holding that respondents made a valid voluntary disclosure, embarked on a trial *de novo* of the factual issues raised by the motion rather than according the requisite weight to the trial court's findings of fact which, in Judge Lindley's opinion, were "amply supported" by the evidence and therefore unassailable on review.[11] Thus, although the majority prefaced

[11] Judge Lindley also took issue with the majority for rejecting the trial court's interpretation of the Treasury Department's voluntary disclosure policy while at the same time failing (R. 3355) "to define clearly its interpretation of the * * * policy." He expressed the conviction that (R. 3360) "the [trial] court's interpretation of the * * * [policy] as requiring such a complete disclosure and good faith effort as to enable the internal revenue agents to assess the additional tax due is a correct interpretation of the offer held out to taxpayers in the Treasury policy statements."

its summary of the evidentiary facts (R. 3343) with the comment that (R. 3343) "[t]he following is a statement of the facts proved, including only those facts shown by the government's evidence wherever there was a conflict." Judge Lindley noted that the majority's summary of evidentiary facts (R. 3359) "tells only a part of the story on which the trial court's findings are based". Judge Lindley pointed out (R. 3359), specifically, that the majority failed to mention the fact that Sauber was not advised by respondents that, in addition to the black-market receipts, there were other wholly unrecorded sales by the corporation (the "unbilled shipments", see pp. 10-11, *supra*); that the only records made by the corporation reflecting black market transactions were destroyed at Cain's direction after the investigation was started;[15] and that the summaries which respondents submitted to the agents purporting to show expenditures by the corporation for the purchase of raw materials on the black market were admittedly fictitious; with respondents maintaining that hundreds of thousands of dollars were paid out by the corporation to unidentified men without the benefit of any receipts. He stated that the majority also ignored the trial court's finding that the respondents' account of black market expenditures was, in large part, a fabrication and that the only purpose of their disclosure was to mislead the Government and conceal the true facts. These and the other critical findings of the trial court were, in Judge

[15] Judge Lindley mistakenly places this destruction of records before the beginning of the investigation. (See R. 785, 1743-1745.)

Lindley's opinion (R. 3360), "adequately supported by the evidence". Accordingly, he concluded (R. 3360) that it was not within the "province [of the reviewing court] to second-guess the trial court on factual questions." Judge Lindley's dissent was summed up in his observation that (R. 3359):

> The point to be stressed is that on the record before us we cannot say that the evidence does not support the finding of the trial court that no sufficient disclosure was made. We cannot say that the court's conclusion that "False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine" is an erroneous legal statement or that the hypothecated facts included in this statement are not descriptive of the proofs made in this case.

In addition to finding that respondents made a bona fide disclosure, the majority below also found (R. 3354) that "[t]he disclosure was timely." In so doing, the majority observed that (R. 3353–54) "the facts in evidence show that when the disclosure was made, no investigation involving the over-ceiling income of Shotwell during the taxable years had been started or even suggested or contemplated by the government." As previously noted, *supra*, p. 18, Judge Nordbye had specifically refrained from making a finding as to the timeliness of the disclosure.

IV

THE NEWLY DISCOVERED EVIDENCE

As set forth in the supplement to the Government's motion to remand (p. 3), subsequent to the filing of the petition for certiorari, and as a result of an investigation initiated by the National Office of the Internal Revenue Service which precipitated a grand jury inquiry,[16] new evidence came to light which is highly relevant to the issues of the timeliness and good faith of respondents' "voluntary disclosure". The Government believes that this evidence will support the charge[17] that perjured testimony with reference to the so-called disclosure was given at the trial of these proceedings by respondents Cain and Sullivan. This evidence indicates, *inter alia*, that no move was made by respondents to disclose the corporation's unreported black market receipts prior to Special Agent Krane's visit to the corporation's plant on June 21, 1948. (See p. 16, *supra*.) Further, this evidence, we submit, conclusively shows that the alleged disclosure by respondents was not only devoid of good faith and incomplete but was designed to mislead the Government and conceal the true facts.

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[16] Certain aspects of this case have been investigated by The April 1956 Term Grand Jury for the Northern District of Illinois which returned the indictment referred to hereinafter.

[17] On February 27, 1957, an indictment was returned in the United States District Court for the Northern District of Illinois charging, among other things, that Cain and Sullivan gave perjured testimony at the trial of this case. *United States* v. *Sullivan, et al.*, No. 57 CR 149. See fn. 23, pp. 30–31, *infra*.

While the Government's petition and the respondents' cross-petition for certiorari were pending, respondent Huebner[18] and others voluntarily came forward with new evidence which relates to both the timeliness and the good faith of the respondents' alleged disclosure.

As previously noted, *supra*, p. 12, it was Busby's testimony that he first learned of the corporation's unreported black market receipts in the course of conversation with Gratlund during their trip to New York early in January 1948; that immediately upon his return to Chicago he discussed the matter with Cain and Sullivan who told him the unreported receipts were washed out by unreported expenditures for raw materials; that he recommended disclosing the omissions to the Treasury Department; and that, at the direction of Cain and Sullivan, he disclosed the whole affair to Sauber in a series of conferences beginning in the latter part of January 1948, at one or more of which conferences he was accompanied by Cain. He also testified that Sauber suggested that respondents gather together and summarize all available data on the black market transactions for submission to the agents who would investigate the returns; and that he and his staff, with the assistance of Gratlund, Huebner and Cain, immediately began a long investigation in order to assemble the data summarized in the respondents' tentative computation of unreported black market receipts and expenditures introduced at the suppression

[18] See Affidavit of Huebner attached to Supplement To Motion To Remand, App. 7, 10. Huebner did not testify at either the suppression hearing or at the trial.

hearing and later at the trial. Cain and Sauber gave similar testimony, except that Sauber fixed the time of Busby's first visit at about the middle of March 1948. Respondents recognize that the only evidence as to the date of the alleged disclosure is the testimony of Cain, Busby and Sauber.[19] (Respondents' Answer to Motion (Amended) To Remand 2-3.)

If this case is remanded to the trial court, Grafflund will testify[20] that he did not discuss the black market transactions with Busby on the trip to New York, and that it was not until a few days after Agent Krane's initial visit to the plant in June 1948, that he related to Busby what he knew about the black market dealings, at which time Busby displayed surprise and complete ignorance of these transactions. Furthermore both Grafflund and Huebner will testify that they did not assist Cain, Busby or any member of the latter's staff in assembling data relative to the black market transactions at any time prior to Agent Krane's visit to the plant,[21] and that the black market payments received from Lubben in fact were reconstructed at a meeting held in the middle of July 1948. In addition, Huebner and Grafflund will testify that, although they were summoned to a meeting at Cain's

[19] It appears evident from Judge Nordbye's memorandum (R. 3242 17) that he found Cain's testimony, at least in part, unworthy of belief.

[20] See Affidavit of H. Stanley Grafflund, lodged with the Clerk of this Court, Aug. 19, 1957; other aspects of the newly discovered evidence are outlined in the affidavits attached to the Motion to Remand (Amended), Appendix, pp. 7-23.

[21] Busby testified that Huebner and Grafflund were two of the principal people who assisted in this work. (R. 182, 185.)

house early in July 1948 to discuss the implications of Special Agent Krane's visit to the plant requesting records relating to the corporation's transactions with Lubben, there was nothing said at the meeting about a voluntary disclosure having been made months earlier. Moreover, Huebner and Graflund will testify that at no time prior to the middle of July 1948 were they ever advised or led to believe by either Cain or Sullivan that the corporation's unreported black market receipts had been disclosed to the Treasury Department. Huebner's affidavit (Supplement To Motion To Remand, App. 7–10) relates, and he will testify, that it was not until late July or early August 1948 that Cain first mentioned to him that a voluntary disclosure had been made to Sauber, at which time he was told by Cain that June 15 had been agreed upon as the date of the disclosure. Also, that during the suppression hearing, after he had heard Sauber testify, he said to Cain (*id.* at p. 10) "I thought the voluntary disclosure date was supposed to be June 15, 1948"; whereupon Cain replied "Ssshhh. There is nobody that knows anything about this. Keep quiet."

As previously noted, *supra*, pp. 10–11, at the trial the prosecution's evidence showed that in 1945 and continuing through 1946, the corporation received more than $450,000 in unreported income from Lubben.[22] Cain, on the other hand, testified that

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[22] Respondents admitted, at least tentatively, the receipt of almost $400,000 in unreported income from Lubben during the years 1944, 1945 and 1946 when they submitted the summary, referred to herein as Busby's summary, to Revenue Agent Lima sometime after July 30, 1948. This schedule was introduced in evidence at the hearing on the motion (R. 189) as Def. Ex. 1

the total of the black market receipts from Lubben was only about a third of the amount shown by the Government's evidence; that the premium payments were received for only a limited period—the latter part of 1945 through the middle of 1946; and that substantially all of these receipts were paid out by the corporation to unidentified men for the purchase of raw materials. Huebner states in his affidavit and will now testify that (Supplement To Motion To Remand, App. 7–8):

> I know; from my own knowledge, that over-ceiling premium payments in currency were received by Shotwell from David G. Lubben during the period from November, 1944, to sometime in December, 1946, that none of these payments were recorded on Shotwell's books and that Cain and Sullivan were aware of these facts as they occurred. Cain and Sullivan testified that these payments were received only during the period beginning in the late summer of 1945 and ending in July, 1946. I know of my own knowledge that this testimony was untrue.

Furthermore, Huebner will testify that between $300,000 and $400,000 of the corporation's black market receipts from Lubben was not paid out for the purchase of raw materials on the black market but instead was diverted from the corporation and divided among Cain, Sullivan and himself.

Further, Huebner and Grafund will testify that Cain told them in the latter part of July 1948, before

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(reproduced in the record at pp. 3091–3096) and at the trial (R. 2811) as Government Exs. 186 and 189.

Busby's summary had been submitted to any Internal Revenue Service personnel, that he could settle the tax case for about $20,000. Huebner will also testify that shortly thereafter Cain asked him for $10,000 in cash which Cain said he needed to "fix" the case; that in the last week of July, he gave Cain $5,000 in cash; that in the early part of August 1948, Cain told him that he had settled the case for a tax deficiency of $20,000; that shortly thereafter, he gave Cain the other $5,000 in cash; and that Cain told him he had turned the money over to someone to take care of the tax "fix". In this connection, Revenue Agent Lima will testify that on July 30, 1948, he was instructed by his Group Supervisor Johnson to make an immediate audit of the corporation's 1946 return, which audit he commenced the first week of August; that thereafter he was instructed by Johnson to allow over-ceiling purchases totaling more than $300,000 shown on Busby's summary, although the alleged purchases were wholly unsubstantiated and their allowance was contrary to the then policy of the Service; and that in accordance with Johnson's instructions, he prepared a revenue agent's report showing a tax deficiency for 1945 and 1946 of about $20,000, which report he destroyed at Johnson's direction in September 1948, after the Intelligence Unit of the Service had made inquiries about the case.

[fn. 17] This and other evidence in the Government's possession forms the basis for the indictment returned in the United States District Court for the Northern District of Illinois on February 27, 1957, which, in addition to charging Cain and Sullivan with perjury (see fn. 17, p. 25, *supra*) charges that Sullivan, Cain, Busby, Sauber and John conspired to de-

The Government respectfully submits that this Court should, in the interests of justice, and in the exercise of its power under 28 U. S. C., Section 2106 (*supra*, p. 3),[21] vacate the judgments of the Court of Appeals and remand these proceedings to the trial court with directions to take further evidence and make supplementary findings on respondents' motion to suppress. The Government recognizes that its motion is unusual. We are, however, confronted here with unusual circumstances which require exceptional action to safeguard the integrity of the judicial process. These larger considerations prompted the Government to move this Court for a remand while at the same time reiterating its firm conviction that the evidence now of record is more than adequate to support the trial court's findings of fact.

As the chronological statement of the history of this litigation indicates (Appendix, *infra*, pp. 40-46), the Government has acted diligently in response to the new facts uncovered by the Internal Revenue Service investigation subsequent to the trial on the merits and the filing of the petition for certiorari. As the chronology further discloses, except to the extent that it has been thwarted by the dilatory tactics of the respondents, the Government has endeavored to bring the true facts to light as promptly as possible. The newly discovered facts have a vital bearing on the

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fraud the United States and to evade taxes. *United States* v. *Sullivan, et al.*, No. 57 CR 149.

[21] Cf. *Yates* v. *United States*, 354 U. S. 298, 327.

issues presented by the motion to suppress and are such that, in the unusual circumstances of this case, a remand to the district court is warranted.

I

THE NEW EVIDENCE HAS A VITAL BEARING ON THE ISSUES PRESENTED BY THE MOTION TO SUPPRESS

The new evidence summarized above, at pages 25–30, indicates that perjured testimony, all of which was designed to aid the respondents, was given at the suppression hearing by respondent Cain, by Busby, as a defense witness, and by Sauber, as a Government witness, and at the trial by respondents Cain and Sullivan and by Busby both as a defense and a Government witness. The new evidence points to the conclusion that what respondents seek to characterize as a timely voluntary disclosure was in truth no disclosure at all but a further step in a conspiracy to defraud the United States and to defeat and evade taxes.

Respondents' motion to suppress was predicated on the theory that there had been a valid voluntary disclosure which, under the then policy of the Treasury Department (see *supra*, pp. 5–6), estopped the Government from instituting and maintaining these proceedings (R. 10–13). But two elements must be present before an accused can invoke this policy:—(1) the disclosure must be timely, *i. e.*, it must take place, as the Court of Appeals stated (R. 3351), before "the revenue agents get the scent and are in pursuit of the miscreant", and (2) it must be a full, good-faith and voluntary disclosure of the operative facts which give rise to the additional liability of the taxpayer. The trial judge found that there had been no

good-faith disclosure and explicitly refrained from making "any finding as to the exact date when the Government first commenced its investigation of the Shotwell Company's income taxes for the years in question" (R. 3247). As we have seen, the Court of Appeals, in reversing, not only substituted its findings and held that there was a "good faith disclosure, but made an affirmative finding that the disclosure was timely." (R. 3354.) The newly discovered evidence goes to the heart of both issues, *i. e.*, timeliness and good faith, and, we submit, conclusively shows that both are absent here.

The new evidence indicates that the testimony which placed the date of the so-called disclosure in January or March 1948 was perjurious testimony of respondents and of Busby and Sauber.[26] In fact, the so-called disclosure took place in July 1948.[27] This was subsequent to the occasion (on June 21, 1948) when Special Agent Krane called at the corporation office and requested, *inter alia*, records relating to transactions with Lubben. See p. 16, *supra*.

The significance of this new evidence is readily apparent. Not only has there been no finding as to timeliness by the proper fact-finding tribunal, but the

[26] We urged in our Petition for Certiorari (pp. 23-24) that the case should at least have been remanded by the Court of Appeals to permit the court of first instance to pass upon this crucial issue, and we adhere to the position that, apart from the newly discovered evidence, this would have been the proper procedure. We urge that, in the light of the new evidence, remand to the district court is *a fortiori* warranted.

[27] See fn. 17, *infra*, p. 25.

[27] The new evidence does not merely impeach testimony as to the time of the alleged disclosure but affirmatively shows that it did not take place until this later date.

Court of Appeals, which erroneously undertook to make a finding on this issue, did so on the basis of a record now shown to have been tainted by the respondents and their co-conspirators. A finding based on a record so corrupted cannot be permitted to stand.

Respondents contend that the so-called 'disclosure would have been timely even if made in July. (Answer to Motion (Amended) to Remand (hereafter referred to as "Answer") 4–7, 19–24.) They predicate this contention on the assertion that no investigation directed specifically at respondents had been initiated by July 1948, and that under the so-called Wenchel doctrine (see Answer 20–21) taxpayers could avail themselves of the voluntary disclosure policy until such an investigation was formally launched. We submit, however, that this is not the proper forum to pass, in the first instance, on this and other aspects of the "timeliness" issue. It is for the trial court, not this Court, to determine what the exact stage of the Government's investigation was as of July 1948, and further, whether an investigation which had proceeded thus far served to end the *locus poenitentiae* afforded taxpayers under the voluntary disclosure policy. These are matters into which the district court may fully inquire on remand after hearing the newly discovered evidence, discounting such of the testimony previously adduced as may be found by it to have been perjurious.

Since respondents had the burden of proof on the motion to suppress, the Government would clearly prevail if no more were to occur on the remand than the striking from the record of the testimony as to the

time of disclosure if it is found to have been perjurious. However, since the district court has never passed on the question of timeliness, and no tribunal has considered this issue on a record cleansed of perjury and amplified by the newly discovered matters, we urge that the case be remanded to the district court for a full hearing enabling the parties to present any new evidence on the timeliness of the alleged voluntary disclosure.

With respect to the nature and good faith of the alleged disclosure, apart from the question of when it was made, the influence of the perjurious testimony on the result reached by the Court of Appeals appears clear. In reversing the district court, the Court of Appeals substituted its findings of fact which of necessity were predicated on the record as it then stood, devoid of the newly discovered facts which we have summarized *supra*, at pp. 25-30. In view of the extensive development of the facts in the statement above, we do not believe that the point need be labored that the new evidence has a direct and vital bearing on the question whether there has ever been a full good-faith voluntary disclosure. The evidence which the Government offers to present on remand would rather show that respondents, believing that their case had been successfully "fixed" (see pp. 29-30, *supra*), went through the mechanics of a disclosure which was really

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[*] In fact, the newly discovered evidence supports the conclusion that the question of timeliness discussed *supra* is not actually presented by this case, since it appears that there has at no time been any disclosure which would satisfy any reasonable interpretation of the voluntary disclosure policy.

but a further step in a scheme to defraud the Government and which actually concealed the corporation's true tax liability.

It would be contrary to the interests of justice to permit the opinion of the Court of Appeals, misled by respondents' perjurious testimony, to stand uncorrected. Rather, this case should be remanded for a further hearing to the district court so that there may be a full inquiry into the circumstances of the alleged disclosure, its extent, timeliness, and good faith. Of course, if after such a hearing the district court should adhere to its denial of the motion to suppress, respondents may again bring the matter to the Court of Appeals which can then pass upon the matter in the light of a full record, amplified by the new evidence and cleansed of the taint of perjury.

II

IN VIEW OF THE UNUSUAL CIRCUMSTANCES OF THIS CASE, THE MOTION TO REMAND SHOULD BE GRANTED

Contrary to respondents' assertion (Answer 13–16), the Government is not seeking a new trial, and authorities with respect to the granting of retrials on the grounds of newly discovered evidence have no application here. The considerations which are relevant when a defendant seeks to have a verdict set aside because of new evidence tending to negate guilt are entirely inapposite here. In this case, the newly discovered evidence supports the conviction—which was set aside by the Court of Appeals—and all of the perjury adduced below was in support of a defense contention which was accepted by the Court of Appeals.

A real concern in the usual new evidence case is whether granting a retrial would, in effect, vest the power to set aside the conviction, not in the court, but in those proffering the evidence. For example, the courts consider whether such action would enable and encourage defendants to join with prosecution witnesses in automatically setting aside a conviction by producing a "recantation". See *People* v. *Shilitano*, 218 N. Y. 161, 168. No such considerations obtain where, as here, the newly discovered evidence serves to preserve rather than vitiate the verdict of the jury.

Moreover, this is clearly not a case where one party, having failed to convince a court of the soundness of his position, seeks a remand merely to bolster his case by additional evidence. Rather, what the Government in essence seeks here is an opportunity to have excised from the record respondents' perjury. As noted *supra* at pp. 34–35, if no more than this took place on remand, the Government would prevail. Put, if the Court of Appeals decision reversing the conviction and remanding with instructions to grant the motion to suppress is not vacated, respondents' perjury will have achieved its desired effect.

Obviously respondents should not be allowed to profit from their perjury. It is in the best interests of justice, after a full development of the facts by the proper tribunal, to place the respondents, as near as may be, in the position which they would have occupied had there been no perjury. Therefore, the conviction obtained not because of, but despite, the perjury, should not be set aside unless the record, cleansed of the perjury, cannot support the conviction. The

sole basis for the reversal of the conviction was the conclusion of the Court of Appeals that the motion to suppress should have been granted. If the newly discovered evidence demonstrates that the trial judge's ruling was in fact a correct one, it is apparent that nothing was presented to the jury by the Government which would mar the verdict and there is no need for the new trial ordered by the Court of Appeals."

The facts and circumstances of this case make apposite the observation of this Court in *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124, reiterated in *Mesarosh* v. *United States*, 352 U. S. 1, 14, that:

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. *See McNabb* v. *United States*, 318 U. S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doings of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

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[20] "The issues of fact and law raised by the alleged voluntary disclosure, in so far as they related to the respondents' motions to dismiss the indictment and suppress the evidence obtained from such alleged disclosure, were decided solely by the trial judge after a pre-trial hearing. (See Petition for Certiorari, 6–7.) These issues, and the evidence bearing on them, were not submitted to the jury, except that the jury was allowed to consider the evidence as to the alleged disclosure in so far as it threw light upon the issue of wilfulness as an element of the substantive offense, *i. e.*, the defendants' "intent" and "good faith" (R. 2968–2970).

Where, as here, all of the perjury related to a defense contention and striking such testimony would not in any wise weaken the Government's case, it is submitted that "the untainted administration of justice" would appear to require a remand of this case to the trial court rather than a new trial. Such remand of course would preserve to the parties the right to seek appellate review of the rulings of the district court, made upon the amplified record.

CONCLUSION

For the reasons stated, the Government respectfully submits that this Court should, in the interest of justice, vacate the judgments of the Court of Appeals and remand these proceedings to the trial court with instructions to take further evidence and make supplementary findings on respondents' preliminary motion to suppress. Ascertainment of where the whole truth lies with respect to the alleged disclosure is a function, we believe, for the trial court in the first instance. Cf. *Remmer* v. *United States*, 350 U. S. 377, 379-380; 347 U. S. 227.

Respectfully submitted.

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AUGUST 1957.

APPENDIX

Chronology of Litigation

Mar. 14, 1952: Indictment returned.

June 24, 1952: Arraignment.

Oct. 6, 1952: Motion to suppress evidence filed.

Nov. 12, 13, 21, 1952: Hearing on motion to suppress.

Nov. 21, 1952: Order entered denying motion to suppress evidence.

Sept. 15 through Oct. 16, 1953: Trial on the merits.

Nov. 30, 1953: Memorandum Decision denying motion to suppress filed.

Dec. 3, 14, 1953: Notices of appeal filed.

Apr. 29, 1955: National Office of Internal Revenue Service commenced full scale investigation of the administrative handling of the Shotwell Manufacturing Company and related income tax cases for years 1944 through 1949. (See Stein and Yadon affidavits, Motion to Remand (Amended), pp. 7-13.)

May 5, 1955: Court of Appeals heard oral argument.

June 15, 1955: Decision of Court of Appeals entered reversing judgments of conviction and remanding for a new trial with instructions to sustain respondents' motion to suppress.

July 30, 1955: Petition for rehearing filed by Government and denied August 18, 1955.

Sept. 16, 1955: Order entered by Mr. Justice Reed extending time within which to petition for writ of certiorari to and including October 17, 1955.

Oct. 17, 1955: Petition for writ of certiorari and conditional cross-petition for writ of certiorari filed.

Nov. 30, 1955: Reply Brief for the United States filed.

Dec. 1, 1955: Department of Justice received letter from Chief Counsel, Internal Revenue Service, recommending grand jury investigation of possible violations of Titles 18 and 26 of the United States Code.

Dec. 6, 1955: Solicitor General, in a letter to the Clerk, advised this Court that an investigation by Internal Revenue Service was in progress and that upon receipt of a full report the Government expected to file in this Court a motion to remand the case to the District Court. Accordingly, the Solicitor General requested this Court to defer action on petitions.

January–March, 1956: Department of Justice reviewed files, determined to institute grand jury proceedings and assigned case to two special attorneys.

Apr. 9, 1956: Grand jury investigation commenced to determine whether various indictable offenses may have been committed, including perjury, obstruction of justice and conspiracy to evade taxes, by respondents and others.

Apr. 10, 1956: A subpoena was issued to Leon J. Busby, the Shotwell accountant, directing him to produce numerous books and papers before The April 1956 Term Grand Jury for the Northern District of Illinois.

Apr. 11, 1956: Respondents filed a Complaint and Petition in the District Court for the Northern District of Illinois praying an injunction restraining the Government's attorneys from presenting to the grand jury any of the evidence which the Court of Appeals ordered suppressed in the case of *United States* v. *The Shotwell Manufacturing Company, et al.*, 225 F. 2d 394.

Apr. 12, 1956: Motion to dismiss respondents' Complaint and Petition filed by the Government.

Apr. 12, 1956: Respondents' motion granted to reassign Complaint and Petition to Judge Perry before whom there was pending a civil action attacking the validity of a jeopardy assessment against the Shotwell Manufacturing Company.

Apr. 13, 1956: Government filed petition with the Executive Committee of the United States District Court for the Northern District of Illinois requesting that the Complaint and Petition be assigned to the judge regularly assigned to empaneling and instructing the grand juries, and on the same date the case was reassigned to Judge Barnes.

Apr. 17, 1956: District Court, after hearing argument, granted the Government's motion and dismissed the Complaint and Petition whereupon respondents noted an appeal.

Apr. 18, 1956: Court of Appeals set May 2, 1956, as date for oral argument and stayed the force and effect of the subpoena duces tecum issued to Leon J. Busby or any other subpoena of like tenor.

May 11, 1956: Court of Appeals affirmed the judgment of the District Court dismissing the Complaint and Petition. *Homan Manufacturing Company, et al.* v. *Russo, et al.*, 233 F. 2d 547.

June 1, 1956: Solicitor General, in a letter to the Clerk, advised this Court of the developments in connection with the grand jury investigation and requested the Court to continue to withhold action on the petitions.

June 6, 1956: Court of Appeals denied respondents' Petition for Rehearing of decision affirming District Court's dismissal of the Complaint and Petition.

June 7, 1956: Motion to set aside and vacate order entered by Court of Appeals on April 18, 1956, filed by the Government.

June 11, 1956: This Court granted the Solicitor General's motion to defer consideration of the petitions for writ of certiorari. 351 U. S. 980.

July 18, 1956: Respondents and others filed petition in the District Court entitled *In The Matter Of The April 1956 Term Grand Jury* praying for the protective power of the District Court against alleged misuse of the grand jury and requesting that the grand jury minutes be produced in open court; that the grand jurors be interrogated by the court; that counsel for the grand jury be admonished or disciplined; and that certain Treasury agents be punished for contempt. Counsel for the grand jury orally moved to dismiss, and, after an immediate hearing, the court granted the motion to dismiss and denied with prejudice the relief prayed for in the petition.

July 27, 1956: Respondents and others filed a notice of appeal from the District Court's order of July 18, 1956.

Aug. 21, 22, 28, 29, 30, 1956: H. Stanley Grafund and Frank J. Huebner appeared before the grand jury and series of conferences with Government attorneys continued.

Sept. 10, 1956: Respondents and others filed Emergency Motion with the Court of Appeals praying the issuance of a temporary order to the Honorable John P. Barnes, District Court Judge, directing him forthwith to instruct the grand jury, and its counsel, that said grand jury can consider no matters involving respondents and others until the Court of Appeals shall enter its order.

Sept. 10, 1956: Motion to Dismiss Appeal from District Court's order of July 18, 1956, filed by the Government.

Sept. 12, 1956: Order of Court of Appeals entered, giving respondents and others three days to file answer to Government's motion to dismiss.

Sept. 25, 1956: Court of Appeals ordered oral argument, set for October 17, 1956, on merits of appeal from District Court's order of July 18, 1956.

October 15, 1956: Motion to Remand filed by Government in this Court together with affidavits of Stein, Yaden, Howard and Russo.

Oct. 25, 1956: Respondents and others moved the Court of Appeals to withhold its decision on the above appeal pending the Court's examination of matters set forth in affidavits attached to the motion and any further investigation the Court should deem appropriate and for leave to file instanter said affidavits.

Oct. 25, 1956: Court of Appeals, reserving its ruling on the above motion of respondents and others, ordered that the Government may file objections to the motion to reserve decision on or before October 29, 1956.

Oct. 26, 1956: Government moved to extend time to file objections.

Oct. 29, 1956: Respondents, and others, filed Conditional Objections to Request for Extension of Time.

Oct. 29, 1956: Order entered extending time to file objections to motion to reserve decision to and including November 1, 1956.

Oct. 31, 1956: Government moved for a further extension of time to file objections.

Nov. 2, 1956: Motions of respondents and others, filed on October 25, 1956, denied by Court of Appeals.

Nov. 13, 1956: Decision of the Court of Appeals reversing the District Court's order of July 18, 1956, and remanding with directions. *In The Matter Of The April 1956 Term Grand Jury*, 239 F. 2d 263.

Nov. 15, 1956: Motion to Remand (Amended) filed by Government in this Court together with affidavits of Stein, Yaden, Howard, Russo, and McNelis.

Nov. 28, 1956: Government filed a motion to modify and clarify the above opinion of the Court of Appeals.

Dec. 5, 1956: Respondents' answer to Government's motion to modify and clarify opinion by Court of Appeals filed.

Dec. 10, 1956: Government's motion to modify and clarify opinion denied by Court of Appeals.

Dec. 11, 1956: Government filed motion in Court of Appeals for stay of mandate re decision entered November 13, 1956, *In The Matter Of The April 1956 Term Grand Jury*.

Dec. 14, 1956: Government's motion for stay of mandate for thirty days granted by Court of Appeals.

Dec. 24, 1956: Respondents' Answer To Motion (Amended) To Remand filed in this Court.

Dec. 31, 1956: Motion of Frank J. Huebner To Withdraw From Opposition To Government's Petition For Certiorari, Motion To Withdraw From Conditional Cross-Petition For Certiorari, And Consent To Government's Motion To Remand, filed in this Court.

Jan. 7, 1957: Motion of Harold A. Smith and others for leave to withdraw as counsel for Frank J. Huebner filed in this Court.

Jan. 9, 1957: Government's Supplement To Motion To Remand filed in this Court together with affidavit of Frank J. Huebner.

Jan. 23, 1957: Respondents' Reply To Supplement To Motion To Remand and their Motion That Conditional Cross-Petition For Certiorari Be Treated As An Unconditional Cross-Petition filed in this Court.

Feb. 6, 1957: Mandate of Court Appeals issued, *In The Matter Of The April 1956 Term Grand Jury.*

Feb. 14, 1957: Interrogatories served upon Vincent P. Russo, Special Attorney, Department of Justice, counsel for The April 1956 Term Grand Jury.

Feb. 20, 1957: H. Stanley Gratlund again testified before grand jury.

Feb. 25, 1957: Motion to strike interrogatories filed in District Court.

Feb. 25, 1957: This Court granted the Government's petition for certiorari limited to the issues raised in the amended motion to remand and supplement thereto and the respondents' answer to the amended motion to remand, and denied respondents' cross-petition for certiorari. It also granted the motions of Frank J. Huebner and his counsel.

Feb. 27, 1957: Indictment returned against respondents Cain and Sullivan and others by the April 1956 Term Grand Jury.

Aug. 19, 1957: Gratlund affidavit lodged with the Clerk of this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 421

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER AND HAROLD E. SULLIVAN,

Cross-Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER AND HAROLD E. SULLIVAN,

Cross-Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that if this Court grants the petition for a writ of certiorari prayed by the Solicitor General in No. 470, this term, and opposed by petitioners, that writs also issue on this cross-petition to review the judgments[1] of the United States Court of Appeals for the Seventh Circuit entered in these causes on June 15, 1955, so that petitioners' motion for dismissal, ruled on by the Court of Appeals adversely to petitioners, may be before this Court.

1. There was a joint indictment in the District Court but several judgments of conviction. Several appeals were taken to the Court of Appeals but were consolidated for disposition.

CITATIONS TO OPINIONS BELOW.

The oral opinions of the District Courts denying petitioners' motion to dismiss the indictment (which motion is the sole subject of this cross-petition) appear at R. pages 90 ff. and 617, and are printed as Appendix B.[2]

The opinion of the Circuit Court of Appeals is not yet reported. It is printed in Appendix C.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 15, 1955 (Appen. C). Rehearing, on the Government's application therefor, was denied on August 18, 1955 (Appen. D). On September 16, 1955, Justice Reed granted an application by the Solicitor General to extend the time of the United States for filing a petition for certiorari to and including October 17, 1955, and granted a conditional application by these petitioners extending their time to the same date, "provided the time has not already expired." Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED.

Whether judicially enforceable immunity from criminal prosecution results from acceptance of public offers of such immunity to those who would voluntarily disclose irregularities in their income tax returns where the offers were made by Secretaries and other Treasury officials authorized by Section 3761 of the Internal Revenue Code of 1939 (26 U. S. C., 1952 Ed., 145), to effect compromise, before indictment, of any criminal case arising under the Internal Revenue laws?

2. Record references herein are to the Record filed in No. 470, this term.

SUBSIDIARY QUESTION PRESENTED.

In a criminal case decided in a Court of Appeals in defendants' favor and in which the Government files a petition for rehearing tolling its time to petition for certiorari, is defendants' time for filing a cross-petition similarly tolled?

STATUTE INVOLVED.

The statutory provision involved is Section 3761 of the Internal Revenue Code of 1939 (26 U. S. C., 1952 Ed., 145), printed as Appendix A.

STATEMENT.

Petitioners were jointly indicted for allegedly wilfully and knowingly attempting to evade a portion of the corporate income taxes allegedly owing by petitioner The Shotwell Manufacturing Company for 1945 and 1946 (R. 5). They were convicted in the District Court. Upon appeal the Court of Appeals reversed and remanded for a new trial, holding that evidence must be suppressed which had been supplied by petitioners in reliance on the Government's "voluntary disclosure" policy, which promised immunity to those who, before investigation was commenced, voluntarily disclosed tax irregularities.

In the trial court, petitioners had moved (R. 10, 612) to dismiss the indictment on the ground that they voluntarily disclosed the irregularities complained of to the District Collector and Treasury Agents, and supplied full data relevant to a proper assessment of the tax under the rules then being applied by the Treasury Department; that this disclosure was made in reliance upon the "voluntary disclosure" policy promulgated and publicly declared by Secretaries of the Treasury and Commissioners of Internal

Revenue which promised and represented that there would be no criminal prosecution where a voluntary disclosure of misstatement or omission in a tax return was made to a responsible officer of the Treasury Department before investigation had been initiated.

The prosecutor did not traverse the facts averred by this motion, which was the equivalent of the former plea in bar, but demurred to it.[3] The District Court (Judge Barnes) upheld the demurrer on the ground that although statutes permitting the compromising of tax liabilities are doubtless wise, that estoppels against the Government may not arise out of what he termed "negotiations looking toward compromise under the statute" (R. 97). The matter was subsequently presented to District Judge Nordbye, who ruled that the question had been exhausted before Judge Barnes (R. 617).

The case went to trial on the merits and the prosecutor was permitted to introduce much evidence made available to, or specially compiled for, the Government during the disclosure process.

3. That the facts averred in the *motion to dismiss* were not a sham and could be proved by competent evidence is established by the Court of Appeals' finding on the *motion to suppress* (which averred similar facts and on which evidence was taken), that (a) the "voluntary disclosure policy" did exist, and (b) that petitioners complied with it.

If the prosecutor had filed a replication raising factual issues as to the motion to dismiss, petitioners would have been entitled to a jury trial, before a separate jury and in advance of any trial on the merits, on such issues. This is because Rule 12(a) of the Criminal Rules provides that a defense formerly raised before trial by plea shall now be raised by motion. The defense raised by the motion to dismiss formerly would have been raised by a plea in bar of the action and separately tried. (*Short* v. *U. S.*, 4 Cir., 91 F. 2d 614, 619; *Commonwealth* v. *Merrill*, 90 Mass. 545.) This, we believe, would be the result *if* this Court directed that the demurrer to the motion be overruled and *if* the prosecutor should thereafter file a factual replication to it.

The Court of Appeals did not pass upon the "merits" of the appeal but held

> (a) that petitioners made a valid voluntary disclosure in compliance with the Treasury's offers therefor,
>
> (b) that the immunity promised by the Treasury could not be enforced judicially because "there was no statutory basis for the alleged promises of immunity announced by the various Treasury Department officials" but,
>
> (c) that the pre-trial motion to suppress evidence surrendered in reliance on the dishonored promises should have been sustained, and
>
> (d) remanded the case for a new trial without passing on other questions raised as to the conduct of the trial or sufficiency of the evidence.

The "voluntary disclosure" policy, on which the questions presented by this, and the Government's petition hinge, was first promulgated by the Treasury on August 22, 1919. It existed in varying forms until January 10, 1952, when it was withdrawn by Secretary Snyder. It has not since been in force. Official explanations were given to Congress for the withdrawal. (See Hearings of a Subcommittee of the Committee on Ways and Means of the House, 82nd Cong., 2nd Session, January 22, 23, 24 and 25, 1952, excerpts from which appear at R. 3106-3153.)

In 1945 and the immediately following years the Treasury gave the policy widespread publicity in a drive to collect taxes on "black market" profits, many millions of which it was feared would not be discovered through ordinary processes of investigation. Relevant, definitive excerpts from Treasury bulletins and public pronouncements offering and promising immunity from prosecution to those who would voluntarily disclose are printed as Appendix E.

THIS CROSS-PETITION IS TIMELY.

It is well established that a timely petition for rehearing tolls the running of the time within which certiorari must be applied for because it operates to suspend the finality of the lower court's judgment (*Department of Banking v. Pink*, 317 U. S. 264). When the Government's petition for rehearing was filed in the Court of Appeals here it operated to suspend the finality of the judgment and to open the door for a possible complete revision of its views by the Court of Appeals and the ultimate entry of a judgment affirming the convictions below or otherwise greatly altering the initial adjudication.

We have found no decision of this Court passing upon the issue stated as a subsidiary question here. However, the precise question came up in *Texas & P. R. R. Co. v. Perkins* (Tex. Comm. of Appeals), 48 S. W. 2d 249, and in *Meda v. Lawton*, 214 Cal. 588, 7 P. 2d 180. Both of the state tribunals involved, operating under appellate procedure akin to Federal certiorari procedure, held that a petition for rehearing by one party tolled the running of the time for all.

REASONS FOR GRANTING THE WRIT.

In our answer to the Government's petition we shall point out why it would be inappropriate for this Court to grant review as the matter now stands. However, if the Court should conclude to grant the Solicitor General's petition, then we submit that this petition also should be granted so that there may be no doubt that both consequential issues, arising from the immunity promises, *i.e.*, enforcement of the promise of immunity and suppression of evidence obtained by means of the promise, may be presented here at the same time.

It is our contention (a) that a contract, for immunity was created by acceptance of the Treasury's offers for voluntary disclosures and that dismissal of the criminal proceedings rather than mere suppression of evidence obtained by means of the promise is the proper remedy for breach of the Treasury's promise, and (b) that the contract is either completely valid, or sufficiently valid to raise an estoppel, even though the formal record of it directed to be made by subsection (b) of the compromise statute was not made.

I.

It well may be that the question as presented by the Government's petition will be sufficiently broad under Rule 23 1(c) to include the remedial point which we urge. However, as of this writing we do not know how the Government will pose its question; and since it is true that a decision by this Court that petitioners' motion to dismiss stated a valid plea in bar would not be an affirmance of the Court of Appeals' judgment, this cross-petition is presented out of an abundance of caution. If the Court should decide to grant the Government's petition, which necessarily will pose the question as to whether the facts constitute compliance with the voluntary disclosure policy, or, more accurately stated, constitute acceptance of the Treasury's offers, it also should determine the full legal consequences of such compliance or acceptance, in so far as questions in that regard were raised below.

II.

Whether Section 3761 of the Internal Revenue Code of 1939 authorizing the Secretary of the Treasury, and certain others, to "compromise," before indictment, "any * * * criminal case arising under the revenue laws," authorizes

him to promise immunity to those who would voluntarily disclose tax irregularities before the Government commenced investigation, is an important question of federal statutory construction which should be passed on by this Court if it determines to review the correctness of the Court of Appeals' decision that a valid disclosure was made in this case.

Moreover, that question involves standards of governmental morality at the highest level of the Executive Department.

The Court of Appeals opinion, by seeking to shrink the promises of immunity publicly and repeatedly made by Secretaries of the Treasury, to the *ad hoc*, and unenforceable, promises of immunity sometimes made by public prosecutors (Cf. *Whiskey Cases*, 99 U. S. 594, cited in the opinion below), skirts this disturbing moral question without coming to grips with it. The situations are far different—while a prosecutor may have discretion as to what cases to prosecute, he is given no authority by Congress to make binding compromises of criminal cases, whereas the Secretary of the Treasury, and certain others, plainly are given such authority by Section 3761.

And "compromise," *in a purely criminal case*, neither involving nor anticipating any reduction of the civil tax liability, necessarily embraces "immunity" because before indictment that is all the Government has to give.

Nor does the Court of Appeals' reliance upon the Second Court of Appeals' decision in *U. S. v. Lustig*, 163 F. 2d 85, answer the question. In the latter case the Second Court held, *inter alia* that Section 3761 afforded no shield to a prosecution "unless there has actually been a compromise. * * * None of the formalities prescribed by the statute and treated by the Supreme Court as necessary to effect a compromise were observed. *Botany Worsted*

Mills v. United States, * * *, 278 U. S. at pages 288-289." The *sine qua non* of a binding compromise under that view would be the memorandum described in subsection (b) of the statute. The trouble is that this Court did *not* hold in the *Botany* case that observance of the "formalities" of Section (b) of the statute was mandatory. To the contrary, it held that to be valid a compromise (there civil) *must* be made by an official authorized by subsection (a) to make it. It left undecided the question as to whether the "record" making formalities of subsection (b) were required in all cases and recognized that a *binding compromise, or "estoppel,"* might be created *if* an individual authorized by subsection (a) of the statute in fact made the compromise but failed to comply with subsection (b).

Subsequent to the *Botany* decision (and apparently unrealized by the Second Court of Appeals when it decided *Lustig*), it has been held uniformly that subsection (b) is *directory*, and not mandatory, and that failure of the Secretary to comply therewith will not invalidate an otherwise valid compromise. (*Backus* v. *U. S.* (C. C.), 59 F. 2d 242; *Schneider* v. *U. S.*, 6 Cir., 119 F. 2d 215.)

Although the Government contended below, and the Court of Appeals held, that the Secretaries in promulgating and living by the "voluntary disclosure" policy did not do so under the compromise statute, no source of power to make, and to live by, such a policy, *other than Section 3761*, has yet been cited. In other words, the Department of Justice is contending that Secretaries Morgenthau, Snyder and Vinson made unauthorized and worthless promises to the public—that although they *could have* acted under the statute, they simply did not do so but chose to operate outside the law and to engage in a course

of compounding felonies. A doctrine less flattering to the Secretaries, or more dangerous to the concept of limited, responsible and orderly government, is difficult to imagine.

III.

The holding in the case at bar that an enforceable contract of immunity (or an enforceable estoppel), cannot be created under the compromise statute short of literal compliance with the record-making requirements of its subsection (b) is not in harmony with the rationale of the Second Circuit in *Rau* v. *U. S.*, 260 Fed. 131, the Fourth Circuit in *Oliver* v. *U. S.*, 267 Fed. 544, and the Fifth Circuit in *Willingham* v. *U. S.*, 208 Fed. 137.

Those cases were decided under Section 3229 of the Revised Statutes, the predecessor of Section 3761 of the Internal Revenue Code of 1939. They involved alleged criminal violations of income, narcotics and whiskey tax laws respectively but did not involve the so-called disclosure policy. In all of them immunity was upheld on informal settlements. In each of them the compromise which the defendant asserted barred prosecution was made without technical compliance with the record-making requirements of Section (b) of the statute.

The present decision is likewise inconsistent with the decision of the Second Circuit in *Lapides* v. *U. S.*, 215 F. 2d 253, in which Judge Frank, although speaking in a dissenting opinion, said that he and his colleagues were in agreement

> "* * * that, if Lapides could have proved the alleged facts [a timely voluntary disclosure], he would have been entitled to the injunction he sought. For (a) the threat to break such a promise of immunity is a threat of unconstitutional conduct, * * *."

For the foregoing reasons this conditional cross-petition should be granted in the event the Government's petition in No. 470 is granted.

Respectfully submitted.

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October 17, 1955.

APPENDIX A.

Section 3761 Internal Revenue Code of 1939.

"SEC. 3761. COMPROMISES.

(a) *Authorization.* The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) *Record.* Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise."

(26 U. S. C. 1952 ed., Sec. 3761.)

APPENDIX B.

Excerpt from Oral Opinion of Judge Barnes (R. 97-8).

Concerning this point 3, counsel for the defendants, in one of the papers filed, states:

> "Point 3 asserts an estoppel in bar of the action by reason of a voluntary disclosure and thereby raises a question of first impression, although estoppels have been successfully invoked against the government in criminal cases on other grounds."

In argument, which I say was pressed with vigor, and very great ability as I thought, it was said that the statute providing for compromise gave authority to the officers of the Government to lay a basis for estoppel there having been disclosed to them facts which were not otherwise in the possession of the Government, the statute laid the basis for this estoppel. I have considered that argument over the week end, since it was made, and I have come to this conclusion:

There are statutes which permit compromising of tax liability. No doubt they are wise, but it is of no consequence to the court whether they are or not, they are there, and they are made by Congress. If there is any occasion for my expressing an opinion on them, I think I would say that they are a wise exercise of legislative power. But the question is: May estoppels against the government arise out of negotiations looking toward compromise under these statutes?

I have thought a good deal about that, and I have come to the conclusion that to permit estoppels to arise out of negotiations for compromise would simply destroy these statutes. If persons who for some reason or another, good,

bad or indifferent, had failed to file proper returns, knew that what they did looking toward a compromise, the disclosure which they might make would give rise to an estopped, they would hesitate to make disclosures.

If governmental officials knew that if they sat down at a table and heard some more or less complete disclosures looking toward compromise they might subject the government to an estopped, it would have the same effect. An estopped resulting from an incompleted compromise might have a greater effect than a compromise. And neither side would take action looking toward the compromises which the government has said are beneficial to the United States.

I think the idea which I have attempted to voice is one excellent reason why incomplete—uncompleted negotiations for compromise should not be permitted to give rise to an estopped in favor of either side. Accordingly, I think the third point is not well taken.

Excerpt from Oral Opinion of Judge Nordbye (R. 617).

This additional motion to dismiss may be filed, but it must be denied. In that the parties have set forth their views in their correspondence to the Court, I see no necessity for any further hearing. First, it may be observed that the filing of this motion is not timely, and secondly the issues which defendants now desire to present in support of their motion have already been presented to the Court on two separate motions as indicated above and ruled upon adversely to the contentions of the defendants. The fact that the defendants now style their special plea in bar as one of pardon and amnesty does not enable them to present for rehearing the same issues as were presented to Judge Barnes. And in passing it may be noted that the defendants have taken the position before the Court that the issues presented on their motion to dismiss before Judge

Barnes and the undersigned were for the Court alone without a jury. Rule 12, Federal Rules of Criminal Procedure, does not recognize any special plea in bar such as defendants now seek to present. It is the Court's view that the defendants have exhausted their rights on the grounds presented before the trial court, first, in moving to dismiss the indictment on the grounds urged before Judge Barnes, and secondly, on the motion to suppress the evidence before this Court. In any event, it would seem that the plea of pardon and amnesty is a matter for the executive or legislative department to consider and is not granted to any officials of the Internal Revenue Department by Title 26, U. S. C. A., § 3671, as defendants contend. The authority to compromise as granted in that statute is not a grant of amnesty.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

October Term, 1954. April Session, 1955.
Nos. 11108-9-10-11.

(Caption)

June 15, 1955.

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.*

Shotwell Manufacturing Company, a corporation (sometimes herein referred to as Shotwell) and Byron A. Cain, Frank J. Huebner and Harold E. Sullivan, its officers, were indicted on two counts on March 14, 1952, for allegedly wilfully and knowingly attempting to defeat and evade a large part of the income taxes due and owing by Shotwell to the United States of America for the calendar years 1945 and 1946, in violation of section 145(b) of the Internal Revenue Code,[1] in that defendants filed and caused to be filed false and fraudulent tax returns for said corporation.

After trial on pleas of not guilty, the jury found all of the defendants guilty on both counts. Judgments of conviction were entered on the verdict, Shotwell was fined $10,000 on each count, the individual defendants were sen-

1. 26 U. S. C. A. § 145(b).

tenced to three years' imprisonment on each count (to run concurrently). Cain was fined $5,000 on each count, Huebner was fined $5,000 on each count, and Sullivan was fined $2,500 on each count. The defendants have severally appealed.

The errors relied on arise out of the alleged insufficiency of the evidence to support the verdict; the failure of the court to sustain defendants' motions to dismiss; the failure of the court to sustain motions to suppress documents and information prepared or furnished by defendants for the government during an alleged disclosure; certain rulings on evidence and instructions; and denial of motions for new trial.

1. The trial court was correct in denying defendants' two motions to dismiss the indictment, in the nature of special pleas in bar. These motions were based on the theory that defendants had acquired immunity from criminal prosecution by making a "voluntary disclosure", in reliance upon an announced policy of the Treasury Department not to prosecute in cases where such a disclosure had been made.

There was no statutory basis for the alleged promises of immunity announced by the various Treasury Department officials.[2] Thus the making of a voluntary disclosure by the defendants was no legal bar to a criminal prosecution. Only an act of Congress could create such immunity. In the absence of statute, a defendant cannot enforce such a promise and "cannot by law plead such facts in bar of any indictment against him, nor avail himself of it upon his trial, * * *" *Whiskey Cases*, 99 U. S. 594, 595, 25 L. Ed. 399, 400.

2. "At the outset, it is most important to point out that this policy of the Bureau of Internal Revenue not to recommend criminal prosecution where the taxpayer had made a voluntary disclosure before the investigation started, had no basis either in statute, rule or regulation." Balter, *Fraud Under Federal Tax Law*, Second Ed. 1935, p. 102.

Defendants contend, however, that there is a statutory basis for the voluntary disclosure policy in the power of the Secretary of the Treasury to compromise any civil or criminal case under § 3761 of the Internal Revenue Code of 1939.[3] This same argument was squarely met and disposed of in *U. S. v. Lustig*, 163 F. 2d 85, 89[3a] where the court said:

> "The compromise statute[4] affords no shield to one who has violated the tax laws unless there has actually been a compromise. See *Botany Worsted Mills v. United States*, 278 U. S. 282, 49 S. Ct. 129, 73 L. Ed. 379. It is not even claimed here that there was more than an offer to make a compromise. None of the formalities prescribed by the statute and treated by the Supreme Court as necessary to effect a compromise were observed. *Botany Worsted Mills v. United States, supra*, 278 U. S. at pages 288-289, 49 S. Ct. 129, 73 L. Ed. 379. There was no issue of fact for court or jury as to whether a contract of compromise had been made. Accordingly there is no merit in the defense of immunity."

The language of the *Lustig* opinion is fully applicable to the case at bar. The Treasury Department officials did not have the power to confer immunity on persons making voluntary disclosures, defendants' voluntary disclosure was not a statutory compromise of a criminal case and did not entitle them to immunity, and the motions to dismiss the indictment were properly denied.

2. A timely motion by defendants, supported by affidavits, and later amended, was made before trial to suppress certain evidence in the possession of the government. The motion averred that the evidence had been produced by defendants in reliance on a promise of im-

3. 26 U. S. C. A. § 3761.

3a. Cert. den. 332 U. S. 775.

4. 26 U. S. C. A. § 3761.

munity. More specifically, it averred that the Bureau of Internal Revenue, through the Secretary of the Treasury, the Commissioner of Internal Revenue, and other responsible treasury officials thereunto duly authorized, publicly offered and held out to all of those whose income tax returns contained omissions or misstatements, that there would be immunity from criminal prosecution in any case where the taxpayer who filed such return would come forward before investigation had been initiated and acknowledge the existence in such return of omissions or misstatements, and the Treasury Department in such case would merely assess such unpaid tax, interest, civil penalties, if any, as might thereafter be determined to be due, and that said offer was and had been in full force and effect. The motion likewise set forth that such timely acknowledgement was made to a responsible officer or agent of the Treasury Department in January, 1948 of the returns of Shotwell for the years mentioned in the indictment; that the defendants informed said agents of the Treasury Department, among other things, that said returns contained omissions and misstatements in that they intentionally failed to include, under the heading of gross sales, all or part of the sums received by Shotwell through sales of goods, and they failed also to include under the heading of "costs of goods sold", various payments made by defendants for said goods, which receipts and payments were in excess of the ceiling prices[5] as set by the laws and regulations of the United States at the time such goods were purchased. It was also stated in the motion that the defendants at said times stated that Shotwell, through its officers, was ready, able and willing to pay such unpaid tax, interest and civil penalties, if any, as might be determined to be due after inspection and investigation by the agents of the Bureau of Internal Revenue. The motion also set forth that, at

5. Fixed pursuant to 50 U. S. C. A.-App. § 902 (1944 ed.).

the time of the disclosure, Shotwell's over the ceiling payments for raw material were not deductible as a part of the cost of goods sold, under the rulings of the Commissioner.

The motion also averred that the officers and agents of the Treasury Department acknowledged the sufficiency and timeliness of the disclosure, and that the defendants, at the request of said officers, caused to be made available to them the books and records of Shotwell, and the individual defendants communicated to them information in their possession materially related to said omissions and misstatements and not available to such officers and agents through said corporate books and records, which information could not have been obtained from the individual defendants in any manner in view of their constitutional privilege and rights, and also that the defendants caused certain accountants to be employed to assist the said agents in obtaining the facts. Shotwell thus incurred and paid auditing charges in excess of $20,000.

The motion also set forth in substance that in pursuance of the foregoing, the Treasury officials examined the corporate books, records and data, and made copies thereof continuously over a period of more than four years preceding the return of the indictment, and did not advise the defendants that said disclosure was untimely or insufficient, or that criminal prosecution was or had been contemplated, or that it might be recommended; that, notwithstanding the foregoing, said officials shortly before the proceedings before the grand jury which resulted in the indictment herein, repudiated the said offer so relied and acted upon by the defendants, without granting to them any hearing or conference, and without communicating to them the amount which, upon such inspection, the Bureau of Internal Revenue had determined to be due, and without affording Shotwell or said officers or its be-

half, an opportunity to pay such amount. The motion charged that the said actions of the Bureau of Internal Revenue constituted an improper inducement of a confession or admission of facts upon which a criminal prosecution might be based and an illegal search and seizure of the books, papers and records of the defendants, and that, in consequence, the admission in evidence of all books, records, papers and statements so obtained, and any copies thereof or data procured therefrom as a result of information obtained therefrom, would violate the rights of the defendants under the fourth and fifth amendments to the constitution of the United States.

A hearing was held on the motion to suppress. The following is a statement of the facts proved, including only those facts shown by the government's evidence wherever there was a conflict.

Leon J. Busby, a certified public accountant under the laws of Illinois, was a member of the firm of Busby and Ourv, located in Chicago. Beginning in 1942 that firm did the general auditing work of Shotwell for the purpose of certifying financial statements used in credit channels. The firm prepared Shotwell's income tax returns, installed efficiency systems, and did other matters of a general accounting nature.

In January, 1948, at the request of defendant Cain, Busby made a trip with Stanley Graflund, vice-president and comptroller of Shotwell, to the plant of General Confections Company in New York, to determine whether a loan of $50,000 to General Confections, requested by David G. Lubben, would be financially secure. Having made a cursory survey, he reported to the Shotwell officers, including Graflund and defendants Cain and Huebner, that the survey did not justify such a loan.

Although Busby was active in the supervision of the

auditing work for Shotwell, he did not know that Shotwell had received over-ceiling or premium payments. During this trip Graflund told him of that condition. In reporting on January 11, 1948 to Cain and Sullivan, Busby recommended against making the loan, and told of Graflund's revelation about the collection of over-ceiling prices for candy sold by Shotwell to General Confections, that Graflund had said that he did not know how much the over-ceiling payments were, and that he (Graflund) also thought "the money had been paid out by Shotwell." Busby said that he told Cain and Sullivan that, while it might not be that Shotwell was in a serious position, they should file an amended return to get the matter on record, and they discussed it for a while. Cain and Sullivan readily admitted the over-ceiling payments. They asked Busby "whether or not it would be in order to discuss the matter with the department." Busby told them that he thought it would and that, even if they made the disclosure, which was, in his opinion, the customary thing to do, "there probably would be nothing to it except that it would clear Shotwell of omissions from the tax returns." Busby directed their attention to the fact that it was a common thing to make disclosures to the department, and in so doing he did no see that there were any serious consequences, and that "there wouldn't be any critical attitude of the department towards them."

This discussion about making a disclosure occurred off and on between these men for a couple of weeks. They assigned Busby to communicate with the department, after having discussed the possibility of sending a lawyer.

About March 15, 1948, Busby went to the office of the Chief Deputy Collector in Chicago, Ernest Sauber, and told Sauber that he had a client which had been engaged in over-ceiling sales and over-ceiling purchases, which were not reflected in its books, that the client "wants to clean

up some omissions from his tax return", that he [Busby] had been asked to prepare amended returns; that he had been unable to ascertain the exact figures and he did not know how he could prepare amended returns without having the figures, and he asked Sauber's advice on how to proceed. In response to Sauber's inquiry, Busby said that these transactions were handled all in cash, the part representing the over-ceiling payments was kept in a cash box, which cash was used to make over-ceiling purchases; that said transactions to a large extent "washed each other"; that when it was no longer necessary to make over-ceiling sales and purchases, the balance in the cash box was taken into the corporate records and declared as income for the year that the OPA ceiling ceased to exist. Busby told Sauber that "we wanted to go into the matter and have the agent come out and examine the situation and see what the real condition was and if there was any net amount due to the Government, we wanted to pay it."

Sauber told Busby that he could not prepare amended returns on the basis of his then knowledge, and suggested that Busby get statements from every individual at Shotwell who had anything to do with these transactions, and therefrom reconstruct the figures necessary for an accurate return, and after the figures had been reconstructed to ask the internal revenue agent's office to audit the Shotwell return. On this occasion Sauber advised Busby that if the disclosure was timely and the facts that he had related to Sauber were correct, the latter saw no reason why the immunity from criminal prosecution policy of the Bureau should not be applied.

The next day Busby met Cain, Huebner and Sullivan and told them that Sauber recommended that one of the officers come forward and disclose the identity of the taxpayer and "that if this were done, they should proceed to determine as nearly as possible how much was involved,

and he saw no reason why there should be any trouble with respect to criminal prosecution in case of timely disclosure." Sauber had said that either an officer of the company or its representative could make the disclosure. Busby also told the individual defendants that Sauber said that there was no need for amended returns. Cain, president of Shotwell, told Busby, to go to the collector's office and "disclose the whole affair, the whole details."

On one of various visits of Busby to Sauber's office, Sauber asked if Busby knew how much was involved, and when given a negative answer and told that Shotwell had no specific records from which that could be determined, Sauber suggested that Busby gather "such information as we could from any memorandum or memory and summarize it on a form, and in the meanwhile he would contact the office of the agent in charge and have an auditor come out and work with us for the purpose of substantiating or getting together the true facts as nearly as could be accomplished." Sauber said that he would have the Agent in Charge, Mr. Wright, send out an agent to verify the summarization, or help to compile it. He said that the Agent "was to cover an examination of the books which would include just about a routine audit, verification of the tax returns; that he would examine the books and any other data that we had to submit to him."

Within a week Busby brought Cain into Sauber's office and said that Shotwell was the client that he had referred to in the previous meeting. Cain then told Sauber the same story that Busby had told him, and that "they did not know how to proceed in order to correct their tax returns." Sauber gave Cain the same advice he had given Busby, and told him "to ask for an audit of their returns."

Cain told Sauber that he had two boys in school and he was worried about publicity, and Sauber said that there would be no publicity on the case, that the only time an

income tax case received publicity was when there was an indictment. Sauber told Cain that in his opinion this was strictly a civil case and that it was not a criminal case; and that he had nothing to worry about so far as publicity was concerned.

About thirty days thereafter (latter part of April, 1948), Cain telephoned to Sauber and said that his advice had been followed, a meeting of all Shotwell people connected with the black market transactions had been held, and that figures had been prepared which he would like to come in and turn over to Sauber. The latter said that he had no jurisdiction in the case, that corporation returns were handled by the Revenue Agent's office, which he should call and request an audit of the Shotwell returns. At Cain's request, Sauber called the Revenue Agent's office. Ralph Johnson, the group chief in that office, agreed to do it. Johnson said he would schedule the returns for audit. Sauber said the cases had not been assigned for audit to any particular agent.

Thirty days later and several times thereafter, Cain called Sauber and stated that no one had come from the department. He was very insistent that the audit be started. Sauber learned by inquiry at the Revenue Agent's office that there had been delays there due to misunderstanding in regard to the name of Shotwell. Sauber reported this fact to Cain.

From 1945 through 1948 the procedure in the office of the Collector of Internal Revenue in regard to corporate returns was that after returns were filed with the collector they were sent to the Bureau at Washington for statistical purposes and for clarification purposes. The Bureau would make a survey of the returns and select those which it believed were worthy of examination in the field. They were then sent to the office of the Internal Revenue Agent in Charge and there was a further classification made of

those returns in the local office. Those returns which a local office believed required investigation were retained, sent to the record section where an office card record was made and then they would be sent to the various groups for investigation by their agents.

As to the Shotwell return for 1945, the card record fails to show on what date it was determined that the return should be audited or investigated. What the card does show, as interpreted by Holz, a government witness, is as follows: On January 15, 1947, the 1945 income tax return and the 1945 excess profits tax return of Shotwell, were assigned to Group Chief Magnus for audit in the field, and Magnus assigned them to Agent Korman on January 20, 1947. Korman filed a report on August 5, 1947, and either then or later an agreement was signed consenting to the assessments of deficiencies, such agreement specifying that the taxpayer waived his right to petition the tax court, and consenting to an immediate assessment of the deficiencies. This may have occurred at any time from August 8, 1947 to September 26, 1947, when the card record indicates that the case was disposed of.

As to the 1946 Shotwell return, the card record indicates that on December 11, 1947, the card was made out, and that on December 16, 1947, the return was assigned to Group Chief Granahan for investigation in the field by one of his agents, which means for an audit. On July 22, 1948, the card indicates the return was sent to Group Chief Johnson, and then on February 4, 1949, to Group Chief Williams, now deceased. The record is silent as to when any investigation or audit commenced as to the 1946 Shotwell return.

In 1949 Cain called Sauber and reported that three men had been auditing the Shotwell returns, and asked what could be done to expedite the closing of the case. Sauber referred him to Wright, Internal Revenue Agent

in Charge. A week later Cain told Sauber that he had seen Wright and had "gotten nowhere" with him, and requested Sauber to find out what the difficulty was. After talking to Wright, Sauber advised Cain that the difficulty was Shotwell "would not tell the Government to whom the over-the-ceiling purchase payments had been paid, and until such time as the Shotwell Manufacturing Company would tell the Government or identify the persons receiving the over-the-ceiling purchase payments, the case would not be closed, that they would be required to cooperate with the Government before they would consider closing the case."

Cain then told Sauber "he could not identify the persons receiving these payments; the only persons that he knew of was a Dr. Doe in the Board of Trade Building, that someone had sent some money to, and that he himself thought it was a fictitious name and he would not appear ridiculous naming a Dr. Doe, and that was the only person he knew that had received any of these payments, and he would not reveal that name because he himself thought it was fictitious."

All corporate records were made available to revenue agents Krane and Mammel.

Revenue agent Krane came to work at the Shotwell plant in June or July, 1948, and he came in from time to time over a long period of time. In July, 1948 Busby, having prepared a tentative schedule, gave it to the revenue agent, when he appeared at the plant to examine the books.[6]

On February 7, 1949, revenue agent Mammel was given the *Shotwell* case. He had nothing to do with a decision as to whether there should be a recommendation of prose-

6. This compilation was introduced in evidence by the government at the trial.

cution. The discretion in that regard was vested in the Intelligence Office, and he was not in that office. Although he could recommend a prosecution, those vested with authority could refuse to prosecute. In March of 1949, he talked to defendant Cain and told Cain that there might possibly be prosecution and therefore he (Mammel) had to do a perfect job in his investigation [of the accounts of Shotwell] so that he would not have to do the work over again. He did not tell Cain that he considered what they had done constituted a voluntary disclosure.

Early in 1951, Cain and Sullivan visited Wright and discussed the case in detail, at which time Cain stated that he wanted a bill. Wright again assured them "that he would check into it and see if a bill could be brought forth." Cain asked Wright if they "couldn't get the tax matter settled."

In October, 1951, Cain talked to Oscar W. Olson, Mr. Wright's assistant, who told him that he would prefer that he see Mr. Wright, "but if I were you I'd have no worry about it at all."

Prior to the indictment on March 14, 1952, the defendants were never notified what amount of tax the Bureau of Internal Revenue had determined was due.

On May 28, 1945, former Secretary of the Treasury Morgenthau stated at a press conference that "some taxpayers who have failed to declare their full income and pay the tax due may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started."

On August 21, 1945, former Secretary or the Treasury Vinson stated through the press: "No one is going to jail for an honest mistake in filling out his tax return. Treasury policy even permits the wilful evader to escape

prosecution if he repents in time. The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return * * *. Monetary penalties may be imposed for delinquency, for negligence and for fraud, but the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out.' "

On October 15, 1945, the then Commissioner of Internal Revenue "stressed the bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases."

On May 14, 1947 the chief counsel of the Bureau of Internal Revenue said in the course of an address: "The law requires the prosecution of the tax evader and that is what the Department recommends to the Attorney General. There is one important exception to that. * * * The Department has always encouraged voluntary disclosures. * * * The making of a voluntary disclosure is a simple thing. The taxpayer or his legal agent can go before any official of the Bureau of Internal Revenue or any of its field offices—whether it is the collector, a deputy collector, a revenue agent, a special agent, or any other responsible Treasury officer. There is no special form for making the disclosure. The simple statement that 'I have filed false tax returns and I want to make the government whole,' would constitute a complete disclosure. * * *"

The government's brief sets forth the following as the reasons the district court denied the motion to suppress:

The Treasury's voluntary disclosure policy required (1) the disclosure of a tax deficiency, (2) an admission that the taxes due had been wilfully evaded, and (3) good faith cooperation with the government thereafter in determining the amount of taxes due. The court made the following findings of fact: that appellant had never disclosed unreported income; that they had consistently denied any intent to evade taxes; that, far from showing good faith, they had attempted to deceive the revenue agents during the investigation; and that no government official had represented to appellants that their alleged disclosure would result in immunity from criminal prosecution.

In seeking to sustain the action of the district court in denying defendants' motion to suppress certain evidence, the government in its brief relies upon the reasons given by the district court, and adds that, "although the taxpayer who made a voluntary disclosure was not entitled to immunity from prosecution, an entirely different question would, of course, arise if the disclosure was made fully and fairly and in reliance on the policy, and if the action of the investigating agents gave the taxpayer good reason to believe that the Treasury would not recommend prosecution." The government contends that "that question has been determined adversely to appellants by the trial court's findings of fact, amply supported by the evidence summarized above, to the effect that the testimony at the suppression hearing indicated an entire absence of good faith on the part of appellants and no misleading actions or improper inducement on the part of the Government representatives."

It is obvious that both the district court and government counsel concede the existence of the Treasury Department's voluntary disclosure policy, and that the policy itself had valid legal standing. The differences of opinion here pertain to the application of the policy to this case.

(a) The evidence shows that defendants did disclose unreported taxable income. Their admission that they had omitted from Shotwell's return, over-the-ceiling receipts for candy sold, revealed income which should have been considered in fixing its tax, according to the Treasury Department's ruling that illegal payments for goods purchased were not deductible for tax purposes.

(b) While they coupled a disclosure of unreported income with a *legal* suggestion that that income was not taxable because it was offset by disbursements substantially equivalent thereto for over-the-ceiling purchases of raw material, contrary to the then legal contentions of the Treasury Department, they did disclose the *facts*. The voluntary disclosure policy referred to the disclosure of facts, and not to the disclosure of the legal contentions of a taxpayer's lawyer. Actually the legal contention made by the defendants at that time was not fantastic or unreasonable. This is established by the department's later reversal of its stand on such offsetting illegal disbursements, and its adoption of the same view that defendants suggested as to the law.[7] Therefore defendants' contention did not cast any doubt upon their good faith in making their disclosure of facts.

Nor was bad faith on their part evidenced by their conduct after making their offer of disclosure. They cooperated to the extent that they were able, and in complete compliance with the policy of the department. The insistence of the revenue agents that defendants go beyond their duty of disclosing facts material to the determination of their unreported tax liability, by informing the government of the names of the persons to whom they paid over-the-ceiling prices for raw materials, was met with a refusal by defendants. This refusal was not inconsistent with

7. The Commissioner later acquiesced in court decisions which held such deductions allowable.

a full disclosure of relevant facts on their tax liability. First, in the various statements of the voluntary disclosure policy, there is no suggestion or requirement that a taxpayer must furnish information for the prosecution of others, except insofar as that information may be incidental to a determination of his own tax liability, and, secondly, in view of the government's position that payments by defendants of over-the-ceiling prices were not germane to the computation of defendants' tax liability, the identification of the persons receiving those payments was irrelevant. It can hardly be contended that a taxpayer, who comes in and admits that he incorrectly reported his income for tax purposes, can be required to become an informer against persons who may be criminally liable in transactions which are not pertinent to his tax liability.

We therefore hold that defendants' inability or refusal to name the recipients of Shotwell's illegal disbursements, did not show that their offer of disclosure was in bad faith.

(c) When confronted with defendants' admission that Shotwell had intentionally omitted taxable income from its 1945 and 1946 income tax returns, and an expressed willingness to pay what was due, and to cooperate with the Bureau of Internal Revenue in taking whatever steps were necessary to establish the amount thereof, the responsible heads of the Bureau in Chicago not only said nothing to indicate that the offer was rejected, but, in complete harmony with the policy of the Treasury Department in regard to voluntary disclosures, accepted the cooperation of the defendants and thereby obtained access to Shotwell's books and records, and conducted investigations which continued until an indictment was filed in the district court.

From March, 1948, when defendants made their disclosure to Chief Deputy Collector Sauber, until March 14, 1952, when the indictment was filed, defendants were led to believe by the government representatives that the course

which they were pursuing would avert their criminal prosecution. At the March 15, 1948, conference between Busby and Sauber, when the nature of the income omissions was frankly outlined by Busby, Sauber said that, if the disclosure was timely and the related facts were correct, he saw no reason why the immunity from criminal prosecution policy of the Bureau should not be applied. Later Sauber told Cain, who was worried about publicity, that there would be no publicity in this case, that the only time an income tax case received publicity was when there was an indictment. He expressed the opinion that this was strictly a civil case, and not a criminal case, and that Cain had nothing to worry about so far as publicity was concerned. This statement is corroborative of defendants' contention that immunity from such prosecution had been offered in return for a voluntary disclosure under the department policy.

Early in 1951, Agent in Charge Wright told the defendants, who repeated prior requests that they be given a bill for their taxes, so they could pay it, that he would check into the matter and see if a bill could be brought forth. As late as October, 1951, Wright's assistant, Oscar Olson, told Cain that he had nothing to worry about at all.

These expressions from the representatives of the government, paralleling the Treasury Department's policy not to "recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return," conclusively show that responsible government officials, from cabinet level to local level, had represented to defendants that their disclosure would result in immunity from criminal prosecution.

The government does not effectively support its contentions when it says that "As early as February, 1949, Cain was told by the examining agents that prosecution was possible." This is because first, Mammel, who is the agent

who made such a statement, had no authority to decide who should be prosecuted and, secondly, if this were to be an announcement of intention by the government to prosecute the defendants, it came almost a year after the disclosure had been made by the defendants and accepted by the revenue officials, and long after the government, by means of the disclosure, had obtained information and records which it used in the prosecution of this case.

(d) The government seems to contend in this court that when the defendants made their disclosure they should have used words indicating that they had perpetrated a fraud upon the government or, as otherwise expressed, that they had wilful intent to evade taxes. Their disclosure showed that they knew that they had over-ceiling income, and that they had intentionally not reported it. That was all that was necessary. Nothing in the pronouncement of the policy required them, in making a disclosure, to use the language of a lawyer in characterizing their failure to report taxable income.

The application of the disclosure policy is not conditioned upon the officers of the corporate taxpayer exhibiting to the representatives of the Commissioner of Internal Revenue a contrite spirit. It is not required by the policy that they appear in sackcloth and ashes and seek absolution from the internal revenue agent, or that he occupy the office of father confessor. When the taxpayer's representatives avail themselves of this policy they are not seeking moral forgiveness. The transaction is entirely amoral, one side seeking to avoid the criminal penalties which they have risked by their incomplete or erroneous return of income, and the government agents being engaged in the mundane purpose of collecting federal taxes.

We hold that as against this attack of the government, the disclosure by defendants was not defective.

(e) In a footnote in its brief in this court the government makes an oblique attack upon the timeliness of defendants' disclosure. We think the facts in evidence show that when the disclosure was made, no investigation involving the over-ceiling income of Shotwell during the taxable years had been started or even suggested or contemplated by the government. The disclosure was timely.

When the revenue agents get the scent and are in pursuit of the miscreant, it is too late for him to seek the protection of the Treasury Department's voluntary disclosure policy. Until then its door is open and the welcome mat is out.

(f) There is no inconsistency between the voluntary disclosure and the statement by Cain that the defendants would contest an assessment when made. That is the right of any taxpayer who would question the method of determining his tax assessment. By making a disclosure of facts upon which an assessment can be made, a taxpayer is not deprived of his right to be heard on the method used in making the assessment.

We hold that defendants made a valid voluntary disclosure in reliance upon promises of immunity. The evidence thereby obtained by the government stands on the same footing as an oral or a written confession induced by such a promise. The use of such evidence at the trial was a violation of each defendant's privilege against being compelled in any criminal case to be a witness against himself, as guaranteed by the fifth amendment to the constitution of the United States.

It therefore follows that the court erred in denying the motion, as amended, to suppress such evidence. The use of that evidence at the trial makes it necessary to reverse the conviction of the defendants.

In view of the fact that a retrial will be required in

this case, we find it unnecessary to rule on defendant Sullivan's contention that the district court erred in overruling his motion for a separate trial made at the close of the government's case-in-chief. Upon his retrial he is free to make a timely motion for severance. We express no opinion as to what the ruling thereon should be.

Inasmuch as important and substantial evidence should have been suppressed, the case must be retried. It is unnecessary to express an opinion as to whether the remaining evidence upon the trial below did or did not establish defendants' guilt, or to pass upon the other errors relied upon.

For the reasons hereinbefore set forth, the judgments of the district court are reversed, with instructions to sustain defendants' motion as amended to suppress evidence, and to retry the case.

REVERSED AND REMANDED WITH INSTRUCTIONS.

LINDLEY, *Circuit Judge*, Dissenting.

I regret that I cannot agree with the result reached in the majority opinion.

Disregarding the merits of the suppression question for the moment, it seems to me the majority fails to define clearly its interpretation of the Bureau's voluntary disclosure policy. The legal issue involved on this phase of the case seems to me to require an explicit determination of just what that policy is, whereas the language of the majority, I think, leaves the resolution of that question in doubt.

As to the merits of the order denying suppression, in the first place, I believe that the majority has overlooked the nature of the issues raised by the motion to suppress. These include the legal question of interpretation of the Government's voluntary disclosure pronouncements and, in addi-

tion, the question of fact as to whether defendants made a voluntary disclosure within the purview of the announced policy. And if these two issues should be resolved in defendants' favor, a further question then arises, in the light of the reported cases, of whether evidence given to the Treasury officials in reliance on the disclosure policy will be suppressed. That question is by no means settled. Compare *Centracchio* v. *Garrity*, 198 F. 2d 382, 388, cert. denied 344 U. S. 866 (CA-1), with *In re Liebster*, 91 F. Supp. 814.

Reverting to the legal question of interpretation of the policy statements, it seems to me the majority opinion turns on an assumption that any action by a taxpayer which advises a Treasury official that a tax return previously filed by him is incorrect or incomplete is a sufficient disclosure. Paraphrasing the language in part, the majority opinion seems to hold that any word which is sufficient to put the Treasury bloodhounds on the scent of a fraudulent return is a sufficient disclosure, irrespective of what facts are revealed to or concealed thereby from the government and irrespective of what roadblocks the taxpayer may thereafter erect in the way of a determination of the true facts surrounding the fraudulent return. Then, as I construe the majority's expressions, any evidence that the taxpayer may thereafter surrender to treasury agents must be suppressed, if criminal prosecution is recommended when the fraudulent omission is discovered.

Such a broad statement of the doctrine, I think, is an unwarranted interpretation of the Treasury policy. The Wenchel statement, upon which defendants place principal reliance, when considered in its entirety, carries with it the clear implication that the disclosure contemplated must be a full disclosure of all facts bearing on the false return. Secretary Snyder's statement, issued about 10 days after the Wenchel statement, after referring to the long existent

policy, concluded that the application of the policy to a particular taxpayer "presumes, of course, that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability."

Furthermore, I think the broad interpretation on which the majority opinion rests ignores persuasive judicial pronouncements bearing on this question. The Court of Appeals for the First Circuit in the *Contracchio* case, *supra*, said at 198 F. 2d at page 389: "If it be assumed * * * that evidence disclosed to the Treasury officials on the faith of the announced voluntary disclosure policy, and in compliance with its conditions, should be excluded from evidence in a subsequent criminal trial, it would seem that the taxpayer would have to satisfy the court that he made a voluntary, good faith disclosure of all data necessary to a correct computation of his income tax deficiencies, and that he made such disclosures before an investigation was under way." And in *In re Monroe*, 140 F. Supp. 507, aff'd 215 F. 2d 81, cert. denied 348 U. S. 914 (CA-5), the court defined the disclosure policy as containing the specification that the disclosure must be "a complete, fair and honest disclosure, and not a portion." While these authorities are not binding on us, the reasonable interpretation adopted by the jurists who penned those opinions is entitled to our respect and deserving of our serious consideration. See also *Chieftain Pontiac Corp.* v. *Julian*, 209 F. 2d 657 (CA-1).

The question, basically, is what would the average taxpayer understand, after reading the Treasury statements, as to what would constitute a sufficient disclosure thereunder. The trial court, consistently with the pronouncements made in *Contracchio* and *Monroe*, applied the rule of reason that a "disclosure" requires a good faith disclosure of all facts pertinent to the fraudulent return. This, I believe, is a correct analysis of the policy as announced and

insofar as the majority opinion is based on a less restrictive rule, I respectfully dissent.

The second point on which I believe the majority falls into error is in its treatment of the suppression question as one wholly of law. It seems to me that the majority attempts to try the factual issues *de novo* and fails to give the requisite weight to the trial court's findings of fact which are essential elements of the question under review.

The weight to be accorded by a court of appeals to such findings has been variously defined. In *Robertson* v. *United States*, 165 F. 2d 752, at 754 (CA-6), the court pointed out that "the finding of the trial court on a preliminary question of fact should not be reversed on appeal if it be fairly supported by the evidence." In *Nichols* v. *United States*, 176 F. 2d 431 (CA-8), the court said at page 432: "The facts as determined by the trial court are supported by evidence, * * * and are binding on this Court." And in *Cannon* v. *United States*, 166 F. 2d 85 (CA-5), the court's language was, at pages 86-87: "It cannot be said that the judge's findings on this question were without substantial support. Therefore we will not disturb those findings."

In each of these cases, the findings to which reference was had were made by the trial court in ruling on a motion to suppress evidence allegedly obtained by an illegal search and seizure. While these decisions, as well as the subsequently adopted rule which embodies the then existing case-law,[1] pertain only to the classic search and seizure question rather than to the Treasury's voluntary disclosure doctrine, the proceeding to suppress the evidence is the same and the same procedural rules should be applied. If adequate evidence supports the findings upon which the trial court's ruling is based, we cannot disturb those findings.

1. Federal Rules of Criminal Procedure 41 (e), effective October 20, 1949, 18 U. S. C. A. See note to subdivision (e), Notes of Advisory Committee on Rules, 18 U. S. C. A. p. 463.

See *White v. United States*, 194 F. 2d 215, 217, cert. denied 343 U. S. 930.

In its memorandum decision denying defendants' motion, the district court found that defendants had not sustained the burden of proving that a sufficient voluntary disclosure within the purview of the announced policy had been made by them. It found that there had been "no disclosure of an intentional violation or * * * of an intent to defraud the Government" in view of defendants' position, which they maintained at all times, that no tax liability could arise from Shotwell's failure to report black-market receipts, since such receipts and corresponding black-market disbursements by the company "washed-out" each other, and that the disclosure to Sauber was merely an admission of omissions in Shotwell's 1945 and 1946 returns which were based on defendants' alleged good-faith belief that no added tax liability arose from the company's black-market operations.

As bearing on defendants' proof as to their good faith in the so-called disclosure, the court found that such records of the cash transactions in the black-market operations as the corporation had, had been destroyed on instructions of Cain prior to the initial conferences between Shotwell's agents and Sauber; that no bona fide efforts were made by defendants to reconstruct such destroyed records so as to enable the government to determine the amount of tax due, and that figures contained in work sheets turned over to Treasury agents as a part of the alleged disclosure were admittedly fictitious. The court found further that no promise of immunity had been held out to defendants by any representative of the government at any time, and that nothing was done by any agent of the Bureau to lead defendants to believe that the alleged disclosure was accepted as adequate or that there would be no criminal prosecution on account thereof.

Unless we can say that these findings are so lacking in evidentiary support as to require that they be set aside, we have no choice but to affirm the order denying the motion to suppress evidence. A brief recital of the facts underlying this litigation and a brief summary of the evidence before the court at the proceeding on the suppression motion sufficiently demonstrate, in my opinion, that the findings of the court, were amply supported.

When Busby, and later Cain, first approached Sauber, each reported that, during the taxable years 1945 and 1946, Shotwell had sold large quantities of candy to Lubben, or to Lubben's companies, at a premium price above the established OPA ceiling for the commodity. These shipments were invoiced to the buyer at the established ceiling price, and payments therefor at those prices were recorded on Shotwell's books and duly reported on its tax returns. The buyer was billed separately for the above-ceiling portions of the purchase prices. These payments were received by defendants in cash and were neither recorded on the company's books nor reported for income tax purposes. At the same time, it was reported that the cash thus received was paid out by Shotwell as above-ceiling premium prices for the raw materials which it needed, such as corn syrup and chocolate. On the basis of the representations thus made, Sauber, at that time, expressed his opinion that the facts disclosed strictly a civil matter. The indictments were returned after several years of investigation, during which time Shotwell employed Busby, an accountant, to work with the federal agents.

But the above facts tell only a part of the story on which the trial court's findings are based. The evidence adduced at the suppression hearing indicates that Shotwell's black market operations were more extensive than those first disclosed to Sauber. For example, Sauber was not advised that Shotwell, during the taxable period, made other black

market sales of goods on which no part of the transaction was reflected on the company's books. Allusion has previously been made to other evidentiary facts bearing on the sufficiency of the alleged disclosure, namely, the fact that all records which reflected black-market operations were destroyed by defendants before they approached the Treasury officials and the fact that work papers and supposed summaries of the unreported income turned over to the agents were admittedly fictitious. Furthermore, defendants have maintained at all times that alleged black-market disbursements totalling hundreds of thousands of dollars were paid out by them without the benefit of any receipts, to faceless men who were unknown to defendants. At all times during the investigation they refused to advise Treasury agents as to who had received these disbursements. They took the position that to whom such payments were made was none of the Bureau's business, while at the same time fictitious figures were inserted in accounting data given to the agents which purportedly reconstructed the financial history of Shotwell's black-market dealings.

The point to be stressed is that on the record before us we cannot say that the evidence does not support the finding of the trial court that no sufficient disclosure was made. We cannot say that the court's conclusion that "False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine" is an erroneous legal statement or that the hypothecated facts included in this statement are not descriptive of the proofs made in this case. Two factual questions were presented to the court below, namely, what was disclosed, and, was the disclosure prompted by the taxpayer's reliance on the an-

nounced policy or by some other motive best known to him? The trial tribunal has found that, at most, only a partial disclosure was made; that good-faith cooperation with Treasury agents was lacking, and that such lack of good faith disclosed a purpose to mislead the agents. These findings are adequately supported by the evidence. It is not within our province to second-guess the trial court on factual questions.

In my opinion we cannot overturn the court's further finding that no promise of immunity was held out to defendants, or that no other representations were made, which reasonably led them to believe that no criminal prosecution was contemplated. Sauber's opinion, which he expressed during his initial meeting with Cain, that this was strictly a civil matter, was based on the latter's original statement that black-market income not reported for the taxable years was "washed-out" by black-market expenditures which was, as the court below found, a partial disclosure only of the true facts of the case. The oral testimony as to statements made at various times by Treasury agents that no prosecution was intended,—that defendants had nothing to worry about,—are disputed by the agents' testimony. Thus this finding is based, in large measure, on the trial court's ruling on the credibility of witnesses.

On the record as a whole, I cannot escape the conviction that the court's interpretation of the voluntary disclosure statements as requiring such a complete disclosure and good-faith effort as to enable the internal revenue agents to assess the additional tax due is a correct interpretation of the offer held out to taxpayers in the Treasury policy statements. Believing that the court's findings of fact are unassailable, I would affirm the decision denying defendant's motion to suppress the evidence and proceed to consider the merits of the appeal.

A true Copy.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Nos. 11108-09-10-11.

Thursday, August 18, 1955.

Before:

Hon. Walter C. Lindley, *Circuit Judge*.
Hon. H. Nathan Swaim, *Circuit Judge*.
Hon. Elmer J. Schnackenberg, *Circuit Judge*.

United States of America,
Plaintiff-Appellee,
vs.
The Shotwell Mfg. Co., Byron A. Cain, Frank J. Huebner, Harold E. Sullivan,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that a Petition for Rehearing of these appeals before the Court *en banc*, be, and the same is hereby Denied.

It is further ordered that a Petition for Rehearing of these appeals before the panel which heard the Appeals is hereby Denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Nos. 11108-09-10-11.

Thursday, August 18, 1955.

Before:

Hon. Walter C. Lindley, *Circuit Judge*.
Hon. H. Nathan Swaim, *Circuit Judge*.
Hon. Elmer J. Schnackenberg, *Circuit Judge*.

United States of America, *Plaintiff-Appellee,* *vs.* The Shotwell Mfg. Co., Byron A. Cain, Frank J. Huebner, Harold E. Sullivan, *Defendants-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the Opinion of the Court in the above entitled appeals, filed June 13, 1955, be amended by the deletion of the following sentence appearing on page 11 thereof:

> "In October, 1951, Cain talked to Oscar W. Olson, Mr. Wright's assistant, who told him that he would prefer that he see Mr. Wright, 'but if I were you I'd have no worry about it at all'."

APPENDIX E.

Excerpts from Statements of the Disclosure Policy.

1. "Taxpayers who have failed to declare their full income and pay the tax due 'may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started'." (Statement of Secretary of the Treasury Morgenthau, May 28, 1945, R. 19.)

2. "* * * the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. *And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out'.*" (Secretary of Treasury Vinson, Aug. 21, 1945, R. 19.)

3. "Mr. Nunan again stressed the Bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases." (Press Release of Treasury Department, October 5, 1945, R. 3132.)

4. "And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the Government. * * * *The simple statement that 'I have filed false tax returns and I want to make the Government whole' would constitute a complete disclosure.*" (Italics added.) (Address by J. P. Wenchel, Chief Counsel of the Bureau, publicly released by Treasury, May 14, 1947, R. 3134, 3136.)

5. "One of the important elements in settling cases, with civil penalties and without prosecution, has been the Treasury's policy of not prosecuting persons who make a voluntary disclosure of their fraud before the Treasury begins an investigation of their cases. This means that, in order *to assure himself against criminal prosecution*, a repentant taxpayer must disclose his fraud to an official of the Bureau of Internal Revenue before the case has been assigned for examination and before an investigating officer of the Bureau has requested advice from appropriate officers of the Bureau regarding the case." (Italics added.) (Press Release by Secretary of the Treasury Snyder, May 25, 1947, R. 3140.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[redacted]57

No. [redacted] /

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 470.

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Statutes and Executive Promulgations Involved.

The Government's petition sets forth statutes which are not involved and fails to set forth a statute and Executive promulgations that are involved.

Section 145 (the penalty provision) of the Internal Revenue Code of 1939, quoted in the petition, is not involved because no question as to guilt or innocence was passed on by the Court of Appeals or is now presented. Section 293 (civil fraud penalties), quoted in the petition, has never been involved and was not presented to the Court of Appeals.

Provisions that are involved are:

Section 3761 Internal Revenue Code of 1939:

> "SEC. 3761. COMPROMISES.
>
> (a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.
>
> (b) *Record.*—Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—
>
> (1) The amount of tax assessed,
>
> (2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and
>
> (3) The amount actually paid in accordance with the terms of the compromise."
>
> (26 U. S. C. 1952 ed., Sec. 3761.)

Statements of Disclosure Policy:

The Government's petition fails to set forth any statements of the disclosure policy, and at pages 5 and 6 makes conclusory and inaccurate statements with respect to it. Relevant, accurate excerpts from Statements of the Disclosure Policy are as follows:

> 1. "Taxpayers who have failed to declare their full income and pay the tax due 'may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started.'" (Statement of Secretary of the Treasury Morgenthau, May 28, 1945, R. 19.)

2. "* * * the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out.'" (Secretary of Treasury Vinson, Aug. 21, 1945, R. 19.)

3. "Mr. Nunan again stressed the Bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases." (Press Release of Treasury Department, Oct. 5, 1945, R. 3132.)

4. "And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the Government. * * * The simple statement that 'I have filed false tax returns and I want to make the Government whole' would constitute a complete disclosure. * * * We are not concerned with the motivating force behind an individual's deciding to come in and talk to us about his evasion. If he 'gets religion' before we have done anything he will not be prosecuted. (Address by J. P. Wenchel, Chief Counsel of the Bureau, publicly released by Treasury, May 14, 1947, R. 3134, 3136-7.)

5. "One of the important elements in settling cases, with civil penalties and without prosecution, has been the Treasury's policy of not prosecuting persons who make a voluntary disclosure of their fraud before the Treasury begins an investigation of their cases. This means that, in order to assure himself against criminal prosecution, a repentant taxpayer must disclose his fraud to an official of the Bureau of Internal Revenue before the case has been assigned for examination and before an investigating officer of the Bureau has requested advice from appropriate officers of the Bureau regarding the case. Prior to such action * * * a taxpayer may make a voluntary disclosure and escape

criminal prosecution even though his name may appear in an inactive file of suspects. This presumes, of course, that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability." (Press Release of the Treasury, May 25, 1947, R. 3140.)

Abandonment of Disclosure Policy:

"While it has been the long-established policy of the Treasury Department to refrain from recommending criminal prosecution where taxpayers make voluntary disclosure of intentional tax evasion prior to the initiation of an investigation by the Bureau of Internal Revenue it has been concluded that such policy will no longer be followed. * * * In the administration of the policy it has been difficult and at times impossible to ascertain whether the disclosure was made because the taxpayer realized he was under investigation or whether the disclosure was in fact voluntary and in reliance on the immunity held out by the policy." (Treasury Department Information Service Release of January 10, 1952, R. 3142.)

STATEMENT.

The Court of Appeals held that convictions of respondents in a criminal income tax case must be reversed and the case sent back for a new trial because the District Court erred in denying a pre-trial motion to suppress evidence furnished, or made available, to the Government in reliance upon the immunity promises of the so-called "voluntary disclosure doctrine."

The "Statement" of the Petition obscures the narrow, and largely academic, question on which certiorari is sought, and by commingling asserted evidence on the merits with that bearing on the pre-trial motion to suppress evidence, presents the case in inaccurate focus.

The *facts* as to respondents' voluntary disclosure of tax

irregularities in reliance on the Treasury's promises of immunity to those who did so, are accurately set forth by the Court of Appeals. The petition, despite its claim that *certiorari* should be granted because the Court of Appeals exceeded its powers of factual review, does not quarrel with those undoubted facts but with the conclusion the Court drew from them. In fact by its Petition for Rehearing in the Court of Appeals the Government (with one minor exception which the Court corrected—Pet. p. 73), *accepted the facts as stated by the Court of Appeals.* But the present Petition seeks to find fault with them and to color the case with carefully selected items of evidence bearing on guilt or innocence. A restatement is necessary to place the suppression issue in true perspective:

Shotwell Manufacturing Company was a substantial Chicago candy manufacturer. (It actually paid $827,000 taxes for the years 1945 and 1946.) In 1944 one David Lubben, a New York trader, asked whether he could get its candy to sell if he could produce chocolate (then in short supply), for Shotwell. He was told that he could. Various "trade" or "barter" deals took place in late 1944 and the first half of 1945 in which, in return for making raw materials (principally chocolate) available, Lubben was placed on Shotwell's customer list and sold candy. According to respondents, these transactions were all at ceiling prices; according to Lubben, he paid cash "overages" or "premiums" on the candy he received but did not charge a premium on the material he supplied.

In the spring of 1945 the ceiling price on corn became unbalanced with respect to that on hogs; farmers, finding it more profitable to use their corn for feed, withdrew it from the market. As a consequence corn refiners were unable to supply corn syrup (essential to the manufacture of Shotwell's candies) in normal and required amounts. When

this shortage developed Shotwell cut Lubben, a new customer, off its list and sold him nothing for three months commencing in June 1945. (Def's Exs. 1 and 2, R. 3091 *et seq.*)

Late in September 1945, according to respondents (R. 2546, 2574), Lubben approached Shotwell and offered to pay cash "overages" on candy, which cash would be used to pay over-ceiling premiums on raw corn which would then be made available to refiners at ceiling; the refiners in turn would sell Shotwell a portion of the resulting syrup at ceiling. Whether over-ceiling sales of candy to Lubben began at this time, as respondents contend, or had started earlier as Lubben claimed, was an issue at the trial. But admittedly at this time, and for about 9 months thereafter, over-ceiling sales were made to Lubben (alone of all Shotwell customers), although not admittedly at the *rates* of overage which he claimed.

Although respondents were aware (R. 774) that Shotwell was violating OPA laws by these over-ceiling sales of candy to get cash for over-ceiling premiums on corn,[1] they believed no income tax problem was involved because the receipts and disbursements balanced (except for a small terminal balance which remained when the corn shortage ended and which was reported on the company's books). (R. 205, 1827-8, 2554, 2585.) According to respondents, the transactions ended in the summer of 1946 when the ceiling on corn was removed; notwithstanding this, Lubben claimed that they continued for some five or six additional months.

In early 1948 respondents were advised by their auditor that the Commissioner of Internal Revenue did not concede that over-ceiling expenditures could be deducted from

1. The Government, through the Commodity Credit Corporation, itself bought corn at over-ceiling prices, R. 2420, 2682, 2709, Def. Ex. 89, 90 and rejected Ex. 74.

or balanced against, over-ceiling receipts and that possible criminal penalties might result from Shotwell's failure to report them. (R. 170-2, 1828-31.)

In January or March 1948 (the difference in date is immaterial), respondents, acting in reliance on the Treasury's invitations for voluntary disclosures, voluntarily disclosed these transactions to Assistant Collector Sauber who assured them that no investigation had been commenced (R. 231, 257, Opinion at Pet. p. 46). Sauber, pursuant to Treasury policy that was followed by the Commissioner until long after the indictment of March 14, 1952 herein, advised respondents that the over-ceiling expenditures would not be recognized as a deduction.[2] Cain, Shotwell's president, told Sauber that Shotwell had dealt with shadowy characters and paid them in cash. He said:

> "As to our expenditures I just can't tell you anything. I don't know."

Sauber replied:

> "* * * it wouldn't do any good if you did know because we wouldn't allow them anyway. We absolutely won't allow over-the-ceiling expenditures." (R. 232.)

As the Court of Appeals points out (Pet. pp. 42, 55), Shotwell then offered to pay any additional tax which the Bureau might assess based upon its additional *gross* over-

2. The Treasury's position appears in IT 3724, 1945 Cum. Bul. 57; 1949—1 CB 6. See also cases collected in 2 Prentice Hall 1955 Fed. Tax Service, Par. 11,308. On December 28, 1948, long after the disclosure here, the Tax Court held in *Lela Sullenger*, 11 T.C. 1076, that over-ceiling payments for goods resold, or used in manufacturing, could be considered as part of the cost of goods sold when determining taxable income. However, the Commissioner refused to recognize this case and fought other cases in the courts. Not until September 14, 1952, six months after the instant indictment and two months before the suppression hearing (November 12, 1952), did the Commissioner acquiesce in the *Sullenger* decision and withdraw IT 3724 (1952-2 Cum. Bul. 3, 7), which until that time had been binding on all agents with whom respondents dealt.

ceiling income and asked for a bill, reserving only the right to file claim for refund if it decided to contest the Bureau's position that over-ceiling expenditures were not deductible. Sauber assured them,

> "That is perfectly all right. All we want to do is get the tax. * * * I am a collector and I want to get the tax." (R. 232.)

Sauber suggested that respondents collect what information they could so that they could reconstruct the accounts and that agents would investigate the case. Cain assured him the Shotwell staff would do this and would ascribe to all of the Lubben transactions the highest amount of "overage" that Lubben might claim. (R. 232.) Promptly elaborate "recapitulations" were prepared which disclosed every sale Shotwell ever made to Lubben.[3] (Def's Ex. 1, R. 3091 *et seq.* Shotwell spent $20,000 doing this and furnishing clerical help to the Treasury to assist it in its investigation R. 200.) These "recaps" carried the "overages" in accordance with what were then understood to be Lubben's figures rather than the lesser amounts respondents claimed were correct.[4] This history is incorrectly compressed in the

3. The statement in Judge Lindley's dissent that "Sauber was not advised that Shotwell made other black market sales of goods on which no part of the transaction was reflected on the company's books" is correct only in an extremely literal sense and is grossly incorrect in its overall implication. When respondents *orally* disclosed to *Sauber personally* they did not purport to be giving a detailed accounting. However, the compilations they promptly prepared at his direction listed every transaction that subsequently was called into question.

4. These recapitulations were one of the items respondents subsequently sought to suppress. They were not suppressed, and were received in evidence as admissions of actual fact that Shotwell had received the amounts there shown despite the fact that the Government's own, and completely uncontradicted, evidence was that they were not represented to be true as to the amount of overages shown. They were based on applying to Shotwell's entire list of shipments (including "trade" or "barter" deals) the highest rate of overage which Lubben was understood "orally" to claim or as he was believed to show on his purported "records" which were never admitted to be true. (R. 2816, 2838, 2841.)

Petition (p. 6) to the misleading statement that in the summer of 1948 respondents "submitted schedules purporting to show that the corporation had received approximately $380,000." At no time did respondents "show" that Shotwell received any such amount. They "showed" the dates and invoice amounts of all transactions with Lubben and what the overages would be *if* all of Lubben's claims, as then understood, were given credence, *i. e.*, "The whole crux of the computation is based upon what Lubben claimed." (R. 2841.)

These compilations were turned over to the investigating agents when they commenced their investigation. (R. 188-195, 319.) Indicative that everyone then believed that a good disclosure had been made is the fact that when one of the compilations was redrafted for greater clarity, the totals shown on the redrafted document, also turned over to, and accepted by the agents, bore the identifying or connecting notation, "*Used in disclosure recap*". (R. 3097-8-9, 3101.)

As the investigation proceeded some of the agents asked for names of the recipients of Shotwell's over-ceiling expenditures. It is uncontradicted that Cain was given the impression that these names were not needed to assess Shotwell's supposed tax but might furnish leads to possible tax violators. And in 1951 Sauber prepared a memorandum in which he reported on 1949 conversations that the case would not be closed until the Shotwell employees

> "* * * cooperated with their Government and disclosed the names of the individuals to whom these over-the-ceiling payments were made." (R. 3156. See also R. 241, 259, 273-4, 276, 290.)

The foregoing statement, which consciously or uncon-

sciously concedes that the money in fact was paid out,[5] *is the only reason ever given by the Treasury for not honoring the disclosure.* Although the Petition now speaks (p. 19) of respondents' "claim of deductible expenditures" and asserts a necessity of verifying such a claim to determine whether to impose a civil fraud penalty, *there is not a scintilla of evidence of the presentation of such a claim by respondents, or the assertion of such a position by the Government, at any time material to the disclosure.*[6] On

5. On the trial every witness, Government or defense, having any knowledge of the facts testified that whatever "overage" cash Shotwell received (except the small terminal balance) was paid out for corn. (R. 775, 782, 1732-4, 1736, 1737, 1740, 1742, 1748, 1783-5, 1790, 2010, 2012, 2462, 2467, 2547-8, 2577, 2581-2.)

6. The present assertion that the agents needed a full explanation of Shotwell's black market expenditures in order to assess a civil fraud penalty is indeed a cynical one *in view of the fact that on September 15, 1955 the agents actually did assess such penalties.* The Treasury's action presumably was unknown to, and unapproved by the authors of the petition for *certiorari.* In any event it leaves them in the difficult position of having assured the Court on October 17, 1955 that something could not occur which in fact had occurred September 15, 1955.

The specious idea that the agents needed a full explanation of Shotwell's black market expenditures in order to determine whether to assess a civil fraud penalty, even though Shotwell was not presenting a claim for deductions because of them, is a lawyer's erroneous afterthought that first saw the light of day during oral argument in the Court of Appeals.

So far as civil fraud penalties are concerned, it has been clear from the beginning that the Commissioner, rightly or wrongly, would have assessed such a penalty on the theory that the initial return had not included all gross income even though respondents had presented engraved receipts for over-ceiling payments in a sum equal to the unreported over-ceiling receipts. See, for example, *Colonial Rubber Co.*, 10 TCM 434; *Benjamin Weisman*, 10 TCM 409, aff'd., 197 F. 2d 221 (1st Cir.); *William A. Prater*, 12 TCM 872; *Marsha Silk Mills, Inc.*, 13 TCM 585; *David J. Pleason*, 22 TC 361; *Harris v. United States*, 125 F. Supp. 175 (M.D. Ga.); *John W. Harrison*, 11 TCM 1000. But certainly unless and until Shotwell presented, by way of an amended return or a claim for refund, a claim for deductions, the agents were under no duty or necessity of investigating. That respondents' failure to identify the recipients did not present the slightest barrier to the Treasury's ability to make a 50% fraud assessment is demonstrated by the fact that it did precisely that on September 15, 1955.

the contrary, respondents not only did *not* file such a claim, but they, and all agents concerned, understood that Shotwell was going to pay a tax on the gross amount of the over-ceiling receipts as the agents determined them to be. It was precisely because they had been informed by their own auditor (and subsequently by every agent of the Bureau) that no such deduction was permissible, that respondents had been impelled to make the disclosure.

But by the time of trial (September 1953) the law, if not clearly established at the time of the suppression hearing (November 1952), had become clear that over-ceiling expenditures for raw materials could be claimed as a deduction. (See Note 1, *ante*.) *The difference between the law that respondents were faced with at the time of disclosure, when black market expenditures were of no help to them and immaterial to an assessment of Shotwell's tax, and the law at time of trial, is one which the Petition obscures and which the District Court did not grasp.*

Respondents, at trial, were able to, and did, assert a defense that no additional net income resulted from the Lubben transactions. They proved expenditures necessarily in an amount of about $160,000, which expenditures the Government finally admitted in the Court of Appeals (Petition for Rehearing, p. 11). This sum was as great as that which any Government witness (except Lubben), claimed Lubben had paid (R. 2835, 1747, 782).

The Petition, seeking to create the impression that respondents did not reveal the full extent of their dealings with Lubben, asserts (p. 11) that respondents' disclosure summary, "revealed the receipt of approximately $380,000 in cash overages from Lubben for 1944, 1945 and 1946," whereas the Government adduced evidence on the trial tending to prove receipt of approximately $450,000 in 1945 and 1946 (Pet., p. 14). If it were conceded (which

it is not), that the Government made the latter proof, the undisputed facts as to the disclosure summary are:

1. Every sale or shipment to Lubben was revealed.

2. The amount of "overages" applied to these shipments in respondents' calculations was never represented to be an admission of cash actually received but to be a computation of what Lubben claimed. (See footnote 3, *ante*.)

3. On this basis the initial summary G. Ex. 5 (R. 3090) showed a gross computation of $415,074.14 for 1945 and 1946 ($213,415.70 plus $201,658.44). Respondents asserted that even if such *rates* be assumed, Lubben did not make payment on certain shipments and suggested a deduction of $48,614.70 on that account.[7] Moreover, respondents did not compute or list overages on unbilled shipments which overages Lubben tacked on the amount of about $35,000 at the trial. These explanations, actually contained, although not quickly observable by a court, in the computations, explain the alleged disparity between the initial computation of Lubben's claims at $380,000 and his subsequent testimony of $450,000. In any event, *all* of the transactions, and both versions of them, were revealed and the agents were invited to determine the amount of overages on the version they might choose to accept.

4. The Petition asserts that Cain presented "meaningless plug figures" to show offsetting black market expenditures. As the Court of Appeals finds, black market expenditures were immaterial to an assessment of Shotwell's tax under the rules the Treasury was insisting on. So far as Shotwell's tax was concerned it made no difference to the Treasury in 1948 whether whatever Shotwell received remained in its till or was expended on the black market because the black market expenditures would not be recognized regardless of to whom paid and regardless of how well documented. Having been willing to concede that gross income be computed in accordance with Lubben's

7. See entry "Less items uncollected due to financial difficulties," G. Ex. 5, R. 3090.

claims rather than the true facts, respondents obviously could not present a true account of how money that Shotwell did not actually receive was spent. Cain said "It isn't going to make any difference anyway, [*i.e.*, the disbursements were not going to be allowed], so let's work the thing backwards." [merely present balancing figures] (R. 258).

5. The jury's verdict did not mean that it found there was an understatement of gross income in the amount of $450,000 or $380,000 or $100,000—all it had to conclude was that there was "substantial" unreported income

ARGUMENT.

The Petition should be denied because it presents no legal question of sufficient importance to warrant granting the writ:

It concedes that where there was compliance with the Treasury's former "voluntary disclosure policy", that the discloser at least is entitled to suppression of evidence obtained through the disclosure (Pet., p. 17). What might have been a major legal question calling for this Court's decision, *i. e.*, does suppression result from compliance, is conceded.

The only question then remaining is whether the particular and undisputed facts of this case[8] show compliance and whether that fact pattern is a common one, likely to be repeated in remaining cases involving the disclosure doctrine, so that re-examination of it and exercise of this Court's supervisory authority is warranted. Plainly, the Petition does not meet the test of this question.

The most it is able to say (p. 20) is that the Solicitor General has been "informed" by someone in the Internal Revenue Service that there are "between 60 and 70 pending cases in which the question of a voluntary disclosure made under the former policy either has been, or may be, raised." A healthy caveat may be raised to such elusive "information"; a caveat that applies both to the number of the asserted cases and to the nature of the asserted potential questions.

8. Observe that the Court of Appeals based its decision on "only those facts shown by the Government's evidence wherever there was a conflict" (Pet., p. 42) and that the Petition, despite its strident but unspecific and undocumented claims of "conflicting evidence," does not contest the accuracy of this statement in the opinion.

To say that "a" question of some sort as to voluntary disclosure "may be" raised, is not to say that the narrow question presented by these facts has been, or will be, raised elsewhere and therefore should be decided by this Court. Up to this time the facts here presented are unique. If there was another comparable case pending elsewhere the Petition would not have failed to refer to it. It is apparent therefore, that if *certiorari* were to be granted, this Court's ultimate decision would establish no general rule of law.

I.

The Court of Appeals Did Not Hold That a "Partial" Disclosure Was Sufficient and Its Decision Is Not in Conflict With Any Other.

The first reason asserted for granting the writ is that it is "uncertain" whether the majority opinion means that a partial disclosure is sufficient to bring a taxpayer within the terms of the policy; that "*if*" it does so hold it is contrary to other cases (Pet. p. 20).

The answer is that the majority does not hold a "partial" disclosure is sufficient. On the contrary, its explicit predicate—the test against which it applied the undisputed facts—was that there must be a full disclosure of facts relevant to the tax liability. So far as it lays down a rule of law for the future, it is that there must be a full disclosure. This is demonstrated by the following language from the Court's opinion appearing on page 54 of the petition (emphasis ours):

> "The insistence of the revenue agents that defendants go beyond their *duty of disclosing facts material to the determination of their unreported tax liability*, by informing the Government of the names of the persons to whom they paid over-the-ceiling prices for raw ma-

terials, was met with a refusal by defendants. This refusal *was not inconsistent with a full disclosure of relevant facts on their tax liability.*"

The Court of Appeals simply held that the matters as to which the District Court felt there was bad faith were all irrelevant to a determination of Shotwell's tax.

There is no difference between the substantive test enunciated here and expressed (to the extent it is expressed) in *Centracchio* v. *Garrity*, 198 F. 2d 382, 389 (C. A. 1st), certiorari denied, 344 U. S. 866; *Bateman* v. *United States*, 212 F. 2d 61, 65-66 (C. A. 9th); *Monroe* v. *United States*, 215 F. 2d 81, 84 (C. A. 5th), certiorari denied, 348 U. S. 914; or *Application of Henry Lustig Co.*, 67 F. Supp. 306, 310 (S. D. N. Y.) affirmed, 163 F. 2d 85 (C. A. 2d), certiorari denied, 332 U. S. 775, referred to in the Petition.

Any notion that certiorari should be granted because the instant decision can be construed to authorize "partial" disclosures is wholly untenable.

II.

The Court of Appeals Did Not Substitute Its "Findings of Fact" for Those of the District Court.

The second reason asserted for granting the writ is wholly a procedural one that does not concern the merits of the suppression question—it is that the Court of Appeals improperly exercised its appellate function by "substituting its findings of fact for those of the District Court."

The theme reiterated throughout the petition is that Judge Nordbye found the disclosure was lacking in good faith, and that the Court of Appeals entrenched upon his fact-finding province by overturning this so-called "finding of fact." To build its argument, the petition wrenches

this asserted "fact-finding" out of context and erroneously asserts that (a) it turned upon the resolution of conflicting testimony (p. 21) and (b) it related to facts affecting Shotwell's tax liability (p. 22). The introductory paragraph to the Petition's statement of the Question Presented is erroneously cast to create the impression that the alleged "fact-finding" related to material facts as to "their unpaid taxes", whereas, as we shall show, all of Judge Nordbye's findings of fact, his conclusion of "lack of good faith," and his strong language *were directed solely to facts bearing on the possible tax liability of Shotwell's recipients, and not to Shotwell's tax liability.*

The Court of Appeals overturned none of Judge Nordbye's findings of fact, but held that since Shotwell had fully disclosed the facts relevant to its own tax liability, a finding of lack of good faith could not be predicated on immaterial matters. The difference between Judge Nordbye and the Court of Appeals is not over facts but over law. This is conclusively established by the following passage from the opinion of the Court of Appeals:

> "We therefore hold that defendants' inability or refusal to name the recipients of Shotwell's illegal disbursements, did not show that their offer of disclosure was in bad faith." (Pet. p. 53.)

In that passage the Court of Appeals is accepting Judge Nordbye's factual determinations but differing with him as to the law.

The invalidity of present contention of the Petition is exposed by the fact that although the Department of Justice filed a vigorous petition for rehearing in the Court of Appeals, requesting *en banc* reconsideration, this contention was not raised. If the Court of Appeals had so far departed from the proper course of review as the present Petition asserts, we may be sure that the Department, as

it would have been duty bound to, would have called it to that Court's attention—and probably quite pointedly. But in its petition for rehearing the Department proceeded upon the correct premise that what the Court of Appeals had done was to announce its view of what legal conclusions flowed from the material and substantially uncontradicted facts.

In the Court of Appeals the Government did not challenge the facts as recited by that court with but one exception. In the single minor, undeterminative instance in which the Court of Appeals had inadvertently relied on contradicted evidence and perhaps obliquely overturned a credibility determination by Judge Nordbye (with respect to a conversation by Olson), the petition for rehearing pointed it out and the Court of Appeals promptly corrected its opinion (Pet. p. 73). This record scarcely permits the Department now to assail the Court of Appeals for having made "an extraordinary departure from the accepted and usual course of judicial proceedings."

This failure to raise the point below is even more significant when it is realized that the dissent in the Court of Appeals was in part on the theory that sufficient weight had not been given to the trial court's findings of fact. The Department did not endeavor to support that theory in its petition for rehearing below, and although it now advances the *theory* here, it does not support Judge Lindley's reasoning but goes at the matter by quite another, and just as erroneous a route.

The dissent had said there were "two factual questions" presented below, namely, what was disclosed and was the disclosure made in reliance on the policy (Pet. p. 67). The error in this was that while those questions called for factual determinations there was no substantial conflict in the evidence:

It was clear that respondents had disclosed fully as to the receipt of income; that, whether unable or disinclined, they had not fully reported on the expenditures they were told were immaterial to the tax liability. It was equally clear they disclosed in reliance on the immunity promise of the disclosure policy, and that as a matter of law their motives in so relying were immaterial. No conflicts, no credibility determinations were involved. Faced with the fact that Judge Lindley's reasons could not be supported, the present Petition, in part by distorting the record, advances new ones. These shifts and changes would not be resorted to if there was substance to the claim that the Court of Appeals made new fact findings.

The basic answer is that the Court of Appeals held merely that a conclusion of lack of good faith in the disclosure could not be predicated on findings of fact related solely to matters that were immaterial to an assessment of Shotwell's tax at the time the disclosure was made, viz., Shotwell's black market expenditures.

Judge Nordbye made no finding that respondents failed to disclose their transactions with Lubben on which they were told the tax would be assessed without regard to expenditures.

Judge Nordbye predicated his holding of lack of good faith and his harsh language exclusively on facts relating to Shotwell's expenditures. He found (a) that an informal record which might have identified some recipients of Shotwell's expenditures was destroyed,[9] and (b) that the list

9. This so-called record was a handwritten memorandum kept by Mrs. Morrill one of the Shotwell employees who for a time had charge of the box in which cash received from Lubben was placed awaiting expenditure for corn premiums. She had not been told to keep the memo; had never shown it to Cain; upon asking him whether it was of any value and should be saved she was told it was of no value and could be destroyed (R. 408-9, 785). Because of the agents' advice to Cain that black market expenses would not be recognized his view that the memo was of no value is easily understandable.

of expenditures on the Busby compilations was fictitious. From these factual findings he held that a lack of good faith could be inferred. None of the disclosure pronouncements, however construed, ever said more than that the taxpayer must cooperate in supplying data relevant to *his* tax. None said he must go beyond that point and turn informer on other possible violators. But Judge Nordbye held that "good faith" so required.

The Court of Appeals, changing none of the facts, held to to the contrary. That was a decision of law rather than fact. And right or wrong (we submit it is obviously right), it presents no departure from the proper function of an appellate court and no reason for granting certiorari.

In laying foundations for its present contention, the Petition confuses the issue by first departing from the suppression issue to deprecate the defense on the merits. Then (p. 22), it makes the wholly inaccurate assertion that the jury's verdict on the merits "necessarily indicated that it had reached the same conclusion [as to validity of the disclosure] as had Judge Nordbye," in the face of the fact that Judge Nordbye, by his instructions, had expressly forbidden the jury from passing on the disclosure question, had turned it into an argument for conviction (R. 2970) and had permitted many of the disclosure documents to go to the jury as evidence of guilt on the merits!

At page 19 the Petition asserts that it became "necessary that *the claim of deductible expenditures* be thoroughly investigated". This is pure invention. No "claim", in any legal sense, of "deductible expenditures" was advanced by respondents during the disclosure. The compilations made in response to Collector Sauber's suggestions and turned over to the agents were far from the presentation of a "claim", or an amended return, seeking allowance of the expenditures as a deduction from gross income. From the beginning Sauber had told respondents it would not do

any good if they knew all about their expenditures and could prove them because,

> "We absolutely won't allow over-the-ceiling expenditures." (R. 232.)

As we have pointed out (Footnote 2, *ante*) Sauber's position was required by the Treasury regulation (I. T. 3724), which remained binding on all agents concerned with this case until six months after the indictments had been returned.

Finally, it is asserted that because the Court of Appeals held that the record showed,

> "* * * that responsible government officials, from cabinet level to local level, had represented to defendants that their disclosure would result in immunity from criminal prosecution," (Pet. p. 56);

it thereby substituted its own finding for Judge Nordbye's "that respondents had been in no way misled by representatives of the Government." (Pet. p. 33.)

The Court of Appeals was addressing itself to a quite different point than had the trial judge. Respondents had argued in the trial court that, entirely apart from the public pronouncements of the voluntary disclosure document, they were independently entitled to suppression of the evidence because of assurances made to them by local officials during the disclosure. It was that contention, which Judge Nordbye was disposing of in the paragraph of his opinion commencing "In addition, etc." (Pet. 33). Judge Nordbye was talking about what was said after the start of the disclosure—the Court of Appeals did not restrict itself to this. The statements are not in conflict. The Court of Appeals was addressing itself to the whole history of the representations made to respondents.

The facts, as set forth by the Court of Appeals, are without dispute that the immunity promises had been made;

that when Busby first broached this case to Sauber the latter replied there was no reason the disclosure doctrine should not apply; that Sauber directed that the extensive compilations be prepared; that when some of the disclosure compilations were recast the new editions of them bore legends, "Used in disclosure recap", to identify items in them with those used in the first compilation; that repeated assurances were made that this was a civil case and there was nothing to worry about. It is clear beyond doubt that all concerned necessarily realized that respondents believed they were protected by the disclosure doctrine.

It is true that in carefully worded testimony Sauber denied that he had ever said, in so many words, that the disclosure as made was a good one and the Court of Appeals does not find that he ever made such an express admission. The Court of Appeals also recognized that Agent Mamel, long after the disclosure had been made, said there might be a prosecution. It is apparent therefore that the Court of Appeals did *not* overturn any finding of credibility by Judge Nordbye. What it did was to base its legal opinion upon the totality of the representations and conduct of all of the Treasury officials, from the highest to the lowest, as they affected this case.

There is no reason for certiorari here in order to lay down proper standards for appellate review. The Court of Appeals did not undertake to pass on questions of credibility or to overturn disputed factual findings. It merely exercised its duty of drawing legal conclusions as to what consequences flowed from the material and undisputed facts. It enunciates no improper rule of review.

III.

Because the Voluntary Disclosure Doctrine Was Abandoned Nearly Four Years Ago and Because This Case Turns, in Large Part, on the Shift in the Tax Law Relating to Black Market Expenditures, a Case Like It Is Very Unlikely to Happen Again. The Question Involved, Except for These Parties, Is Essentially Academic. Hence Certiorari Should Not Be Granted.

In a large measure this case revolves about the Treasury's change of position with respect to black market expenditures. Had the Treasury initially conceded that black market expenditures for raw materials could be taken as a deductible expense it well may be that respondents would have operated on their original belief that since the black market expenses "washed out" the black market income there was no reason to make a disclosure. And in such event there well might never have been an indictment. But the Treasury first took one position and then another. And the trial court insisted that the "good faith" of the 1948 disclosure be tested in the light of the 1952 law which made the expenditures deductible.

We believe it is apparent that even if the disclosure doctrine had remained in effect there would have been scant likelihood of a similar case getting into the courts. In view of the fact that the entire doctrine was abandoned nearly four years ago it is likely that there will be but few, if any, cases involving it in any way in the courts in the future; at this late date it is a virtual certainty that there will be none falling within the unique fact pattern of this case. In these circumstances we understand it to be the policy of this court not to grant certiorari. (*Rice* v. *Sioux City Memorial Park*, 349 U. S. 70.)

IV.

The Decision Below Was Correct.

For the reasons set forth in the Court of Appeals opinion the decision below was correct. (*Bram* v. *U. S.*, 168 U. S. 532; *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385; *White* v. *U. S.*, 194 F. 2d 215, cert. den. 343 U. S. 930.)

Even if it were thought that there was not full and literal compliance with the voluntary disclosure doctrine, we submit that the Constitution would have required suppression of evidence obtained with the knowledge that respondents believed they were acting under the disclosure doctrine's immunity promise and were protected thereby. (*Gouled* v. *U. S.*, 225 U. S. 298; *McNabb* v. *U. S.*, 318 U. S. 332.)

Moreover, although we contend that respondents complied in good faith with every material requirement of the doctrine, it may be observed that the elastic concept of "good faith" is not contained in, or necessary to, the doctrine. It was a judicial concept attached to the doctrine by Judge Nordbye and applied by him to matters immaterial to Shotwell's tax. In England, which had a "disclosure policy" virtually identical with that of our Treasury, it has been held that a taxpayer who discloses is entitled to suppression, once he has disclosed the nature of his irregularities, even though thereafter, in an attempt to keep his tax liability down, he deliberately prepares false entries in purported regular records that misrepresent both his items of income and expense, *Rex* v. *Barker*, 2 K. B. 381 [1941]. Under the English view suppression must be granted regardless of good or bad faith.

The decision here may also be said to be correct, or to reach a justifiable result, from another point of view—we submit, for the reasons set forth in our conditional cross

petition in No. 471, that respondents were entitled to the immunity promised them in the voluntary disclosure invitations and that the indictment should have been dismissed. If that is correct, then they were at least entitled to suppression as a lesser, but appropriate remedy.

V.

Certiorari Should Not Be Granted Because, If the Government's Contentions Are Permissible, This Court Would Be Required to Study the Entire 3,000 Page Factual Record.

It should be clearly understood that the Department of Justice is asking this Court to review the entire 3,000 page printed record to determine whether, as an entirety, it shows that the disclosure was defective. Although page 17 of the Petition admits

> "* * * that if a taxpayer should have voluntarily disclosed an unpaid tax liability before investigation has begun, and should thereafter co-operate in good faith in a determination of the taxes due, he would be entitled to an exclusion of the evidence thus obtained * * *,"

it thereafter makes a number of factual assertions which have little or no relation to that question and in its footnote 4 asserts that this court should search "the whole record, not merely that portion prior to the ruling" to determine the validity of the suppression ruling.

Carrying this thought out it is asserted (p. 18) that the Government made proof on the trial that respondents, long after the disclosure, "attempted to settle the case through political pressure," from which the conclusion is sought that the disclosure was somehow defective. Obviously this is a *non sequitur*, and even if it be assumed that Shotwell, faced with a potential tax liability and

with its business and customers disrupted by constant visitations of agents, was endeavoring to hasten settlement of its taxes, no connotation, either of criminal guilt or of failure in the initial disclosure, would flow from the assumption.

Again, it is argued that Lubben testified on the trial (we say falsely), that after the disclosure had been made one of the respondents tried to get him to leave the country; from this the petition seeks to infer that the disclosure was defective. Once more the conclusion does not follow from the assumed fact.

But more importantly, this Court could not properly pass on these and other asserted facts, which were vigorously disputed on the trial, without reviewing the entire trial record so that the evidence with respect to them could be placed in proper context and perspective. This, we submit, is so obviously not the function of this Court that it would appear that the charges were made only to prejudice the respondents. This seems clear because the Department of Justice has waived any right, if one ever existed, to ask this Court to consider on the suppression question evidence which went in at the subsequent trial on the merits. No claim was made to the Court of Appeals that it should do what the petition now asks this Court to do. On the contrary the Government there stood solely on the facts developed on the suppression hearing and on which the trial judge had acted (Gov't Ct. of App. Br. pp. 25-29). The present contention therefore is not only unsound but is not open (*Helvering* v. *Minnesota Tea Company*, 396 U. S. 378, 380; *Forged Steel Sales Co.* v. *Lewellyn*, 251 U. S. 502, 515).

It also may be observed that the Petition stresses the fact that the jury brought in a guilty verdict, from which the Court apparently is asked to conclude that the dis-

closure must have concealed something. Once more there is an obvious *non sequitur*. Moreover, the argument merely amounts to saying that because the Department of Justice obtained a conviction by using the evidence sought to be suppressed it has proved that the evidence should not have been suppressed—a thoroughly evil argument.

VI.

The Court of Appeals Did Not Err in Holding That the Disclosure Was Timely.

The petition suggests that the Court of Appeals erred in not sending the case back to the trial court to make a finding on the subject of timeliness.

The short answer to this is that the Government did not take this position in the Court of Appeals and cannot now take it here. (*Helvering* v. *Minnesota Tea Company, supra; Forged Steel Sales Co.* v. *Lewellyn, supra.*)

In their brief as appellants in the Court of Appeals respondents, to show that they had complied with all of the requirements of the policy, asserted that the disclosure was timely and said:

> "The evidence showed that at the time of the disclosure, and for months thereafter, the Shotwell return was in the hands of a Group Chief, along with hundreds of other returns, for a mere *possible* assignment for audit (R. 316). We doubt that the timeliness argument will be renewed [it had been advanced in the District Court *before* the suppression evidence was completed] but if it is, we reserve the right to reply."

When the Government filed its brief, it did not raise the issue. To demonstrate this we quote its "Summary of Argument" as an Appendix hereto. It relegated the entire matter to a mere passing footnote in its brief and the

Court of Appeals properly said that it was presented only "obliquely" (Pet. p. 58). Actually the evidence was not in dispute, no questions of credibility were involved, and had the matter been contested in the Court of Appeals, it was in as good a position as the trial court had been to make a finding (*Cf., City* v. *Denver Union Water Co.*, 246 U. S. 178; *Horwitz* v. *New York Life Ins. Co.*, 9 Cir., 80 F. 2d 295, 302.) And its finding of timeliness is unquestionably correct.

Conclusion.

It is respectfully submitted that the writ of *certiorari* should be denied.

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November 15, 1955.

APPENDIX.

"Summary of Argument". Pages 31 and 32 of Government's Brief in Court of Appeals.

"IV.

"The voluntary disclosure policy was a self-imposed administrative restriction by which the Treasury Department agreed not to refer a taxpayer's case to the Department of Justice for prosecution, provided he had made a full and fair disclosure prior to the initiation of an investigation. Since it did not give the taxpayer any legal right to immunity from prosecution, the motion to dismiss the indictment was properly denied.

"The trial court found, upon the evidence presented at the suppression hearing, that appellant's alleged voluntary disclosure was totally lacking in good faith, and that no actions by Government representatives had given them good cause to believe that they would be granted immunity. Hence the motion to suppress evidence was properly denied."

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 471

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER AND HAROLD E. SULLIVAN,

Cross-Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM FOR CONDITIONAL CROSS-PETITIONERS.

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REPLY MEMORANDUM FOR CONDITIONAL CROSS-PETITIONERS.

This reply is limited to the question of timeliness of the Conditional Cross-Petition. It should not be construed as a deviation from our basic position that certiorari should be denied in No. 470, this term, and in that event, here also. But if the writ should be granted in No. 470, it should be granted here.

We do not understand that the Solicitor General contends that the Cross-Petition is untimely. Nor could he well do so because inspection of the briefs in *Johnson* v. *Eisentrager*, 339 U. S. 763, reveals that in that case the Government considered, just as we assert here, that the running of time for certiorari was tolled for all parties where one of them (there the Government's

opponent), filed a petition for rehearing below. The Court, without discussion of the point, allowed the writ. Stern and Gressman, in their *Supreme Court Practice*, 2d ed., p. 166, state that a similar result was reached in *U. S. v. Crescent Amusement Co.*, 323 U. S. 173. (The briefs and record in that case are not currently available to us.)

Federal Trade Commission v. *Minneapolis Honeywell Co.*, 344 U. S. 206, is of no assistance because it did not in any way involve a petition for rehearing, much less one in a criminal case in which the judgment is necessarily unitary (*Cf. Heike* v. *United States*, 217 U. S. 423). It involved successive judgments on separate and severable parts of a Federal Trade Commission order.

Respectfully submitted,

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. [redacted] /

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,

Cross-Petitioners,

vs.

UNITED STATES OF AMERICA.

ANSWER TO MOTION (AMENDED) TO REMAND (AND APPENDICES.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

Nos. 9 and 10.

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,

Cross-Petitioners,

vs.

UNITED STATES OF AMERICA.

ANSWER TO MOTION (AMENDED) TO REMAND.

The Solicitor General's blandly stated Motion to Remand to the trial court so that additional evidence, some old but not heretofore "appreciated" and some assertedly new, may be spliced onto that taken in a 1952 pre-trial suppression hearing, all in an effort to bolster a conviction obtained in 1953 and reversed in 1955, masks a multiplicity of legal and factual perversions. Many of them are not ap-

parent from the scanty statements of the Motion. We do not believe that any motion by the Solicitor General, no matter how ill-founded we believe it to be, can be regarded lightly. For these reasons we reply to it at some length, perhaps thereby giving it more color than it deserves.

The Motion is wrong in its basic procedural and substantive legal premises; its incorrect factual showing is mere hearsay and conclusory rather than direct and competent; lack of diligence is apparent; even if the Motion were sound, it is presented to the wrong court. It, and the petition for certiorari, should be denied. It is made against the following background:

BRIEF STATEMENT OF CASE.

Defendants, respondents to the instant motion, were indicted in 1952 for alleged falsities in the income tax returns of Shotwell Mfg. Co. (now named Homan Mfg. Co.), for 1945 and 1946. They asserted, by motion to dismiss, immunity from prosecution because in February 1948, in reliance upon repeated promises of immunity from criminal prosecution by the Treasury to those who voluntarily disclosed irregularities before investigation was initiated, they had voluntarily disclosed such to Ernest J. Sauber, then Chief Deputy Collector (subsequently District Director of Internal Revenue in Chicago). It was held by the District Court, and subsequently by the Court of Appeals, that the promised immunity was not judicially enforceable.

Defendants then moved to suppress evidence they had produced in reliance on the promise of immunity.[1] Evidence taken on this motion showed that the disclosure, which was wholly oral as permitted by Treasury pronounce-

1. It is conceded by the Petition for Certiorari to this Court that if the disclosure was a good one defendants were entitled to a suppression order (Pet. p. 17).

ments,[2] was participated in by only three persons: Leon Busby, Shotwell's auditor, Byron Cain, its president, and Sauber. They all testified and fixed the disclosure as occurring in January-March 1948; they agreed that Shotwell, at the time of the disclosure, confessed it did not have records and figures from which to prepare correct returns, and that such data would have to be assembled (R. 178, 202, 229, 231-3, 283, 284, 286) for use of a Revenue Agent who from it and other records would "audit" the company and assist in making a correct return. It was assembled and then was summarized in "recapitulations" (Def. Ex. 1, R. 3091 *et seq.*) which were furnished Agent Lima when he started his audit, in response to the disclosure, on, or shortly after, July 30, 1948.

At the suppression hearing the Government contended the evidence was admissible because the disclosure was invalid for two reasons: (a) Untimely, because the 1946 return had been "assigned" for audit on December 16, 1947 which date was contended to mark the "commencement of investigation" (R. 440-1, 445). The assignment contention proved to be without factual support and it is no longer contended that December 16, 1947 is the timeliness date (see note 3, *post*). (b) Insufficient, because after disclosure defendants did not supply sufficient information. The District Court adopted this latter theory; the Court of Appeals rejected it.

Now it is the Government's contention, contrary to its

2. "There is no special form for making the disclosure. The simple statement that 'I have filed false tax returns and I want to make the Government whole', would constitute a complete disclosure." (Treasury release of May 14, 1947, R. 3136.) Note also that the supplying of data or cooperation in determining the true tax liability, if required at all, is in the nature of a condition subsequent to the disclosure. The disclosure itself was the act of disclosing oneself as a possible violator and inviting the Bureau to make an examination.

position in the District Court and the Court of Appeals, that "conceivably" no disclosure was made until after June 21, 1948; that this was too late to be timely because on June 21 the Government got a clue or "scent" which ultimately would have led to an independent investigation had no disclosure been made.

If it be assumed that a disclosure in July would have been untimely (which is not the case), the fact remains that neither Busby, Cain nor Sauber, the only participants to the disclosure, have recanted or changed their testimony as to disclosure in the January-March period. Nor is any contradiction of trial testimony claimed—only that the Government had evidence at the time of the hearing (which it did not use), and asserts it now has (but does not display) supplementary evidence, from which it is contended inferences inconsistent with a disclosure in the January to March 1948 period "conceivably" may be drawn.

SUMMARY OF REASONS FOR DENIAL OF MOTION.

1. In a criminal case the Government may not, after trial on the merits, move for a partial new, or additional trial of a suppression of evidence hearing, in an attempt to validate the hearing on the merits.

2. A new trial on the ground of newly discovered evidence is never given merely because such evidence "*might conceivably alter*" the result, all that is claimed here (Mo., p. 5), but only where it reasonably can be asserted that the evidence is so important and material that it will probably produce a different result.

3. The Motion is based on a new, incorrect and radically changed *legal theory*, not open to the Government on review, namely that the Revenue Service's act of inspecting certain of *this* taxpayer's records while in the course

of investigating *another* taxpayer gave them a possible "scent" as to this taxpayer which would constitute legal "initiation" of an investigation of this taxpayer and would make a disclosure subsequent thereto "untimely:"

Such a legal theory was expressly disavowed in the trial court where the Government correctly conceded that the "timeliness" date, under the Treasury's voluntary disclosure doctrine, was to be determined by the Treasury's "objective" test of (a) when the taxpayer's return was actually assigned for audit, or (b) when an investigating officer requested advice (R. 440-1, 445).[3] The Government initially believed the assignment for audit, and hence the timeliness, date was December 17, 1947; however, the proof showed, without contradiction, that the Shotwell return was not then assigned for audit but merely for "survey" as to whether it should be audited (R. 393-6).

3. Government counsel have attempted to slide away from the "objective" test for determining "initiation of investigation", to change their basic *legal* as well as factual theory, without informing the Court they are doing so. They premise their motion on the legal theory that if someone in the Revenue Service picks up the name of B while investigating A, that *ipso facto* the Service has "initiated" an investigation as to B and any subsequent disclosure by him is invalid. No such theory was presented below. Counsel misapprehend a sentence in the Court of Appeals opinion which we quote below (emphasis ours):

> "When the revenue agents get the scent *and are in pursuit* of the miscreant, it is too late for him to seek the protection of the Treasury Department's voluntary disclosure policy."

Counsel show that on June 21, 1948 New York agents, investigating Lubben of New York, requested Chicago agent Krane to check information on Lubben by examining certain of Shotwell's books as to its dealings with him. They argue that this gave the agents the "scent" as to possible violations by Shotwell. There is no utterly factual basis for this argument because the agents got no "scent" from Krane's visit of June 21. What happened was that Close & Co., of Chicago, which had also dealt with Lubben, made a disclosure on August 20, 1948, that came to the attention of Intelligence Agents in Chicago. On August 31, the Chicago Intelligence Office, which was unaware that the Shotwell disclosure had been made and

No investigation of this taxpayer, independent of the one flowing from, or in verification of, the disclosure and which was commenced by assignment to Revenue Agent Lima on July 30, 1948 (Dft. Ex. 15, R. 3173), ever was commenced. There are indications that an independent investigation, flowing from clues picked up in the Close & Company revelations in late August 1948, (not from the asserted Krane clue of June 21), *might have been initiated* in late September 1948 (R. 3167). But by that time there is no dispute but that Chicago Agent Lima's examination in verification of the disclosure was well under way and the idea of an independent investigation was dropped. No step inconsistent with full recognition of a valid disclosure was taken until September 19, *1950*, when agents in the Intelligence Unit requested that a "case jacket be issued," *not because the disclosure*

---

that Agent Lima actually was at work checking on it, wrote to the New York Intelligence Office, suggested that "possibly similar over-invoice payments were received by Shotwell * * * from Lubben," and requested it to make appropriate inquiries of Lubben. New York replied on September 13, 1948, that it was informed that Shotwell had made a disclosure to the Revenue Agent's office in Chicago. Chicago Intelligence Agents then made inquiry of the Internal Revenue Agent in Charge in Chicago and found that Lima already was conducting his examination (See Agent Krane's report at R. 3166-7). Thus the present hindsight speculation that the Treasury obtained a "scent" on June 21, 1948, is contrary to the Treasury's own record.

But in any event "scent" is not enough. Even in the graphic and non-technical language of the foregoing quotation, the test is stated in the conjunctive, "scent" *and* "pursuit." Unless the agents were "in pursuit," *i.e.*, had actually commenced an investigation, a taxpayer could still disclose. Even the Motion to Remand admits a disclosure at least as of late July 1948. The record shows, as we demonstrate in the text, that no investigation that can in any way be said to be independent of that precipitated by the disclosure and requested by defendants was ever initiated. The new theory thus would not invalidate the suppression order even if counsels' factual assumptions be accepted. (This note is no retreat from our position that the disclosure occurred in January-March 1948.)

had been untimely, but solely because Shotwell's officers allegedly "refused to identify the recipients" of Shotwell's over-ceiling disbursements for which it was not going to be allowed tax deductions (R. 3172).

The new theory that a disclosure in July 1948 would have been untimely is fruitless because no investigation had then been "initiated" within the admitted Treasury definition of that term.

4. The evidence is not new. The Motion concedes (p. 3) that much (we believe virtually all), of it had been considered in 1952 and 1953 but was not "appreciated." The Motion emphasizes that Chicago Agent Krane visited the Shotwell plant on June 21, 1948, and that Shotwell's controller, Graflund, telephoned its president, Cain, at a candy convention in New York, about the visit. This call, and Cain's reaction to it, were gone into on the suppression hearing in 1952 (R. 269-270) and the hearing on the merits in 1953 (R. 2614-5, 2559, 2679). The questioning demonstrated that one Daniel Tobias had heard defendant Cain's end of the conversation (R. 2614-15); Agent Krane heard Graflund's end. Cost records in the District Court show that Tobias was under subpoena and was paid $172.12 witness fees from November 10 to 14, 1952 (suppression hearing), and was under subpoena and was paid witness fees of $398.24 from September 17 to 27 and October 10 to 14, 1953 (trial), but neither he nor Agent Krane was placed on the stand.

The Motion makes much of the 4 to 5 month interval between the disclosure and the making of "summaries" or "recaps" of the Lubben account, seeking to create the illogical inference that because the summaries were not prepared until July 1948, no disclosure was made in January-March 1948. There is nothing new about the fact that the summaries were not made until July: When

defendants made the disclosure they said they had no figures; that they would have to reconstruct them (R. 178, 202, 229, 231-3, 283, 284, 286, 2564, 2570, 2577, 2590). In testifying with respect to one of the final summary sheets, defendant Cain put it this way: "We had made our disclosure *months and months and months before this sheet was put out*" (R. 259). At the trial it was again clear that the data ultimately compressed into the summary sheets (Dft. Ex. 1 etc., Suppr. hrg., R. 3091, *et seq.*) was assembled "over a period of months" (R. 2585, 2590). Although no point was made by either side as to the precise date on which the summary sheets were prepared, it was clear that it had to be sometime in July 1948 because the testimony was that defendants were assembling underlying data and information during March, April, May and June (R. 2577); Busby testified he was still compiling data in June (R. 187), and as late as July 9, Cain was still trying to get confirmatory figures from Lubben's books through Tobias (R. 2616).

5. The Motion is not supported by the affidavits of the purported witnesses, who in some instances are in no way identified, but only by the hearsay statements and argumentative conclusions of interested lawyers and a detective.

6. If a motion by a prosecutor for a partial new trial can be countenanced in any court it should have been made to the Court of Appeals and not here. *First*, this Court has not taken jurisdiction; *Second*, it is established practice that motions on grounds of evidence theoretically discovered after a Court of Appeals decision, even after application for certiorari has been made here, go initially to that Court for a determination of whether there is a prima facie showing that warrants a change in its mandate and remandment to the District Court. (*U. S.* v. *Johnson*,

142 F. 2d 588, 589, C.A. 7, reciting action of this court sending the case back to the Court of Appeals; see also recitals in this Court's subsequent opinion in the same case at 327 U. S. 106. Contrast that case and this with *Mesarosh v. U. S.*, No. 20 this term, in which, after this Court had taken jurisdiction, both sides agreed that there was tainted testimony by a prosecution witness and that there should be a further inquiry.)

HISTORY OF THIS CASE AND RELATED PROCEEDINGS.

Voluntary disclosure of irregularities in Shotwell's 1945-6 income tax returns was made in the spring of 1948. Indictment was returned March 14, 1952 (R. 5). On November 21, 1952, the District Court, after hearing, denied respondents' Motion to Suppress Evidence (R. 447). The hearing on the merits, in September and October 1953, resulted in convictions.

Appeal was taken to the Seventh Court of Appeals where oral argument did not take place until May 3, 1955. On June 15, 1955, the Court of Appeals reversed and remanded on the ground that the District Court erred in failing to suppress evidence furnished in reliance on the Government's promise of immunity. The Court did not pass on other important errors urged as to the hearing on the merits. Petition by the Government for rehearing was not filed in the Court of Appeals until July 30, 1955. It contained no hint of the matters now asserted.

Petition for Certiorari was filed October 17, 1955. Although this Court has not yet taken jurisdiction of the case, no motion has been made in the Court of Appeals calling its attention to the matters that are claimed to warrant modification of its mandate.

On December 6, 1955, the Solicitor General wrote to the

Clerk of this Court and adopted representations of the Internal Revenue Service dated December 1, 1955, charging that Government witnesses Busby and Sauber, with respondent Cain, had given testimony that "was false in material and vital aspects." The letter said the Government expected to file a motion to remand to the District Court "at an early date" and requested that action on the certiorari application be withheld.

Before this letter was sent, Director Sauber, on December 2, 1955, was placed on administrative leave by the Internal Revenue Service. Departmental charges were filed against him, including one charging perjury in this case and reciting many other claims that are at least partially reflected in the hearsay affidavits here (App. I). He was suspended on March 2, 1956, and administrative hearings followed. We assert that those hearings exonerated him of any wrongdoing in connection with this case *because, after hearing, no administrative finding of any wrongdoing herein was made.* (Cf. *Jolly* v. *U. S.*, 170 U. S. 402, 408; *Selvester* v. *U. S.*, 170 U. S. 262, 267; *Dealy* v. *U. S.*, 152 U. S. 539, 542.) The order there was removal from office on wholly distinct and admittedly "unrelated charges" on August 6, 1956 (Footnote 4 to Mo. to Remand).

In the meantime, in February 1956, the Treasury importuned the Justice Department to commence a new grand jury investigation involving, among other things, the asserted claim of perjury in this case. The grand jury investigation commenced in April 1956 and is still continuing.[4] No indictments have yet been issued.

4. This grand jury investigation is referred to in footnote 4 of the Motion to Remand. It has resulted in two proceedings to restrain believed improper use of grand jury process:

In the first of these, *Homan* v. *Russo, et al.*, 233 F. 2d 547 (C. A. 7, May 11, 1956), it was held (a) that the grand jury could

On June 1, 1956, the Solicitor General again wrote to this Court and requested that this case be held over the term because "evidence sought to be adduced before the Grand Jury *may*, in the opinion of the Department, have important bearing on whether perjury was committed in the trial [sic] of the case." Apparently such evidence has not been forthcoming because the records of the District Court reveal no motion by the prosecutors under Criminal Rule 6 to have it made available to this Court.

As the matter now stands, Sauber has been exonerated of perjury in administrative hearings and the prosecutors thus far have been unable to come up with enough evi-

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subpoena documents that were ordered to be suppressed in the main case, and (b) that allegations that the prosecutors proposed to divert subpoenaed material from the exclusive use of the grand jury to that of unauthorized persons were not sufficiently pleaded.

In the second proceeding, *In the Matter of the April 1956 Term Grand Jury*, C. A. 7, November 13, 1956, Appendix II hereto, the Court held that it would in no way interfere with the scope of grand jury inquiries for purposes of alleged criminal investigations but that sufficient showing was made that voluminous material, theoretically subpoenaed for the jury's use, was actually being diverted to Treasury agents for civil or collateral purposes and that such use should be restrained.

In the proceedings last referred to, Vincent P. Russo, the principal affiant in support of the present motion, argued the matter to the Court of Appeals. In so doing he misrepresented facts to such extent that on November 2, 1955, the Justice Department filed a motion with that Court in which it said:

> "The Government admits and sincerely regrets that certain misstatements of fact were made to the Court on oral argument [by Mr. Russo] on October 17, 1956. The Department of Justice desires to make a full and accurate correction of the record, and the matter is under consideration by the Assistant Attorneys General in charge of the Criminal and Tax Divisions."

In the light of that record, Mr. Russo's ability to make fair and accurate digests, appraisals and summaries of alleged statements of alleged potential witnesses, as he purports to do here, may be doubted. The requirement that the actual affidavits of the prospective witnesses be produced rather than a lawyer's version of what he thinks witnesses might say, has significant impact here.

dence to warrant an indictment of Sauber, Busby or Cain for anything.[5] The claim now is merely that "had the evidence now available been presented [originally] * * * the rulings * * * *might conceivably have been altered*" (Mo., p. 5).

While the foregoing proceedings were going on, the Treasury, on September 15, 1955, made a jeopardy assessment against respondent Shotwell (Homan) claiming $3,172,000 in taxes, penalties and interest for the years 1944-45-46. Of this, $1,036,000 was asserted for taxes for the years 1945 and 1946, as contrasted with the $286,000 tax deficiency asserted here for those years.

Respondent Shotwell (now named Homan Mfg. Co., Inc.), proceeded in the District Court for an injunction against collection of this assessment on the ground it was arbitrary and capricious. A deposition was taken from Revenue Agent Charles J. Mammel, who made the $3,172,000 assessment, and who necessarily is the Revenue Agent whose opinions and complaints are referred to, or paraphrased, in the Stein affidavit, Ex. A to the present Motion. On June 14, 1956, the District Court, acting on the deposition and other evidentiary material, entered a summary judgment holding that the assessment was "patently arbitrary, capricious and wholly void" (App. III). It found:

> "11. Mammel's determinations were arbitrary, capricious and unlawful in the extreme and it is not necessary to decide whether such actions sprang from malice, incapacity, or a desire to justify the length of time and large amounts of manpower consumed in this investigation, or from a combination of these or other reasons. Mammel suffered a complete mental breakdown on March 19, 1953 and upon cross-examination in February 1956 was unable to recall

5. Even if an indictment charging some crime had been, or should be returned, it would have no evidentiary standing in this case. (*Brinegar* v. *U. S.*, 338 U. S. 160, 173.)

basic rules of taxation involved in this case and which should have come into play when he made the assessment of September 1955. He also was unable to recall important points developed during the criminal trial of late 1953 to which he should have applied fair judgment in making the 1955 assessment."

A significant fact thus emerges after more than 8 years of Treasury examinations: all of the Government attorneys and revenue agents who, from 1948 through the trial of the case interviewed the witnesses and worked on the case, believed that the witnesses pro and con who testified on the suppression hearing told the essential truth as to the disclosure. (See Howard affidavit, Ex. C., Mo. to Remand.) There were minor, immaterial differences that are the hallmark of honest, as distinguished from rigged, testimony. But in late 1954, an embittered Revenue Agent (Maumel), of questionable mental balance and who subsequently entered an assessment that violated elementary concepts of due process, submitted critical reports and set in motion the train of events that has ended in the instant unprecedented motion. The unanimity of opinion by those who prepared and tried the case that Sauber, Busby and Cain told the essential truth is strong evidence that they did precisely that.

AMPLIFICATION OF REASONS FOR DENIAL OF MOTION

I.

The Government cannot move for a partial new trial in order to validate a conviction already obtained.

We have been unable to find a case in which it has ever been asserted, much less held, that the Government can bolster a criminal judgment of conviction, which has been reversed by a Court of Appeals, by going back into

the trial court and supplementing the record. But such is the maneuver here attempted, and on so palpably weak an evidentiary showing that it would be treated with derision were it not advanced in the highest court in the land by counsel occupying distinguished offices.

Strictly speaking, the prosecutors are not endeavoring to place the defendants in double jeopardy. They are attempting something which to us seems worse—they wish to hang on to the original jury verdicts of guilty while trying to patch up the suppression hearing; they are not willing to place the Government in jeopardy of a new trial. A tactic more oppressive and less consonant with the concept that the sovereign may not seek a second "go" at a citizen in criminal proceedings is difficult to imagine.

Even in the notorious prosecution of *Fries* under the Alien and Sedition Act, Fed. Cas. No. 5126, it was conceded that the Government could not have a new trial, on good or bad grounds, in a criminal case. But here it is contended that this Court, out of hand, may modify the Court of Appeals mandate to the point of virtual reversal, and permit the prosecution to go back to the trial court for the avowed purpose of putting in more evidence to support the conviction already reached in that court. If such procedure be permitted, citizens could be partially retried endlessly until ultimately exhausted or convicted, guilty or innocent.

Rule 33 of the Rules of Criminal Procedure restates the basic proposition, sacred to our law, that only the defendant may move for a new trial. It says:

> "The court may grant a new trial to a *defendant* if required in the interests of justice."

There is no rule, or practice, permitting the prosecution to move for a new trial, or a partial new trial, save action

in the nature of a confession of error (Cf. *Mesarosh v. United States*, No. 20 this term).

Observe that what is really involved is a ruling by the trial court, after a hearing on legal and factual issues, as to the admissibility of evidence, viz., the prosecution contended it could introduce voluminous material which it had procured through a promise of immunity. It still so contends. The issue is much the same as would arise in a murder trial if the defendant contended that a purported confession had been obtained by coercion. In both instances there is a hearing before the court as to whether the evidence is admissible. Under Rule 41(e) this normally is prior to empaneling of the jury, although it may be had thereafter if the cause is not earlier known.

If it be supposed that this was a murder case instead of an income tax case; that the trial court after hearing evidence, had admitted a supposed confession of murder; and that the Court of Appeals had reversed on the ground that the confession was unconstitutionally obtained, we think the notion that the prosecutor could go into the Supreme Court and ask for a new trial as to the admissibility of the confession because he had new evidence that the confession was not obtained by coercion, would instantly be rejected.

This case is no different simply because it is an income tax, rather than a murder prosecution. The prosecution is here seeking a second chance to convict defendants after failing in its first attempt. Or, more accurately, it is seeking a second chance to try suppression issues which are essential to the validity of the merits portion of the trial. Although this effort to assail defendants a second time is casually presented as a "motion to remand" it is essentially a motion for a partial new trial.

It may be doubted that such iniquitous procedure would

ever be presented in the more ordinary fields of criminal law. The reason that the Solicitor General's motion cites no authority would seem to be that the recorded judicial history of the country fails to show any such prior attempt. This is not a proceeding to determine, or to collect taxes. This is a criminal case in which the liberty of citizens is at stake. Zealousness in the collection of taxes may be commendable; overzealousness in criminal prosecution which reduces it to persecution is deplorable.

II.

A new trial cannot be given merely because additional evidence "might conceivably alter" the results.

When Internal Revenue a year ago induced the Solicitor General to seek delay in this Court it was on the ground that it had new evidence which was "in direct conflict" with the original testimony of Busby, Cain and Sauber which "*was false in material and vital aspects*" (Letter of Chief Counsel of Internal Revenue to H. Brian Holland, December 1, 1955, submitted with Solicitor Sobeloff's letter of December 5, 1955 to the Clerk of this Court). This was tantamount to a charge of perjury. Our letter of December 9, 1955 to the Clerk denied this assertion and no evidence "in direct conflict" is now tendered.

When the Solicitor wrote to the Court on June 1, 1956, requesting further delay, the charge had been modified:

> "* * * the additional evidence developed by the Internal Revenue Service suggested *the possibility that there might have been* perjured testimony * * *."

Our answering letter contested this.

Now the amended Motion to Remand (p. 5) asserts only that

> "* * * had the evidence now available been submitted

to the lower courts *the rulings under review might conceivably have been altered* * * *."

It is apparent that Internal Revenue Service has placed the Solicitor General in steady retrogression. A year ago Internal Revenue was claiming perjury. But after an additional exhaustive investigation, grand jury and otherwise, *there has been no recantation of testimony and there is no claim of perjury.*

It nearly always is possible to assert that a modicum of additional evidence, pro or con, might "conceivably have altered" a prior result, or, as really is the claim here, have furnished an additional argument for the same result in the trial court. Indeed new trials on essentially the same evidence frequently lead to different results. But by none of the established rules is such a possibility recognized as grounds for a new or further hearing. If such were the law, there would never be an end to litigation. Many cases might be cited, but the applicable rules and authorities are well summarized in *U. S.* v. *Johnson*, 142 F. 2d 588 (C. A. 7),[6] in which Judge Minton reviewed many cases and said (p. 592):

> "Having decided that there was no recantation or false swearing by Goldstein, the District Court then considered the case as any other motion for a new trial on newly discovered evidence would be considered. On such consideration, the court found that the rule for such motions 'has never been better nor more succinctly stated than' in *Berry* v. *State of Georgia*, 10 Ga. 511, which he quoted as follows:
>
> "'Upon the following points there seems to be a pretty general concurrence of authority, viz: that it

6. The *Johnson* case had a long history in which there were at least two unsuccessful efforts by the defendant to obtain a new trial. The matter was finally closed by this court's opinion in 327 U. S. 106. This court approved the rules we quote in the text.

is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy The Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz.:—speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.'

"This is the general rule applicable where there has been no showing of recantation or false swearing and the effect of the newly discovered evidence is considered in its relation to a possible new trial. This rule has been followed in the Federal cases and is of almost universal application among the States. *Johnson* v. *United States*, 10 Cir., 32 F. 2d 127, 130; *Kithcart* v. *Metropolitan Life Ins. Co.*, 8 Cir., 119 F. 2d 497, 500; *Weiss* v. *United States*, 5 Cir., 122 F. 2d 675, 691; *Evans* v. *United States*, 10 Cir., 122 F. 2d 461, 469; *Wagner* v. *United States*, 9 Cir., 118 F. 2d 801, 802; *Prisament* v. *United States*, 5 Cir., 96 F. 2d 865, 866; 23 Corpus Juris Secundum, Criminal Law, § 1461; 39 American Jurisprudence, § 165. In the application of this rule, the District Court considered whether the so-called newly discovered evidence was cumulative, whether it was diligently obtained and presented, and whether some of it was merely impeaching. The court found that much of the evidence was subject to one or the other of these infirmities and that on the whole it did not meet the standards of newly discovered evidence warranting a new trial. In this we cannot say, as a matter of law, that the trial court erred."

Legally, as we show under our next point, the additional evidence could not change the result—the disclosure was timely regardless of whether made in January or July

1948, or at some intermediate date. Moreover the timeliness of the disclosure appears in bold relief from the fact no independent initiation of investigation ever did occur—when agents from Internal Revenue's Intelligence unit possibly might have been preparing to initiate an investigation they found that agents from the Audit Section already were busy verifying or checking on the disclosure. A further hearing might supply minor bits of evidence but it could not alter those essential facts that are fatal to any contention that this disclosure was untimely. And when the Motion is examined closely it will be seen that the Solicitor General does not assert that the additional evidence will, or should, or probably should, lead to an "altered result," merely that it *conceivably* could do so. As much could be said in any case.

III.

The legal theory of the motion, viz., that the "timeliness" date under the voluntary disclosure policy was fixed by date of receipt of an asserted clue or "scent" which ultimately might or would lead to an investigation, was conceded to be erroneous in the District Court and was not presented to, or passed upon, by the Court of Appeals.

Counsel have made a drastic but unannounced, and perhaps unrealized, shift in legal theory that is partially explained in our footnote 3. The motion is presented as dependent solely upon assertedly new facts—actually it is based upon a new and erroneous legal theory applied to old facts which theory was expressly disavowed by the Government in the trial court and never heard of in the Court of Appeals.

It well may be that with a four year lapse of time and with changes of Government counsel, the present brief

writers have overlooked what occurred at the suppression hearing; but the record is clear, not only that their present theory as to when the timeliness date fell (and would bar a subsequent disclosure) is erroneous, but that is not open to them. Counsel also may not be familiar with the detail of the record which indisputably shows that Intelligence did not get a "scent" on June 21, 1948. (See our footnote 3.)

Unless the new legal theory is sound, and may now be asserted, the entire motion is pointless—the prosecutors ask that the case go back so that they may attempt to prove that the disclosure was made in July, 1948 rather than in January-March, 1948. But that is immaterial if a disclosure in July would still have been "timely." Even if the Intelligence Agents had gotten a clue or "scent" on June 21, 1948, and even if defendants had thought such "scent" might lead to investigation, there was no "initiation" of an investigation that would have prevented a valid subsequent disclosure. The Treasury had announced:

> "Now we have said that in order to be considered voluntary, a disclosure must be made before we have initiated an investigation in the case. Therefore, it is essential that we define 'the initiation of investigation.'
>
> "*The mere record of a name does not mean that an investigation has been initiated.* The fact is that examining officers throughout the country have thousands of names or possible leads. To deny the existence of a voluntary disclosure merely because we have a name would be comparable to regarding the telephone book as a dossier of tax evaders.
>
> "*An investigation is initiated when a special agent, an internal revenue agent, a deputy collector, or other Bureau officer, is assigned a return for examination, or where an investigating officer has requested advice of appropriate officers of the Bureau with respect to the filing of a return or the payment of taxes.*
>
> "The time of disclosure and the time an investiga-

tion begins are, therefore, matters which can be ascertained with complete objectivity and certainty, thus protecting both the Government and the taxpayer from decisions based on guesswork or other vague circumstances. To assure adherence to this principle, the Bureau stands ready at all times where a dispute may arise as to the time of a disclosure and the time an investigation was initiated to open its records in that regard.

"*We are not concerned with the motivating force behind an individual's deciding to come in and talk to us about his evasion. If he 'gets religion' before we have done anything, he will not be prosecuted.*" (Treasury release of May 14, 1947, consisting of address, "Tax Frauds and Voluntary Disclosure," by Chief Counsel of the Bureau of Internal Revenue, J. P. Wenchel, R. 3132, 3136.)

The foregoing definition of "initiation of investigation" became known as the "Wenchel doctrine" or "Wenchel objective test," was so referred to at the suppression hearing herein (R. 378, 433, 441), AND WAS CONCEDED TO BE CONTROLLING BY THE GOVERNMENT (R. 441, 445). THAT CONCESSION, AND IT WAS A CORRECT ONE, STILL STANDS. Getting a clue or a "scent" as to Shotwell, at any time while investigating Lubben, obviously would not be the "initiation of investigation" of Shotwell under any construction of the Wenchel doctrine.

Shortly after the widespread release of the quoted Wenchel speech, Treasury Secretary Snyder made a further release on May 25, 1947, in which he said (portion in parentheses and emphasis ours):

"Prior to such action (initiation of investigation as defined in the Wenchel speech) within the Bureau, a taxpayer may make a voluntary disclosure and escape criminal prosecution *even though his name may appear in an inactive file of suspects.*" (R. 3141.)

It is crystal clear that the Treasury's own definition of "initiation of investigation," precluded treating the mere obtaining of a clue or "scent" as to a possible violator as the initiation of investigation which would bar a subsequent disclosure. Even if persons within the Treasury had Shotwell on a list of suspects as to whom it had a "scent," Shotwell and its officers were still free to accept the Treasury's offers for the making of a voluntary disclosure until such time as investigation was actually initiated.

The original prosecutor recognized that merely obtaining a clue or "scent" would not constitute "initiation of investigation" within the meaning of the disclosure policy. At the suppression hearing there was incidental evidence which showed that supposedly in March 1948 the New York agents who were investigating Lubben obtained information which gave a clue to Shotwell. Prosecutor Edward J. Ryan admitted that this evidence did not tend to prove the "initiation of investigation" or to establish a so-called "timeliness date". He said:

> "* * * The Government did not offer evidence of this statement that Mr. Toohig received from an informant for the purpose of indicating that the express activity in New York represented a commencement of the investigation in this case for the reason that that appears to be preexcluded by the Wenchel doctrine. That was offered for the purpose of demonstrating that eventually in spite of this disclosure the Government was going to be examining these corporate books and records. That was the purpose for offering it. That is the reason it was never implemented with anything else, and there was never any contention made it was transmitted to Chicago at all. There was no such action with respect to it before this alleged disclosure such as would satisfy the Wenchel doctrine. The purpose of the Wenchel doctrine is very apparent. It was to establish an objective test, an objective break-off

> point that wouldn't be affected by what the taxpayer knew or what his motives were, but just a time when after which there could be no disclosure, so that it would eliminate those arguments.
>
> "That certainly must be apparent from its very language." (R. 441.)

With respect to the variations in the testimony as to the dates of disclosure events in January, February and March 1948, the Government, pinning its case on a believed "timeliness date" of December 16, 1947 (which date has long since been abandoned), held that these differences were immaterial, or certainly of no serious consequence. Prosecutor Ryan said:

> "When I mention the dates of the alleged disclosure, I want to say that I don't think it makes any difference whether it was January, February or March. I think those dates are after December 16th, and apparently nobody here made any record of when it was." (R. 445.)

In sum, we find that the prosecutors are now asserting a legal theory, viz., that the obtaining of a clue constituted "initiation of investigation", which is squarely contrary to the official Treasury pronouncements on the subject and was expressly disavowed in the trial court. The fact that the disavowal was as to the asserted March 1948 clue rather than one that is now mistakenly asserted as of June 21, 1948, does not alter the fact that the whole clue or "scent" theory was disavowed by the Government and was admitted to be "preexcluded" by the Wenchel doctrine.

We submit that it is not properly open to the present prosecutors to advance a legal theory which the Government not only did not advance, but denied, below (*Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380; *Forged Steel Sales Co.* v. *Lewellyn*, 251 U. S. 502, 515). Additionally, it does not lie in the mouth of the prosecution at this

remote state in the proceedings to complain of lack of specificity as to some of the events connected with the disclosure and the compilation of figures, when it took the position in the trial court that pinpointing of such dates and sequence of events made no difference. Defendants in criminal cases should not be continuously harassed with new theories, be they good or bad.

IV.

The evidence is not new.

Under Point 4 of our "Summary of Reasons" we have shown that the principal facts on which the Motion is hinged, *i. e.*, the telephone call of June 21, 1948, and the fact that the summary sheets were not prepared until July 1948, were clear at the suppression hearing and the hearing on the merits.

In addition to these items, Inspector Yaden's affidavit of December 1, 1955, says (a) that at a luncheon meeting at the Chicago Atheletic Club sometime between July 21 and July 30, 1948, Cain and Busby had figures of the unreported over-ceiling sales received by Shotwell, which they offered to turn over to Sauber or Group Supervisor Johnson; (b) that the Shotwell personnel which helped put together the final recapitulations in July 1948 did so at the Belden-Stratford Hotel in Chicago; (c) that neither Sauber nor Johnson made any record or contemporaneous memorandum of their meetings with Cain or Busby in 1948. The Russo affidavit adds (d) that Edward T. Urban, an officer of Close & Co., a Chicago candy manufacturer which also had received black market premium money from Lubben, informed Russo that at a luncheon meeting in July 1948 with defendants Huebner and Sullivan, "there was discussed a contemplated purchase by the Shotwell Mfg. Co.,

Close & Co., and others who had received over-ceiling currency payments from Lubben," of Lubben's companies, for the purpose of getting control of, and destroying, the Lubben books.

These allegations and affidavits are interesting for what they do *not* say as much as for what they say:

It is not shown *when* any of these alleged items *first came to the attention of the Government.* The recitals that undisclosed witnesses told Yaden and Russo things in 1955 or 1956 do not negate the fact that the same things were told to other Government investigators in 1952, 1953 or earlier and are no fulfillment of the inflexible rule that it must be shown "That the evidence has come to [movant's] knowledge since the trial." (Cf. *U. S.* v. *Johnson, supra.*)

The omission of such showing is doubly significant because the Yaden affidavit is the same one that was attached to the Solicitor General's letter of December 6, 1955, and was attacked by our letter of December 9, 1955, as displaying nothing of consequence that was new. If the prosecutors could have filed a supplemental affidavit saying that these things were not known to the Treasury or Justice Departments at the time of the suppression hearing, or the hearing on the merits, or the appeal proceedings, we may be sure they would have done so.

Although the motion states that it was "only as a result of the full-scale investigation begun in April 1955 into possible misconduct" by Internal Revenue personnel in Chicago that "this new evidence was discovered" it is apparent that the Solicitor General has permitted himself to overstate the case:

We have seen that the telephone call of June 21, 1948 and the slow process of assembling data for the final recapitulations which were made in July were repeatedly inquired into by well trained, competent Government counsel

of unquestioned integrity at the suppression hearing and the hearing on the merits.

The same is true of the fact that neither Sauber nor Johnson made any contemporaneous memoranda of their meeting or meetings with Cain and Busby. Prosecutor Ryan was well aware of that and, as we have seen, mentioned that fact in arguing the suppression motion (R. 445).

It may be that the Government did not know in 1952 or 1953 that Sauber and Johnson met Busby and Cain for lunch at the Chicago Athletic Club and did not know that the final recapitulation figures were put together in an office which Cain, a real-estate man and part owner of the Belden-Stratford Hotel, maintained and regularly used in that hotel. Or it well may be that it did know. The record does not show and certainly the motion makes no positive showing. We do know that Sauber was cleared of administrative wrongdoing in meeting Busby and Sauber for lunch. But the *places* of these meetings were, and are, immaterial. The places were normal and by no means sinister. Defendants have never attempted to conceal these places. Indeed at the suppression hearing defense counsel asked Sauber if he had any talk with Busby or Cain outside his office and Sauber replied, "I may have. I can't recall any particular time" (R. 302). The matter was not further pursued.

If there was anything wrong about having a meeting in the Chicago Athletic Club or in assembling the top echelon of Shotwell people in Cain's office at the Belden-Stratford we may be sure that in the year since the Yaden affidavit was filed here, and promptly attacked in our reply letter as being inconsequential, some additional or supplemental showing would have been made.

Finally, it is said that Urban of Close Candy Co., which

had received over-ceiling payments from Lubben, had a meeting with defendants Huebner and Sullivan in July 1948 at which there was discussed a proposal for a group of companies that had dealt with Lubben to acquire his company for the purpose of destroying its books. Under our next point we shall show the peculiarities of Mr. Russo's affidavit in this respect, but whatever the Urban conversation may have been, is it new? The failure of the Government to make a showing of when this alleged episode *first* came to its attention is, we believe, no oversight.

We respectfully submit that as a motion for a partial new trial on the ground of newly discovered evidence the instant motion wholly fails to show the essential ingredient of "newness".

As to diligence it may be sufficient to observe that the Stein affidavit discloses that "certainly" as early as "the middle of 1955" a Treasury "suspicion" that the disclosure did not occur in March, 1948, had become "firmly fixed". However, the case remained in the Court of Appeals for more than three months after this and not a word was said to that court. It is a fair assumption that it was decided to gamble on the outcome in that court on the record as it then stood. On December 6, 1955 the Yaden affidavit was presented here and a motion to remand was promised at an early date. It did not come until nearly a year later. This is the precise reverse of diligence.

V.

The motion is not supported by the affidavits of the purported witness.

The motion is supported only by conclusory and hearsay affidavits by prosecuting counsel and by that of a Treasury detective—not a single affidavit of a witness competent to testify to a single fact is attached, whereas the uniform,

strictly applied, and well known rule is that "the affidavit of the witness himself should be produced, or its absence accounted for." (*U. S.* v. *Johnson*, 142 F. 2d 588, *supra.*)

The books abound with cases in which the rule requiring witness affidavits has been enforced against convicted private citizens who sought a new trial. Would it not be a cruel and repulsive system of justice which would excuse the Government, better equipped as it is to conduct investigations and to obtain affidavits, from giving the citizen, when it wants a new trial (assuming *arguendo* it ever may have one), what it demands from him when he prays the same relief?

There are portions of the affidavits of both Yaden and Russo that are utterly unfit for any judicial proceeding involving the liberty of citizens, much less one in the Supreme Court—"* * * witnesses under interrogation by me * * * have given statements * * *." That is the anonymous informer system carried to the nth degree.

On the other hand both the Yaden and Russo affidavits say that Internal Revenue Group Supervisor Johnson gave an affidavit or made a sworn statement, but the document is not attached. Nor is that of Special Agent Sam Krane from whom the Treasury could readily procure an affidavit.

Thus the Court is presented with carefully filtered characterizations of stories by anonymous and concealed informants on the one hand, and on the other, the same kind of argumentative hearsay with respect to witnesses from whom it is indisputable that affidavits could be produced.

Conclusions, arguments and characterizations permeate the affidavits:

Yaden says that the Belden-Stratford meeting in July 1948 was "for the express purpose of preparing the underlying documents from which there could be developed a purported voluntary disclosure", etc. The key words in

that quotation express complex conclusions rather than facts and display a woeful ignorance of what a "voluntary disclosure", was. It was not necessary to "develop figures" from which to make a disclosure—the disclosure was the act of coming forward and identifying oneself as having filed an erroneous return. (See footnote 2 hereof.) The cooperation with the Government in getting an accurate return came afterward and as a consequence of the disclosure. And use of the sweeping and undefined phrase "underlying documents" is inexcusable. The record shows without dispute that the "underlying documents" in this case were shipping tickets, invoices and the like as well as books of account. The documents that admittedly were prepared in July at the Belden-Stratford Hotel were "summaries" or "recapitulations" prepared *from* underlying documents that had been gathered over a period of months.

The Russo affidavit is even worse: In one sweeping sentence (p. 18) Mr. Russo wraps up the whole case:

> "From statements of fact * * * and from facts and circumstances already in the record, it appears that prior to June 21, 1948 when Special Agent Sam Krane * * * requested, among other things, certain records evidencing shipments of merchandise for which no invoices were rendered * * *, no disclosure, voluntary or otherwise, had been made * * *."

This statement assumes that if a disclosure had not been made by June 21, 1948 that one thereafter would be untimely. As we have seen, this is incorrect.

The statement that no disclosure had been made by June 21 is nothing more than Mr. Russo's opinion as to everything in a 3000 page record plus his own secret investigation. Nevertheless it is boldly and unqualifiedly sworn to as a fact and is made in the face of uncontradicted and unrecanted testimony to the contrary.

There is only one statement of fact in the entire sentence and that statement is demonstrably false: Mr. Russo says that on June 21, 1948 Special Agent Krane asked for records "evidencing shipments of merchandise *for which no invoices were rendered*". But the request to Krane to get information from Shotwell is in the record (R. 3158) and so is his report (R. 3161). Instead of seeking evidence as to shipments *without* invoices he went to get *invoices* (and he got them). He was asked to procure

> "#1—All sales invoices to General Confections, Hillsdale, New Jersey, and 40 West 170th Street, New York City * * *
>
> #2—Same to Eatsum Foods, 19 Rector Street, New York City" (and certain warehouse receipts and mortgage papers.) (R. 3159.)

Krane's report (R. 3161) shows he asked for, and got, these documents. There never has been the faintest doubt of these facts. Mr. Russo's statement reverses the truth and shows how unreliable are his summaries of "facts and circumstances". (See footnote 4.) We think the reason for this misstatement, which could hardly be one of oversight, is obvious—a routine call, such as Krane's really was, to check invoices while investigating another taxpayer excites no curiosity, whereas an investigation as to shipments without invoices might excite curiosity and would give greater color to the new and unsound "clue" theory.

Russo next purports to describe "information" and "assertions" he says he received from Urban, an officer of Close and Company, pertaining to a discussion in the first three weeks of July as to a possible purchase of Lubben's company for the purpose of destruction of its records. Russo says this did not relate to the acquisition of Lubben's books for the purpose of accumulating data to be

used in the making of the Shotwell disclosure. This hearsay recital is subject to all of the vices we have heretofore pointed out. It may be observed that while he tries to create a sinister atmosphere Mr. Russo fails to say whether this asserted proposal supposedly emanated from Lubben, from Urban or someone else. In any event, he does not claim (and he would if he possibly could), that any of the defendants here initiated this proposal and he does not claim that anyone did anything about it. Mr. Russo seeks to draw the inference that because Sullivan and Huebner failed to agree to buy Lubben's company so that they could use its books in preparing further figures in pursuance of the disclosure, that no disclosure in fact had been made. The *non sequitur* is obvious.

Finally Russo says that "from Busby's testimony in the record it appears that he and members of his staff compiled the data in Government exhibits 186 and 189A, B, C, D and E (the alleged disclosure documents) from the first of February through the first of June, 1948, or thereabouts. From statements of fact" made to him by anonymous witnesses it "appears that Government exhibits 186 and 189 A, B, C, D and E were compiled during the space of a day or two * * * in late July 1948." This is either a play on the word "compiled" or a deliberate misrepresentation. The specified summary exhibits admittedly were prepared in the space of a short time. The record has always been clear on that point. However, the data that is reflected by them was collected, or "compiled", over a considerable period of time and there has been no dispute about that (R. 2812-7, 2837). Merely because the summary documents were not put together until late July does not tend to prove that the disclosure had not been made much earlier.

We realize that this Court is not the place to argue facts. Nevertheless, we, and the Court, are faced with a motion

which purports to have a factual background. If that background is examined it will be seen that it consists of argumentative and conclusory hearsay and, in some instances, contains demonstrable misstatements. It endeavors to create the appearance of contradiction of prior evidence but it does not contradict. And that fact we believe we are entitled to make clear to the Court.

In any event, examination of these opinion and hearsay affidavits demonstrates the wisdom of the rule the Government always applies to citizens who seek a new trial on the grounds of newly discovered evidence, namely, affidavits or sworn testimony of witnesses competent to testify to the facts must be produced and not the opinions and conclusions of lawyers and detectives, whether they be well or ill-founded. The affidavits of Yaden, Russo and McNelis well could be stricken. Certainly they cannot be given the weight necessary to subject citizens to further criminal proceedings.

VI.

If the motion has any standing at all it is presented to the wrong Court.

We think that the motion is bad on its face and should be denied. However, if a motion of this kind can be made anywhere it should have been made in the Court of Appeals. In the case culminating as *U. S. v. Johnson*, 327 U. S. 106, there were two separate motions for a new trial made while the case was pending in this Court. The procedural steps are briefly outlined in the early paragraphs of 327 U. S. 106 and are more fully stated in 149 F. 2d 31. There as here a motion for a new trial, or a motion to supplement the record with additional information alleged to show that a Government witness had testified falsely, was presented to this Court while a petition for certiorari was pending. This Court refused to entertain the

motion but did agree to withhold consideration of the petition for certiorari until the defendants could apply to the Court of Appeals. Much the same procedure had earlier occurred after this Court's first decision in the *Johnson* case (319 U. S. 503) in which a motion based upon new evidence was presented here pending a petition for rehearing. This Court denied the motion for stay of mandate without prejudice to the consideration of a similar motion by the Court of Appeals. In other words, in each instance the movant was sent to the Court of Appeals to make his prima facie show for a new trial or for the reception of additional evidence. And that Court in each instance decided whether its then outstanding mandate should be modified to permit the reception of additional evidence in the trial court. (Johnson never did obtain a new trial.)

If we are correct in our view that a motion of the kind now made cannot be made anywhere, the motion should be denied unconditionally. On the other hand, if this Court should believe there is some color to the motion it nevertheless should not be granted but be denied conditionally with leave to present it to the Court of Appeals. Granting the motion outright here would result in a direction to the trial court to receive new evidence in the original case and would deprive defendants of their right to test the legal and factual sufficiency of the motion.

CONCLUSION.

When certiorari was sought over a year ago it was on the basis that the case presented a question of law which was "of considerable importance to the revenue, for, although the [voluntary] policy has been abandoned" the Internal Revenue Service asserted that there were then between 60 to 70 pending cases in which a question under the former voluntary disclosure policy either had

been or could be raised (Pet. p. 20). In our Brief in Opposition (p. 14) we questioned whether there were 60 or 70 pending cases presenting a question like the one here and asserted (p. 23) that under this Court's usual doctrines (*Cf. Rice* v. *Sioux City Memorial Park*, 349 U. S. 70) certiorari should not be granted to determine a question no longer of public importance. Examination of the reported cases since that date reveals only one District Court case (*U. S.* v. *Pack*, D. C. Del.) and that case turned on quite different facts. It is, therefore, now apparent, if it was not apparent a year ago, that the petition for certiorari does not show a case warranting review.

The Government waited until the last day before the statute of limitations ran before indicting these defendants in 1952. The matter has been held in this Court for a year longer than is normal. We are now, in late 1956, talking about tax events of 1945 and 1946 and disclosure events of 1948. Such lengthy and leisurely prosecution is punishing and exhausting.

The Shotwell Company has been unable, and so long as the criminal case is pending, will be unable to make any civil settlement of its asserted tax liabilities for any year after 1944. The individual defendants, and a corporation in which the defendant Cain is a principal stockholder, have been unable to make any settlement of tax liabilities asserted against them for numerous years since 1946 and will be unable to do so as long as this case is pending, for the Treasury successfully opposes bringing any of those matters to trial in the Tax Court (See recitals in App. II hereto).

If the motion to remand and the petition for certiorari be denied we believe it is doubtful if this case will ever be retried in the District Court. But if it should be retried, defendants will have an opportunity to establish

their innocence, or in any event to learn where they stand and bring some order out of their chaotic affairs.

On the other hand, if the motion to remand be allowed and further proceedings take place in the District Court, supplementary to, but in support of the present convictions, and if the Government should prevail, the old record will again have to be reviewed by the Court of Appeals, not merely for error in the supposed new hearing, but to dispose of questions not originally passed because, in the light of its disposition of the suppression issue, the Court of Appeals believed it was "unnecessary to express an opinion as to whether the remaining evidence on the trial below did or did not establish defendant's guilt, or to pass upon the other errors relied upon." Such a path would be a long, long one.

We respectfully pray that the motion to remand and the petition for certiorari be denied.

Respectfully submitted,

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December 21, 1956

APPENDIX I.

Full Administrative Charges Dated December 2, 1955, Against Ernest J. Sauber Insofar as They Relate to This Case. After Hearing No Finding Was Made Against Sauber on These Charges.

Charge III Failure to render honest, fair, and conscientious service in connection with the income tax matters of the Shotwell Manufacturing Company, Incorporated for the years 1944 to 1949, inclusive; and Cain and Culhane, Incorporated, and Byron A. and Sally T. Cain, for the years 1947 to 1949, inclusive. Specifically,

1. On four separate occasions, you fixed the date of the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case, for the years 1944, 1945 and 1946, as occurring in March, 1948, when in fact, the taxpayer did not furnish the Internal Revenue Service any information bearing upon, or relative to, its unreported black market income for the years 1944 to 1946, inclusive, until July, 1948, after the government had uncovered this source of unreported income and had contacted the taxpayer. The four occasions referred to above were (1) in an interview, as Chief Field Deputy, with Internal Revenue Agent Charles Mammel on October 18, 1950; (2) in a memorandum, written as Assistant Collector, to Special Agent Sam Krane, dated October 16, 1951; (3) in sworn testimony, as District Director, at a hearing on the motion to suppress the evidence in the Shotwell case, in the U. S. District Court for the Northern District

of Illinois, Eastern Division, Chicago, Illinois, on November 13, 1952; and (4) in sworn testimony, as District Director, before representatives of the Inspection Service, on July 20, 1955.

2. You, as Chief Field Deputy, failed to make notes, diary entries, or memoranda in connection with the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946, prior to October 16, 1951, when you, as Assistant Collector, furnished a memorandum with respect thereto to Special Agent Sam Krane.

3. You, as Chief Field Deputy, failed to refer the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946, to the office of the Internal Revenue Agent in Charge or the Special Agent in Charge, through proper administrative channels.

4. You, as Chief Field Deputy, failed to notify your superiors in the office of the Collector of Internal Revenue of the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946.

5. You, as Chief Field Deputy, participated in a luncheon meeting with Byron A. Cain, President of the Shotwell Manufacturing Company, Incorporated, and Leon Busby, the company accountant, at their expense, at the Chicago Athletic Club in July, 1948, for the prearranged purpose of discussing The Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946. You failed to make any record or report of this meeting and failed to report this matter to your superiors.

6. You, as Chief Field Deputy, induced Group Supervisor, Ralph R. Johnson, Office of the Internal Revenue Agent in Charge, to attend the luncheon described in the

preceding specification without the knowledge or consent of Johnson's superiors who had official responsibility for the investigation and determination of the tax liability of The Shotwell Manufacturing Company, Incorporated.

7. You, as Chief Field Deputy, withheld information from Internal Revenue Agent Charles Mammel respecting the luncheon meeting when you were questioned by him on October 18, 1950 relative to the various contacts that you had with officials and representatives of the Shotwell Manufacturing Company, Incorporated, in connection with the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946.

8. You, as Assistant Collector, failed to include information relative to the Chicago Athletic Club luncheon meeting in a memorandum that you prepared on October 16, 1951, at the request of Special Agent Sam Krane, relative to the various contacts that you had with officials and representatives of the Shotwell Manufacturing Company, Incorporated, in connection with the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946.

9. You, as District Director, authorized the rejection of Internal Revenue Agent Charles Mammel's request for travel authority to Palm Springs, Los Angeles and San Diego, California, to conduct an investigation in those places in connection with the Shotwell Manufacturing Company, Incorporated, and related income tax cases for the years 1944 to 1946, inclusive.

10. You as District Director, ordered the complete removal of Internal Revenue Agent Charles Mammel from the Byron A. and Sally T. Cain, the Cain and Culhane, Incorporated, and the Shotwell Manufacturing Company, Incorporated, income tax cases for the years 1947 to 1949,

inclusive, although Mr. Mammel, from February, 1949, had been the principal revenue agent in charge of the audit features of the Shotwell Manufacturing Company, Incorporated, case for 1944 to 1946, inclusive, and had a most comprehensive knowledge of the facts and circumstances involving the taxpayers. You further forbade the revenue agents assigned thereto to discuss or communicate with Mr. Mammel, thereby depriving the Service and its agents from knowledge and direction available by reason of Mr. Mammel's familiarity with the case.

11. You, as District Director, withheld information from Assistant United States Attorney General Edward J. Ryan of the luncheon meeting when he originally questioned you on October 23, 1952 relative to the various contacts that you had had with officials and representatives of The Shotwell Manufacturing Company, Incorporated, in connection with the alleged disclosure in the Shotwell Manufacturing Company, Incorporated, income tax case for the years 1944, 1945 and 1946.

12. You, as District Director, intimidated Internal Revenue Agent Paul T. Seto during a conference in your office on April 7, 1955 by indignantly charging that Mr. Seto's report was the worst report you had seen or had knowledge of, and that the agent who wrote it was incompetent and not fit to be an employee of the Internal Revenue Service and was a case for a psychiatrist. You further stated that Mr. Seto, in violation of your orders, was consulting and working together with Internal Revenue Agent Charles Mammel, who as stated in specification 10, above, had substantial knowledge of the facts in the case and was in a position to furnish direction and advice to Mr. Seto, in the best interests of the Internal Revenue Service. You further accused Mr. Seto of working for the Inspection Service of the Internal Revenue Serv-

ice instead of the District Director's office. Such statements of intimidation by a superior officer toward an employee under his direction and control, who was attempting to discharge his duties honestly and faithfully, were contrary to the best interests of the Internal Revenue Service and were designed to impede Mr. Seto's investigation of the Byron A. and Sally T. Cain income tax case for the years 1947 to 1949, inclusive. At the conclusion of said conference you issued instructions to the Chief of the Audit Division to detail Revenue Agent Seto to the Office Audit Branch, thus further intimidating Mr. Seto by removing him from his usual assignment of field audit work.

13. On November 23, 1952, as District Director, you testified under oath that you told Special Agent Krane everything you knew about the Shotwell Manufacturing Company, Incorporated case when, in fact, you failed to tell Mr. Krane about the Chicago Athletic Club luncheon described in specification 5, above; and you represented that you were first contacted by Shotwell Manufacturing Company, Incorporated, in March 1948 when, in fact, no attempt was made by the taxpayer to bring to the attention of the Internal Revenue Service its unreported income for the years 1944 to 1946, inclusive, until July 1948.

14. On July 20, 1955, as District Director, you testified before representatives of the Inspection Service that the luncheon meeting at the Chicago Athletic Club described in specification 5, above, took place at the time that the returns of The Shotwell Manufacturing Company, Incorporated, were being transferred from Group Supervisor Ralph Johnson to Group Supervisor Raymond Williams, that is, about February of 1949, whereas, in truth and in fact, the said luncheon meeting took place in July of 1948.

15. On July 20, 1955, as District Director, you testified before representatives of the Inspection Service that, after receiving a telephone inquiry from a representative of the taxpayer, you called Group Supervisor Johnson to inquire as to the delay, and that Group Supervisor Johnson explained that the failure to initiate an investigation with respect to the tax liabilities of The Shotwell Manufacturing Company, Incorporated, for the years 1944 to 1946, inclusive, was because you erred in identifying the taxpayer as "Shotwell Candy Company." Contrary to this statement, Group Supervisor Johnson contends he never made such explanation to you.

16. On July 20, 1955, as District Director, you testified before representatives of the Inspection Service that you had never advised Group Supervisor Ralph Johnson that representatives of The Shotwell Manufacturing Company, Incorporated, had made or were attempting to make a voluntary disclosure. In conflict with this statement, it has been asserted by Group Supervisor Johnson that you did advise him, respecting the tax liability of Shotwell Manufacturing Company, Incorporated, that the taxpayer desired to make a voluntary disclosure.

17. On October 4, 1955, as District Director, you testified before representatives of the Inspection Service that a check for $50.00 drawn payable to you by Cain and Culhane, Incorporated, for a dinner in behalf of a retiring Internal Revenue Service employee, was returned to Byron A. Cain because the dinner was oversubscribed and there were no facilities available to accommodate additional guests. However, when first explaining this transaction to Group Supervisor Ned Klien in May or June, 1955, you stated that after the check had been returned because Mr. Cain found he was unable to attend the dinner, you subsequently received cash or a check in the amount of $50.00 from Mr. Cain.

APPENDIX II.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11861. SEPTEMBER TERM, 1956, SEPTEMBER SESSION, 1956.

IN THE MATTER OF THE APRIL 1956 TERM GRAND JURY.

BYRON A. CAIN and SALLY CAIN, ET AL.,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 13, 1956.

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* On July 27, 1956, Byron A. Cain and Sally Cain, John H. Cain as Trustee of Cain Trust No. 1, a partnership, Harold E. Sullivan, Frank J. Huebner, Uptown Federal Savings & Loan Association of Chicago, Homan Mfg. Co., Inc., a corporation, and Cain & Culhane, Inc., a corporation, filed notice of appeal to this court from an order entered by the district court on July 18, 1956, dismissing their verified petition. The court's action was taken upon a motion of the United States of America, which filed no answer to the petition.

Allegations of pertinent facts set forth in said petition which, for the purpose of this proceeding, are accepted as true, are as briefly as possible now set forth.

In 1948 the treasury department began an investigation of Shotwell Manufacturing Company, a corporation (sometimes herein referred to as Shotwell)[1] and Byron A. Cain, Frank J. Huebner and Harold E. Sullivan, its officers. That investigation was being continued when the petition herein was filed. Shotwell furnished to treasury agents its records and suitable accommodations for the agents at its offices, and expended about $20,000 in making the services of its auditors available to said agents to assist the treasury's investigation, which extended also into the personal affairs of said Cain, Sullivan and Huebner.

Shotwell, Cain, Sullivan and Huebner were indicted on two counts on March 14, 1952, for allegedly wilfully and knowingly attempting to defeat and evade a large part of the income taxes due and owing by Shotwell to the United States of America for the calendar years 1945 and 1946, in violation of 26 U.S.C.A. § 145(b), in that defendants filed and caused to be filed false and fraudulent tax returns for said corporation. In a trial before a jury, defendants were convicted. On July 15, 1955, we reversed the judgment of conviction and remanded the case (*United States* v. *Shotwell Manufacturing Company, et al.*, 225 F. 2d 394), with instructions to sustain a seasonably made motion by the defendants to suppress certain evidence, and to re-try the case.[2]

At the beginning of the year 1954 (after the trial of the criminal case), the treasury department commenced a new and complete audit and investigation of Shotwell's affairs

1. Now known as Homan Mfg. Co., Inc., a corporation and hereinafter referred to as Homan or Shotwell.

2. Petition to the United States Supreme Court for *certiorari* is now pending.

and those of its officers for 1947 and subsequent years. Shotwell furnished space where its records were made available to the treasury agents.

On or about June 9, 1954, the then district director of internal revenue issued a departmental subpoena to Homan "In the Matter of the Tax Liability of Homan Mfg. Co. for the years 1944, 1945 and 1946", calling for all books, documents, work papers, etc., prepared and used at any date by: first, Frank DelMonte, former cost accountant of Shotwell; second, Busby and Oury, certified public accountants working for Shotwell; and third, all persons and organizations, for Shotwell, in connection with sales by said company in said years.

About July 1, 1954, Shotwell (Homan) delivered to treasury agents books and records covering transactions during the 1940's for examination, constituting a van load of papers, all of which were minutely examined by revenue agents, who made copies of those which they considered relevant, and which documents were returned to Shotwell in late 1955.[3]

Sundry records of Shotwell for the years 1947 to 1952 were called for by a subpoena issued by the acting district director about October 6, 1954. However, said records were not delivered by Shotwell because, among other reasons, Shotwell and its officers were advised and informed that said documents had been examined repeatedly by agents of the treasury and could no longer be called for re-examination under the internal revenue code,[4] constituted preparatory analyses of possible evidence to be adduced at the criminal trial and otherwise could not lawfully and constitutionally be subpoenaed.

3. However, the documents thus delivered by Shotwell did not include special compilations made out of the regular course of business by Frank DelMonte and Busby and Oury, as demanded by the June 9, 1954 subpoenas.

4. In their brief herein, petitioners cite 26 U. S. C. A. § 7065(b).

In September and October 1955, other departmental subpoenas were served upon Homan and Byron A. Cain and Sally T. Cain, Cain Trust No. 1, and Cain & Culhane, Inc., calling for production of substantially all of their books, records and documents for the years 1947 to 1952 inclusive, relating to all of their transactions with or concerning the petitioners, or most of them.[5]

On September 15, 1955, the treasury department made a jeopardy assessment and levy against Homan for the years 1944, 1945 and 1946. The district court held the assessment and levy void. The government's appeal from that order is pending in this court.[6]

On September 16, 1955, Cain on behalf of himself, and Cain & Culhane, Inc., Homan, and Uptown Federal Savings and Loan Association of Chicago, wrote to the regional commissioner of the internal revenue service, declining to comply with the subpoenas, and stating his reasons therefor, including the statement that the materials referred to had been produced repeatedly for inspection by the government's examining agents. He averred that any further attempt to force production of such records would constitute unreasonable and unnecessary harassment and persecution, and therefore would con-

5. For example, Cain & Culhane, Inc. was directed to produce: "All accounting books and records including general ledgers, journals, cash books, auxiliary registers and ledgers, together with canceled checks, vouchers, correspondence, invoices and other written data supporting the original entries in said accounting books relating to any and all transactions had with Byron A. Cain, Sally T. Cain, John H. Cain, James B. Cain, Mary A. Cain or Patricia A. Cain either directly or indirectly, including, but not limited to all books of account relative to reimbursement by Cain & Culhane, Inc. to Byron A. Cain for expenses of any nature, including payments made to Byron A. Cain; Sally T. Cain, John H. Cain, James P. Cain, Mary A. Cain or Patricia A. Cain and payments to others for or in behalf of Byron A. Cain, Sally T. Cain, John H. Cain, James B. Cain, Mary A. Cain, or Patricia A. Cain."

6. *Homan Mfg. Co., Inc.* v. *D. J. Luippold, et al.*, No. 11782.

stitute unreasonable searches and seizures in violation of the fourth amendment to the constitution of the United States as well as a denial of due process of law in violation of the fifth amendment to the constitution.

The treasury department has not attempted to enforce compliance with any of said subpoenas.

Prior to February 7, 1956, the treasury department recommended to the department of justice "that a grand jury investigation be undertaken to determine whether criminal proceedings should be initiated against one or more of [Cain & Culhane, Inc., Byron A. Cain and Sally T. Cain] for certain indicated violations of titles 18 and 26 U.S.C." The department of justice acceded and the attorney general appointed as special assistants Vincent P. Russo and Charles A. McNelis to conduct an investigation. Thereupon, at the behest of the treasury department and not *sua sponte*, the April 1956 term grand jury commenced an investigation into the income tax returns and allegedly related matters of several of the petitioners.

On April 10, 1956, Russo and McNelis caused a grand jury *subpoena duces tecum* to be issued directed to Leon J. Busby, an accountant who had done work for petitioners, requiring the production of documents, some of which had theretofore been by this court ordered suppressed in the criminal case. Thereupon Homan, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner, by their complaint, asked the district court to quash said Busby subpoena, that Russo and McNelis be enjoined from using any of the material ordered suppressed before the grand jury, and also be enjoined from taking any witness before the grand jury for the purpose of testifying with respect to any part of said material. We affirmed an order of the district court dismissing the complaint. *Homan Mfg. Co., Inc., et al.* v. *Russo*, 233 F. 2d 547.

About July 10, 1956, Russo and McNelis caused grand jury *subpoenas duces tecum* to be issued directed to John H. Cain, Trustee of Cain Trust No. 1, a partnership, Byron A. Cain, Harold E. Sullivan and Gladys Morrill, "as officers of Shotwell Mfg. Co.", Byron A. Cain as President of Cain & Culhane, Inc., Byron A. Cain as President of Uptown Federal Savings & Loan Association of Chicago, and Martin A. Culhane, as a partner of Cain & Culhane, Inc., a partnership existing during the years 1944 and 1945, returnable before the said grand jury on July 20, 1956. These subpoenas called for all records of said partnership and corporations in so far as they in any way touch or concern transactions with or for Byron A. Cain or any member of his family, including Sally T. Cain, John H. Cain, James B. Cain, Mary A. Cain or Patricia A. Cain; or with Harold E. Sullivan or any member of his family, including Stella M. Sullivan, Harold E. Sullivan, Jr., and Joseph Sullivan; and Frank J. Huebner, or any member of his family, including Lowell A. Huebner, Frank J. Huebner, Jr., Lorraine Huebner Mannebach, from 1944 through 1952.

Said documents would fill between two and three vans.

The July 10, 1956 grand jury subpoenas in large part duplicate and, in important particulars, are *in haec verba* with the treasury's administrative subpoenas of 1954 and 1955.

About July 13, 1956, Busby complied with the April 10, 1956 subpoena by delivery of sundry documents to the grand jury, which, acting under the advice of Russo and McNelis, thereupon turned the subpoenaed documents over to treasury agents for searching, and recessed for a week.

There are pending in the United States Tax Court eight cases involving an asserted tax liability of Shotwell from 1944 through 1952, and asserted liabilities of Byron A.

Cain and Sally Cain and Cain & Culhane, Inc. for divers years, in which cases counsel for the treasury have repeatedly asserted that they are not ready for trial and require additional investigation and preparation.

Petitioners pray that "the grand jury minutes be produced in open court for examination in the premises; that the grand jury be assembled and be interrogated in the premises by the court; that the said assistant attorneys general be admonished or disciplined as to the court may seem meet; that all treasury agents who have received or in any way examined, outside the presence of a quorum of the grand jury duly assembled and in session, any of the documents surrendered under the Busby subpoena be punished for contempt".

The Department of Justice, both through the said Russo and McNelis and otherwise, has repeatedly announced that it is causing said grand jury to investigate as to whether crimes have been committed by petitioners Shotwell, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner. Hence petitioners further pray that, if the court be satisfied that any of the documents surrendered to the grand jury under the said Busby subpoena have been seen or examined by any agents of the grand jury, the jury be instructed that it cannot validly consider any accusations of crime against the said named petitioners or make any inquiries as to them or return any indictments against them to which the said documents or any material in or suggested by them is or are in anyway relevant

They also pray that all of the subpoenas referred to be quashed "because the same constitute aggravated harassment of petitioners, are an unreasonable search and seizure, a violation of due process of law in violation of the several constitutional rights of the several petitioners". Petitioners further pray that the subpoenas be quashed

"because they are but a step in an illegal scheme of the treasury to subvert the grand jury subpoena of this court into a tool for a treasury fishing expedition".

During oral argument in this case, Mr. Russo stated that, in July 1956, following the entry of the order from which the appeal herein was taken, the aforesaid *subpoenas duces tecum* directed to John H. Cain, et al. were obeyed and the records therein called for were turned over to the grand jury which caused the same to be examined as were the other records procured by prior subpoenas. That examination still continues.

Petitioners charge misuse of the powers of the grand jury. They contend that thereby their constitutional rights under the fourth and fifth amendments of the constitution of the United States are being and will be violated. The fourth amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *."

The fifth amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * * nor be deprived of * * * property, without due process of law; * * *."

They claim that, as a result of said violations, they will suffer injury in two areas; first, in the return of indictments against them and, secondly, in civil proceedings for the collection of federal taxes, with interest and penalties. We shall treat of these two areas separately.

Inasmuch as this appeal pertains to an investigation of documents produced in accordance with grand jury

subpoenas, the status of the grand jury in our jurisprudence is a polestar to guide us. The fifth amendment adopted the grand jury, as it existed at common law, and thereby made it a part of the fundamental law of the United States for the prosecution of crime. No part of the constitution defines the grand jury. No act of congress has ever attempted such a definition.[7] It had its origin in the common law and has existed for many hundred years.

The power of the grand jury is not dependent upon the court but is original and complete, and its duty is to diligently inquire into all offenses which shall come to its knowledge, whether from the court, the prosecutor, its own members or from any source, and it may make presentments of its own knowledge without any instruction or authority from the court. *Cauley* v. *Warren*, 216 F. 2d 74, 76.[8]

7. While Rule 6 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., adopted under the authority of congress and relating to the grand jury, recognizes the continued existence of the grand jury system in this country, that rule is limited to providing a method for its organization, a manner of returning indictment or no bills, the period for which it serves, provision for relaxation of secrecy by the court, and, by enumeration, a restriction on the persons who may be present during the grand jury's sessions.

8. In *Ex parte Bain*, 121 U.S. 1, 30 L. Ed. 849, 852, the court quoted with approval the language of Justice Field in a charge to a grand jury:

> "The institution of the grand jury is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the accounts of commentators on the laws of that country that it was at first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. * * * the institution was adopted in this country, and is continued from considerations similar to those which give

In *Costello* v. *United States*, 350 U. S. 359, at 361, the court said:

> "The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as

to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizens against unfounded accusation, whether it come from the government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial."

> in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor".

While the grand jury is, in a sense, a part of our court system, when exercising its traditional functions it possesses an independence which is unique. Its authority is derived from none of the three basic divisions of our government, but rather directly from the people themselves. It is unnecessary for us to enunciate general rules as to when a grand jury may so exceed its historic authority as to justify a court in interfering with its investigatorial power. In the case at bar, we are asked to decide only whether the 1956 April term grand jury was acting within its authority in swearing witnesses and then entrusting them with subpoenaed records and documents for the purpose of examination thereof by or under the direction of said witnesses, out of the physical presence of the jury or any member thereof, for the purpose of assisting the grand jury in its deliberations.

While it is true that, at least in a limited sense, the testimony before a grand jury of witnesses who, pursuant to its direction, have examined voluminous records and documents and testify as to what they have found therein, is hearsay evidence, that fact would not make it improper for the grand jury to consider it.[9]

9. In *Costello* v. *United States*, *supra*, at 362, the court said:

> "* * * As late as 1927 an English historian could say that English grand juries were still free to act on their own knowledge if they pleased to do so. And in 1852 Mr. Justice Nelson on circuit could say 'No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof . . .' *United States* v. *Reed*, 27 Fed. Cas. 727, 738.
>
> "* * * If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evi-

1. In view of the independence of the grand jury and its traditional functions, on the showing made it would be incongruous for the district court to require the grand jury to produce its minutes in open court for examination, to assemble and interrogate it or the members thereof, to admonish or discipline the assistant attorneys general assigned to the grand jury, to instruct the jury that it cannot validly consider any accusations of crime against petitioners, make any inquiries as to them, return any indictments against them, to which the documents in question are relevant, or that the court should quash the grand jury subpoenas because, it is claimed, they are but a step in an illegal scheme to subvert the grand jury subpoena into a tool for a treasury fishing expedition. On the facts appearing in the petition alone, it would be unwarranted for the court to punish for contempt treasury agents merely because they have received or examined,

dence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more. . . .

"Petitioner urges that this court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in an interminable delay but add nothing to the assurance of a fair trial."

outside the presence of a quorum of the grand jury assembled and in session, any of the documents surrendered to the grand jury in response to its subpoenas, and it would also be unwarranted for the court to quash all of the subpoenas on the ground of the constitutional violations charged. Any such actions by the district court would be gratuitous.

What we have just said should not be construed as precluding the right of the district court, to which indictments against the petitioners may be returned, from considering, if and when properly raised there, the contentions of the petitioners that their constitutional rights, herein relied on, were violated in the processes culminating in said indictments. Of course, we express no opinion as to how the district court should then rule. While we hold that the grand jury's actions under the circumstances are immune from interference by the court, we feel that any indictments which it votes, when they reach the court, carry no immunity from the application of the court's established criminal procedure.

2. In this country, as in England of old, the grand jury acts in secret. *Costello* v. *United States*, supra, at 362. Grand jury proceedings are traditionally secret. *United States* v. *Rose*, 215 F. 2d 617, 628. From earliest times it has been the policy of the law to shield the proceedings of grand juries from public scrutiny. Courts and text writers have advanced various reasons for this rule of secrecy. For a comprehensive review of this matter see *Goodman* v. *United States*, 108 F. 2d 516, 519, 127 A. L. R. 265 and the annotation at 272. See also, *Reichert* v. *Commissioner of Internal Revenue*, 214 F. 2d 19, 22.[10]

10. In the *Reichert* case, in speaking of a state statute dealing with grand juries, we quoted the reasons for secrecy as stated in *Schmidt* v. *U.S.*, 115 F. 2d 394, at 396, by way of quotation from *U.S.* v. *Amazon Industrial Corp.*, 55 F. 2d 254, 261:

"'(1) To prevent the escape of those whose indictment

The uncontradicted facts in this case in themselves point to an additional reason. The government had by various administrative subpoenas endeavored to gain access to the documents and records referred to in the petition. Having failed in that effort, government counsel made no effort to compel compliance with said subpoenas. Evidently they abandoned all civil procedures available to them. Instead they resorted to grand jury subpoenas and thereby brought those documents and records before the grand jury. With the consent of the grand jury this material has been turned over to treasury agents, who, with their assistants, have been examining it. If these efforts are directed toward the procuring of evidence for civil proceedings now or hereafter pending against petitioners, and that purpose is accomplished, then the secrecy of the grand jury has been breached. We find nothing in the history of the grand jury to justify the perversion of its functions or machinery by third persons for the purposes of a civil proceeding. The fifth amendment's adoption of the grand jury for use in the United States was for the historic purpose of initiating prosecutions for serious crimes. With the grand jury came its time-honored policy of secrecy. The idea that information obtained from the

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may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. It is obvious that the basis of all but the last of these reasons for secrecy is protection of the grand jury itself, as the direct independent representative of the public as a whole, rather than of those brought before the grand jury."

perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings.

Moreover, the public has an interest in maintaining the secrecy of the grand jury. This is because the grand jury is the direct, independent representative of the people as a whole rather than those brought before it. The application of secrecy to its proceedings is a safeguard for the grand jury itself, because it tends to prevent it from being used as an instrument for explorations in aid of civil proceedings. Otherwise such misuse of the grand jury's time and functions might in a substantial degree interfere with its investigation of crime and the return of indictments and no bills.

We are aware that it has been held that, if, after an indictment has been found and made public and the defendant has been apprehended, *Metzler* v. *United States*, 64 F. 2d 203, 206, and the grand jury discharged, *Atwell* v. *United States*, 162 Fed. 97, 101, a disclosure becomes essential to the attainment of justice and the vindication of the truth, the rule of secrecy may be relaxed in the discretion of the court. This responsibility should reside in the court, of which the grand jury is a part and under the general instructions of which, it conducts its "judicial inquiry". *Schmidt* v. *United States*, 115 F. 2d 394, 397. But, in the cases just cited, the purposes for relaxation of secrecy were fundamentally different from the government's purpose in searching for evidence, in the case before us. Therefore, in the situation presented to us in the case at bar, we hold that the safeguard of secrecy, in the interest of the public, continues even after the grand jury has completed its efforts and therefore forbids any use in civil proceedings of information derived by

or through an examination of records and documents made under the authority of the grand jury.

It is significant that the government's counsel, in their brief herein, first, do not challenge the proposition that a grand jury subpoena cannot be used for the purpose of obtaining evidence to be used in a civil proceeding; and secondly, do not disclaim an intention to use, in civil proceedings, information gleaned from examination of the records and documents subpoenaed by the grand jury in this case.

We said in *Homan Mfg. Co., et al.* v. *Russo, et al.*, 233 F. 2d 547, that the proceedings of the grand jury are secret but that we had no right to presume that the grand jury would permit records covered by its subpoenas to be diverted to the use of third persons, or that defendants propose or intend such diversion. We added that such a proposed use, if attempted, would invoke the protective power of the district court, which could act either contemporaneously or afterward in connection with such attempt. The admitted facts now before us show that there is a need for the exercise of the protective power of the district court.

3. While we hold that the district court cannot properly interfere with the action of the grand jury in turning over to third persons, including treasury agents, voluminous records and accounts for the sole purpose of examination and report to the grand jury, as an assistance to it, we also hold that persons, nonmembers of the grand jury, thus having access to said records and documents, have no right to use them for any purpose whatsoever except to assist the grand jury in its work. Such persons may not in any manner use these records and documents, or any information acquired therefrom, for any other purpose, and specifically for any civil purpose, such as

tax collection or otherwise. The right to freedom from interference by the court, which the grand jury enjoys, does not extend to such treasury agents or other third persons, including those who work with, under, or superior to said treasury agents. The direct or indirect use of any of the records and documents in question, or any information gained therefrom, in any civil proceeding can be prevented if objection is timely made therein. Moreover, the protective power of the district court should now be used to restrain any of such persons from in any manner violating the secrecy which enveloped these records and documents when the grand jury turned them over for examination. Such a restraining order should, of course, be in such detail and directed to such persons as to make it capable of effective enforcement. Thus, these are some of the ways in which the courts can and should implement the constitutional guarantees upon which the petitioners here rely. While, *in a criminal prosecution* based upon indictments of these petitioners (if they are indicted) they will be required to await the return of said indictments before having a hearing in the trial court on their contentions that their constitutional rights were violated, we think it is now apparent that, as far as *civil proceedings* are concerned, the production of these records and documents pursuant to a grand jury subpoena, if followed by their use in any manner for the purposes of such a civil proceeding against petitioners, violates their constitutional rights under the hereinbefore quoted provisions of the fourth and fifth amendments.

For the reasons herein set forth, the order from which this appeal was taken, is reversed and this cause is remanded to the district court for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

APPENDIX III.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

HOMAN MFG. CO., INC., a corporation,	*Plaintiff,*	Civil Action No. 55 C 1541
vs.		
D. J. LUIPPOLD, *et al.*,	*Defendants.*	

FINDINGS OF FACT.

The Court finds the following as facts established by the evidentiary material presented to it on the motions for summary judgment herein and that there is no genuine issue as to the same:

1. The Court has jurisdiction of the parties and the subject matter.

2. Homan Mfg. Co., Inc., plaintiff herein, was formerly known as "The Shotwell Manufacturing Co." It is one of the defendants in a certain criminal income tax case, entitled *United States of America* v. *The Shotwell Manufacturing Company, et al.*, cause No. 52 CR 143 on the dockets of this Court, hereafter in these findings and conclusions sometimes referred to as "the criminal case."

3. The criminal case was commenced by the filing of an indictment on March 14, 1952, alleging that the net income of The Shotwell Manufacturing Company was understated in its tax returns for the calendar years 1945 and 1946 in the sum of $490,719.52, resulting in a tax deficiency of $286,607.79. Upon the trial of the criminal case, Charles J. Mammel, Revenue Agent, testified that upon the basis of all the evidence in that case the understatement of income for the years 1945 and 1946 was $453,872.40.

4. On February 7, 1949 Charles J. Mammel was assigned as Revenue Agent to investigate Federal income tax returns of the plaintiff for the years 1944, 1945 and 1946, and has worked on an investigation of the plaintiff's tax returns for the said three years, and possibly others, to the exclusion of everything else from that time to this. At various times he has had as many as nine other Revenue Agents or employees of the Internal Revenue Service working under him and assisting him in his work.

5. On, and for some time prior to, September 15, 1955, all of the assets of the plaintiff (except a small amount of office furniture and records and an automobile) consisted of cash in checking accounts in Chicago banks or in deposits or shares in sundry Federal Savings and Loan associations, and amounted to approximately $1,114,000. Said assets had been held in such form for some considerable time and plaintiff did not intend to secrete or hide them.

6. On September 15, 1955, the Internal Revenue Service issued and served a jeopardy levy against the plaintiff and against all of the financial institutions in which its funds were lodged asserting that the total sum of $3,172,123.65 was then due and owing the United States from the plaintiff for additional income and excess profits taxes,

penalties and interest for the years 1944, 1945 and 1946, beyond those reported and paid by plaintiff. The said levy asserted that of the foregoing sum $755,190.98 was due for taxes for the year 1945, exclusive of penalties and interest, and $281,029.72 was due for taxes for the year 1946, exclusive of penalties and interest. The total amount of taxes and penalties asserted by the said assessment was $2,306,900.05. On or about November 14, 1955, the Internal Revenue Service issued a notice of determination of income tax liability for the said three years in which it asserted deficiencies of $2,122,944.94 for alleged taxes and penalties. The difference (excluding interest) between the amount of the jeopardy assessment of September 15, 1955 and the determination of November 14, 1955 came from a recomputation of tax rates and correction of mathematical errors and not from any substantial change in asserted income forming the base for the tax.

7. The said assessment and determination were based on the work and conclusions of Charles J. Mammel, and with insubstantial deviations represent his determinations of taxable income, notwithstanding the assessment itself is signed in the name of another person.

8. The assessment in question is patently arbitrary, capricious and wholly void.

9. In making his determinations of taxable net income Mammel made no attempt to be fair to the taxpayer at any time; he proceeded on the assumption that he was only required to be fair to the taxpayer "if I can" and did not adhere even to that standard.

10. The alleged additional income determined by Mammel consists principally of (a) alleged over-ceiling cash "premiums," paid by one Lubben which asserted payments were the subject matter of the criminal case; (b) approximately $964,000 gross income which it is asserted should

have resulted from extra manufacture of candy which Mammel believes should have occurred but which is not reflected on the records of the company; and (c) disallowance of sundry items of expense. In determining item (a) above Mammel both relied upon, and misconstrued, items of evidence ordered suppressed in the criminal case, relied upon altered and changed purported records of said Lubben, wholly failed to make any good faith practical judgment as to offsetting black-market expenditures, and acted essentially upon an informal determination he had made in late 1951 or early 1952 and ignored relevant facts brought to his attention between that time and September 1955 showing that at least part of his initial determination were erroneous. In determining item (b) above Mammel was wholly imaginary and did not even purport to find whether the so-called extra production remained in inventory or was sold and admits that he has no evidence that so much as one pound of this asserted extra 4,000,000 pounds of candy was ever sold or shipped or remained in possession. In determining substantial disallowances comprising item (c) above Mammel failed to follow reasonable procedures to test the verity of plaintiff's claimed deductions but made disallowances by whim and caprice on the excuse that he "didn't have time" between 1949 and 1955 to investigate. The arbitrary, capricious and unlawful actions in this finding described were carried into and are substantially found in the determination of November 14, 1955.

11. Mammel's determinations were arbitrary, capricious and unlawful in the extreme and it is not necessary to decide whether such actions sprang from malice, incapacity, or a desire to justify the length of time and large amounts of manpower consumed in this investigation, or from a combination of these or other reasons.

Mammel suffered a complete mental breakdown on March 19, 1953 and upon cross-examination in February 1956 was unable to recall basic rules of taxation involved in this case and which should have come into play when he made the assessment of September 1955. He also was unable to recall important points developed during the criminal trial of late 1953 to which he should have applied fair judgment in making the 1955 assessment.

12. The making of the assessment and jeopardy levy has had the effect of completely tying up, with *de minimis* exceptions, all of the taxpayer's assets. Unless the arbitrary assessment and levy is set aside the taxpayer will be without funds to pay the fees and taxes necessary to maintain its corporate existence. If collection upon the jeopardy levy was permitted, all of the taxpayer's assets would be seized and it would be without funds to engage lawyers, accountants or pay any other expenses necessarily incident to a legal proceeding to recover the unlawful exaction resulting from Mammel's arbitrary and capricious assessment.

13. Special and extraordinary circumstances exist in this case so as to make inapplicable section 7421 of the Internal Revenue Code of 1954 relating to injunctions against the assessment and collection of taxes.

14. The United States has actively participated in and controlled the defense of this litigation.

15. No genuine issue as to any material fact exists in this case.

CONCLUSIONS OF LAW.

1. The jeopardy assessment of September 15, 1955, made against the taxpayer, and all subsequent proceedings based thereon were made unlawfully and in violation of the taxpayer's constitutional rights and hence are wholly null and void.

2. The jeopardy assessment being wholly void and of no legal effect created no lien in favor of the United States and the United States is not a necessary party to this action.

3. Plaintiff is entitled to a permanent injunction against the enforcement of the assessment and levy of September 15, 1955, and any other proceedings or rights that might be claimed by virtue of said assessment and levy or any new assessment based on the present determinations of Charles J. Mammel.

4. Section 7421 of the Internal Revenue Code of 1954 does not prevent the Court from entering an injunction under the circumstances of this case.

5. Defendant's motion for a summary judgment should be denied.

6. Plaintiff's motion for a summary judgment should be granted.

Enter:

JOSEPH SAM PERRY.

Dated June 14th, 1956.

Office - Supreme Court
FEB 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NOS. 9 and 10

UNITED STATES OF AMERICA,
Petitioner,

v.

THE SHOTWELL MANUFACTURING COMPANY,
BYRON A. CAIN, FRANK J. HUEBNER,
AND HAROLD E. SULLIVAN

THE SHOTWELL MANUFACTURING COMPANY,
BYRON A. CAIN, FRANK J. HUEBNER,
AND HAROLD E. SULLIVAN,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA

MOTION TO WITHDRAW FROM OPPOSITION TO GOVERNMENT'S PETITION FOR CERTIORARI, MOTION TO WITHDRAW FROM CONDITIONAL CROSS-PETITION FOR CERTIORARI, AND CONSENT TO GOVERNMENT'S MOTION TO REMAND (AMENDED)

FRANK J. HUEBNER,
In Propria Persona.

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

NOS. 9 and 10

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UNITED STATES OF AMERICA

MOTION TO WITHDRAW FROM OPPOSITION TO GOVERNMENT'S PETITION FOR CERTIORARI, MOTION TO WITHDRAW FROM CONDITIONAL CROSS-PETITION FOR CERTIORARI, AND CONSENT TO GOVERNMENT'S MOTION TO REMAND (AMENDED)

I am one of the respondents and cross-petitioners in the proceedings pending before this Court. As a defendant in the trial court, I was convicted and sentenced, my conviction having been reversed upon appeal. I joined in

the opposition to the Government's petition for a writ of certiorari and also in the conditional cross-petition for a writ of certiorari.

I subsequently testified before the April 1956 Term Grand Jury for the Northern District of Illinois to the extent of my knowledge on the facts concerning the voluntary disclosure alleged to have been made for and on behalf of The Shotwell Manufacturing Company. I have also provided to the Government an affidavit which I understand is to be filed by the Government in support of its motion to remand.

I now desire, and respectfully request the permission of this Court, to withdraw from the opposition to the Government's petition for certiorari, and to withdraw from the conditional cross-petition for certiorari, and to consent to the Government's motion that the case be remanded to the District Court for the Northern District of Illinois.

Respectfully submitted,

FRANK J. HUEBNER,
In *Propria Persona.*

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FILED
JAN 7 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. ~~9 and 10~~ /

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THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,
Cross-Petitioners,
vs.

UNITED STATES OF AMERICA,

MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR FRANK J. HUEBNER.

HAROLD A. SMITH,
GEORGE B. CHRISTENSEN,
HOWARD ELLIS,
WILLIAM T. KIRBY,
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IN THE

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vs.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR FRANK J. HUEBNER.

Now come Harold A. Smith, George B. Christensen, Howard Ellis and William T. Kirby, and move that they be permitted to withdraw as attorneys of record for Frank J. Huebner, who has filed a motion herein *In Propria Persona* consenting to the Government's position in all matters now pending before the Court. In support of their motion, movants attach the affidavits of Neal J. McAuliffe and George B. Christensen and the consent of said Huebner to their withdrawal, and respectfully show:

On December 14, 1956, movants learned for the first time that in August or September, 1956, Huebner, under circumstances not known to movants, testified before the April 1956 Term Grand Jury, which, *inter alia*, has been investigating this case. Events subsequent to December 14, 1956, have demonstrated to movants that Huebner for some months has not relied upon them as his attorneys, and he appears to be fully within the control of Government counsel.

Movants show by the annexed affidavits that Huebner for some time has been seriously upset because of the strain of this protracted prosecution.

Movants make the following points with respect to the motion of Huebner and to illustrate the propriety of relieving movants of responsibility as counsel for him:

1. Huebner is basically mistaken in consenting that this Court grant certiorari for the reason that a question as to a detail of the former "voluntary disclosure" policy no longer is (if it ever was) a question of public importance and for the other reasons set out in movants' opposition to certiorari.

2. Huebner is basically mistaken in consenting that the case should be remanded to the District Court for a supplemental suppression of evidence hearing as to "timeliness" of the disclosure because Government counsel admit the disclosure in any event was made in July 1948. The Treasury had not "initiated investigation" (as that phrase is defined by the controlling "Wenchel objective test") by that date; in fact, never did initiate an investigation independently of that flowing from disclosure. That a disclosure was made is uncontested, and, whether in January or July 1948 (or some intermediate date), it was timely under Treasury rules. These salient facts, movants believe, cannot be avoided by any affidavit which Huebner may have given.

3. Huebner is basically mistaken in consenting to the motion to remand because that motion does not

show the existence of such new evidence and such diligence as are necessary to support a motion for a partial new trial on the ground of newly discovered evidence.

4. Huebner is basically mistaken if he is under the impression that by consenting to the Government's motion he may (should the convictions ever be affirmed) escape the sentence originally imposed by the District Court because the mandate of the Court of Appeals has not been stayed; under Criminal Rule 35, the District Court long since lost jurisdiction to change the sentence (Cf. *U. S.* v. *Hunter*, 162 F. 2d 644).

5. Huebner is without legal training and is unequipped to decide, or to advise the Court, whether the Government ever may move for a new trial in a criminal case on the ground of alleged new evidence. Yet it would appear that he committed himself to his present course of action without legal advice.

Movants cannot prevent Huebner from making legal mistakes which they believe are detrimental to him and are not helpful to the Court; they should be permitted to withdraw.

Respectfully submitted,

HAROLD A. SMITH,
GEORGE B. CHRISTENSEN,
HOWARD ELLIS,
WILLIAM T. KIRBY,
Counsel for Respondents-Cross-Petitioners The Shotwell Manufacturing Company, Byron A. Cain and Harold E. Sullivan.

WINSTON, STRAWN, SMITH & PATTERSON,
38 S. Dearborn Street,
Chicago, Illinois,

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS,
130 E. Randolph Drive,
Chicago, Illinois,
Of Counsel.

January 4, 1957.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

NEAL J. MCAULIFFE, being first duly sworn, deposes and says that movants heretofore have entered their appearance as counsel for all respondents and cross-petitioners in the foregoing entitled case; that affiant is a partner of Harold A. Smith and George B. Christensen, two of counsel of record for respondents and cross-petitioners herein, is familiar with the proceedings herein, and has worked as a lawyer on this case during all steps in the appellate proceedings.

That on December 12, 1956, Frank J. Huebner, who has filed a motion to withdraw from opposition to the Government's petition for certiorari, etc., in a telephone conversation with him, informed affiant that he "had his own lawyer," who was Frank J. Smith, 10 South La Salle Street, Chicago, Illinois; that he, the said Huebner, was "sick of the whole case"; that it would probably drag on for many more years, and that he wanted to get it over with one way or the other; that Huebner would not make answer to pertinent questions relating to the defense of the case but repeatedly told affiant that he would not discuss the matter further with affiant or his partners; that this was the first notice that affiant or any of the attorneys of record had that Huebner was not relying on them.

That on December 14, 1956, affiant had a conversation with said Attorney Frank J. Smith, who told affiant that he, the said Smith, was not well informed as to the case but that Huebner had told him that he had testified before the Grand Jury in August or September, 1956, and before seeking legal advice from him; that affiant suggested to Smith that Huebner apparently had acted without any independent legal advice whatsoever, and that affiant did

not believe that Huebner knew what his rights or duties were, that the pressure of years of litigation and perhaps continuous pressure and threats or promises by Treasury Agents, unbeknown to affiant and his partners, had reduced Huebner to a state where he was so mentally upset that he should be allowed to take no action whatsoever without advice of competent independent counsel; that Attorney Smith told affiant that in view of the fact that Huebner had dealt with representatives of the Treasury unbeknown to affiant or his partners, or before retaining him, and from the tenor of Huebner's recent communications with him, he was convinced that Huebner had made up his mind not to oppose the Government and that he believed there was nothing he could do about it; Smith said he expected to see Huebner Saturday afternoon, December 15th, and learn more about the case and Huebner's attitude.

(Sgd.) NEAL J. MCAULIFFE.

Subscribed and sworn to before me this 3rd day of January, 1957.

(Sgd.) JANE NEIS.
Notary Public.

(NOTARIAL SEAL)

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

GEORGE B. CHRISTENSEN, being first duly sworn, on oath deposes and says that he is one of the attorneys of record herein; that on December 17, 1956, he had a conversation with Attorney Frank J. Smith, who is identified in the affidavit of Neal J. McAuliffe submitted herewith, in which affiant pointed out that the time within which the defendants were permitted to answer the Government's motion to remand would expire on December 22, 1956; that it was affiant's opinion that Frank J. Huebner should resist the motion to remand because even though he had testified before the Grand Jury, affiant and other counsel who had studied the case were of the opinion that he could have given no testimony that would invalidate the voluntary disclosure herein for the record indisputably showed that no investigation of Shotwell's tax returns, independent or separate from that flowing from the disclosure, ever had been made; that Huebner himself was not competent to decide, or to know, what constituted either a sufficient or a timely voluntary disclosure; that in the opinion of affiant Huebner was so distraught from years of litigation that he was not competent to protect his own interests in a complex legal matter and could become an easy victim of overzealous or misinformed Government agents.

Attorney Smith replied in substance that he had not had time to familiarize himself with the entire situation; that he did not know what Huebner's ultimate attitude would be but that at that time he would not consent that his name be recorded in opposition to the Government's motion.

Affiant told Smith that it was apparent that Huebner was no longer following, and no longer wanted, the advice

of present counsel of record; that although it was the opinion of affiant that Huebner needed advice from counsel fully familiar with the record, under the circumstances present counsel of record should be relieved of any duty to protect him.

On December 26, 1956, present counsel of record requested in writing that Huebner consent to their withdrawal, and on December 31, 1956, they were furnished the written consent to withdrawal dated December 27, 1956, submitted with this affidavit.

(Sgd.) GEORGE B. CHRISTENSEN.

Subscribed and sworn to before me this 3rd day of January, 1957.

(Sgd.) JANE NEIS,
Notary Public.

(NOTARIAL SEAL)

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1956.

Nos. 9 and 10.

UNITED STATES OF AMERICA,

Petitioner.

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,

Cross-Petitioners,

vs.

UNITED STATES OF AMERICA.

CONSENT TO WITHDRAWAL OF APPEARANCE.

I hereby consent to the withdrawal of Harold A. Smith, George B. Christensen, Howard Ellis and William T. Kirby as my attorneys in all phases of the above entitled matter.

Dated December 27, 1956.

(Sgd.) FRANK J. HUEBNER.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [illegible]

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,
Cross-Petitioners,

vs.

UNITED STATES OF AMERICA.

REPLY TO SUPPLEMENT TO MOTION TO REMAND

MOTION THAT CONDITIONAL CROSS-PETITION FOR CERTIORARI BE TREATED AS AN UNCONDITIONAL CROSS-PETITION.

HAROLD A. SMITH,
GEORGE B. CHRISTENSEN,
HOWARD ELLIS,
WILLIAM T. KIRBY,
Counsel for Respondents-Cross-Petitioners The Shotwell Manufacturing Company, Byron A. Cain and Harold E. Sullivan

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KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS,
130 E. Randolph Drive,
Chicago, Illinois,
Of Counsel

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

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Nos. 9 and 10.

UNITED STATES OF AMERICA,
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THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,
Cross-Petitioners,

vs.

UNITED STATES OF AMERICA.

REPLY TO SUPPLEMENT TO MOTION TO REMAND

The "Supplement" to the Motion to Remand should be recognized and condemned for what it is—a disgraceful, police court attempt to avoid or obscure, by a barrage of accusations against our clients, the unanswerable propositions, adherence to which is essential in a proper system of criminal justice, that are set forth in our "Answer to Motion (Amended) to Remand."

THE SIGNIFICANT FACTUAL ASPECT OF THE "SUPPLEMENT" IS THAT IT ESTABLISHES THAT IN ANY EVENT THERE WAS A DISCLOSURE BY JULY 1948 WHICH WOULD HAVE BEEN TIMELY.

THE SIGNIFICANT LEGAL ASPECT OF THE "SUPPLEMENT" IS THAT IT CONCEDES THE CORRECTNESS OF OUR MAJOR PROPOSITION THAT IN NO EVENT CAN THE GOVERNMENT MOVE FOR A PARTIAL NEW TRIAL IN A CRIMINAL CASE IN AN ATTEMPT TO VALIDATE A CONVICTION ALREADY OBTAINED. It does this in the last half of its page 5 and on page 6 where the prosecutors deny that they are in any sense moving for a partial new trial as we have asserted. After conceding by indirection that they could not so do, they go on, in different words, to ask for precisely that but under a different label. They say they are asking that the district court make "a full investigation and *determination of the matters involved,*" and "*receive and appraise testimony and evidence bearing on the controverted questions of fact.*"

To "*receive and appraise*" "*evidence*" and to make a "*determination*" is so obviously to hold a trial, or, in the circumstances here, a partial, additional or supplemental trial in an effort to validate the original convictions, that it is effrontery to pretend otherwise.[1]

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1. *Carpenter* v. *Winn*, 122 U. S. 533, 538:

"Blackstone defines 'trial' to be the examination of the matters of fact in issue * * * But the word often has a broader significance, as referring to that final examination and decision of matter of law as well as fact for which every antecedent step is a preparation, which we commonly denominate 'the trial.'"

Black's Law Dictionary, 4th Edition:

"A judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has jurisdiction over it."

88 *C. J. S.*, p. 19:

"As used in its legal sense with respect to judicial proceedings 'trial' is a familiar common-law term denoting a judicial examination of the issues in an action."

Aktiebolaget Svenska Handelsbanken v. *Chase National Bank*, 69 F. Supp. 833, 834:

By the vehemence and speciousness of their protest that they are not seeking a new trial, the prosecutors effectively concede that our system of law does not permit them so to do; their complex language as to "evidence," "controverted questions," "appraisals" and a "determination," cannot conceal, but quite clearly proves, that nevertheless that is exactly what they seek.

The force of this must not be overlooked—in our Answer (pp. 13-16) we argued that the prosecutors were seeking a wholly impermissible end—that the recorded judicial history of the country fails to show any such prior attempt. That argument alone is fatal to the Motion to Remand, regardless of by what affidavits it be supported. It would have been answered squarely if there were answer that could be made. Unable to answer it, or to cite authority, the prosecutors have resorted to the frivolous assertion that they want a *new "determination"* rather than a *"new trial."* One must look to Lewis Carroll rather than to law books to find the counterpart of such reasoning.

The Court is here dealing with the liberty of citizens of heretofore unblemished reputation (R. 2686-2705); it is dealing with fundamental rules of criminal procedure that have been recognized as necessary, wise and just throughout this Court's existence; it is dealing also with an attempt to have it rule that hereafter criminal cases

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"In a restricted sense a trial denotes that step in an action by which issues of fact are decided. In a broader sense, a trial is a judicial examination of the issues between the parties, whether they be issues of law or of fact."

People v. *Richetti*, 302 N. Y. 290, 97 N. E. 2d 908, 911;

"For centuries a 'trial' of a dispute of fact has meant 'the examination, before a competent tribunal, according to the laws of the land, of the facts put in issue, for the purpose of determining such issue.'"

In *People* v. *Looney*, 314 Ill. 150, 145 N. E. 365, 367, the Court held that the word "trial" includes all preliminary and subsequent proceedings after the return of the indictment.

may be tried piece-meal with the prosecutor traveling back and forth between appellate and trial courts until finally he either wears out the defendant or puts in, one way or another, enough evidence to satisfy the appellate tribunal. We cannot believe the Court ever will countenance so vicious a proposition.

If we are correct in what we have said thus far it follows that the Motion to Remand must be denied and it will be unnecessary for the Court to consider the balance of this Reply. Additionally, as we shall show, the Huebner testimony, which is alleged reason for the Supplement, was in the Government's possession considerably before the Motion to Remand was filed. Such of it as was believed material was reflected in the attorneys' hearsay affidavits attached thereto. All that the Huebner affidavit itself adds is disparaging material that conceivably might be relevant to some other indictment, or to the merits of this case, but is not material to the disclosure issues here—it does not in any way invalidate our previous Answer to the Motion.

However, the Supplement is so unusual a document and so trespasses on the rights of our clients, that we make further reply to it:

Assuming That the Government May Move for a New Trial on the Ground of Newly Discovered Evidence, the Supplement Is Insufficient.

The reason advanced for a further trial is that the prosecutors wish now to prove, through assertedly newly discovered evidence, that the disclosure was an "untimely" one—this is the ultimate factual and legal "determination" aimed at. But if everything in the Huebner affidavit be taken as true, it proves that a disclosure was made at least by July 1948. If it be considered as proving (which we shall show it does not), that a disclosure was not made in

January-March 1948, it nevertheless would show, for the legal reasons set forth in our Answer to the Motion to Remand (pp. 5-7, 19-24), *to which counsel attempt no reply*, a disclosure which, under definitive Treasury pronouncements and offers for disclosures, would have been timely. At the most, therefore, it is merely impeaching as to an immaterial point. Impeachment even as to a material point always has been ruled an insufficient ground for a new trial. (See *U. S.* v. *Johnson*, 142 F. 2d 588, 592, quoted at p. 17 Answer to Motion to Remand.)

But does the Supplement show contradiction of evidence as to when the disclosure was made? Despite its strident, generalized claims of "perjury" (quite in contrast with the modest claim of a "conceivably altered result" advanced in the Motion to Remand), does it make even a *prima facie* showing of perjury, or contradiction on a material point on the suppression hearing?

The Supplement asserts (p. 4) only that Huebner will testify on three points:

(1) That Lubben made over-ceiling payments from November 1944 to December 1946, rather than from September 1945 to June 1946 as defendants asserted. This goes solely to the merits of the case. This question was in no way involved in the suppression hearing. It has no bearing on the timeliness of the disclosure and therefore may be disregarded.

(2) That during the first six months of 1948 no one "mentioned" to Huebner (p. 8) that a disclosure had been made; that in July 1948 he was at the meeting with Shotwell staff people in the Belden-Stratford Hotel at which the recapitulations were prepared "so that a disclosure could be made;" that prior to this "so far as he knows" no work was done by anyone relative to compiling data "for the purpose of making a voluntary disclosure;" that

he was "given to understand" the date would be set at June 15, 1948. It is said (p. 4) that this contradicts suppression testimony by auditor Busby that Huebner was at a meeting in late January at which it was decided to make a disclosure, and by Cain that Huebner "possibly" was there.[2] And it does. But it does not contradict the testimony of Busby, Cain and Sauber that the disclosure in fact was made in the January-March period, that Sauber told them to assemble figures to assist the agents who would make an audit or investigation (R. 178, 182, 215, 232), that this work "dragged" and that finally Cain assembled the staff and got the job done (R. 232-3).

Neither Busby nor Cain in lengthy testimony as to the events leading up to the disclosure and as to the work done in assembling figures thereafter, mentioned Huebner as playing any part until the staff met to assist in putting together the final recapitulations, except that Busby gave a single answer (R. 176) that Huebner was present when Cain made the decision to disclose, while Cain at one point said Huebner "possibly" was (R. 228-9) and at another excluded him (R. 249). Out of many meetings between these people on many subjects in this period involving not merely taxes but a loan Lubben was requesting, any one of the three could be mistaken. Busby's and Cain's testimony as to who was present at this particular meeting was as to an immaterial point. The fact that Huebner's present alleged recollection differs from theirs is not unusual, is still a difference as to an immaterial point, and certainly does not show perjury by Busby or Cain or, for that matter, by Huebner. And Huebner's affidavit that "no one men-

2. It may be noted that at one point Cain said Huebner was "possibly" there (R. 228-9), at another he identified only himself and Sullivan as being at this particular session with Busby (R 249). This is indicative of the fact that the witnesses were endeavoring, within the limits of memory, to give honest testimony —it is indicative also of the unimportance or immateriality of this particular meeting to the issues that were being tried.

tioned to him" that a disclosure had been made plainly does not contradict evidence that one had been made. In neither law nor fact does the president of a corporation (Cain) always tell a plant manager (Huebner) everything he has done.

The affidavit discloses that someone has drilled into Huebner the notion that a disclosure could be made only by presenting a document containing corrected figures. Thus he says that the recapitulations were made "*so that*" a disclosure could be made. The fact that the disclosure *per se* consisted merely of coming forth and identifying one's self as having filed an improper return, that the Treasury always reserved the right to make its own investigation in verification of the disclosure, and that assistance by the tax payer in making a correct return was at most in the nature of a condition subsequent to the disclosure (Cf. Answer to Motion to Remand, pp. 28-29; see also footnote 2 thereof, p. 3), is one that has escaped Mr. Huebner and the prosecutors from whom he apparently is taking his advice. ("The simple statement that 'I have filed false tax returns and I want to make the Government whole,' would constitute a complete disclosure." Treasury release, May 14, 1947, R. 3136.)

(3) That sometime in the late summer or early fall of 1948 Cain and Busby told Huebner the case had been "fixed" for a tax deficiency of $20,000, but that someone destroyed the settlement papers. While this carries overtones of wrongdoing, it has nothing to do with the disclosure question because admittedly Agent Lima was assigned on July 30, 1948 (Dft. Ex. 15 at R. 3173, R. 321) to investigate or audit the company *pursuant to the disclosure* and had gone to work on the case.

Of the three items of proof, then, on which the Supplement claims the case should be reopened, items (1) and (3) obviously have no relevancy to the disclosure timeliness

issue that is pressed as the reason for reopening. Item (2), while connected with the disclosure events, is not material to the issue and could not support a motion for a new trial. New evidence that might warrant a new trial (assuming the Government could move for one), would have to be in direct contradiction of something originally given at the suppression hearing that was vital to a decision of the issue. Analysis demonstrates that the Supplement, despite its poisonous air, offers nothing that would warrant a new trial even if one were permissible.

By Failure to Support the Legal and Factual Theories of the Motion to Remand, i. e., That on June 21, 1948, Treasury Agents Got a "Scent", Which Would Make Any Disclosure Thereafter Untimely, the Supplement Is an Effective Demonstration That Those Theories Are Wrong.

The fact that the Supplement is a reply to our "Answer" to the Motion to Remand, cannot be disguised. It argues vigorously, albeit erroneously, against our argument that the Government cannot move for a partial new trial in order to validate a conviction already obtained; footnote 2 of the Supplement is a direct, although merely assertive, reply to our contention, supported by cases, (Answer, p. 10) that the result of the administrative proceedings against Sauber was exoneration from charges of official wrongdoing in connection with this case.

Since the Supplement is a reply to our Answer, it is of utmost significance that not a word is said to dispute the detailed demonstrations, based on the record and Treasury documents, at pages 4 to 7 and 19 to 25 of the Answer showing that the Intelligence Agents did not get a clue or "scent" as to tax violations by Shotwell on June 21, 1948, and that even if they had, a disclosure thereafter would have been timely. Huebner, for all the extraneous matter in his affidavit, only fortifies the fact that a disclosure *was*

made and that the disclosure brought about the investigation conducted by agent Lima.

Moreover, the report of Intelligence Agent Krane (R. 3166-3170), made in 1950 when events were fresh in people's minds and unconfused by the varying theories of successive sets of Government lawyers, shows conclusively that no independent investigation of Shotwell was even considered until long after Agent Lima had been assigned to the case as a result of the disclosure and had gone to work on it. Let it not be forgotten, as is shown by Record (pp. 3172, 3156) and Court of Appeals opinion, that the only reason this disclosure was not honored was not because of untimeliness but because the agents believed defendants could inform on persons who might be tax evaders and insisted, *as the price of immunity*, that they do so—"cooperate with their Government" (R. 3156) was the euphonious phrase they used. That noxious excrescence on the disclosure policy has spawned all this litigation. The policy invited the taxpayer to inform on himself alone, not on others.

Nor does the Supplement dispute our contention that counsel are now pressing upon this Court a point of disclosure law which was specifically disavowed in the trial court.

These are not minor points; they are as determinative of the issue as is our point that the Government cannot move for a partial new criminal trial; they would have been answered if counsel felt able so to do.

The Supplement and the Huebner Affidavit Were Not Diligently Presented.

It should be observed that neither the Supplement nor the Huebner affidavit makes any mention of *when* the Huebner evidence *first* came to the attention of the prosecutors. The documents are adroitly cast to leave an impression that all this is very recent and that the prosecutors have

moved with diligence. Thus, the Supplement opens with the unctuous, but unspecific assurance that "The rapidly unfolding developments in this case require the filing of this Supplement * * *," and the affidavit is dated December 19, 1956. However, the record rather than demonstrating "rapid unfolding" shows that *the Huebner evidence, whatever it may be, was in the possession of the prosecutors at least as early as August or September 1956*, in ample time to have been included in the original Motion to Remand filed here in October 1956. Huebner's affidavit admits that he testified before the April 1956 Term Grand Jury but refrains from admitting *when* he did so. However, the affidavit of McAuliffe, attached to our Motion for Leave to Withdraw as Counsel, establishes that Huebner was before that Grand Jury last August or September, and Huebner swears that when there (Supp. p. 10) he testified "to *these* and other facts."

It is apparent that the prosecutors, rather than being diligent or frank, have been playing cat and mouse with the defendants and with the Court. Ultimately, fearing that the Amended Motion to Remand might be denied, they decided to produce an affidavit from Huebner, although presumably they could have procured one at any time in the last five or six months. Certainly they could have procured an order from the District Court under Criminal Rule 6 making Huebner's testimony before the Grand Jury available.

The Character of the Supplement.

Up to this point we have examined everything in the Supplement and the affidavit that is asserted to be material to the suppression question which is before the Court. That examination leads to two plain conclusions:

(1) The Supplement and the affidavit are obviously in-

sufficient for the purpose for which they ostensibly are advanced.

(2) Both the Supplement and the affidavit contain many charges not material to the issue but of a type calculated to arouse animus against our clients.

If the prosecutors think they have a good case against our clients for these sundry offenses charged or inferred, they, of course, could procure indictments and endeavor to convict them. We of course think they should not do that; however the course is open to them. But it is grossly improper to attempt to reverse the present Court of Appeals judgment by innuendo of sundry misconduct.

When this case and its offshoots are viewed in perspective it will be seen that the Government's record is stained by repeated administrative excesses. Defendants have suffered from years of torture and improper Governmental action of which the Supplement is the mere culmination:

(a) The Treasury initially, and for years after the courts had ruled to the contrary, refused to recognize "black market" premiums on raw materials as a deduction from gross income (See Brief in Opposition to Certiorari, pp. 7-11). The whole controversy stems from this Treasury error of law. While no one can now recast events, we believe it is a certainty that had the Treasury ruled correctly as to what the tax law was at the time of the disclosure, or had it done so within the next few years, the whole course of events would have been greatly different and it is entirely probable that there would have been no indictment. Not until after indictment here did the Treasury bow to court rulings in this regard (See footnote 2, p. 7, Br. in Opp. to Certiorari).

(b) Three successive Secretaries of Treasury, (including one who became Chief Justice of the United States), and numerous lesser but highly placed and responsible

officials, publicly promised immunity to those who would voluntarily disclose. Now the same Government, the Government that talks about "good faith" by defendants, says that its promise is valueless and need not be kept. It now seeks a conviction despite its promise. The immoral position of the Government still is that even if the disclosure was letter perfect that the most a citizen can get is a suppression order; that he still may be convicted; that a Cabinet Member's promise to the contrary is of no more value than a Russian treaty. The fraud here is not by the defendants—it is by faithless public officials toying with the liberty of citizens.

(c) When the criminal case failed in the Court of Appeals, the Treasury resorted to a jeopardy assessment and levy so vicious, arbitrary and fantastic as to be set aside as a violation of due process (App. III, Answer to Motion to Remand). Had this maneuver succeeded however, it would have been a death sentence for the corporate defendant and seriously embarrassed the individuals in their means of defense.

(d) Then the Grand Jury was resorted to and soon the Court of Appeals had to enter its order that the prosecutors and Treasury agents again had violated Constitutional guaranties and must hereafter act lawfully (App. II, Answer to Motion to Remand). And in an attempt to avoid that decision, prosecutor Russo told such serious untruths to the Court of Appeals that the Department was impelled to lodge an apology (Footnote 4, pp. 10-11, Answer to Motion to Remand).

(e) The original Motion to Remand filed here was so cast as to leave the impression that Director Sauber was dismissed from Governmental service because of official misconduct in connection with this case. That had to be corrected by an Amended Motion to Remand.

(f) The Amended Motion to Remand is based in sub-

stantial part on the Russo affidavit, in which the key sentence, designed to support the new and erroneous theory that Government agents got a "scent" on June 21, 1948, is a square inversion of truth (See Answer to Motion to Remand, pp. 29-31).

(g) Each time it appears likely this Court may rule, some new artifice appears: at the time it might have been assumed a ruling would come down on the certiorari application, the Solicitor General's letter of December 6, 1955, was filed; when it was possible that the Court might rule before adjourning the 1955 term, the letter of June 1, 1956, was filed; when our Answer to the Amended Motion to Remand was filed (December 22, 1956) and it was likely that a ruling would be made on it, the Supplement and Huebner's affidavit were filed. Perjury was first charged, then abandoned (See Point II, Answer to Motion to Remand, pp. 16 ff), now is asserted again in the face of the significant fact that although a Grand Jury has been in session for months, no perjury indictment has come down.[3] The Huebner affidavit goes only to the Motion to Remand for a further trial as to suppression issues, yet it is loaded with vicious assertions material, if at all, only to the merits of the case for which a new trial already has been ordered.

(h) The concluding paragraph of the Huebner affidavit contains a sentence which should not pass unnoticed—"I was not asked to testify at either the trial or suppression hearing because I had stated I would not lie on the stand." Although the sentence is peculiarly phrased and is susceptible of many meanings, one possible innuendo is that the distinguished and wholly honorable and respected lawyers, members of the bar of this Court, who represented Huebner and the Company at the suppression hearing and the hearing on the merits (and are not on this appeal),

3. Although such an indictment would have no evidentiary standing here (*Brinegar* v. *U. S.*, 338 U. S. 160, 173), certainly the absence of one does not lend color to the prosecutors' claims.

were guilty of a serious offense. It is apparent from the entire record that there was no occasion to call on Huebner on the suppression hearing. As to the hearing on the merits this Court may be assured that counsel of the standing of those who handled the case below did not deprive Huebner of the privilege of testifying if he wished to do so.

We respectfully suggest this record of endless and unfair harassment is long enough—only the courts stand between citizens and administrative harassment that in and of itself is destructive of freedom.

Conclusion.

It is respectfully submitted that the Motion to Remand should be denied. It is further submitted that the Supplement, the sole avowed purpose of which is to present the Huebner affidavit, is such a departure from proper criminal procedures that it should be stricken.

Respectfully submitted,

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January 18, 1957.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 10.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN AND HAROLD E. SULLIVAN.
Cross-Petitioners,

vs.

UNITED STATES OF AMERICA.

MOTION THAT CONDITIONAL CROSS-PETITION FOR CERTIORARI BE TREATED AS AN UNCONDITIONAL CROSS-PETITION FOR CERTIORARI.

Now come The Shotwell Manufacturing Company, Byron A. Cain and Harold E. Sullivan by their attorneys, and respectfully move that the Conditional Cross-Petition for Certiorari heretofore filed on their behalf be treated as an unconditional Cross-Petition for Certiorari, and show:

1. When the Court of Appeals decision herein was made final in the late summer of 1955, this litigation was then some three and one-half years old and concerned, as to its merits, events that had occurred from eleven to nine years earlier. Cross-Petitioners either directly or through stock ownership in the Shotwell Company were involved in the series of civil cases referred to in *In the Matter of the April 1956 Term Grand Jury*, C. A. 7, November 13, 1956 (Appendix II, Answer to Motion to Remand), and were desirous of following that course of procedure which they were advised held most promise of enabling them to come

to some early general settlement of their tax problems. They were advised, and believed, that the effect of the suppression order entered by the Court of Appeals would probably be to prevent a re-trial of the criminal case; that while the Court of Appeals decision did not give them the immunity they had been promised, nevertheless it would probably prevent further practical prosecution; that upon such assumption, voluntarily to seek further litigation in this Court by an unconditional application for certiorari might well serve to prolong, rather than to hasten, a final conclusion.

2. The present apparent willingness of the defendant Huebner to testify hereafter as a Government witness raises the possibility that the Government may attempt upon re-trial of this case, to prove a *prima facie* case through Huebner (the very man whose affidavit shows there was a disclosure and that it was timely), even though the evidence produced by defendants in reliance upon the Government's promise of immunity be suppressed, *i. e.*, that the suppression order would be a fairly hollow victory. The Government now seems determined to press for a retrial some eleven-to thirteen years after the event. Such retrial would visit further harassment, crushing expense and emotional strain on citizens who already have been subjected to years of such treatment because the Government refused to honor its word. One of the obvious purposes of the Huebner affidavit is to convince the Court that defendants were guilty of tax evasion. But even if that should be assumed there is all the more reason to hold the Government to its solemn word not to prosecute, for the express purpose of the voluntary disclosure policy was to extend immunity to the presumptively guilty as well as to the innocent.

3. The Cross-Petition for Certiorari does not stand on the same footing as the Government's. The Government's

should be denied and Cross-Petitioners' granted for the following reasons:

The Government asks certiorari on a question of no present public importance if it ever was such. It asks merely that this Court review the case to determine a detail of an abandoned disclosure policy under a non-recurring fact situation. On the other hand, the Cross-Petition presents a fundamental moral and legal question that always will be of deep and abiding public importance, namely, can the highest officials of the Executive Branch of the Government, who are authorized by statute (as no ordinary prosecutor is), to compromise criminal cases (Section 3761 Internal Revenue Code of 1939, quoted p. 13 Conditional Cross-Petition), make promises of immunity within the ambit of such statute, obtain much evidence as a result thereof (and a willingness to pay taxes), and then have the promised immunity subsequently repudiated by a bureaucracy which is heartless enough to prosecute citizens who have been naive enough to trust their government?.

4. Presently this nation is engaged in a campaign to convince the outside world that its word is good. Is this Government's word to be good to others but valueless to its own citizens? This Court has been alert, and properly so, to protect citizens who have been induced or coerced into making alleged confessions by improper actions of minor law enforcement officials. Is it to be less alert in protecting citizens who have relied on the word of highest Government officials acting under statutory authority, and whose word is subsequently repudiated by conscienceless tax gatherers?

5. The practical effect and the necessity for enforcement of the promised immunity is abundantly shown by the facts in the trial court record, as supplemented by the record here. For years Cross-Petitioners have been beset and harassed despite the promise that they would not be.

The relentless procedures in this Court have been unusual. The record here shows that one of the Cross-Petitioners has recently suffered severe heart attacks; while it is too early to tell what Cain's ultimate condition will be, men of experience can well fear that the strain of another trial might kill him.

6. Cross-Petitioners believe that their Cross-Petition, for the reasons set forth herein and in the Cross-Petition, is meritorious, that granting of it and entry of an ultimate order by this Court upholding the motion below to dismiss on the grounds of immunity might now prove to be the shortest way of bringing this litigation completely to a close. Indeed we believe it would be a sound exercise of this Court's plenary and supervisory jurisdiction to direct, without further ado, dismissal of the entire proceeding, because a criminal trial in 1957 or 1958 concerning events of 1944-1946 could not be fair and would make a mockery of the constitutional right to a speedy trial.

Respectfully submitted,

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January 18, 1957.

Office Supreme Court, U.S.
FILED
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 1

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, AND HAROLD E. SULLIVAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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IN THE

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UNITED STATES OF AMERICA,
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THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, AND HAROLD E. SULLIVAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

JURISDICTION.

Jurisdiction, asserted to lie under 28 U. S. C., Sec. 1254(1) giving this Court power to review, by certiorari, cases in the Courts of Appeal, is questioned:

This Court's order of February 25, 1957, in form *granting* certiorari "limited to the issues raised in the [Solicitor General's] amended motion to remand, etc.," was actually a *denial* of everything raised by the petition for certiorari and a granting of leave, at least temporarily, to present a wholly new motion here. If the Court proceeds with this cause on the question now presented an original motion

to allow the prosecutors a partial new trial on the ground of allegedly newly discovered evidence it will not be reviewing anything that has been ruled on by the Court of Appeals. The practice heretofore has been for this Court not to entertain contested motions for a new trial on the ground of newly discovered evidence but to refer them (assuming they show surface plausibility) to the appropriate Court of Appeals (Cf. *U. S. v. Johnson*, 319 U. S. 503, 327 U. S. 106. *Mesarosh v. U. S.*, 352 U. S. 1, in which the Solicitor General confessed that a conviction might have been obtained erroneously, was the reverse of the situation at bar in which the prosecution seeks to validate a conviction).

QUESTIONS PRESENTED.

1. May the prosecution, after verdict of guilty in a criminal case, reopen the record and put in more evidence in an attempt to validate an otherwise invalid verdict?

2. If it be assumed that the prosecution may make a motion for a partial new trial, or for a new "determination" (Cf. Suppl. to Motion to Remand, p. 5), does the instant motion meet the tests of a motion for a new trial, of a new "determination," on the ground of newly discovered evidence?

Subsidiary Question.

3. Assuming that a motion of the kind involved may be made by a prosecutor, should it be presented here or to the Court of Appeals?

STATUTE INVOLVED.

28 U. S. C., Sec. 2106, giving this Court power to remand a case for further proceedings, is not involved because it only defines the various orders this Court may enter in a

case properly before it on review. It is not a grant of original jurisdiction.

STATEMENT.

The Statement tendered by the Solicitor General roams the record at large and contains much material which is wholly irrelevant to the issue posed by this Court's order of February 25, 1957, limiting consideration to the issue raised, not by the petition for certiorari, but by the Amended Motion to Remand and Answer thereto. We therefore tender the following:

Proceedings Below.

Respondents to the Motion to Remand were indicted in 1952 for alleged falsity in the income tax returns of Shotwell Mfg. Co. (now named Homan Mfg. Co.) for 1945 and 1946. They asserted, by motion to dismiss, immunity from prosecution because in February, 1948, acting in reliance upon repeated promises of immunity from criminal prosecution by Secretaries of the Treasury and other authorized officials to those who voluntarily disclosed tax irregularities before investigation was initiated, they had voluntarily disclosed such to Ernest J. Sauber, then Chief Deputy Collector (subsequently District Director of Internal Revenue in Chicago). The motion was denied by the District Court (and subsequently by the Court of Appeals) upon the ground that even though Executive officials had promised immunity, their promise was not judicially enforceable.

After the motion to dismiss had been overruled in the District Court, respondents, before trial, moved to suppress evidence which they had produced for the Treasury in reliance on its promises of immunity. A hearing was held and evidence was taken on this motion. The motion to suppress was denied in the District Court, trial ensued,

and respondents were convicted. Upon appeal the Court of Appeals, without passing upon numerous other asserted errors, set aside the convictions on the ground that the motion to suppress should have been allowed and directed a retrial of the case.

The Certiorari Applications.

The Solicitor General sought certiorari for review of the Court of Appeals decision (and respondents filed a conditional cross petition). Such review was denied by this Court's orders of February 25, 1957. It is for this reason that we say much of the "Statement" in the Government's brief, constituting as it does a subtle argument that there were factors which might have warranted certiorari, is irrelevant and serves only to confuse the present issue. A restatement, we believe, is necessary to place in proper focus the motion that is before the Court:

The gist of the indictment and Government proof as to the merits of the case was that in 1945 and 1946 Shotwell Mfg. Co., a Chicago candy manufacturer, received approximately $400,000 unreported income by way of cash "premiums" or "overages" above ceiling prices on sales of candy to one David Lubben (or companies he controlled) of New York. Shotwell was a substantial company and actually paid $827,000 taxes for those years (see indictment figures R. 5). The gist of the defense was that Lubben had paid cash premiums for a portion of that time but in a far smaller amount (approximately $160,000) than he claimed; that this *gross income* had been expended by the company in payment of over ceiling "premiums" on raw corn which was then sold to corn refiners at ceiling prices, with the refiners in turn selling a portion of the resulting corn syrup, necessary to the manufacture of

Shotwell's candies, to Shotwell at ceiling;' that no *net income* resulted from the transactions. Although the law was clear at the time of trial (1953) that Shotwell's over-ceiling expenditures for raw materials could be taken as a deduction against its over-ceiling receipts, it had been the Treasury's position (IT 3724, 1945 Cum. Bul. 57: 1949—1CB6) at the time of the voluntary disclosure (1948) and the indictment (1952), that such expenditures, no matter how well proved, were not deductible.

The Government's star witness at the trial was Lubben. Judge Nordbye[2] found Lubben to be a credible witness but subsequent events and judicial decisions have proved him to be a self-confessed perjurer and a swindler.[3]

1. During 1945 and the first half of 1946 the ceiling price on corn became greatly deranged with respect to that on hogs and farmers, finding it more profitable to use their corn for feed than to sell it at ceiling prices, withdrew it from the open market (R. 2372, 2376 7, 2419 22). The government itself, through the Commodity Credit Corporation, began buying corn at 30c a bushel, over ceiling prices (R. 2420, 2682, 2709, Def. Ex. 74). The candy trade generally found it necessary to engage in over-ceiling "corn deals" in order to get sufficient quantities of corn syrup from the corn refiners (R. 1790). Shotwell has never been accused of being in the black market generally its only over-ceiling sales were to Lubben and for the purpose, so we contend, of getting unrecorded cash which it could spend for unrecorded premiums on corn without alerting O. P. A. inspectors to whom its books were open.

2. Judge Nordbye was specially assigned to the Northern District of Illinois to hear the case because one of respondents is a brother of one of the Northern Illinois District Judges.

3. The District Attorney for the Southern District of New York describes Lubben as follows: "* * * a perjurer and a black marketeer and practically anything else you want to talk about, though I don't know of any income tax violation that he was guilty of. * * * He certainly did not admit any. He certainly admitted many other crimes." (See *Giglio* v. *U. S.*, No. 10 this term, R. 2589.) *In re*

Identification of Persons Involved.

Respondents Cain and Sullivan were large stockholders in Shotwell and were its principal officers. Cain testified at both the suppression hearing and the main hearing; Sullivan at only the latter. Leon Busby, asserted by the motion to remand to have perjured himself, is an independent auditor who regularly audited Shotwell's books and prepared its tax returns; he testified as a defense witness at the suppression hearing, as a government witness at the main hearing. Frank Huebner, a defendant who now wishes to "cooperate" with the Treasury agents, was Shotwell's factory manager and a titular officer; he physically received most of the cash payments of overages which Lubben made; he did not testify. Stanley Gratlund, whose affidavit was filed August 19, 1957, was Shotwell's comptroller; he testified briefly as a defense witness at the suppression hearing, at length as a government witness on the main hearing. Ernest Sauber in 1948 was Chief Deputy Collector of Internal Revenue in Chicago; and subsequently was made Director for the area; he was removed from office on August 6, 1956, after Treasury hearings in which he was accused of wrongdoing in this case (see App. I to Answer to Mo. to Remand) but no finding was made against him in this regard and his removal was ordered on "unrelated charges" (Ftn. 4, Mo. to Rem.); he testified as a government witness at the suppression hearing.

The Facts as to the Voluntary Disclosure.

The essential facts as to the voluntary disclosure are accurately summarized in the Court of Appeals opinion.

Carlsen, 17 N. J. 338, 111 A. 2d 393, shows Lubben in a distillery swindle in Puerto Rico in 1951. *State* v. *Wilcox*, 34 N. J. Super. 267, 112 A. 2d 23, 25, again shows his penchant for perjury.

In sum, the opinion shows that about March 15, 1948 Busby and Cain disclosed the nature of the Shotwell irregularities to Sauber;[4] they were told by Sauber to assemble such data as they could to indicate the transactions and that an agent would be assigned to investigate and substantiate the matter. The record is undisputed that Busby went on a month's vacation and that after his return Cain began complaining that the work was dragging; that ultimately Shotwell personnel were assembled and from the record of sales to Lubben, and other data "recapitulations" of the unrecorded transactions were prepared as an aid to the revenue agent in going about his work. In these sheets, in order to avoid argument, the overages were listed at the amounts it was then believed Lubben, upon inquiry, would claim them to have been (respondents meantime having had access to some of his books), rather than the lower amounts respondents contended were involved."

Although neither side tried, at either the suppression, or the main hearing, to fix the precise date when these recapitulations were finally compiled, it was apparent from the context of the testimony and continuity of events that it necessarily had to be in June or July 1948. Likewise there was, and is, no dispute but that agent Lima was assigned to audit the matter on July 30, 1948 (R. 3173), *solely as a result of respondents' disclosure*; and there was, and is, no dispute but that when agent Lima actually commenced his work he was tendered complete "recapitulations" which listed *every unrecorded transaction with*

4. The disclosure, as permitted by Treasury announcements was oral. ("The simple statement that 'I have filed false tax returns and I want to make the Government whole' *would constitute a complete disclosure.*" Treasury release, May 14, 1947, R. 3136); no one made a memorandum of it; this was agreed to at the hearing (R. 445). Busby and Cain fixed the time as late January 1948, Sauber as about March 15, 1948. The court accepted the latter date.

Lubben. Likewise there was, and is, no dispute that the *only* reason that the Treasury did not make an assessment and close the matter without prosecution was, as the Court of Appeals puts it, that respondents did not turn "informer" and disclose the identity of the recipients of Shotwell's black market payouts, for which "payouts" the Treasury insisted it would allow no deduction.

Against the foregoing background it is now asserted that the Government should have a "new" or "further" trial of the suppression issue because, it is asserted, newly discovered evidence tends to show that the disclosure did not occur until July 1948 and that Busby, Sauber and Cain gave perjurious evidence, of which the record should be "cleansed," when they placed it in the January March 1948 period.

Reduced to lowest terms, the essential logic of the prosecutors' present position is: "We assert that because we now have direct evidence that the explanatory 'schedule or 'recapitulations' of the Lubben transactions were not finally prepared until July 1948, and because Grafund and Hiebner say they did not know about it until about that time, it follows that the disclosure was not made in March." The *non sequitur* is apparent. Moreover, there is nothing "new" about the fact that the recapitulations were not prepared until July.

The 1956 Grand Jury, After an 11 Month Investigation, Refused to Indict Anyone for Perjury in This Disclosure.

The outstanding omission of the "Statement" in the Government's brief is its failure to inform the Court cleanly and squarely that the much vaunted investigation, grand jury and otherwise, on the strength of which the Department of Justice has secured considerable delay in

this Court, *has resulted in no indictment at anytime for perjury with respect to the suppression issues herein.*

The April 1956 Term grand jury for the Northern District of Illinois, Eastern Division, specially impaneled to investigate this case and acting under the guidance of special attorneys dispatched from Washington, returned its indictment on February 27, 1957, two days after this Court had entered its orders which had the effect of denying certiorari. Copy of the indictment appears as an appendix hereto. In lurid, but unspecific terms it makes grave charges against respondents which they deny but which they will have to meet. *However, it does not indict Busby or Sauber for perjury at all; counts Six to Ten are perjury counts against Cain, but these counts go to differences between Cain's testimony and Labbe's on the trial on the merits* — details or items of evidence not material to the question now raised.

Artfully worded footnote 17 to the Government's brief, [fn. 17] "* * * an indictment was returned * * * charging, among other things, that Cain and Sullivan gave perjured testimony at the trial of this case" conceals what it should reveal: that the perjury charged by the grand jury is not material to the pending issues. The refusal of the grand jury to indict Cain or Busby or Sauber for perjury in connection with the disclosure came *after it had heard and evaluated* (as is now shown by the Aug. 21-30, 1956 entry in the "Chronology" attached to the Government brief), *the witnesses Hughes and Gotthard whose truncated affidavits* nevertheless are offered to this Court as prima facie evidence of perjury at the suppression hearing.[5]

5. We are aware that some of the alleged overt acts of the conspiracy count of the indictment come close to allegations of perjury. But the specifying of overt acts is by no means the equivalent of a direct charge or an indictment on the matter covered by the alleged overt act. The telltale distinction is that it is not necessary that all the overt acts charged be proved, or be proved as laid.

SUMMARY OF ARGUMENT.

The motion, although labeled as a mere Motion to Remand, is far more than that: It is a motion by the Government, in a criminal case, for a further, supplemental or new hearing by which it seeks to add new or supplementary evidence to the existing record in an attempt to validate an invalid verdict of "guilty" already obtained. Such a motion is not merely "unusual" as the Government brief confesses, but is unprecedented in the criminal jurisprudence of the country. The Government cannot have a new trial in a criminal case on the ground of newly discovered evidence. To grant such a right would be to defy the wisdom of centuries and open the door for endless, vindictive harassment. The oft-repeated proclamation of perjury in a Government lawyer's brief cannot create the right of a second chance to attempt to convict people, which both the common law and Congress have failed to provide.

If perjury was committed below the Government was not without remedy—it could have procured an indictment therefor. Its inability to get such an indictment makes the present claims of perjury hollow indeed.

The assertion by Government counsel that this is not a case where one party, having failed to convince a court of the soundness of his position, seeks to remand merely to bolster his case by additional evidence, but rather is one where the Government seeks an opportunity to have "excised" from the record respondents' asserted perjury, is wholly specious because the whole thrust of the motion is to add new evidence to the old record and, all else laid aside, the so-called "excision" of *alleged* perjury could not take place in any event unless the testimony was judicially found to be perjury. Decision on such an issue would involve a new trial and a new determination in every sense of the word.

Even if it be assumed that the Government in a criminal case can move for a partial new trial on the ground of newly discovered evidence, it could do so only by meeting the tests uniformly applied in all cases, civil or criminal, where a new trial or new determination is sought on the ground of newly discovered evidence: the movant must show that the evidence could not have been earlier discovered, that he has been diligent, that the evidence goes to a material, controlling point rather than being merely impeaching or affecting credibility, and will probably lead to a different result. The evidence tendered here meets none of these tests nor does the Government brief claim that it does; moreover, it is proffered in support of a theory as to "timeliness" of the disclosure that is legally unsound, and that was specifically disclaimed below.

In any event, if it be assumed that a motion of this kind may be made by the Government in a criminal case, it should be presented to the Court of Appeals rather than to this Court. The Court of Appeals decision not being under review for error, this Court has no independent jurisdiction to set the Court of Appeals mandate aside and send the case back to the District Court.

ARGUMENT.

I.

A PROSECUTOR CANNOT MOVE FOR A PARTIAL NEW TRIAL IN ORDER TO VALIDATE A CONVICTION ALREADY OBTAINED.

Our position that the kind of motion here attempted, even if diligently made and supported by the strongest affidavits, cannot be made by a prosecutor, is set forth in the "Answer to the Motion (Amended) to Remand," p. 13 ff. The Government brief (p. 31) confesses that the "motion is unusual." The confession is a gross understatement: the motion is unprecedented in the criminal jurisprudence of the country. To countenance it would be to open the doors to piecemeal criminal litigation and endless harassments by prosecutors.

We are compelled to investigate new fields: We find no case precisely in point on the facts but several which indicate appropriate correct principles. Although the precise limits of the constitutional prohibition against double jeopardy have never been marked out (Cf. *Palko* v. *Connecticut*, 302 U. S. 319, 322), what is attempted here is probably not a literal violation of the prohibition because the jury verdict was one of guilty. (Cf. *Kepner* v. *U. S.*, 195 U. S. 100, but compare *U. S.* v. *Zisblatt*, 2 Cir., 172 F. 2d 740, certification dismissed, 336 U. S. 934, and *Sapir* v. *U. S.*, 348 U. S. 373.) What is attempted is worse in many aspects than the usual jeopardy case for the prosecutors seek to retain the old guilty verdict through the device of adding to the existing record.

Although the motion is labeled as a mere Motion to Remand, it is far more than that: It is a motion by the Gov

ernment for a new trial of the suppression branch of the case, a branch on which defendants had not asked a new trial in the Court of Appeals and as to which defendants had raised only points of law.

As early as 1799, in the *Case of Vrigs*, Fed. Case No. 5126, it was recognized that the Government cannot have a new trial in a criminal case on good or bad grounds. Rule 33 of the Rules of Criminal Procedure provides only that "the court may grant a new trial to a *defendant* if required in the interests of justice." This is a codification of the established rule that the Government cannot move for a new trial in a criminal case. In *U. S. v. Sanges*, 144 U. S. 310, 312, this Court said:

> "And from the time of Lord Hale to that of *Goldwick's Case*, just cited, the textbooks, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case."

This Court went on to point out that although in some states decisions denying a writ of error to the State after a verdict of acquittal had done so on the grounds that it would constitute double jeopardy, the courts of many states had denied the right upon broader grounds viz. such right does not exist in the absence of statute. This Court further said at page 318, after reviewing many authorities:

> "In many of the States, indeed, including some of those above mentioned, the right to sue out a writ of error, or to take an appeal in the nature of a writ of error, in criminal cases, has been given to the State by positive statute. But the decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the State, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered

ket dealing "at which time Busby displayed surprise and complete ignorance of these transactions." The brief writers have stretched Graflund's language considerably for the affidavit contains only the negative statement that "he [Busby] gave no indication to me that he had known about the matter previously."

Busby testified (as a defense witness at the suppression hearing (R. 170) and as a Government witness on the main hearing (R. 1826-7)), that in early January 1948 Cain sent him and Graflund to New York to investigate Lubben's actual financial position, with respect to a $50,000 loan Lubben was then requesting Shotwell to make him; that on that trip he and Graflund examined Lubben's books and Graflund informed him that over-ceiling payments had been made by Lubben to Shotwell; that promptly upon returning to Chicago he (Busby) brought the matter up with Cain and Sullivan and that this led to the disclosure.

Graflund's affidavit contradicts Busby's testimony that he and Busby talked about the over-ceiling transactions in January 1948, but it does not in any way contradict Busby's, Cain's and Sullivan's material testimony that in any event Busby was fully informed about these transactions by the latter two in January 1948 and was instructed by them to, and did, make the disclosure. The Graflund affidavit therefore cannot rise to the dignity of direct contradiction on the material issue. The most that can be said for it is that it is a contradiction which might tend to impeach the credibility of Busby. That is insufficient as a basis for a new trial.

The inherent weakness of the Graflund affidavit (as well as the Huebner affidavit) is disclosed by the following statement in it: "Prior to this time, *so far as I know,* no work had been done by anyone to assemble records, etc." The brief writers cite no authority for their unstated major premise that alleged absence of knowledge of a fact by one

who need not necessarily have known of it, proves that the fact did not exist.

That Graflund was not taken into the complete confidence of Cain and Sullivan and told everything they were doing is amply shown by the previous record in two ways: *First*, Lubben's financial troubles had started in 1947 and Shotwell had guaranteed a $75,000 bank loan for him. This was a major transaction, yet Graflund had not been consulted or had any connection with it (R. 1757, 1774). *Second*, although sent East with Busby in 1948 to ascertain Lubben's financial condition with respect to the requested $50,000 loan, Graflund had no recollection as to whether he had been told how large a loan it was that Lubben was seeking (R. 1779).

The respondents Cain and Sullivan are men of prominence, pride and reputation in the Chicago area (R. 2686-2705) and were "ashamed" that they were involved in a combined O.P.A. and tax difficulty (R. 2605). There is no reason to suppose they would tell anyone they absolutely did not have to precisely what they were gathering information for.

It is respectfully submitted that if is quite clear that the affidavits of Huebner and Graflund (for all of the prejudicial material inserted in them), do not rise to the dignity of the clear, direct and striking proof on a matter material to the issue under consideration that would warrant a new trial on the ground of newly discovered evidence if presented by a convicted defendant.

This brings us back to counsel's contention that they do not have to meet the tests that a convicted defendant must meet in order to get a new trial on the ground of newly discovered evidence. What reasons do they give? The primary one is set forth at page 37, where they say:

> "A real concern in the usual new evidence case is whether granting a retrial would, in effect, vest

> the power to set aside the conviction, not in the court, but in those proffering the evidence. For example, the courts consider whether such action would enable and encourage defendants to join with prosecution witnesses in automatically setting aside a conviction by production of a 'recantation'. See *People* v. *Shilitano*, 218 N. Y. 161, 169. No such considerations obtain where as here, the newly discovered evidence serves to preserve rather than vitiate the verdict of the jury."

As we understand this passage, counsel say that courts are fearful that if new trials on the grounds of newly discovered evidence were freely granted, the convicted person frequently would intimidate prosecution witnesses and produce "recantations". No such considerations obtain, so they say, when the Government is trying to validate a verdict.

We do not think this asserted "concern," although it well may exist in some cases, is the basic reason why new trials are not readily granted on claims of newly discovered evidence. However, counsel's position ignores the fact that governments, peopled as they are, and always have been, by some functionaries who are over-zealous or over-ambitious, may produce "recantations" or "impeachments" on an issue they lost, by threatening witnesses with seizure of all their world goods through a jeopardy fraud assessment, or by threatening to indict them for crimes. As witness the following questionable chain of events:

In 1952 respondents were indicted on the theory that *Shotwell* received over $400,000 from Lubben. The Shotwell people had never conceded any such figure was true, and in 1951 Cain went to Lubben and asked him to "tell the truth about the barter deals we have had" (deals on which Lubben claimed he had paid cash overages but on which Shotwell contended candy had been made available

at ceiling in exchange for raw material, principally chocolate, at ceiling). Cain's version is at R. 2565, that of Lubben's lawyer Davidson, testifying as a Government witness, is at R. 1326-7, 1336. Lubben insisted he had paid premiums on *all* transactions, *and principally to or through Huebner — that if there was a difference between what Lubben claimed he had paid and Shotwell admitted it received, Cain "ought to have [Huebner] down to the cellar and make him give back the money because he had stolen from his partners"* (Davidson, R. 1336).

It may be, as Lubben's lawyer Davidson claimed in 1951, that Huebner had transactions of some kind with Lubben and put money in his own pocket that the Shotwell executives knew nothing about; that he did, to some extent unknown to them, "steal from his partners," as Lubben claimed. To the degree this may be true, Huebner may owe, or be claimed to owe, very substantial back taxes. If the transactions started as early as 1944, as Huebner's affidavit seems to say and as Lubben claimed, he owes whatever the additional tax may be for that year plus (as of this writing) 50% penalty, plus 72% interest, and so on for successive years. The temptation on a man in such position to dissemble is strong indeed. It does not require much imagination to see what a powerful weapon this situation would provide someone endeavoring to get an affidavit believed to be helpful to the Treasury's case. And no experienced person will believe that Treasury detectives, smarting under the defeat of losing a case, are less dexterous or more timid in using the weapons that come to hand than are detectives the world over.

But, whatever the fact as to that may be, the rule against allowing a new judicial determination on the grounds of newly discovered evidence does not rest on the narrow basis posed by Government counsel, viz., considerations peculiarly applicable to persons convicted of crime. The

upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government."

There is no statute which gives the Government the right to move for a partial new trial in a criminal case on any grounds. The oft repeated proclamation of perjury in a lawyer's brief cannot supply the right of a second chance to try that Congress has failed to give. There is nothing anomalous about such a result. It stems from the fact that our law always has recognized the peril of allowing prosecutors or administrative officials to prosecute endlessly, and that the Government, in a criminal case, has only such rights as are given to it by the common law and the Congress, acting within constitutional limitations.

A defendant in a criminal case has, and rightly so, many rights which the Government does not have. For example, a defendant may appeal to a reviewing court after a conviction, but the Government never can after an acquittal. A supposed criminal by committing perjury may escape punishment for a crime which he committed in fact, but the Government, even though it showed the perjury beyond shadow of a doubt, cannot retry him for the original offense. *U. S.* v. *Ball*, 163 U. S. 662; *Kepner* v. *U. S.*, 195 U. S. 100. It has the right in such a situation to indict and endeavor to convict for perjury. Here, respondents had the right, after judgment of conviction, to urge the reviewing court that the lower court erred in denying the motion to suppress. However, had the trial court in the instant case sustained a motion to suppress, the Government could not have appealed from such an order. (*U. S.* v. *Rosenwasser*, 9 Cir., 145 F. 2d 1015; *U. S.* v. *Janitz*, 3 Cir., 161 F. 2d 19.)

Other examples come to mind: Trial courts may erroneously exclude evidence offered by the Government resulting in the freeing of the defendant by the jury, but the Government is remediless in such a situation and the defendant cannot be retried. Examples might be multiplied, but the foregoing are sufficient to illustrate the point that the Government's rights to a new trial, or to relief from a reviewing court, do not coincide with those of a convicted defendant's.

It is asserted that all that is sought is to "cleanse" the record of what is asserted to be perjury (G. Br., p. 34), but much more is involved: *First*, the prosecutors wish to raise a wholly new timeliness theory, which they disclaimed below (See Answer, p. 19 ff.) and for which no tenable legal theory ever could have been, or is now advanced; *Second*, no simple automatic "striking" or "cleansing" could occur because Sauber, Busby and Cain insist that their testimony was true, and the April 1956 Grand Jury that investigated the case did not find probable cause for accusing them of perjury. Consequently, if the motion was granted, a full new adversary hearing, with rulings as to the materiality and sufficiency of the allegedly "new" evidence; if a material issue developed, the weighing of evidence pro and con (We do not concede that *any* of the proffered evidence is material to show an untimely disclosure under the so-called "Wenchell objective test," Ans. to Mo. to Rem. p. 19 ff.); and a new "determination" (as the prosecutors put it at page 5 of their "Supplement to Motion to Remand") would be required. That is precisely the endless, piecemeal prosecution that is repugnant to our system of justice.

If it was true that Cain or Busby or Sauber perjured themselves in the respects charged, they could have been indicted and, if proved guilty, punished. Justice and purity of the courts (assuming they have been defiled) need not go unavenged; but, as we have seen, the Grand Jury which

investigated this case refused to return perjury indictments of this kind.

Finally, we believe a very practical word may be added. It is well known that the Treasury Department has, at least in recent years, embraced the so-called policy of "relentless prosecution" in criminal cases; has accepted the theory that it is in the interests of the collection of the revenue to overlook potential cases in which it believes there is a doubt as to whether a conviction is obtainable, but to prosecute "relentlessly" those in which it believes it will obtain convictions. The supposed advantage of this policy is that it tends to make the mere threat of a criminal case a weapon of terror and potency in securing taxes. The wisdom of that policy, of course, is a question to be determined in Executive, and not in Judicial, circles. But when administrators attempt to carry that policy of never losing to the point where the established safeguards of judicial procedures are sought to be set at naught, as is here the case, they are beyond their province and must be checked by the courts.

And if it should be that all the criminal litigation against these respondents should evaporate, the revenue would still not be in danger, for the Government has ample means under the civil laws to collect the tax, *if any*, that may be owing, and presumably to do so with penalties, and certainly with interest.

II.

THE LEGAL THEORY OF THE MOTION, VIZ., THAT THE DISCLOSURE WAS NOT TIMELY, IS INCORRECT, WAS CONCEDED TO BE ERRONEOUS IN THE DISTRICT COURT, AND NEVER WAS PRESENTED TO THE COURT OF APPEALS.

In the confusion of the various briefs and the varying theories that have been offered by successive Government

counsel, the following salient and indisputable facts must not be lost sight of:

Respondents, whether in January-February 1948 as they contend, or in July 1948 as the prosecutors now contend, did in fact make a disclosure (a) to a proper official of the Bureau of Internal Revenue; (b) of all of their transactions with Lubben; (c) before the Treasury had initiated any independent investigation of Shotwell, and (d) this disclosure led to the assigning of a Treasury agent (Joseph Lima) on July 31, 1948 (R. 3173) to audit the accounts with the aid of "recapitulations" furnished him by respondents, which listed every single transaction that has since been called into question; and (e) the only reason ever assigned for dishonoring the promise of immunity was that respondents would not "inform" on the recipients of their payouts.

These facts were made clear in our Answer to the Motion (Amended) to Remand (see pages 5 and 6, footnote 3, pages 19-24). They have not been, and cannot be gainsaid. The present brief for the United States does not do so and does not point out any theory which would make this disclosure untimely.

Instead of stating and defending a specific theory of "untimeliness", instead of attempting to show that the treasury ever did initiate an investigation of Shotwell independent of that flowing from the disclosure (it cannot), the brief endeavors to slide around the point by stating that "this is not the proper forum to pass, in the first instance, on this and other aspects of the timeliness issue." But the matter is not that simple. The question is whether at this remote stage of the case the prosecutors can inject a new timeliness issue or theory, and whether the issue or theory they seek to inject is even *prima facie* sound.

The timeliness theory expressed for the first time in the

Motion to Remand, which the brief does not now attempt to support, was that since the New York Revenue Office, *in the course of investigating Lubben*, asked a Chicago agent on June 21, 1948 to verify some of Lubben's transactions from Shotwell records, that the Revenue Service received a "clue" that *might* have led to Shotwell (it did not), and hence a disclosure, assuming it occurred after the receipt of such "clue", would be untimely. But this is all factually, as well as legally, unsupportable:

The facts shown by the Revenue Agent Krane's own report appearing at record 3166-7 are simply that on June 21, 1948, New York agents, investigating Lubben, requested Chicago agent Krane to verify or check information *on Lubben* by obtaining certain invoices and other data from Shotwell. Krane did this. His report of July 1, 1948, prepared for transmission to New York, appears at R. 3161 ff. *Nothing further happened with respect to Shotwell as a result of this June 21, 1948 call.*

Krane's report of August 30, 1950 (R. 3166 ff.) also shows that on August 20, 1948, Close & Co. of Chicago, another candy manufacturer which had dealt with Lubben, made a disclosure that came to the attention of Intelligence agents in Chicago. On August 31, 1948, Intelligence officers of the Chicago office wrote to the New York Intelligence Office suggesting that possibly Shotwell had received over-invoice payments from Lubben similar to those Close & Co. had received. The Chicago Office requested the New York Office to make appropriate inquiries of Lubben. The New York Office replied on September 13 *that it was informed that Shotwell had made a disclosure* to the Revenue Agents' Office in Chicago. The Chicago Intelligence Agents then inquired of their brothers in the Revenue Agents' Office and found out that Lima was already conducting his examination.

The theory that merely getting a *clue* (at whatever date),

in the course of investigating Lubben that might ultimately have led to an investigation of Shotwell-marked the "initiation of investigation" of Shotwell was specifically and properly disclaimed by the Department of Justice in the District Court (R. 441, 445) and could not be raised here (*Helvering v. Minnesota Tea Co.*, 296 U. S. 378, 380) even if it was legally sound—which it plainly is not.

"Timeliness" of a voluntary disclosure, *i. e.*, whether it was made before investigation had been "initiated", is determined by the so-called "Wenchel objective test" for determining "initiation of investigation" which is:

> "*An investigation is initiated when a special agent, an internal revenue agent, a deputy collector, or other Bureau officer, is assigned a return for examination, or when an investigating officer has requested advice of appropriate officers of the Bureau with respect to the filing of a return or the payment of taxes.*" (Treasury release, May 14, 1947, R. 3132-3136.)

The theory advanced in the trial court was that the "timeliness date" was December 16, 1947 when, so it was first asserted, the Shotwell return was assigned for "audit" in the Chicago office. However, the proof showed without dispute that the return was *not* then assigned for "audit" but merely routinely assigned for "survey" as to whether it should be audited (R. 393-6). The December 16, 1947 theory has long since disappeared.

There is no dispute about these facts and they lead inevitably to the conclusion that the disclosure, whether in early 1948 as respondents contend, or in July 1948 as the prosecutors now contend, was timely. The *only investigation of Shotwell's affairs that was undertaken flowed from the disclosure and no independent investigation ever was undertaken.* No step inconsistent with full recognition of a valid disclosure was taken until September 1950 when the Intelligence Unit requested that "a case jacket be

issued" simply because Shotwell's officers "refused" to identify the recipients of the over-ceiling disbursements for which the Treasury insisted then and for some years thereafter it would allow no deduction (R. 3172).

III.

IF IT BE ASSUMED THAT THE GOVERNMENT CAN MOVE FOR A PARTIAL NEW TRIAL, THE SHOWING IN SUPPORT OF THE MOTION SO UTTERLY FAILS TO MEET APPLICABLE TESTS THAT IT MUST BE DENIED.

Government counsel appreciate that the showing that they have made in support of the motion, if tested by the rules applicable to a motion by a convicted defendant for a new trial on the grounds of newly discovered evidence, is so utterly inadequate that it would be denied out of hand. Therefore, they claim that it does not have to meet those tests, saying:

> "Contrary to respondents' assertion (Answer 13-16) the Government is not seeking a new trial, and authorities with respect to the granting of retrials on the grounds of newly discovered evidence have no application here. The considerations which are relevant when a defendant seeks to have a verdict set aside because of new evidence tending to negate guilt are entirely inapposite here. In this case, the newly discovered evidence supports the conviction—which was set aside by the Court of Appeals—and all of the perjury adduced below was in support of a defense contention which was accepted by the Court of Appeals." (Br. 36.)

Counsel never do say what kind of a showing must be made in support of a motion such as theirs, but, judging by the showing actually made, it entails no more than reiterating frequently the charge of perjury and adducing of affidavits tending to impeach the testimony of witnesses who testified to a non-decisive occurrence or a few of the details relating to it.

To put the matter another way: counsel are contending for a double standard. The Government, so they say, which is attempting to send citizens to the penitentiary in violation of their constitutional rights (according to the Court of Appeals), has to make some undefined, but lesser showing than a citizen who is trying to escape the penitentiary on the grounds that newly discovered evidence will show he was innocent.

The mere statement of that evil proposition contains its self-refutation. The fact that a convicted defendant is trying to upset a jury verdict while the Government is here trying to hang onto one, to which counsel attribute such legal significance, is legally irrelevant.

The leading case as to when a defendant may secure a new trial on the ground of newly discovered evidence is *U. S. v. Johnson*, 7 Cir., 142 F. 2d 588, which collects many authorities and in which Judge Minton said at p. 592:

> "Having decided that there was no recantation or false swearing by Goldstein, the District Court then considered the case as any other motion for a new trial on newly discovered evidence would be considered. On such consideration, the court found that the rule for such motions 'has never been better nor more succinctly stated than' in *Berry v. State of Georgia*, 10 Ga. 511, which he quoted as follows:
>
> "'Upon the following points there seems to be a pretty general concurrence of authority, viz: that it is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3rd. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz.:—speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for.

> And 6th, a new trial will not be granted, *if the only object of the testimony is to impeach the character or credit of a witness.*" (Italics added.)

Here the only avowed object of the so-called newly discovered evidence is merely to impeach a part of Busby's testimony, and perhaps that as to Cain, as to certain facts not directly, but perhaps circumstantially, militating against their testimony as to when the disclosure was made.

The Government does not pretend there has been any change or recantation by any of the three participants to the disclosure; nor that it has direct evidence that the disclosure was not made when the participants say it was. The brief on the contrary with its extravagant charges of perjury, relies almost exclusively on the affidavits of Huebner and Graflund. That these affidavits contain nothing warranting a vacation of the Court of Appeals judgment and a remand of the case we now show:

The "Supplement to Motion to Remand" asserts (p. 4) only that Huebner will testify on three points.

(1) That Lubben made over-ceiling payments from November, 1944, to December, 1946, rather than from September, 1945, to June, 1946, as defendants asserted. This goes solely to the merits of the case. This question was in no way involved in the suppression hearing. It has no bearing on the timeliness of the disclosure, and therefore may be disregarded.

(2) That during the first six months of 1948 no one "mentioned" to Huebner (Suppl. p. 8) that a disclosure had been made; that in July, 1948, he was at the meeting with Shotwell staff people in the Belden-Stratford Hotel at which the recapitulations were prepared "so that a disclosure could be made"; that prior to this, "so far as he knows," no work was done by anyone relative to compiling data "*for the purpose of making a voluntary disclosure*";

that *he was "given to understand"* the date would be set at June 15, 1948. It is said (Suppl. p. 4) that this contradicts suppression testimony by auditor Busby that Huebner was at a meeting in late January at which it was decided to make a disclosure, and by Cain that Huebner "possibly" was there.[6] And it does. But it does not contradict the testimony of Busby, Cain and Sauber that the disclosure in fact was made in the January-March period, that Sauber told them to assemble figures to assist the agents who would make an audit or investigation (R. 178, 182, 232), that this work "dragged" and that finally Cain assembled the staff and got the job done (R. 323).

Neither Busby nor Cain in lengthy testimony as to the events leading up to the disclosure and as to the work done in assembling figures thereafter, mentioned Huebner as playing any part until the staff met to assist in putting together the final recapitulations, except that Busby gave a single answer (R. 176) that Huebner was present when Cain made the decision to disclose, while Cain at one point said Huebner "possibly" was (R. 228-9) and at another excluded him (R. 249). In fact however, Huebner, even according to Government witness Davidson (R. 1315 ff.), had been sent as a messenger to Lubben in February 1948 to get, *and he got*, some of Lubben's records to take to Chicago "to correct or conform the Shotwell books, because they had no—there were some entries missing on their books" (R. 1321).[7]

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6. It may be noted that at one point Cain said Huebner was "possibly" there (R. 228-9); at another he identified only himself and Sullivan as being at this particular session with Busby (R. 249). This is indicative of the fact that the witnesses were endeavoring, within the limits of memory, to give honest testimony—it is indicative also of the unimportance or immateriality of this particular meeting to the issues that were being tried.

7. It will be noted this is strong corroboration of the fact that the disclosure had been made in January and that

In any event, out of many meetings between these people on many subjects in this period involving not merely taxes, but a loan Lubben was requesting any one of the three could be mistaken. Busby's and Cain's testimony as to who was present at this particular meeting was as to an immaterial point. The fact that Huebner's present alleged recollection differs from theirs as to this particular gathering is still a difference as to an immaterial point, and certainly does not show perjury by Busby or Cain or, for that matter, by Huebner. Huebner's affidavit that "no one mentioned to him" that a disclosure had been made plainly does not contradict evidence that one had been made. In neither law nor fact does the president of a corporation (Cain) always tell a plant manager (Huebner) everything he has done.

The affidavit discloses that someone has drilled into Huebner the notion that a disclosure could be made only by presenting a document containing corrected figures. Thus, he says that the recapitulations were made "*so that*" a disclosure could be made. The fact that the disclosure *per se* consisted merely of coming forth and identifying one's self as having filed an improper return, that the Treasury always reserved the right to make its own investigation in verification of the disclosure, and that assistance by the taxpayer in making a correct return was at most in

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the work of assembling data, as suggested by Sauber, started soon thereafter; moreover, it casts grave doubts on the verity of Huebner's affidavit that he didn't hear of the disclosure until July, 1948. It will be recalled that Shotwell's books showed no "overages", while Lubben's, whether correct as to rates and amounts, did show them, at least for some of the periods for which Lubben's books were in existence. The information obtained in this manner, supplemented by memories and other data, was incorporated in the "recapitulations" furnished to the examining agents (R. 2814-5; see also Def. Suppr. Ex. 2, 3097 ff., particularly the columns headed "Memo Taken from Luben (*sic*) Record.").

the nature of a condition subsequent to the disclosure (Cf. Answer to Motion to Remand, pp. 28-29; see also footnote 2 thereof, p. 3), is one that has escaped Mr. Hudner and the prosecutors from who he apparently is taking his legal advice. But, "The simple statement that 'I have filed false tax returns and i want to make the Government whole', would constitute a complete disclosure." (Treasury Release, May 14, 1947, R. 3136.)

(3) That sometime in the late summer or early fall of 1948 Cain and Busby told Huebner the case had been "fixed" for a tax deficiency of $20,000, but that someone destroyed the settlement papers. While this carries overtones of wrongdoing, it has nothing to do with the disclosure question because, admittedly, agent Lima was assigned on July 30, 1948 (Dft. Ex. 15, at R. 3173, R. 321), to investigate or audit the company *pursuant to the disclosure* and had gone to work on the case.

Of the three items of asserted Huebner proof, on which the Supplement claims the case should be reopened, items (1) and (3), disparaging as they may be, obviously have no relevancy to the disclosure timeliness issue that is pressed as the reason for reopening. Item (2), while connected with the disclosure events, is not material to the issue and could not support a motion for a new trial. New evidence that might warrant a new trial (assuming the Government could move for one), would have to be in direct contradiction of something originally given at the suppression hearing that was vital to a decision of the issue. The irrelevant matter loaded into the affidavit may, or may not, be material to the new conspiracy indictment. But that is not this case, nor is that the issue before the Court.

With respect to Graflund, the brief states that if the case is remanded he will testify that it was not until June 1948, that he related to Busby what he knew about the black mar-

rules in criminal cases which are applicable to convicted defendants merely embody a policy against piecemeal and endless litigation which is found in every type of judicial proceeding, criminal or civil, jury or nonjury. And every litigant, be he a private person or the Government, who seeks a new judicial determination on the grounds of newly discovered evidence, *must meet substantially the same tests which a person convicted of crime must meet:*

Moore's Federal Practice (2d Ed.), Vol. 6, p. 3785, says with reference to a civil jury case:

> "To warrant a new trial the evidence must not have been known to the movant at the time of the trial; and moreover, the movant must have been excusably ignorant of the facts, *i. e.*, the evidence must be such that it was not discoverable by diligent search."

At p. 3787:

> "In general, a new trial is not warranted unless the evidence, if it had been presented at the former trial, would probably have produced a different result. Evidence, therefore, that is merely cumulative or whose only effect is to contradict or attack the credibility of witnesses will ordinarily not warrant a new trial, in the absence of very unusual or extraordinary circumstances."

The author further points out that the same rules prevail where one seeks a new trial on this ground in a nonjury civil case (Vol. 6, p. 3771, note 13).

In *Marshall's U. S. Auto Supply* v. *Cashman*, 10 Cir., 111 F. 2d 140, 142, the Court said:

> "A motion for new trial on the ground of newly discovered evidence must show that the evidence was discovered since the trial, must show facts from which the Court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that it is material; and must show that it is of such char-

> acter that on a new trial such evidence will probably produce a different result."

In *Brown* v. *Schwartz*, 5 Cir., 164 F. 2d 151, 152, the Court said:

> "She [the Appellee] invokes the settled rules of state and federal courts alike; * * * (2) that a motion for a new trial on the ground of newly discovered evidence may not be granted unless (a) the facts discovered are of such nature that they will probably change the result if a new trial is granted; (b) they must have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier; (c) they are *not* merely *cumulative* or *impeaching*."

In discussing the claim for a new trial on the grounds of perjury committed on behalf of the prevailing party, the Court, in *Glade* v. *Allied Electric Products*, 7 Cir., 135 F. 2d 590, said at p. 591:

> "It certainly cannot be said as a matter of law that a new trial ought to be granted whenever an affidavit is made that testimony used against the losing party at the trial or in a related proceeding was perjured, for the mischief of endless litigation would far outweigh any advantage which would be gained thereby."

Other authorities to the same effect might be multiplied. But the foregoing are sufficient to dispel any notion that only persons convicted of crime are subject to stringent rules when they seek a new trial on the ground of newly discovered evidence. The rule is substantially the same whenever a party seeks a new determination, whether it be by a jury or by a court.

Certainly, a seriously injured plaintiff, for example, who has lost his claim because of alleged perjury on the part of the defendant, who seeks a new trial on the ground of new evidence, should meet with as warm, if not a more sympathetic response from the Court than should

the prosecuting arm of the Government, which is making the same type of claim in an effort to send people to the penitentiary. The same can be said of an alleged patent infringer where the patentee has obtained a finding of invention from the Court on testimony allegedly perjured.

A claim for a new judicial determination on the basis of newly discovered evidence is a disfavored one in whatever branch of litigation it is made. The claim of "perjury", and others of a similar nature, are so frequently advanced by losing litigants that they are always viewed with suspicion. There must be an end to litigation sometime, and this is even more true in a criminal case where liberty is at stake than in most others.

This policy has peculiar application here, in view of the fact that this case has already been pending in this Court for over two years while the Government has leisurely investigated and reinvestigated, and has been able to come up with nothing better than questionable evidence perhaps tending to impeach a small part of the testimony of one of the participants in the disclosure.

There is a final observation with respect to counsel's effort to escape the established and salutary rules with respect to granting new trials, or new determinations, on grounds of newly discovered evidence, that merits consideration because its utter speciousness betrays the incurable weakness of the motion. The Government's brief states (p. 37):

> "Moreover, this is clearly not a case where one party, having failed to convince a court of the soundness of this position, seeks to remand merely to bolster his case by additional evidence. Rather, what the Government in essence seeks here is an opportunity to have excised from the record respondents' perjury."

If excising so-called "perjury" from the record in a trial

court in order to reobtain or reaffirm the order (denying suppression) already entered in that court, and which it is hoped will pass review after the "excision", is not bolstering one's case, then there is no such thing. One's case may be "bolstered" by affirmatively adding to one's own evidence or by taking away or detracting from that of one's opponent.

Let there be no mistake: all that is sought is a chance for the prosecution to hang on to a trial court conviction and to bolster a record that was not good enough to sustain it—a record on which certiorari has been denied.

Counsel's protests that they are not seeking to bolster their case by additional evidence serves only to emphasize that that is precisely what they are trying to do. Indeed, their brief (p. 27 ff.) asserts that if the motion is granted, Huebner, who did not testify at all, will now testify thus and so; that Graflund, who testified but briefly (R. 383-389), will now testify as to such and such additional facts; that Agent Lima, who testified but briefly (R. 319-26), will now testify to such and such additional facts. Logic simply will not tolerate the false excuse that because the Government is not seeking to bolster its case by additional evidence it may be excused from the usual rules pertaining to motions for a new trial (assuming *arguendo* it can make such a motion at all).

For counsel to assert, as they do (pp. 27-30), that if the motion is granted they will produce certain additional evidence, and to deny on page 37 that they are seeking to bolster their record with additional evidence, gives away their whole argument.

In this same vein the suggestion is made (Br. p. 34) that, since respondents had the burden of proof on the motion to suppress, the Government would clearly prevail on the supposed new hearing if not more were to occur there than striking from the record the testimony as to the time

of disclosure, if it is found to be perjurious. But "striking from the record" or "excising" testimony does not occur automatically. What would be involved would be a whole new trial of the issue as to suppression, with witnesses examined and cross-examined as to whether Busby, for example, was correct when he said Graflund discussed the over-ceiling payments with him on the New York trip in January, 1948, or whether Graflund was correct in saying that the first discussion did not occur until in June, etc., etc. This is far from an automatic obliteration of testimony. It is putting in "bolstering" evidence to overcome evidence already in the record.

We respectfully suggest that the counsel would not go to such extreme lengths in attempting to minimize what they are asking for if they could truly defend it. They clearly are seeking a new trial, or a new determination, in the broadest sense of the word on both legal and factual issues. That is a thing that never has been permitted and, if it ever is permitted, will open the door for executive and administrative tyranny.

IV.

THE GOVERNMENT HAS NOT BEEN DILIGENT.

One of the hornbook requirements for a new trial on the grounds of newly discovered evidence is that the evidence should not have been previously discoverable and should have been diligently sought and diligently presented. Apply this to the present contention that the motion should be granted because of supposedly newly discovered evidence to be given by Huebner, Graflund and Revenue Agent Lima.

Huebner was a defendant; we will concede that his evidence was not available to the prosecutors in 1952. But Graflund was not a defendant and was not in the

employ of the Shotwell Company in either 1952 or 1953. He was available to the Government and was interviewed and examined. Revenue Agent Lima was at the beck and call of the Treasury at all times. It is little short of farcical to say that the evidence of these people was not available and could not have been produced.

In our "Reply to Supplement to Motion to Remand" we asserted that the Department of Justice, rather than being diligent and frank, had been playing cat and mouse with the defendants and with the court (p. 10). We suggest that everything there said is borne out by what has now occurred:

The chronology attached to the brief shows that Huebner and Graflund testified before the 1956 Grand Jury on August 21 to 30, 1956, and that a "series of conferences with Government attorneys continued"; that Graflund again testified before the Grand Jury on February 20, 1957. Nevertheless, the motion was first presented on the wholly improper hearsay affidavits of lawyers and Treasury operatives. The Huebner affidavit was not presented until January 9, 1957; the Graflund affidavit not until August 19, 1957. It is obvious that the affidavits could have been presented at any time after the first of September, 1956. An affidavit from agent Lima could have been produced at any time, but such has not *yet* been done. Instead we find the first reference to Lima is the naked assertion of counsel in their present brief that if a new trial is granted Lima will testify thus and so.

Such tactics should not be tolerated and would not be tolerated by the Department if they were indulged in by a citizen seeking to void a conviction. No private litigant who seeks a new determination on the ground of newly discovered evidence is allowed to harbor evidence for months and years and then claim it as newly discovered. Yet that is what has occurred here.

V.

IF A MOTION OF THE KIND MADE CAN BE MADE AT ALL, IT SHOULD BE MADE IN THE COURT OF APPEALS AND NOT HERE.

On February 27, 1957, this Court refused to review the case on anything raised by the petition for certiorari. The motion to remand, although filed while the petition for certiorari was pending, is independent of it and now stands alone.

Counsel assert that jurisdiction exists under 28 U. S. C., Par. 2106, which, of course, does give this Court, or a Court of Appeals, authority to remand causes, but that section is conditioned and dependent upon the fact that the case be before the court "for review."

We think the matter is governed by *Realty Acceptance Co.* v. *Montgomery*, 284 U. S. 547, decided under Section 701 of the Revised Statutes, the predecessor statute of 28 U. S. C., Par. 2106, and identical with it in all material respects. *Realty Acceptance* pertains to the power of a Court of Appeals rather than of this Court but that fact makes no difference because Par. 2106 applies without distinction to "the Supreme Court or any other court of appellate jurisdiction." The holding is summarized in headnote 3, which reads:

> "Section 701 of the Revised Statutes, providing that this Court may affirm, modify or reverse judgments of federal courts brought before it for review * * *, or may direct * * * such further proceedings to be had, by the inferior court, as justice may require, which section was made applicable to the Circuit Court of Appeals * * * does not authorize a Circuit Court of Appeals to reverse a judgment at law in which it has found no error upon the record, and to remand the case to the District Court in order that that court may reopen it after expiration of the term at which such judgment was rendered, for the purpose of hearing new evidence."

The *Realty Acceptance* case involved a question as to expiration of the term of the lower court which, of course, is no longer of importance under the virtual abolition of the old time term distinctions. But that is of no consequence on the major proposition involved here, which is whether a reviewing court (here this Court), which does not have a case before it for review, nevertheless is given authority by Par. 2106 to remand the case for new evidence. On that question *Realty Acceptance* v. *Montgomery* is, we believe, decisive. Note Justice Roberts' language at page 551, where, after reviewing several cases, he says:

> "* * * Nothing was there said to indicate that this court would order further proceedings below to attack or set aside a judgment entered on a record which disclosed no error calling for a modification or reversal. No authority is cited in which R. S. 701 has been construed as extending this court's powers in the manner for which petitioner contends."

It is established practice that motions on grounds of evidence theoretically discovered after a Court of Appeals decision must go initially to that court for a determination as to whether there is a *prima facie* showing that warrants a change in that court's mandate. See *U. S. v. Johnson*, 7 Cir., 142 F. 2d 588, 589, reciting action of this Court sending the case back to the Court of Appeals while it was pending upon an application for certiorari here; see also recitals in this Court's subsequent opinion in the same case at 327 U. S. 106.

We cannot escape the conclusion that the Department of Justice, being dissatisfied with its treatment by the Seventh Court of Appeals, is engaging in a polite and sophisticated form of forum shopping, and perhaps entertains the hope that this Court, not presently as familiar with the record as is the Court of Appeals, will give the Department's protestations of "material new evidence" more weight than it fears they would be given by the Court of Appeals.

CONCLUSION.

It is respectfully requested that the motion to remand be denied.

Respectfully submitted,

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September 25, 1957.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* HAROLD E. SULLIVAN, BYRON A. CAIN, LEON J. BUSBY, ERNEST J. SAUBER, and RALPH R. JOHNSON, *Defendants*.	No. 57 CR 149.

INDICTMENT RETURNED BY GRAND JURY, FEBRUARY 27, 1957.

COUNT ONE.

The Grand Jury charges:

1. That from on or about June 21, 1948, and continuously and at all times thereafter up to and including the date of this indictment Harold E. Sullivan, Byron A. Cain, Leon J. Busby, Ernest J. Sauber and Ralph R. Johnson, hereinafter referred to as defendants, in the Northern District of Illinois, Eastern Division, and elsewhere, did willfully and unlawfully conspire, combine, confederate and agree together, each with the other, and with the Homan Mfg. Co., Inc., formerly The Shotwell Mfg. Co. (hereinafter referred to as Shotwell), Frank J. Huebner and Patrick J. Grace,

Jr., and with divers other persons to the Grand Jury unknown, all of which persons, named and unknown, other than the defendants themselves, will hereinafter be referred to as co-conspirators, said co-conspirators being not named as defendants or indicted herein:

(A) To defraud the United States of America of income taxes due and owing to it by defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner for the calendar years 1944, 1945, and 1946, by concealing, causing the concealment of, and continuing to conceal from officers and employees of the United States, including officers and employees of the Bureau of Internal Revenue and the Internal Revenue Service of the United States Treasury Department (said Bureau and Service hereinafter referred to as the Internal Revenue Service), the receipt, utilization and disposition of taxable income by defendants Harold E. Sullivan and Byron A. Cain and co-conpirators Shotwell and Frank J. Huebner during the years 1944, 1945, and 1946, in connection with transactions had during said years by co-conspirator Shotwell with one David G. Lubben, the Eatsum Food Products Co., a sole proprietorship, the Eatsum Food Products Co., a partnership, General Confections, Inc., a corporation, and its wholly owned subsidiary, Reserve Trading Co.

(B) To defraud the United States of and concerning:

(1) The exercise of its governmental function and right of ascertaining, computing, levying, assessing, and collecting taxes due and owing to the United States of America for the calendar years 1944, 1945, and 1946 by defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner, respectively, and of the investigating, detecting and prosecuting violations of the internal revenue laws of the United States, free from bribery, unlawful impairment, obstruction, improper influence, bias,

dishonesty, false statements, misrepresentations, concealment, deceit, fraud and corruption;

(2) Its right to and interest in the conscientious, faithful, disinterested, unbiased and honest services, judgments, determinations and actions of defendants Ernest J. Sauber and Ralph R. Johnson, duly appointed employees of the Internal Revenue Service, concerning matters affecting and pending in and before the Internal Revenue Service, and to have such services, judgments, determinations and actions exercised free from bribery, corruption, dishonesty, improper influence, bias, partiality, and fraud;

(3) Its governmental function and right to have the business and affairs of the Internal Revenue Service, in the consideration, administration and disposition of matters affecting and pending in and before the Internal Revenue Service, conducted on its behalf fairly, honestly, and free from fraud, deceit, improper influence, partiality, concealment, interference, obstruction and corruption;

(4) The exercise of its governmental function and right of administering justice in the United States District Court for the Northern District of Illinois, Eastern Division, and of punishing violators of the internal revenue laws of the United States, free from interference, obstruction and impairment through the giving of false, fictitious, and fraudulent testimony before the said Court and before Grand Juries of the said Court.

(C) To commit certain offenses against the United States, to wit:

(1) The crime of willfully attempting to evade and defeat a large part of the taxes due and owing to the United States of America by co-conspirator Shotwell for the calendar years 1944, 1945, and 1946, in violation of Title 26, United States Code (I. R. C. 1939), Section 145(b);

(2) The crime of willfully attempting to evade and defeat a large part of the income taxes due and owing to the United States of America by defendants Harold E. Sullivan and Byron A. Cain and co-conspirator Frank J. Huebner, respectively, for the calendar years 1944, 1945, and 1946, in violation of Title 26, United States Code (I. R. C. 1939), Section 145(b);

(3) The crime of bribery in violation of Title 18, United States Code, Section 201;

(4) The crime of knowingly and willfully making and causing to be made false, fictitious and fraudulent statements and representations in matters within the jurisdiction of agencies of the United States, to wit, the Internal Revenue Service and the United States Department of Justice, in violation of Title 18, Section 80, United States Code (1946 Ed.); 18 U. S. C. 1001;

(5) The crime of perjury in violation of Title 18, United States Code, Section 1621;

(6) The crime of obstruction of justice in violation of Title 18, United States Code, Section 1503;

(7) The crime of violating Title 26, United States Code (I. R. C. 1939), Section 3793(b); and

(8) The crime of violating Title 26, United States Code (I. R. C. 1939), Section 4047(c) (3), (5) and (6).

The Grand Jury further charges that said unlawful conspiracy, combination, confederation and agreement was to be accomplished by the means and method and in the manner following:

1. During the course of the conspiracy The Shotwell Mfg. Co., which became the Homan Mfg. Co., Inc., on or about May 15, 1952, was a corporation organized and existing under the laws of the State of Illinois. During the course of the conspiracy defendant Byron A. Cain was

President and Treasurer of The Shotwell Mfg. Co. and its successor, the Homan Mfg. Co., Inc.; defendant Harold E. Sullivan was attorney for and Executive Vice-president of the said corporation; defendant Leon J. Busby was a practicing certified public accountant; defendant Ernest J. Sauber was successively Chief Field Deputy in the office of the Collector of Internal Revenue, Chicago, Illinois, Assistant Collector of Internal Revenue, Chicago, Illinois, and District Director of Internal Revenue, Chicago, Illinois; defendant Ralph R. Johnson was successively a Group Supervisor in the office of the Internal Revenue Agent in Charge and in the Audit Division, Internal Revenue Service, Chicago, Illinois, and Chief of the Field Audit Branch, Audit Division, Chicago District Office, Internal Revenue Service, Chicago, Illinois; co-conspirator Frank J. Huebner was Vice-president of The Shotwell Mfg. Co.; and co-conspirator Patrick J. Grace, Jr. (now deceased), was a practicing attorney in Brooklyn, New York.

2. During the course of the conspiracy there were pending in the Internal Revenue Service and the United States Department of Justice income tax investigations, matters and proceedings concerning defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner. During the course of the conspiracy there was pending in the United States District Court, Northern District of Illinois, Eastern Division, an indictment charging The Shotwell Mfg. Co., Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner as defendants with willfully and knowingly attempting to defeat and evade a large part of the taxes due and owing by The Shotwell Mfg. Co. to the United States of America for the calendar years 1945 and 1946. During the course of the conspiracy the April 1956 Term Grand Jury of the United States District Court for the Northern District of Illinois, Eastern Division, a competent tribunal, instituted an inquiry and investigation into

possible violations of the internal revenue laws and other criminal laws of the United States in said district, and into possible violations of laws concerning the administration of the internal revenue laws and the administration of the affairs of the Internal Revenue Service in said district. Said inquiry and investigation was a case in which a law of the United States authorized an oath to be administered.

3. It was a part of the conspiracy that defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner, having willfully attempted to evade and defeat large amounts of corporation taxes and individual income taxes, due and owing to the United States by said defendants and co-conspirators for the calendar years 1944, 1945, and 1946, would nevertheless escape the payment of a substantial amount of said taxes due and owing to the United States, and would escape indictment, and if indicted, would escape prosecution.

4. It was a part of the conspiracy that the defendants and co-conspirators would conceal, cause to conceal, and would make continuing efforts to conceal from the Internal Revenue Service, the United States Department or Justice, the United States District Court for the Northern District of Illinois, Eastern Division, and Grand Juries of said Court, that defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner received large amounts of unrecorded and unreported income during the years 1944, 1945, and 1946, and that they each owed the United States large amounts of tax for said years, by virtue of over-invoice premium payments in currency and other payments received in currency on certain sales of merchandise by co-conspirator Shotwell during the said years. It was further a part of the conspiracy that the said concealment and efforts to conceal were to be aided and accomplished by various means, in-

cluding, but not limited to, bribery, obstruction of justice, the making of and causing to be made false and fraudulent statements and representations to the Internal Revenue Service, the submission of and causing to be submitted false and fraudulent papers and documents to the Internal Revenue Service, the inducement of others to make false statements and representations to the Internal Revenue Service, the concealment and destruction of books and records, the obstruction, impeding and thwarting of investigations, inquiries and proceedings of the Internal Revenue Service, attempts to terminate and suspend investigations and inquiries being conducted by the Internal Revenue Service, attempts to influence, impede and obstruct witnesses and potential witnesses, and the giving of and causing to be given false, fictitious, and fraudulent testimony and representations to the United States District Court for the Northern District of Illinois, Eastern Division.

5. It was a part of the conspiracy that the defendants and co-conspirators would make and cause to be made false and fraudulent statements and representations to the Internal Revenue Service, the United States Department of Justice, the United States District Court for the Northern District of Illinois, Eastern Division, and Grand Juries of said Court, concerning an alleged voluntary disclosure purportedly made to the Internal Revenue Service in 1948 by or on behalf of co-conspirator Shotwell.

6. It was a part of the conspiracy that the defendants and co-conspirators would attempt corruptly to obtain a settlement of tax cases concerning co-conspirator Shotwell for the years 1944, 1945, and 1946 at a figure greatly below the amount of tax due and owing to the United States by said Shotwell, although such action would result in the defeat and evasion of a large amount of taxes due and owing the United States for said years by defendants Harold E.

Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner.

7. It was a part of the conspiracy that defendant Ralph R. Johnson, in violation of his lawful duties as an employee of the Internal Revenue Service, would corruptly take actions and render decisions with respect to investigations, matters and proceedings pending in and before the Internal Revenue Service, and would aid in committing fraud and would allow fraud to be committed on the United States by the other defendants and co-conspirators.

8. It was known to the defendants and co-conspirators from the inception of the conspiracy that investigations of the subject matters of the conspiracy were probable and that the matter of the evasion of taxes due and owing the United States for the years 1944, 1945, and 1946 by defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner would be considered, scrutinized and investigated by the Internal Revenue, by the United States Department of Justice, by one or more Federal Grand Juries, and by one or more Courts of the United States. It was from the inception of the conspiracy and throughout the course thereof part of the conspiracy and a principal objective thereof that the true nature of the conspiracy and the acts of the defendants and co-conspirators in pursuance of the conspiracy and in pursuance of the evasion of taxes for the years 1944, 1945, and 1946 would be concealed, misrepresented, and caused to be concealed and misrepresented, whenever and wherever it was sought by any governmental agency to detect and prove the tax evasion and the existence of the conspiracy, and that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body, executive or judicial, of the conspiracy and of tax frauds perpetrated by the defendants and co-

conspirators, through the use of any means whatsoever, including, but not limited to,

(a) the obstruction, impeding and thwarting of investigations, inquiries and proceedings of the Internal Revenue Service, the United States District Court for the Northern District of Illinois, Eastern Division, and Grand Juries of said Court;

(b) the making of and the causing to be made false, fictitious, and fraudulent statements and representations to the Internal Revenue Service and the United States Department of Justice;

(c) the giving of false, fictitious and fraudulent affidavits and testimony to the said Court and Grand Juries of the said Court;

(d) attempts to induce others to give false statements and testimony to the Internal Revenue Service;

(e) the withholding of information from and the refusal to furnish information to the Internal Revenue Service;

(f) submitting and causing to be submitted to the Internal Revenue Service false, fictitious and fraudulent papers and documents;

(g) causing the concealment and destruction of books and records;

(h) obstruction of justice; and

(i) bribery.

Overt Acts.

The Grand Jury further charges that the defendants and co-conspirators, in furtherance of and for the purpose of carrying into execution said conspiracy, combination, confederation and agreement, did and performed the following and other overt acts, to wit:

1. On or about June 21, 1948, defendants Harold E. Sullivan and Byron A. Cain, in New York, New York, had telephone conversations with one H. Stanley Graflund in Chicago, Illinois.

2. On or about June 23, 1948, defendants Harold E. Sullivan and Byron A. Cain and co-conspirator Frank J. Huebner had a conversation with co-conspirator Patrick J. Grace, Jr., in Brooklyn, New York.

3. On or about June 28, 1948, defendant Byron A. Cain and co-conspirator Patrick J. Grace, Jr., had a conversation with David G. Lubben and one Samuel Davidson at the Riviera night club, Fort Lee, New Jersey, and defendant Byron A. Cain and co-conspirator Patrick J. Grace, Jr., asked and urged David G. Lubben to leave the United States for about two years in order that he would not be available as a witness in any tax case involving co-conspirator Shotwell and defendant Byron A. Cain.

4. On or about June 30, 1948, in Chicago, Illinois, defendants Harold E. Sullivan and Byron A. Cain had a conversation with co-conspirator Frank J. Huebner and they told said Frank J. Huebner to keep quiet, to let one man do all the talking to any investigating agents of the Internal Revenue Service, and that the less said to such agents the better.

5. On or about July 9, 1948, defendants Harold E. Sullivan and Byron A. Cain and co-conspirator Patrick J.

Grace, Jr., had a meeting and conversation with one Daniel Tobias in New York, New York.

6. In or about early July 1948, in Chicago, Illinois, defendant Harold E. Sullivan and co-conspirator Frank J. Huebner had a conversation with one Edward Urban and discussed the matter of purchasing certain business interests of David G. Lubben for the purpose of acquiring and destroying books and records of David G. Lubben relating to black market transactions and other transactions with co-conspirator Shotwell.

7. In or about the latter part of July 1948, and in August 1948, in Chicago, Illinois, defendant Byron A. Cain instructed H. Stanley Graflund and one Gladys Morrill to destroy or cause the destruction of records of black market currency received from David G. Lubben by co-conspirator Shotwell in 1945 and 1946.

8. On or about July 21, 1948, defendant Ralph R. Johnson caused the transfer to himself of the United States corporation income tax return of The Shotwell Mfg. Co. for the calendar year 1946.

9. In or about the latter part of July 1948, defendants Byron A. Cain, Leon J. Busby, Ernest J. Sauber and Ralph R. Johnson had a meeting and conversation at the Chicago Athletic Club, Chicago, Illinois.

10. In or about the latter part of July 1948, in Chicago, Illinois, defendant Byron A. Cain had a conversation with co-conspirator Frank J. Huebner, and said Byron A. Cain asked said Frank J. Huebner for $10,000 in currency to take care of and "fix" the tax difficulty they were in.

11. In or about the latter part of July 1948, in Chicago, Illinois, at the request of defendant Byron A. Cain, co-conspirator Frank J. Huebner delivered $5,000 in currency to said Byron A. Cain to take care of and "fix" the tax difficulty they were in.

12. In or about the first week of August 1948, in Chicago, Illinois, defendant Leon J. Busby had a meeting and conversation with Internal Revenue Agent Joseph Lima and delivered to said Joseph Lima a paper containing false, fictitious and fraudulent figures and representations respecting unrecorded and unreported receipts and disbursements of currency by co-conspirator Shotwell during the years 1944, 1945, and 1946.

13. In or about August 1948, in Chicago, Illinois, defendant Byron A. Cain asked co-conspirator Frank J. Huebner for $5,000 in currency as part of the $10,000 in currency which said Byron A. Cain wanted to take care of and "fix" the tax difficulty they were in.

14. In or about August 1948, in Chicago, Illinois, at the request of defendant Byron A. Cain, co-conspirator Frank J. Huebner delivered $5,000 in currency to said Byron A. Cain to take care of and "fix" the tax difficulty they were in.

15. In or about August 1948, in Chicago, Illinois, defendant Ralph R. Johnson instructed Internal Revenue Agent Joseph Lima to make a tax computation and prepare an Internal Revenue Agent's report allowing unsubstantiated disbursements of currency claimed to have been made by co-conspirator Shotwell during the years 1945 and 1946.

16. On or about October 12, 1948, in Chicago, Illinois, defendant Byron A. Cain, in the presence of defendant Leon J. Busby, told Special Agent Sam Krane, Internal Revenue Service, that he would never give any one in the Government any further information concerning unrecorded disbursements of currency purportedly made by co-conspirator Shotwell during the years 1945 and 1946.

17. In or about February 1949, defendant Harold E. Sullivan told co-conspirator Frank J. Huebner that said Frank J. Huebner should stay away from Internal Revenue Agent Charles J. Mammel, that said Frank J. Huebner

should not discuss anything with said Charles J. Mammel, and that the less said the better.

18. In or about September 1949, in Chicago, Illinois, H. Stanley Graflund, acting on instructions of defendant Byron A. Cain, obtained certain records prepared by one Franklin Del Monte and destroyed or caused the destruction of said records.

19. In or about September 1949, in Chicago, Illinois, defendant Ernest J. Sauber had a conversation with Ernest C. Wright, then Internal Revenue Agent in Charge, about termination of an investigation Internal Revenue Agent Charles J. Mammel was conducting with respect to co-conspirator Shotwell.

20. On or about September 29, 1949, in Chicago, Illinois, defendant Byron A. Cain falsely stated to Internal Revenue Agent Charles J. Mammel that he had told said Charles J. Mammel all he knew about overceiling disbursements purportedly made by co-conspirator Shotwell in 1945 and 1946 and that he did not know any further details of said disbursements.

21. On or about October 4, 1949, in Chicago, Illinois, defendants Harold E. Sullivan and Byron A. Cain had a conversation with Ernest C. Wright, then Internal Revenue Agent in Charge, and defendant Harold E. Sullivan stated to said Ernest C. Wright that he and said Byron A. Cain knew to whom overceiling disbursements had been made by or on behalf of co-conspirator Shotwell during 1945 and 1946, but that they would not tell said Ernest C. Wright.

22. On or about October 17, 1950, in Chicago, Illinois, defendant Leon J. Busby made false statements to Internal Revenue Agent Charles J. Mammel concerning meetings and conversations he and defendant Byron A. Cain allegedly had with defendant Ernest J. Sauber in 1948.

23. On or about October 18, 1950, in Chicago, Illinois, defendant Ernest J. Sauber made false statements to Internal Revenue Agent Charles J. Mammel concerning meetings and conversations he allegedly had in March 1948 with defendants Byron A. Cain and Leon J. Busby.

24. On or about November 2, 1950, in Chicago, Illinois, defendants Harold E. Sullivan and Byron A. Cain, in a conversation with Internal Revenue Agent in Charge Ernest C. Wright, stated that they wanted Internal Revenue Agent Charles J. Mammel removed from the investigation of co-conspirator Shotwell, and defendant Harold E. Sullivan stated to said Ernest C. Wright that he and defendant Byron A. Cain did not know to whom overceiling payments were made by or on behalf of co-conspirator Shotwell during the years 1945 and 1946.

25. On or about November 17, 1950, in Washington, D. C., defendant Byron A. Cain had a conversation with Commissioner of Internal Revenue George C. Schoeneman and complained about the length of time of the investigation of co-conspirator Shotwell.

26. On or about November 20, 1950, in Chicago, Illinois, defendant Byron A. Cain falsely stated to Internal Revenue Agent Charles J. Mammel that 50 per cent of the money listed in papers submitted to the Internal Revenue Service as having been received by or on behalf of co-conspirator Shotwell from David G. Lubben as overceiling premiums and for uninvoiced shipments of merchandise was in fact trades and not money.

27. On or about May 9, 1951, Daniel A. Taylor, then attorney for co-conspirator Shotwell, had a conversation with Special Agent Sam Krane and Internal Revenue Agent Charles J. Mammel wherein he asserted that all of the unrecorded and unreported currency received by co-conspirator Shotwell during the years 1944, 1945, and 1946

was, with the exception of $5,898, paid out by co-conspirator Shotwell for the purchase of raw materials.

28. In or about the summer of 1951, in Chicago, Illinois, Daniel A. Taylor, then attorney for co-conspirator Shotwell, had a conversation with Special Agent Sam Krane wherein he asserted that a large part of the over-invoice premium collections listed in papers submitted to the Internal Revenue Service as having been received by co-conspirator Shotwell during 1944, 1945, and 1946 was actually "trades and exchanges" on which no money was received by or on behalf of co-conspirator Shotwell.

29. In or about August 1951, in New York, New York, defendant Byron A. Cain had a conversation with David G. Lubben wherein he attempted to induce said Lubben to falsely state to agents of the Internal Revenue Service that many of the black market transactions between the said Lubben and co-conspirator Shotwell involved exchanges of merchandise rather than currency payments by David G. Lubben to co-conspirator Shotwell.

30. On or about October 16, 1951, in Chicago, Illinois, defendant Ernest J. Sauber wrote a memorandum to Special Agent Sam Krane, in which memorandum said Ernest J. Sauber made false statements concerning meetings and conversations he allegedly had in 1948 with defendants Byron A. Cain, Leon J. Busby and Ralph R. Johnson.

31. On or about March 4, 1952, in Washington, D. C., defendant Leon J. Busby and Daniel A. Taylor, then attorney for defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner, had a conference with one James G. Sharon, Jr., an attorney of the United States Department of Justice.

32. On or about March 13, 1952, defendant Harold E. Sullivan, in Miami, Florida, had telephone conversations

with H. Stanley Graflund and Gladys Morrill in Chicago, Illinois.

33. On or about November 12, 1952, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Byron A. Cain gave false testimony concerning an alleged voluntary disclosure purportedly made to the Internal Revenue Service in 1948 by or on behalf of co-conspirator Shotwell.

34. On or about November 12, 1952, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Leon J. Busby gave false testimony concerning an alleged voluntary disclosure purportedly made to the Internal Revenue Service in 1948 by or on behalf of co-conspirator Shotwell.

35. On or about November 13, 1952, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Ernest J. Sauber gave false testimony concerning meetings and conversations he allegedly had in 1948 with defendants Byron A. Cain and Leon J. Busby.

36. On or about November 13, 1952, in Chicago, Illinois, defendant Byron A. Cain had a conversation with co-conspirator Frank J. Huebner concerning the date of an alleged voluntary disclosure to the Internal Revenue Service.

37. On or about October 9, 1953, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Byron A. Cain gave false testimony concerning a conversation he purportedly had with David G. Lubben in September or October, 1945, regarding the time of commencement of over-invoice premium payments on certain sales of merchandise by co-conspirator Shotwell; concerning the period during which over-invoice premium payments were received on certain

sales of merchandise by co-conspirator Shotwell; concerning the amount of over-invoice premium payments and other payments received during the years 1945 and 1946 on certain sales of merchandise by co-conspirator Shotwell; and concerning meetings and conversations with David G. Lubben and Samuel Davidson in about June 1948 and in about August 1951.

38. On or about October 9, 1953, and October 12, 1953, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Harold E. Sullivan gave false testimony concerning the receipt by him of black market money paid by David G. Lubben in 1945 and 1946; concerning meetings and conversations with David G. Lubben in 1945 and 1946; concerning his knowledge of overceiling premium transactions involving David G. Lubben; and concerning his knowledge of uninvoiced shipments of merchandise by co-conspirator Shotwell in 1946.

39. On or about July 20 and 21, 1955, defendant Ernest J. Sauber made false statements in Chicago, Illinois, to Inspectors James E. Yaden and Leonard D. Charles, Internal Revenue Service, concerning meetings and conversations he allegedly had with defendants Byron A. Cain, Leon J. Busby and Ralph R. Johnson in 1948 and 1949.

40. On or about July 20, 1955, defendant Ralph R. Johnson made false statements in Chicago, Illinois, to Inspectors James E. Yaden and Leonard D. Charles, Internal Revenue Service, concerning conversations he allegedly had with defendant Ernest J. Sauber in 1948.

41. On or about February 7, 1956, co-conspirator Shotwell filed and caused to be filed a petition in The Tax Court of the United States, Washington, D. C., verified by the affidavit of defendant Byron A. Cain, which said petition and affidavit were materially false and fraudulent.

42. On or about July 25, 1956, before the April 1956 Term Grand Jury of the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Ernest J. Sauber gave false testimony concerning meetings and conversations with defendants Byron A. Cain, Leon J. Busby and Ralph R. Johnson in 1948.

In violation of Title 18, Section 88, United States Code (1946 Ed.); 18 U. S. C. 371.

COUNT TWO.

The Grand Jury further charges:

1. That on or about October 9, 1953, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, Harold E. Sullivan, defendant herein, having taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Northern District of Illinois, Eastern Division, which Court was then conducting a trial in a cause entitled The United States of America *vs.* The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, No. 52 CR 143, in which case a law of the United States authorized an oath to be administered, did unlawfully, willfully and knowingly, and contrary to said oath, state material matters which he did not believe to be true, that is to say:

2. That at the time and place aforesaid, the defendant Harold E. Sullivan, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

Q. Mr. Sullivan, what was the first knowledge you

ever had of Shotwell engaging in any overceiling cash deals with David Lubben?

A. Well, the first knowledge I ever had was in the late summer of 1945.

3. That the aforesaid testimony of the defendant Harold E. Sullivan, as he then and there well knew and believed, was false and untrue, in that he knew prior to the summer of 1945 of "Shotwell," that is to say, The Shotwell Mfg. Co., engaging in overceiling cash deals with David Lubben.

In violation of 18 U. S. C. 1621.

COUNT THREE.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the second count of this indictment.

2. That at the time and place aforesaid the defendant Harold E. Sullivan, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

Q. Have you ever received any money from David Lubben?

A. None, never.

Q. Have you ever seen him pay any money?

A. I never have.

Q. Has anybody given you any money from David Lubben?

A. No.

3. That the aforesaid testimony of the defendant Harold E. Sullivan, as he then and there well knew and believed, was false and untrue, in that money from David Lubben had been given to him.

In violation of 18 U. S. C. 1621.

COUNT FOUR.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the second count of this indictment.

2. That at the time and place aforesaid the defendant Harold E. Sullivan, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters, to wit, the defendant testified that he did not talk to David Lubben about any business matters in the years 1945 and 1946.

3. That the aforesaid testimony of the defendant Harold E. Sullivan, as he then and there well knew and believed, was false and untrue, in that he did talk to David Lubben about business matters in the years 1945 and 1946.

In violation of 18 U. S. C. 1621.

COUNT FIVE.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the second count of this indictment.

2. That at the time and place aforesaid the defendant Harold E. Sullivan, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

> Q. Mr. Lubben testified here that on about February 14th, 1946, he made out some checks which have holes in them now, and they are Government's Exhibits 14, 14-A and 14-B. One day when he was on the stand he said he came up to your office and showed you those checks. Now, did he ever do any such thing?

A. He never did.

Q. Did you ever see those checks before this trial?

A. I never did.

Q. Now, Mr. Lubben came back the next day and himself dropped that testimony. You heard that, did you?

A. Yes, I did.

Q. But he then said that he had come up to your office in August or September of '46. Did he do that?

A. Mr. Lubben has never been in my office.

3. That the aforesaid testimony of the defendant Harold E. Sullivan, as he then and there well knew and believed, was false and untrue, in that he had seen the said checks and in that Mr. Lubben had been in the defendant's office.

In violation of 18 U. S. C. 1621.

COUNT SIX.

The Grand Jury further charges:

1. That on or about October 12, 1953, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, Harold E. Sullivan, defendant herein, having taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Northern District of Illinois, Eastern Division, which Court was then conducting a trial in a cause entitled The United States of America *vs.* The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, No. 52 CR 143, in which case a law of the United States authorized an oath to be administered, did unlawfully, willfully and knowingly, and contrary to said oath, state material matters which he did not believe to be true, that is to say:

2. That at the time and place aforesaid the defendant Harold E. Sullivan, duly appearing as a witness before

the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters, to wit, the defendant testified that he had never seen any money that was paid in cash by David Lubben to or for The Shotwell Mfg. Co., and had never gotten any of the money himself.

3. That the aforesaid testimony of the defendant Harold E. Sullivan, as he then and there well knew and believed, was false and untrue, in that he had seen some of the money paid in cash by David Lubben to or for The Shotwell Mfg. Co., and had gotten some of the said money himself.

In violation of 18 U. S. C. 1621.

COUNT SEVEN.

The Grand Jury further charges:

1. That on or about October 9, 1953, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, Byron A. Cain, defendant herein, having taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Northern District of Illinois, Eastern Division, which Court was then conducting a trial in a cause entitled The United States of America *v.* The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, No. 52 CR 143, in which case a law of the United States authorized an oath to be administered, did unlawfully, willfully and knowingly, and contrary to said oath, state material matters which he did not believe to be true, that is to say:

2. That at the time and place aforesaid the defendant Byron A. Cain, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to

material matters in answer to questions propounded to him, as follows:

Q. When was the next transaction in which you had any business discussion with Mr. Lubben?

A. I would say in September or October of 1945.

Q. Where was that?

A. At our office, Shotwell Manufacturing Company.

Q. And who was present?

A. Well, I was with—Mr. Huebner, Mr. Lubben and myself were present. And there may have been others, although I can't place them in there at this time.

Q. What occurred at that conversation?

A. Lubben had been advised prior to that conversation by Mr. Huebner that we would be unable to ship the quantities of merchandise we had been shipping to him, because of the acute shortage in our plant of corn syrup. Lubben contacted Mr. Huebner—

By Mr. Lockley: Just a moment Mr. Cain, I object to any recitation of hearsay by Mr. Cain.

By the Court: Yes.

By Mr. Lockley: What he had to do with this—

By the Witness: I am trying to bring out the reason for the meeting.

By the Court: Your answer wasn't responsive.

By Mr. O'Brien:

Q. Just tell us what occurred in the conversation.

A. Well, a meeting was arranged in my office and Mr. Lubben said that if we would ship him merchandise that he would pay us a cash overage on the merchandise and show us how to go into this market and cause corn to be delivered to the refiners so that the life blood of our business could continue to flow into it, namely, corn syrup.

Q. What was said about the rates of overages to be paid?

A. It may not have been consummated at that one meeting, there may have been two, but the deal was ultimately consummated whereby we started at a rate

of three cents on gum work and five cents on chocolate items that were to be shipped to Eatsum Food Products Company. The money, in turn, was to be turned over to somebody in the Shotwell Manufacturing Company, which, in turn, was to go out for the purchase of raw corn.

Q. Now, did those rates—Well, excuse me. Did you tell Mr. Lubben that you would do that?

A. We did.

Q. And did you proceed to do it?

A. We did, we proceeded to ship him merchandise.

3. That the aforesaid testimony of the defendant Byron A. Cain, as he then and there well knew and believed, was false and untrue, in that the said meeting and conversation of Mr. Huebner, Mr. Lubben and the defendant did not occur.

In violation of 18 U. S. C. 1621.

COUNT EIGHT.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the seventh count of this indictment.

2. That at the time and place aforesaid the defendant Byron A. Cain, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

Q. Do you know whether or not Mr. Lubben wasn't one of your biggest single customers in that year?

A. Oh, I don't think so. He was one of our larger customers.

Q. He was one of your larger customers?

A. That's right.

Q. And is the same true in 1946?

A. Yes, sir.

Q. Was there any other customer, who didn't have any quota in the base period, given the same amount or nearly that amount of candy as Mr. Lubben was in '45 and '46?

A. No, sir.

Q. And you say he only paid you premiums for this short period from—what are the dates again?

A. September or October of '45 until around July of '46.

Q. But you made pretty substantial sales to him, didn't you, in the months from January to August of 1945?

A. That is correct.

Q. And you continued to make substantial sales to him, didn't you, from July to December of 1946?

A. I think that's correct.

Q. And you mean that the sales that you made from September of '45 until about July or so of 1946 were the only premium sales?

A. That is correct.

Q. And the rest of them, you let him have without any premium whatsoever?

A. That's right.

3. That the aforesaid testimony of the defendant Byron A. Cain, as he then and there well knew and believed, was false and untrue, in that sales made to David Lubben from September 1945 to about July 1946 were not the only premium sales and in that David Lubben paid premiums on sales made to him prior to September 1945 and after about July 1946.

In violation of 18 U. S. C. 1621.

COUNT NINE.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the seventh count of this indictment.

2: That at the time and place aforesaid the defendant Byron A. Cain, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

Q. All right. Now, when was it then that you next met Lubben?

A. In the latter part of June of 1948.

Q. Where was it?

A. I met him—

Q. Well, let me put it this way. Will you tell us the circumstances. Where were you and how did you happen to meet him?

A. Well, I was at the Gotham Hotel in New York and I had called Pat Grace and asked him to have dinner with me. Pat is a bachelor and he likes to fill in the time, anyway, so he came down and we had dinner and went up to my room in the Gotham and a phone call came in from Lubben and he asked if he could see me and I said yes. I said, "Yes, Dave, come on over."

He said, "Well, what about meeting me half way?"

I said, "Where would half way be?"

He said, "There is a place on the other side of the George Washington Bridge called the Riviera."

I said, "Fine. I will be over." And asked Pat to go with me and the two of us went to the Riviera and took a table and later on Lubben and Sam Davidson came in.

Q. Had you met Davidson before?

A. I think the first time I ever met Davidson was in connection with the mortgage, which would be before.

Q. Now did they join you at your table?

A. Yes, they did.

Q. And was there a conversation.
A. Yes, there was a conversation.
Q. With four people present?
A. Yes, there was four of us, Pat Grace, Lubben, Davidson, and myself.
Q. What was said?
A. Well, we carried on a general conversation for a while, and then I said, "Dave, what is on your mind? Let us get down to brass tacks."

He said, "Well, I can have an opportunity of getting a franchise for a soft drink in one of the Central or South American countries." I don't recall what it was.

"And I am going to need some money." And he said, "I would like for you to come up with it."

"Well," I said, "I don't know, Mr. Lubben, but," I said, "it isn't concrete now, is it?"

He said, "No."

I said, "Whenever it is concrete, why don't you do this: You call Mr. Grace and if you have something that is concrete and worthy of consideration, I will think about it at that time."

Q. Did you discuss tax matters at that meeting?
A. No, sir.

3. That the aforesaid testimony of the defendant Byron A. Cain, as he then and there well knew and believed, was false and untrue, in that he did discuss tax matters at the said meeting and in that the meeting was requested and arranged by the defendant and not by David Lubben.

In violation of 18 U. S. C. 1621.

COUNT TEN.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the seventh count of this indictment.

2. That at the time and place aforesaid the defendant Byron A. Cain, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid,

testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

Q. At the meeting that you had at the night club, the Riviera night club, there was no reference whatsoever made to Mr. Lubben's leaving the United States so he wouldn't be available to testify against you?

A. None.

Q. The sole purpose of that meeting was so Mr. Lubben could borrow some money and buy a soft drink franchise in South America, is that right?

A. That is right.

3. That the aforesaid testimony of the defendant Byron A. Cain, as he then and there well knew and believed was false and untrue, in that at the meeting at the Riviera night club there was a reference to Mr. Lubben's leaving the United States so he wouldn't be available to testify against the defendant and in that the sole purpose of the meeting was not so Mr. Lubben could borrow some money and buy a soft drink franchise in South America.

In violation of 18 U. S. C. 1621.

A True Bill,

/s/ H. Leevane Weaver,
Foreman.

/s/ R. Tieken,
R. Tieken,
United States Attorney,

/s/ Vincent P. Russo,
Vincent P. Russo,
Special Attorney,
Department of Justice,

/s/ Charles A. McNelis,
Charles A. McNelis,
Special Attorney,
Department of Justice.